FEDERAL INDIAN LAW OUTLINE

INTRODUCTION

Colonization
- ***Spanish***
- ***Northern European***

INDIAN LAW PRIMER

What Is Indian Law?
Sources of Indian Law

Who Is an Indian?
- ***Indian Education Act of 1972***

What Is an Indian Tribe?

Indian Tribes and Reservations
- ***580 federally recognized tribes.***
- ***314 reservations.***

Tribal Organization
- ***Section 16 of the IRA, 25 U.S.C. § 476***
- ***Section 17 of the IRA, 25 U.S.C. § 477 (Must be 100% owned by tribe.)***
- ***Can opt out even if you elected in to IRA.***
- ***Secretarial approval re constitutions and codes. Kerr-McGee Corp. v. United States.***
- ***Pourier v. South Dakota Dept. of Revenue (2004)***
- ***Airvator v. Turtle Mountain Mfg. Co., 329 N.W.2d 596 (N.D. 1983)***
- ***Non-Profit: Huron Potawatomi, Inc. v. Stinger, 574 N.W. 2d 706, 709 (Mich. App. 1997); Ransom v. St. Regis Mohawk Educ. & Community Fund, 658 N.E.2d 989, 993 (N.Y. App. 1995).***

Tribal Recognition

- ***Federally Recognized Tribe List Act, 108 Stat. 4791, 25 U.S.C. §479a-1 (1994). Criteria regulations are at 25 C.F.R. Part 83.***

Indian Land and Resources

- ***56 million acres of land.***
- ***General Allotment Act of 1887***

Land Use

- ***BIA regulations for leasing for most purposes are set forth at 25 C.F.R. Part 162***
- ***90 million acres of the previously designated 150 million acres of Indian land lost due to GAA.***

Resource Development

- ***Minerals: 25 C.F.R. Parts 211, 212 and 225; TERA (Part 224)***

- ***National Indian Forest Resources Management Act, 25 U.S.C. §§ 3101-3120 ("Forest Act"); Def. of Forest Resources 25 U.S.C. § 3103(7), Regs. at 25 C.F.R. Part 163.***

- ***American Indian Agricultural Resource Management Act, 25 U.S.C. §§ 3701 et seq. ("Agriculture Act"). 25 C.F.R. Part 162 for agriculture and Part 166 for grazing. New allottee regulations.***

- ***U.S. v. Mitchell, 463 U.S. 206 (1983). Navajo Tribe v. United States, 9 Ct. Cl. 336 (1986).***

- ***NEPA compliance required. Silver v. Babbitt, 924 F. Supp. 976 (D. Ariz. 1995).***

- ***"Our Land Is What Makes Us Who We Are: Timber Harvesting on Tribal Reservations after the NIFRMA," 21 Am. Indian L. Rev. 259, 275 (1997)***

Land Protection: Dams

Indian Dams Safety Act of 1994, 25 U.S.C. §§3801-3803

Land Protection: Fires

16 U.S.C. § 594 and the Forest Act

U.S. v. Feather River Lumber Co., 23 F.2d 642, aff'd 30 F.2d 642 (D.C.Cal. 1928).

Land into Trust

- ***§ 5 of the Indian Reorganization Act of 1934, 25 U.S.C. § 465. See January 3, 2008, Assistant Secretary for Indian Affairs, Carl Artman, Guidance on taking off-reservation land into trust for gaming purposes.***

Tribal Property

- ***1823, Johnson v. M'Intosh***

Indian Country

- ***18 U.S.C. § 1151***

Dependent Indian Community

What is Sovereignty?
Indian Tribal Sovereignty

What is Jurisdiction?
Jurisdictional Issues: Federal, State and Tribal
Jurisdiction in Indian Country

Federal Agencies
Administrative Law Administrative Procedure Act ("APA")

- ***5 U.S.C. § 706(2)(A) (1994)***
- ***Chevron U.S.A., Inc. and Pittsburgh & Midway Coal Mining Co., 139 IBLA 173, 176 (1997).***

United States v. Mead Corp., 533 U.S. 218 (2001)

Treaty Rights

- ***Three hundred seventy one treaties have been entered into. The last such treaty was in 1868 with the Nez Perce.***
- ***Executive orders were used to create reservations through 1855.***

- ***After 1919, only Congress could create reservations. 43 U.S.C. § 150.***

Indian Treaty Abrogation and Congressional Intent

- ***Seneca Nation of Indians v. United States In Seneca Nation of Indians v. Brucker, 262 F.2d 27 (D.C.Cir. 1958), cert. denied, 360 U.S. 909 (1959) (Seneca I); Seneca Nation of Indians v. United States, 338 F.2d 55 (2d Cir. 1964), cert. denied, 380 U.S. 951 (1965) (Seneca II), the court refused to enjoin construction of the Allegheny Reservoir Project which would flood more than 10,000 acres of Seneca land reserved by the Treaty of Nov. 11, 1794, 7 Stat.4. The Project would leave less than 2,300 acres habitable.***
- ***Menominee Tribe v. United States, 391 U.S. 404 (1968)***

Sources of Federal Power over Indians

Indian Commerce Clause
Treaty Clause

1871 Indian Appropriations Act

- ***16 Stat. 566 (1871), 25 U.S.C. §71 (1982)***

Federal Agreements with Tribes; Legislation

- ***1871 - agreements requiring Senate and House ratification were the means used to deal with Indian tribes, rather than treaties (98 were entered into, 96 were ratified by Congress)***

Legal Hierarchy

Legal Representation

- ***25 U.S.C. §175***

History and Policy

1800's Treaty Period.
1860-1880 War and removal.
1880-1930 Assimilation and allotment.
1880-1931 Everything Indian came under attack

1930-1945 Restoration of tribal self-government.
1945-1960 Termination of tribal status and relocation of Indian people to cities.
1960's Indian self-determination.
1970's Termination repudiated by President Nixon.
1980's Tribal self-determination but federal funding decreased by 40%.
1990's New federalism. Government to government relationship.
1970-2000's Rehnquist Court.

- ***1787*** ***First federal treaty enacted with the Delaware Indians. From 1787 to 1868, 371 treaties were ratified by the U.S. government. (Between 1607 to 1776, at least 175 treaties had been signed with the British and colonial governments).***

- ***1789*** ***Indian Commerce Clause of the Constitution, art. I, §8, cl. 3***

- ***1789*** ***Indian affairs assignation.***

- ***1790*** ***Indian Nonintercourse Act***

- ***1790*** ***Military battle between U.S. Army and Shawnee. The army, some 1,500 strong, invaded Shawnee territory in what is now western Ohio. The Americans were defeated in 1791 after suffering 900 casualties - 600 of whom died.***

  1795 ***The Treaty of Greenville. This treaty marked the end of an undeclared and multitribal war begun in the late 1770s and led by the Shawnees who fought to resist American expansion into Ohio. In 1795, over a thousand Indian delegates ceded two-thirds of present-day Ohio, part of Indiana, and the sites where the modern cities of Detroit, Toledo, and Chicago are currently situated. The Indians, in return, were promised a permanent boundary between their lands and American territory.***

  1808 to 1812 ***Tecumseh, Chief of the Shawnees, and his brother known as The Prophet, founded Prophetstown for the settlement of other Indian peoples who believed that signing treaties with the U.S. government would culminate in the loss of***

the Indian way of life. At the same time, Tecumseh organized a defensive confederacy of Indian tribes of the Northwestern frontier who shared a common goal - making the Ohio River the permanent boundary between the United States and Indian land. When Tecumseh was away from Prophetstown in November 1811, Harrison led troops to the town and after the ferocious Battle of Tippecanoe, destroyed the town as well as the remnants of Tecumseh's Indian confederacy.

<u>1813 to 1814</u> Creek War. This war was instigated by General Andrew Jackson who sought to end Creek resistance to ceding their land to the U.S. government. The Creek Nation was defeated and at the Treaty of Fort Jackson, the Creek lost 14 million acres, or two-thirds of their tribal lands. This was the single largest cession of territory ever made in the southeast.

<u>1824</u> The Indian Office.

<u>1830</u> Indian Removal Act.

<u>Key Judicial Decisions (Marshall Trilogy)</u>
1830-1832

<u>1835-42</u> Seminole War. The second and most terrible of three wars between the U.S. government and the Seminole people was also one of the longest and most expensive wars in which the U.S. army was ever engaged. Thousands of troops were sent, 1,500 men died, and between 40-60 million dollars were spent to force most of the Seminoles to move to Indian territory - more than the entire U.S. government's budget for Indian Removal.

<u>1836</u> Creek Removal. In five groups, over 14,000 Creeks were forcibly removed by the U.S. Army from Alabama to Oklahoma.

<u>1838</u> Trail of Tears. Removal of Cherokee. 800 mile forced march to Oklahoma. An estimated 4,000 Cherokee died during the removal process.

Sioux, Navajo and Nez Perce Wars

1849 ***Bureau of Indian Affairs***

1862 ***Homestead Act. This Congressional Act made western lands belonging to many Indian Nations available to non-Indian American settlers. Marked the beginning of mass migrations to Indian lands for non-Indian settlement.***

1864 ***Sand Creek Massacre. The massacre occurred when a band of Cheyenne and some southern Arapahos were attacked by the Third Colorado Cavalry. The soldiers mutilated and killed between 150 and 200 Indians, most of whom were women and children.***

1871 ***Indian Appropriations Act. This Congressional Act specified that no tribe thereafter would be recognized as an independent nation with which the federal government could make a treaty. (From 1778 to 1868, 371 treaties were ratified by the U.S. government.)***

1876 ***Indian Trader Statutes, Act of August 15, 1876, 25 U.S.C. §§261-264.***

1879 ***Carlisle Indian School. This first off-reservation military-style boarding school for Indians was established in Pennsylvania. The school employees created a model curriculum, disciplinary regime, and educational strategy designed to "kill the Indian and save the child." Many children died at Carlisle and are buried there.***

1880 ***Civilization Regulations.***

1885 ***Major Crimes Act.***

1887 ***General Allotment Act of 1887, also commonly known as the Dawes Act, 24 Stat. 388, codified as amended by 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 354 and 381.***

1890 ***Ghost Dance Religion Created. An Indian prophet, Wovoka, created a new religion called the "Ghost Dance." Its followers believed that practicing ritual dance would bring back dead loved ones and restore the land to Native peoples. Ghost dancers also believed that clothing worn in the dance would protect them from bullets or other forms of attack.***

1890 ***Wounded Knee. This battle occurred shortly after non-Indians in South Dakota became alarmed by reports of Indians performing the Ghost Dance. The Seventh Cavalry reacted by massacring more than 200 men, women, and children of Big Foot's band of Miniconjou Sioux at Wounded Knee.***

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

1917 ***World War I. When the U.S. entered the war, about 17,000 Indians served in the armed forces.***

1918 ***Native American Church. This Indian church was organized in Oklahoma to combine an ancient Indian practice - the use of peyote - with Christian beliefs of morality and self-respect. The Church prohibits alcohol, requires monogamy and family responsibility, and promotes hard work. By 1923, 14 states had outlawed the use of peyote and in 1940, the Navajo Tribal Council banned it from the reservation. In 1944, the Native American Church of the United States was incorporated. Today, the Church continues to play an important role in the lives of many Indian people. In 1994, AIRFA Amendments made peyote use by NAC legal.***

1924 ***Indian Citizenship Act, 8 U.S.C. § 1401(a)(2). Extended citizenship and voting rights to all American Indians. U.S. v. Nice – U.S. citizenship not incompatible with tribal membership or federal trust relationship. Right to vote which goes with citizenship was not automatically granted to Indians. Arizona (1948), Maine (1954), Utah (1956) and New Mexico (1962) were the last states to grant the right to vote pursuant to court order.***

1924 ***Pueblo Lands Act of 1924***

Indian New Deal in 1930's:

1934 Indian Reorganization Act, 48 Stat. 984, 25 U.S.C. §§461-479

1934 Johnson O'Malley Act of April 16, 1934, 48 Stat. 596 as amended by Act of June 4, 1936, 49 Stat. 1458, 25 U.S.C. §§452-456. Stipulated that the federal government was to pay states between 35 and 50 cents per day for Indian children enrolled in public schools.

1941 World War II. During the course of the war, about 25,000 American Indians served in the armed forces; another 40,000 Indian men and women were employed in wartime industries.

1944 National Congress of American Indians ("NCAI") formed. National organization designed to influence federal policies.

1946 Indian Claims Commission Act, Act of August 13, 1946, 60 Stat. 1049, 25 U.S.C. §§70-70v-3. The Commission was created to do away with tribal grievances over treaty enforcement, resource management, and disputes between tribes and the U.S. government. Tribes were given five years to file a claim, during which time they had to prove aboriginal title to the lands in question and then bring suit for settlement. The Commission would then review the case and assess the amount, if any, that was to be paid in compensation. Until the Commission ended operations in 1978, it settled 285 cases and paid more than $800 million in settlements.

1953 Termination. Under House Concurrent Resolution 108. Congress can terminate federal-tribal relationship, but not tribe itself.

1953 Public Law 280

In 1953, Congress enacted Public Law 280, empowering states to assume civil and criminal jurisdiction in "Indian country." Public Law 280 ceded certain civil and criminal jurisdiction over Indian country to five (later six) states automatically and provided procedures by which other states could assume jurisdiction. States: California, Oregon, Nebraska, Minnesota and Wisconsin. Alaska added in 1958.

Public Law 280 was amended in Title IV of Civil Rights Act of 1968. Cite to Bryan v. Itasca.

1970 ***Nixon's "Special Message on Indian Affairs."***
[Public Papers of the Presidents of the United States: Richard Nixon, 1970, pp. 564-567, 576-76.]

1965-1973 ***Vietnam War. More than 43,000 American Indians fought in the Vietnam War.***

1971 ***Alaska Native Claims Settlement Act.***

1973 ***Wounded Knee Occupation.***

1975 ***Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450 et seq.***

1975 ***Council of Energy Resource Tribes (CERT). Leaders from over 20 tribes created CERT to help Indians secure better terms from corporations that sought to exploit valuable mineral resources on reservations.***

1977 ***Senate Committee on Indian Affairs. This Senate resolution re-established the SCIA. The Committee was originally created in the early nineteenth century, but disbanded in 1946 when Indian affairs legislative and oversight jurisdiction was vested in subcommittees of the Interior and Insular Affairs Commission of the House and Senate. The Committee became permanent in 1984.***

1978 ***Indian Child Welfare Act of 1978, 25 U.S.C. §§1901 et seq. Adoption and guardianship cases were to be handled by tribal courts with preference to Indians over non-Indians in adoption of Indian children.***

1978 ***American Indian Religious Freedom Act, 42 U.S.C. §§ 1996 et seq.***

1982 ***Indian Mineral Development Ac, 25 U.S.C. §§ 2101-2108.***

1982 ***Indian Tribal Government Tax Status Act, Pub. L. No. 97-473, 96 Stat. 2607 (codified in part at 26 U.S.C. § 7871 (2000))***

1988 ***Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 - 2721***

1988 ***Tribally Controlled Schools Act (repudiated termination), 25 U.S.C. §§ 2501 et seq.***

1989 ***National Museum of the American Indian Act of 1989, 20 U.S.C. § 80q-5, amended in 1996 to address repatriation.***

1990 ***Native American Graves Protection and Repatriation Act ("NAGPRA"), 25 U.S.C. §§3001, et seq.***

1990 ***Indian Arts and Crafts Act of 1990, 25 U.S.C. §§ 305 et seq.***

1990 ***Native American Languages Act ("NALA"), 25 U.S.C. §§ 2901-06***

1993 ***Indian Tribal Justice Act, Pub. L. No. 103-176, 107 Stat. 2004 (codified at 25 U.S.C. §§3601-3631 (2000)).***

1994 ***President Clinton's Executive Memorandum, April 29th***

1994 ***American Indian Religious Freedom Act Amendments, 42 U.S.C. § 1996(a) .This Congressional Act protected the rights of American Indians to use peyote in traditional religious ceremonies.***

1996 ***National American Indian Heritage Month. President Clinton declared November of each year to be National American Indian Heritage Month.***

1996 ***Executive Order, October 21, 1996 on Tribal Colleges and Universities***

2000 ***Indian Tribal Justice Technical and Legal Assistance Act, Pub. L. No. 106-559, 114 Stat. 2778 (codified at 25 U.S.C. §§3651-3681 (2000))***

2003 ***Southwest Native American Language Revitalization Act of 2003***

2005 ***Indian Tribal Energy Development and Self Determination Act of 2005, Title V of the Energy Policy Act of 2005, 109-59, 119 Stat. 594, 25 U.S.C. §§ 3502 et seq. (August 8, 2005)***

2006 ***Esther Martinez Native Languages Preservation Act, 42 U.S.C. §§ 2991b-3 et seq.***

Rehnquist Court

United States v. Sioux Nation of Indians, 448 U.S. 371 (1980)

David H. Getches in "Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values," 86 Minn. L. Rev. 267, 360-361 (2001),

Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation, 425 U.S. 463 (1976)

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)

Nevada v. U.S., 463 U.S. 110 (1983) (Orr Ditch res judicata.)

Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408 (1989)

Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991)

Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001)

The Supreme Court and Federal Indian Policy, Matthew L. M. Fletcher, 85 Neb. L. Rev. 121 (2006)

Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America (Indigenous Americas) by Robert A. Williams, Jr., takes an even harsher stance.
Williams is a professor of law and American Indian studies at the James E. Rogers College of Law, University of Arizona. A member of the Lumbee Indian Tribe, he is author of The American Indian in Western Legal Thought: The Discourses of Conquest and coauthor of Federal Indian Law.

Worthen, Kevin J., "Who's in Charge Here? Tribal, State, and Federal Authority over Non-Indian Resource Development in Indian Country," RMMLF, Vol. 47, p. 2-1 (2001).

Plains Commerce Bank v. Long Family Land & Cattle, 491 F.3d 878 (8th Cir. 2007), cert. granted, 128 S. Ct. 829 (Jan. 4, 2008) (No. 07-411).

Indian Law Themes

Tribal Sovereignty

Congress' Plenary Power Delaware Tribal Business Committee v. Weeks, 430 U.S. 73, 85 (1977),

Federal Preemption

Fiduciary Responsibility

Indian Law Doctrines/Tests/Key Cases

Doctrine of Discovery: ***Johnson v. M'Intosh, criticized as "an extravagant and absurd idea" in Worcester but confirmed as an institutionalized concept through international law, treaties and the U.S. Constitution: "The great case of Johnson v. McIntosh denied the power of an Indian tribe to pass their right of occupancy to another. It confirmed the practice of two hundred years of American history 'that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest.'" Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 280 (1955).***

Tribes Are Domestic Dependent Nations, Not Foreign Nations:
Cherokee Nation v. Georgia, 30 U.S 1, 17 (1831).

Federal Government Is Absolute Sovereign, State Laws Do Not Govern Non-Indians within Indian Reservation Due to Federal Preemption and Tribal Sovereignty:
Worcester v. Georgia, 31 U.S. 515, 561 (1832).

Reserved Rights:
So long as tribal sovereign rights are not ceded by the tribe in a treaty or in other negotiations approved by Congress, they continue in existence. They are considered to be reserved.

Doctrine of Infringement on Tribal Sovereignty: ***McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973).***

Doctrine of Federal Preemption: ***New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983). Ramah.***

When Compensation Is Due for Taking of Indian Lands:
Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); Three Affiliated Tribes of Ft. Berthold Reservation v. United States, 182 Ct.Cl. 543, 390 F.2d 686 (Ct. Cl. 1968).

Extinguishment of Aboriginal Title:
United States v. Santa Fe P. R. Co., 314 U.S. 339, 347 (1941).

Compensation Due for Taking of Treaty Tribal Lands:
United States v. Sioux Nation of Indians, 448 U.S. 371 (1980). Simple interest (not compound) due for taking

No Compensation for Taking of Executive Order Tribal Lands:
Sioux Tribe v. United States, 316 U.S. 317 (1942).

No Compensation for Taking of Aboriginal Tribal Lands:
Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955).

Given Certain Circumstances, Tribe Can Maintain Action for Violation of Aboriginal Possessory Rights under Federal Common Law:
County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985). Strategy was to bring small claim first.

Fiduciary Standard:
Seminole Nation v. United States, 316 U.S. 286 (1942).

Obligation of Government to Prudently Invest Funds of Tribes:
Cheyenne-Arapaho Tribes of Indians v. United States, 512 F.2d 1390, 1394 (Ct. Cl. 1975).

Congressional Power Not Absolute:
Delaware Tribal Business Committee v. Weeks, 430 U.S. 73, 85 (1977).

Indian "Tucker Act"
Section 24 of the Indian Claims Commission Act, 28 U.S.C. §1505

Indian "Tucker Act" Requirements:
United States v. Mitchell, 463 U.S. 206 (1983).

General Allotment Act Only Creates Limited Trust, Breach Not Compensable in Money Damages:
United States v. Mitchell, 445 U.S. 535, 543 (1980) (Mitchell I).

Indian Mineral Leasing Act of 1938 Does Not Create Trust, Breach Not Compensable in Money Damages:
United States v. Navajo Nation, 537 U.S. 488, 507 (2003).

Fishing Rights:
United States v. Winans, 198 U.S. 371 (1905).

United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974)

Gaming:
Seminole Tribe of Florida v. Butterworth, 658 F.2d 310 (5th Cir. Fla. 1981), cert. denied,* 455 U.S. 1020 (1982)*; accord, California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

Dependent Indian Community:
Alaska v. Native Village of Venetie, 522 U.S. 520 (1998).

Federal Statutes of General Applicability:
Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99 (1960).

Donovan v. Coeur d'Alene Rule:
Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985).

BIA Indian Employment Preference:
Morton v. Mancari, 417 U.S. 535 (1974).
Freeman v. Norton, preference applies to promotions and lateral transfers.
Preston v. Heckler, 734 F.2d 1359 (9th Cir. 1984) Preference applies to IHS.
Mescalero Apache Tribe v. Hickel – does not apply to RIFs.

DOI Indian Employment Preference:
Indian Educators Federation v. Kempthorne, Civil Action No. 2004-0959 (D.D.C. March 31, 2008). It is uncertain whether this decision will be appealed.

State Workers' Compensation Laws

State Workers' Compensation Statutes (40 U.S.C. § 290) Do Not Apply to Tribal Employers on Indian Reservations: ***White Mountain Apache Tribe v. Industrial Comm'n, 696 P.2d 223 (Ariz. Ct. App. 1985); Swatzell v. Industrial Comm'n, 277 P.2d 244 (Ariz. 1954), (petitioner was a non-Indian employee); Tibbetts v. Leech Lake Reservation Business Committee, 397 N.W.2d 883 (Minn. 1986).***

State Workers' Compensation Statutes (40 U.S.C. § 290) Held to Apply to Tribal-Member Owned Business on Indian Reservation in North Dakota Supreme Court Case:
See State ex rel. Workforce Safety & Ins. v. JFK Raingutters, LLC, 733 N.W.2d 248 (N.D. 2007).

State Workers' Compensation Statutes (40 U.S.C. § 290) Apply to Non-Indian Employers on Indian Reservations:
Begay v. Kerr-McGee Corp., 682 F.2d 1311 (9th Cir. Ariz. 1982).

Pueblos of New Mexico Are Subject to Congressional Legislation:
United States v. Sandoval, 231 U.S. 28 (1913).

Liquor Regulation:
Before 1953 federal law generally prohibited the introduction of alcoholic beverages into 'Indian country.' 18 U.S.C. § 1154(a). 'Indian country' was defined by 18 U.S.C. § 1151 to include non-Indian-held lands 'within the limits of any Indian reservation.' See United States v. Forty-three Gallons of Whiskey, 93 U.S. 188, 198 (1876).

Local Option Legislation: Act of Aug. 15, 1953, 67 Stat. 586, 18 U.S.C. §1161.

Free Exercise of Religion:
Employment Div. v. Smith, 494 U.S. 872 (1990).

State Taxation of "Federal Traders":

Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685 (1965). But see Department of Taxation & Fin. v. Milhelm Attea & Bros., 512 U.S. 61 (1994).

State Income Taxes:
McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973)

State Taxes on Non-Trust Indian Land and Activities Outside of Indian Reservation:
Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973).

State Personal Property Taxes Prohibited on Indian Personal Property Located on Indian Trust Land; Public Law 280 Does Not Permit State Taxation or Regulatory Authority on Indian Trust Land:
Bryan v. Itasca County, 426 U.S. 373 (1976).

State Taxation of Non-Indian and Non-Member Indians Cigarette Purchases on Indian Trust Land Permitted:
Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation, 425 U.S. 463 (1976)
Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980) (non-members).

Bracker Test: State Taxation of Non-Indians Engaged in Activities on Trust Lands:
White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).

Tribal Taxation Authority:
Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).
Cheyenne-Arapaho Tribes of Oklahoma had the authority to impose a severance tax on oil and gas production on allotted lands held in trust for tribal members because such lands constitute Indian country over which tribes have civil jurisdiction and the inherent power to enact and enforce their taxes. Mustang Production Co. v. Harrison, 94 F.3d 1382 (10th Cir. 1996), cert. denied, 117 S.Ct. 1288 (1997).
No State Tax on Tribal Royalty Income:
Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985).

State and Tribe Have Concurrent Taxing Authority:
Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989).

State Tax May Not Be Exorbitant:
Montana v. Crow Tribe of Indians, 484 U.S. 997 (1988).

Chickasaw Rule:
Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995).

State May Tax Federal Contractor for Work Done on Tribal Lands for Federal Government, including BIA:
Arizona Dep't of Revenue v. Blaze Constr. Co., 526 U.S. 32 (1999).

An Indian Tribe's Sovereign Power To Tax--Whatever Its Derivation--Reaches No Further Than Tribal Trust Land (Does Not Include Fee Land within Exterior Boundaries of Indian Reservation (Absent Montana Exception – Consensual Relation or Threat to or Direct Effect on Tribal Political Integrity, Economic Security, Health, Welfare):
Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001).

Corporation Owned by Tribe or Enrolled Tribal Member Residing on Indian Reservation and Doing Business on Reservation for Benefit of Reservation Indians Is an Enrolled Member for Purpose of Protecting Tax Immunity:
Pourier v. South Dakota Dept. of Revenue

Entities Under Tribal Control Are Extended Same Sovereign Immunity as Tribe Itself:
Sanchez v. Santa Ana Golf Club, Inc., 104 P.3d 548 (N.M. Ct. App. 2004), cert. denied, 106 P.3d 578 (N.M. 2005)

Off-Reservation Tax Between Non-Indians on Motor Fuel Sold on Indian Trust Land Permitted:
Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95 (2005).

County May Tax General Allotment Act Fee Land on Reservation:

County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251 (1992); Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103 (1998) [unanimous opinion].

State May Zone Open Areas of Fee Land on Reservation, Not Closed Predominantly Tribal Area:
Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408 (1989)

Indian Trader Statutes Applies To "Trade" In Services As Well As To Trade In Goods:
New Mexico Taxation & Revenue Dep't v. Laguna Indus., 855 P.2d 127 (N.M. 1993).

Natural Resources:

State Agency Has No Jurisdiction to Regulate Oil and Gas Development on Tribal Lands: Assiniboine & Sioux Tribes of Fort Peck Indian Reservation v. Board of Oil & Gas Conservation, 792 F.2d 782, 795 (9th Cir. Mont. 1986).

Environmental Law:

Tribes Eligible for Treatment as State under EPA Regulations when Statute So Specifies:
Backcountry Against Dumps v. EPA, 100 F.3d 147 (D.C. Cir. 1996).

EPA Approval of State Program with respect to All Lands in State Does Not Authorize State Regulation over Indian Lands:
Washington, Dep't of Ecology v. United States EPA, 752 F.2d 1465, 1469 (9th Cir. 1985).

Water Rights:

Water Rights Necessary for Purpose of Indian Reservation Reserved to Tribes:
Winters v. United States, 207 U.S. 564 (1908).

Practically Irrigable Acreage:
Arizona v. California, 373 U.S. 546 (1963).

State Court Has Jurisdiction to Adjudicate Tribal Reserved Water Rights:
Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 559-561, 570 (1983).

Reservation Disestablishment:
South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998); Solem v. Bartlett, 465 U.S. 463 (1984); Hagen v. Utah, 510 U.S. 399 (1994).

Indian Claims Commission Act of 1946:
Claim Barred if Not Asserted under ICCA:
Navajo Tribe of Indians v. New Mexico, 809 F.2d 1455, 1464 (10th Cir. N.M. 1987)

Tribal Civil Jurisdiction:
Williams v. Lee, 358 U.S. 217 (1959).

Indian Civil Rights Act – Federal Action limited to Habeas Corpus):
Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

No Garnishment by Non-Indian Employer of Wages of Tribal Member on Navajo Nation:
Joe v. Marcum, 621 F.2d 358 (10th Cir. 1980).

Montana Test:
Montana v. United States, 450 U.S. 544, 565 (1981).

No Tribal Jurisdiction on State Highway Crossing Reservation:
Strate v. A-1 Contractors, 520 U.S. 438 (1997).

No Tribal Jurisdiction on Railroad Right-of-Way Crossing Reservation:
Burlington Northern R.R. v. Red Wolf, 196 F.3d 1059 (9th Cir. Mont. 1999).

No Tribal Jurisdiction on Transmission Pipeline Right-of-Way Crossing Reservation:
Big Horn County Elec. Coop. v. Adams, 219 F.3d 944 (9th Cir. Mont. 2000).

No Tribal Jurisdiction on Telephone Right-of-Way Crossing Reservation:
Reservation Tel. Coop. v. Henry, 278 F.Supp.2d 1015 (D.N.D. 2003) (Telephone lines crossing tribal trust lands on Fort Berthold Reservation.)

Tribal Jurisdiction on BIA or Tribal Roads Crossing Reservation:
McDonald v. Means, 309 F.3d 530 (9th Cir. Mont. 2002).

No Tribal Jurisdiction over State Officials Acting on Reservation, Absent Montana Exception:
Nevada v. Hicks, 533 U.S. 353 (2001).

Must Exhaust Tribal Court Remedies before Challenging Tribal Jurisdiction in Federal Court in Federal Question or Diversity Cases:

National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985) (federal question); Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987) (diversity).

Tribe May Use State Court to Bring Civil Action without Waiving All Tribal Immunity in All Cases:
Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Engineering, P.C., 476 U.S. 877 (1986) ("Wold II").

Criminal Jurisdiction:
McBratney Rule:
United States v. McBratney, 104 U.S. 621 (1882).

Federal Court Jurisdiction over Indians under Major Crimes Act Lawful:
United States v. Kagama, 118 U.S. 375 (1886).

U.S. Constitution Grand Jury Requirement Not Applicable to Tribes:
Talton v. Mayes, 163 U.S. 376 (1896).

Assimilative Crimes Acts Applicable To Indian Reservations:
United States v. Marcyes, 557 F.2d 1361 (9th Cir. 1977).

Tribes Do Not Have Criminal Jurisdiction Over Non-Indians Absent Affirmative Delegation of Such Power by Congress:
Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

No Double Jeopardy in Being Tried for Crime by Tribal and Federal Court where Criminal Statute Is Not Federal Statute:
United States v. Wheeler, 435 U.S. 313 (1978); United States v. Lara, 541 U.S. 193 (2004) (Double Jeopardy Clause barred subsequent federal prosecution for non-member Indian tried under amended Indian Civil Rights Act.)

Tribal Courts Have Criminal Jurisdiction Over All Indians (Members and Non-Members) for Crimes Committed on Tribal Trust Land:
After Duro v. Reina, 495 U.S. 676 (1990), Congress amended Indian Civil Rights Act. Means v. Navajo Nation, 432 F.3d 924 (9th Cir. Ariz. 2005), cert. denied, 127 S. Ct. 381 (2006)

Tribal Police Officer Authorized to Investigate, within Reservation, State and Federal Law Violations Thought to Have Been Committed by Non-Indian Offenders:
Even Strate recognizes need for tribal police automobile stops.
Ortiz-Barraza v. United States, 512 F.2d 1176, 1181 (9th Cir. Ariz. 1975).

Tribes' Sovereign Immunity Extends to Tribal Officials when Acting in Their Official Capacity:
Linneen v. Gila River Indian Cmty., 276 F.3d 489, 492 (9th Cir. Ariz. 2002), cert denied, 536 U.S. 939 (2002)

Indian Child Welfare Act Upheld:

Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989).

Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001 et seq. ("NAGPRA") Enforced:
Pueblo of San Idlefonso v. Ridlon, 103 F. 3d 936 (10th Cir. N.M. 1996).

Arbitration:
C & L Enters., Inc., v. Citizen Band Potawatomi Indian Tribe, 532 U.S. 411 (2001); Jane Doe

Canons of Construction

Rooted in trust responsibility
County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985).

Plain meaning controls: See, e.g., Winters v. United States, 207 U.S. 564 (1908); Squire v. Capoeman, 351 U.S. 1 (1956); Joint Tribal Council of Passamaquoddy Tribe v. Morton, 388 F. Supp. 649, 660 (D. Me. 1975), aff'd, 528 F.2d 370 (1st Cir. Me. 1975)

Ambiguous Terms Are Interpreted in Favor of the Weaker Party:
McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973)

Treaty Construction as Understood by Tribe at Time Treaty Entered Into: United States v. Winans, 198 U.S. 371, 380-381 (1905)

Ambiguous Terms Are Liberally Construed in Favor of the Weaker Party: McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982)

Tribal Independence and Economic Development: Ramah

Federal Statutes of General Applicability

Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99 (1960) – Tuscarora Rule

Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985)

Criminal Jurisdiction: Federal, State and Tribal

Federal:

In 1885, as a popular reaction against the Ex parte Crow Dog ruling, Congress passed the Major Crimes Act, 18 U.S.C. § 1153, which extended the jurisdiction of federal courts to a list of seven serious crimes (now sixteen), if they are committed by an American Indian in Indian country regardless of whether the victim of the crime was Indian. Upheld in United States v. Kagama, 118 U.S. 375 (1886).

General Crimes Act – 18 U.S.C. § 1152

Assimilative Crimes Act, 18 U.S.C. § 13, makes state law applicable to conduct occurring on lands reserved or acquired by the federal government as provided in 18 U.S.C. § 7(3). United States v. Marcyes, 557 F. 2d 1361 (9th Cir. 1977).

State:

United States v. McBratney, 104 U.S. 621 (1882); Draper v. United States, 164 U.S. 240 (1896).

Tribal:

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).
United States v. Lara, 541 U.S. 193 (2004)
Means v. Navajo Nation, 432 F.3d 924 (9th Cir. Ariz. 2005), *cert. denied, 127 S. Ct. 381 (2006)* Upheld Duro-fix.

Civil Jurisdiction: Federal, State and Tribal

Federal:

Federal question and diversity cases.

State: Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408 (1989)
Nevada v. Hicks, 533 U.S. 353 (2001).

Tribal:

Williams v. Lee, 358 U.S. 217 (1959).
ICRA
Montana v. United States, 450 U.S. 544, 565 (1981)

Taxation of Indians: Federal, State and Tribal

Federal:
Internal Revenue Ruling 94-16, dated March 21, 1994
Squire v. Capoeman

State:
***Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995);**
Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980).

Tribal:
Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).
Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001).

Federal Intergovernmental Agreements
President Clinton's Executive Orders Nos. 12875 ("Enhancing the Intergovernmental Partnership") and 12866 ("Regulatory Planning and Review")

State Intergovernmental Agreements

Incorporation of Tribal Customary Law

Indian Population
Health Conditions
Education
Economic Conditions

Economic Development

Necessary Contractual Approvals

25 U.S.C. § 81: Mandates that all contracts that "encumber Indian lands for a period of 7 years or more" must be approved by the Secretary of the Interior.

Contracts that "do not convey exclusive or nearly exclusive proprietary control over tribal lands for a period of 7 years or more" are not covered by § 81. Gasplus, L.L.C. v. United States DOI, 510 F.Supp.2d 18 (D.D.C. 2007).

Yavapai-Prescott Indian Tribe v. Watt, 707 F.2d 1072 (9th cir. 1983), cert denied, 464 U.S. 1017 (1983). No unilateral lease cancellation by tribe.

Pueblo of Santa Ana v. Hodel, 663 F. Supp. 1300 (D.D.C. 1987). Contract with a tribal corporation formed under state law is not with the tribe.

Inecon Agricorporation v. Tribal Farms, Inc., 656 F.2d 498 (9th Cir. Ariz. 1981).

Altheimer & Gray v. Sioux Mfg. Corp., 983 F.2d 803, 810 (7th Cir. Ill. 1993)

United States ex rel. Crow Creek Sioux Tribe v. Hattum Family Farms, 102 F.Supp.2d 1154 (D.S.D. 2000), aff'd,* 237 F.3d 919 (8th Cir. S.D. 2000) *(parties considered the tribe and its entities to be interchangeable.)

See "Contracting with Tribes under 25 U.S.C. §81, The Uncertainty Continues," Mark A. Smith, ABA Section of Real Property Trust and Estate Law, Probate & Property, March/April 2006, Vol. 20 No. 2.

Banking and Lending

Loan programs. Indian Financing Act of 1974, SBA and HubZone. Bond programs.
Indian Tribal Government Tax Status Act, 26 U.S.C. § 7871
Plains Commerce Bank v. Long Family Land & Cattle, 491 F.3d 878 (8th Cir. 2007), cert. granted, 128 S. Ct. 829 (Jan. 4, 2008) (No. 07-411).
In re Blue Lake Forest Products, Inc., 30 F.3d 1138 (9th Cir. 1994), UCC does not supersede federal law in re timber sales.

Small Business Administration

13 C.F.R. § 109(c)(3)(i).

13 C.F.R. § 124.109(b).

13 C.F.R. § 124.109(c)(4(i)(B).

Contracts may be awarded to Indian tribes on a sole-source basis. 13 C.F.R. § 124.506(a)(iii); 13 C.F.R. § 124.506(b).

Indian tribes are not limited in the dollar amount of competitive and sole source 8(a) contracts they may receive. 13 C.F.R. § 124.506(b); 13 C.F.R. § 124.519(a).

13 C.F.R. § 124.109(c)(3(ii).

13 C.F.R. § 124.109(c)(2)(iii).

Native Contracting Section 8(a) Statistics - 2005

Advantages Afforded Indian Tribes under the Section 8(a) BD Program

AGFE II

Tribal Laws; Tribal Codes; Tribal Courts

Sovereign Immunity

Kiowa Tribe v. Mfg. Techs., 523 U.S. 751, 754 (1998).

Sanchez v. Santa Ana Golf Club, Inc., 104 P.3d 548 (N.M. Ct. App. 2004), cert. denied, 106 P.3d 578 (N.M. 2005)

Waiver of Sovereign Immunity

C & L Enters., Inc., v. Citizen Band Potawatomi Indian Tribe, 532 U.S. 411 (2001)

Jane Doe

State Sovereign Immunity

Seminole Tribe v. Florida, 517 U.S. 44 (1996)

Governing Law

Dispute Resolution

Federal question: 28 U.S.C. § 1331. Diversity of state citizenship (28 U.S.C. § 1332).

Diversity: See Weeks Constr., Inc. v. Oglala Sioux Housing Authority, 797 F.2d 668, 671 (8th Circuit S.D. 1986). Standing Rock Sioux Indian Tribe v. Dorgan, 505 F.2d 1135, 1140 (8th Cir. N.D. 1974); Gaines v. Ski Apache, 8 F.3d 726 (10th Circuit 1993); Stock West, Inc. v. Confederated Tribes of Colville Reservation, 873 F.2d 1221, 1226 (9th Cir. Wash. 1989).

Diversity: Individual Indians born in the United States are U.S. citizens (8 U.S.C. § 1401b) and citizens of the state in which they reside (U.S. Constitution, Amendment XIV, Section 1).

Public Law 280: Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin. The jurisdiction may vary by state.

ADR

Arbitration

Arizona Pub. Serv. Co. v. Aspaas, 77 F.3d 1128 (9th Cir. Ariz. 1996) (Ninth Circuit enforced the parties' agreement that Navajo Employment Preference Act not apply).

Remedies and Judgments

Comity and Full Faith and Credit

Indian Child Custody Proceedings: 25 U.S.C. §1911 (d)

Abstention

Pittsburgh & Midway Coal Mining Co. v. Watchman, 52 F.3d 1531, 1541 (10th Cir. N.M. 1995)

Warn v. Eastern Band of Cherokee Indians, 858 F. Supp. 524, 527 (W.D.N.C. 1994)

Exhaustion of Tribal Remedies

National Farmers Union Ins. Cos. v. Crow Tribe (1985)

Exhaustion Required:

Basil Cook Enters. v. St. Regis Mohawk Tribe, 117 F.3d 61 (2d Cir. N.Y. 1997 (exhaustion required in suit over bingo management contract).

Strate v. Bremner, 1997 WL 464499 (D. Mont. 1997) (requiring exhaustion of tribal court remedies where tribal member injured in auto accident).

Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation, 27 F.3d 1294, 1300 (8th Cir. N.D. 1994), cert. denied, 513 U. S. 1103 (1995). When federal court considers the question of tribal curt jurisdiction following exhaustion, determinations of tribal law should be accorded deference, factual questions should be reviewed using a clearly erroneous standard and federal questions would be reviewed de novo.

Reservation Tele. Coop. v. Three Affiliated Tribes of Fort Berthold Reservation, 76 F.3d 181 (8th Cir. 1996) (challenge to tribal possessory interest tax must first be heard in tribal forum).

Texaco, Inc. v. Hale, 81 F.3d 934 (10th Cir. 1996) (affirming decision to abstain pending exhaustion of tribal remedies in case involving area outside of Navajo Reservation, but within Navajo Indian Country).

Pittsburgh & Midway Coal Mining Co. v. Watchman, 52 F.3d 1531 (10th Cir. N.M. 1995) (47% of mine area outside of Navajo Reservation was held in trust for Navajo allottees and thus was located at least partly in Navajo Indian Country).

Mustang Prod. Co. v. Harrison, 94 F.3d 1382 (10th Cir. Okla. 1996), cert. denied, 520 U.S. 1139 (1997**) *(tribal jurisdiction asserted over activities on Indian country allotments despite disestablishment of the reservation from which the allotments were drawn).***

<u>Exhaustion Not Required:</u>
If there is no tribal court. Comstock Oil & Gas, Inc. v. Ala. & Coushatta Indian Tribes, 261 F.3d 567 (5th Cir. Tex. 2001), cert. denied, 535 U.S. 971 (2002).

If claim is preempted by federal law:

> ***El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473 (1999) (Price Anderson Act, federal statute controlling).***

Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community, 991 F.2d 458 (8th Cir. Minn. 1993) (Hazardous Materials Transportation Act preempts tribal ordinance).

Blue Legs v. United States Bureau of Indian Affairs, 867 F.2d 1094 (8th Cir. S.D. 1989) (Resource Conservation and Recovery Act).

Exhaustion Not Required:
Divided on necessity for pending tribal court proceeding:
No exhaustion if case not pending: Altheimer & Gray v. Sioux Mfg. Corp., 983 F.2d 803 (7th Cir. Ill. 1993), cert. denied, 510 U.S. 1019 (1993)

Crawford v. Genuine Parts Co., 947 F.2d 1405 (9th Cir. Mont. 1991), cert. denied, 502 U.S. 1096 (1992) (exhaustion required where there is tribal court even if proceeding had been removed to federal court because the accident occurred on the reservation, the Ninth Circuit deemed dispositive that the case was a "reservation affair."

Wellman v. Chevron U.S.A., Inc., 815 F.2d 577 (9th Cir. Mont. 1987).

Exhaustion Not Required:
Montana DOT v. King, 191 F.3d 1108 (9th Cir. Mont. 1999)

Glacier County School Dist. v. Galbreath, No. CV-97-061 (D. Mont., Dec. 8, 1997) (exhaustion not required in suit regarding public school expulsion of Native American child).

Indian Nonintercourse Act

Act of July 22, 1790, 1 Stat. 137. The Act provided that a sale of Indian lands was not valid unless "made and duly executed at some public treaty, held under the authority of the United States." Id. The current version contains similar language. 25 U.S.C. § 177.

Indian Trader Statutes, 19 Stat. 200, 25 U.S.C. §§ 261-264 (1876)

- ***MARSHALL TRILOGY***
- ***CONGRESSIONAL AUTHORITY***
- ***COMPENSATION FOR INDIAN LAND***

- ***FIDUCIARY OBLIGATION***
- ***FEDERAL CONFLICT OF INTEREST***
- ***FISHING RIGHTS***
- ***GAMING***
- ***INDIAN COUNTRY***
- ***STATUTES OF GENERAL APPLICABILITY***
- ***LABOR AND EMPLOYMENT LAW***
- ***LIQUOR CASES***
- ***RELIGION CASES***
- ***TAXATION AND REGULATION***
- ***NATURAL RESOURCES***
- ***ENVIRONMENTAL***
- ***WATER RIGHTS***
- ***GAME AND FISH TRIBAL REGULATION***
- ***PUEBLO LAND CLAIMS ACT OF 1924***
- ***INDIAN CLAIMS COMMISSION ACT OF 1946***
- ***PUBLIC LAW 280***
- ***TERMINATION***
- ***SELF-DETERMINATION ERA***
- ***TRIBAL GOVERNING BODY***
- ***CIVIL JURISDICTION: FEDERAL, STATE AND TRIBAL***
- ***CRIMINAL STATUTES***
- ***CRIMINAL CASES***
- ***AN ANALYTICAL APPROACH TO CRIMINAL JURISDICTION***
- ***INDIAN CHILD WELFARE ACT OF 1978***
- ***INDIAN CULTURE AND ART***
- ***AREAS OF LAW INVOLVED IN INDIAN PRACTICE***

MARSHALL TRILOGY

Johnson v. M'Intosh, 21 U.S. 543 (1823) Individual **acquired land title directly from Indians and the other individual acquired title in the same land from the United States subsequently. The question is whose title prevails. The court held that the Indians have the right of occupancy in the land not the title. The title in the land belongs to the United States as sovereign conqueror. Since the Indians had no title in the first place, they transferred the land without a title. Therefore, the individual who acquired the title from the United States has property right in the land. The right of occupancy was less than a title and was not transferable.**

The McIntosh case stands for the institutionalization of this doctrine that all of the titles to the land in the United States come from discovery or conquest, and relations with the tribes don't pass title to the United States, they pass the right of occupancy.

Cherokee Nation v. Georgia, 30 U.S. 1 (1831) **The state of Georgia enacted laws that abolished Indian right to sovereignty, self government, and land. The federal government took no action on behalf of Cherokee and the Cherokees filed a claim in the Supreme Court. The primary question was whether the Supreme Court had jurisdiction over the case. Chief Justice Marshal held that the Supreme Court has original jurisdiction over disputes between the states, and disputes between the United States and a foreign state. The court has to determine whether an Indian tribe is a state or foreign nation or some other entity. The court held that an Indian tribe is neither a state nor a foreign nation but rather is limited dependent sovereign. The reason that a tribe is limited dependent sovereign and not a state or foreign nation is that a tribe does not have the attributes that a state or foreign nation has. Namely, unlike a state or a foreign nation, an Indian tribe can not claim title but rather has the right of occupancy and is subservient to the federal government. The court's decision was a split of 2, 2, and 2. Two justices held that the Indian tribes have no sovereignty at all; two justices held that the Indian tribes were limited dependent sovereigns, and two justices held that the Indian tribes were foreign nations with all the attributes. The Marshal view was a compromised and centrist view while the other four justices represented each extreme.**

Worcester v. Georgia, 31 U.S. 515 (1832) **Georgia enacted a series of laws beginning in 1827 which, in effect, would have abolished the Cherokee government, distributed Cherokee land among five Georgia counties, prohibit Cherokee legislature and courts from meeting, and annulled all tribal laws, usages, and customs. The court held that the Cherokee nation is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress.**

The three cases: McIntosh, Cherokee Nation, and Worcester represent the Marshal trilogy and fundamentally shaped the federal Indian policy and institutionalized the major doctrines of federal Indian relationship. Namely, that the federal government owns all title to the land and the Indians have the right occupancy; that the federal government is the absolute sovereign and the Indian tribes are limited dependent sovereigns and thus outside of the authority of the states.

CONGRESSIONAL AUTHORITY

Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) **Suit to enjoin the carrying into effect of the act of Congress of June 6, 1900 (31 Stat. at L. 677, chap. 813), dealing with the disposition of tribal property of the Kiowa, Comanche, and Apache Indians. The plenary power of Congress over the tribal relations and lands of the confederated tribes of Kiowa, Comanche, and Apache Indians could not be so limited by any of the provisions of a treaty with such Indians as to preclude the enactment by Congress of the act of June 6, 1900, 31 Stat. 677, c. 813, providing for allotments to the Indians in severalty out of the lands held in common within the reservation and purporting to give an adequate consideration for the surplus lands not allotted among the Indians or reserved for their benefit**

Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977)

COMPENSATION FOR INDIAN LAND

Shoshone Tribe of Indians v. United States, 299 U.S. 476 (1937) Settlement **of Northern Arapahos at Wind River.** Justice Cardozo.

United States v. Shoshone Tribe of Indians, 304 U.S. 111 (1938) **In a subsequent unsuccessful case, the government challenged the ownership of the Wind River Tribes to the timber and minerals. In determining the compensation to which an Indian tribe is entitled for the taking by the United States, without the tribe's consent, of reservation lands of which, under treaty, the tribe was to have "absolute and undisturbed use and occupation," the timber and mineral resources are properly to be taken into consideration, even though the legal title to the reservation is in the United States and the Indian right is a right of use and occupation.**

The phrase "absolute and undisturbed use and occupation" in a treaty between an Indian tribe and the United States which provides that the tribe shall have "absolute and undisturbed use and occupation" of lands reserved, is to be read with other parts of the document, having regard to the purpose of the arrangement made, the relation between the parties, and the settled policy of the United States fairly to deal with Indian tribes.

Treaties between the United States and Indian tribes are not to be interpreted narrowly, as sometimes may be writings expressed in words of art employed by conveyancers, but are to be construed in the sense in which naturally the Indians would understand them. In interpreting a treaty between the United States and an Indian tribe, any doubts as to the ownership of lands, or minerals or timber on lands reserved to the tribe, should be resolved in favor of the tribe.

This case confirmed that tribes are presumed to beneficially own land, minerals, timber and other associated property rights, unless otherwise provided by treaty or statute.

Mr. Justice CARDOZO delivered the opinion of the Court. Mr. Justice Stone and Mr. Justice Cardozo took no part in the consideration or decision of this case. Mr. Justice Reed dissents.

United States v. Santa Fe P. R. Co., 314 U.S. 339, 347 (1941) **The creation of Indian reservation at request of Walapai Tribe of Indians in Arizona and its acceptance by tribe amounted to a relinquishment of any tribal claims to lands outside that reservation, and that relinquishment was tantamount to an extinguishment of Indian title by "voluntary cession" within act granting land to railroad and providing that United States would extinguish Indian title to lands within grant only by their voluntary cession.** Mr. Justice Douglas - opinion of the Court.

Sioux Tribe of Indians v. United States, 316 U.S. 317 (1942) Four **executive orders were issued withdrawing lands from public sale and setting them apart for the tribe's use. A stated purpose behind the executive orders was to stifle the liquor trade in the area. Several years later an executive order restored three of the parcels of land to the public domain. The tribe sought compensation from the United States asserting that a**

taking occurred when the land was restored to the public domain. On appeal, the court affirmed the order denying compensation to the tribe. The court concluded that: (1) there was no express constitutional or statutory authorization for the conveyance of a compensable interest to the tribe; (2) the congressional and executive understandings of such executive conveyances did not imply that the tribe had received a compensable interest in the property; and (3) the executive orders were effective to grant the tribe the use of the property, but they were terminable at the will of the President or Congress without any financial obligation on the part of the United States.

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. Since the Constitution places the authority to dispose of public lands exclusively in Congress, the executive's power to convey any interest in these lands must be traced to Congressional delegation of its authority. An Indian tribe must be compensated where lands, reserved for its use and occupation by the terms of a treaty or statute, are subsequently taken from it by the government. Mr. Justice Byrnes delivered the opinion of the Court. Chief Justice took no part.

Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955) **Petitioner American Indian group alleged that respondent United States owed it just compensation pursuant to the U.S. Const. amend. V for the taking of land that petitioner occupied in Alaska. Petitioner argued that Congress had sufficiently recognized its possessory rights in the land so as to make its interest compensable. The court of claims adopted the findings of a commissioner which determined that petitioner's interest in the land was that of original Indian title, and that such title was not a sufficient basis to maintain the suit because there had been no recognition by Congress of any legal rights in petitioner to the land in question. The court of claims then dismissed petitioner's suit. The court granted certiorari to review the case and determine the nature of petitioner's interest in the land, if any. Upon review the court affirmed the court of claims. The court held that the certain statutes that petitioner cited did not indicate any intention by Congress to grant to petitioner any permanent rights in the lands that they occupied by permission of Congress. Therefore the court held that the taking by respondent of this unrecognized title was not compensable.**

Where the Congress by treaty or other agreement has declared that thereafter Indians were to hold lands permanently, compensation must be paid for subsequent taking. There is no particular form for congressional recognition of Indian right of permanent occupancy. It may be established in a variety of ways but there must be the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation.

In all the States of the Union the tribes who inhabited the lands of the States held claim to such lands after the coming of the white man, under what is sometimes termed original Indian title or permission from the whites to occupy. That description means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised "sovereignty." This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.

The taking by the United States of unrecognized Indian title is not compensable under the U.S. Const. amend. V. Indian occupancy, not specifically recognized as ownership by action authorized by Congress, may be extinguished by the government without compensation. Mr. Justice Reed – opinion. Mr. Justice Douglas, Mr. Chief Justice Warren and Mr. Justice Frankfurter dissented.

Three Affiliated Tribes of Ft. Berthold Reservation v. United States, 182 Ct.Cl. 543, 390 F.2d 686 (Ct. Cl. 1968) **Transmutation test.** Before Cowen, Chief Judge, and Laramore, Durfee, Davis, Collins, Skelton, and Nichols, Judges. Opinion Collins, Judge.

United States v. Sioux Nation of Indians, 448 U.S. 371 (1980) **The Black Hills (hills) were granted to the tribes by treaty in 1868. In 1877, after gold was found, Congress passed an act taking the hills back. In 1923 the tribes petitioned the claims court for compensation, which was denied in 1942, but Congress later directed the claims court to review the merits of the hills takings claim without regard to the defense of res judicata. In 1978 the claims court finally found for the tribes. The Court**

affirmed, finding that Congress's waiver of the defense of res judicata did not violate the doctrine of separation of powers, as Congress had not tried to interfere with the claims court's ultimate decision on the merits. The Court also found that the claims court had used the proper legal standard, and the record supported the factual findings and the conclusion that the hills were appropriated in circumstances which involved an implied undertaking by the government to make just compensation to the tribes, and that the undertaking of an obligation to provide rations for the tribes was a quid pro quo for depriving them of their chosen way of life and was not intended to compensate them for the taking of the hills, and thus compensation was due.

"It is obvious that Congress cannot simultaneously (1) act as trustee for the benefit of the Indians, exercising its plenary powers over the Indians and their property, as it thinks is in their best interests, and (2) exercise its sovereign power of eminent domain, taking the Indians' property within the meaning of the Fifth Amendment to the Constitution. In any given situation in which Congress has acted with regard to Indian people, it must have acted either in one capacity or the other. Congress can own two hats, but it cannot wear them both at the same time.

Where Congress makes a good faith effort to give the Indians the full value of the land and thus merely transmutes the property from land to money, there is no taking. This is a mere substitution of assets or change of form and is a traditional function of a trustee."

Where Congress waives the Government's sovereign immunity, and expressly directs the courts to resolve a taking claim on the merits, there would appear to be far less reason to apply *Lone Wolf*'s principles of deference. In every case where a taking of treaty-protected property is alleged, a reviewing court must recognize that tribal lands are subject to Congress' power to control and manage the tribe's affairs. But the court must also be cognizant that "this power to control and manage [is] not absolute.

Indian tribal sovereignty remains a doctrine of considerable vitality because of its internal significance for tribal governments and the resulting external consequences for the states and for non-Indian individuals and corporations within Indian country. The law since the early days of the nation up through several major supreme court

decisions of the modern era has been that self-governing powers of tribes survive to the extent the general government has not abolished them.

The westward movement was devastating to traditional forms of tribal governments. The arrival of non-Indian settlers and missionaries, the removal policy, allotment, and war all altered the fabric of Indian society. Most particularly, traditional tribal government was effectively displaced by federal bureaucrats. Mr. Justice Blackmun wrote opinion. Mr. Justice White concurred in part and concurred in judgment and filed opinion. Mr. Justice Rehnquist dissented and filed opinion.

Oglala Sioux Tribe v. United States, 650 F.2d 140 (8th Cir. 1981), cert. denied, 455 U.S. 907 (1982) **Case sought to reject the damage award and to restore the Oglala Sioux Tribe's rights to the Black Hills based upon the allegation that Congress acted unconstitutionally in taking the Black Hills. The case was dismissed on the basis that Congress enacted the Indian Claims Commission Act as the exclusive remedy for wrongful taking of Indian lands.**

County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985) **Respondents, Indian tribes, instituted suit against petitioners, counties (counties) in New York State, alleging that a 1795 conveyance of land to New York State (state) violated Indian Trade and Intercourse Act (Act), 1 Stat. 329 (1793). Respondents sought damages for fair rental value of the land for a two-year period. Petitioners cross-claimed against the state, also petitioner herein, for indemnification. District court found counties liable to respondents, awarded respondents damages and held state required to indemnify counties for damages owed. Court of Appeals affirmed. Petitioners sought review. Court affirmed district court's ruling with respect to finding of liability under Federal common law but reversed with respect to its exercise of ancillary jurisdiction over counties' cross-claim for indemnification against state. Respondents had common law right of action for unlawful possession which was not preempted by passage of the Act. Respondent's cause of action was not barred by statute of limitations or political question doctrine and had not abated. United States did not ratify New York state's unlawful purchase of respondents' land by passage of subsequent treaties.**

No purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution and in the presence, and with the approbation of the commissioner or commissioners of the United States appointed to supervise such transactions. 1 Stat. 330, § 8 (1793).

Indian nations hold "aboriginal title" to lands they had inhabited from time immemorial. The "doctrine of discovery" provides, however, that discovering nations held fee title to these lands, subject to the Indians' right of occupancy and use. As a consequence, no one could purchase Indian land or otherwise terminate aboriginal title without the consent of the sovereign.

Indians have a federal common law right to sue to enforce their aboriginal land rights. In determining whether a federal statute pre-empts common-law causes of action, the relevant inquiry is whether the statute speaks directly to the question otherwise answered by federal common law. In the absence of a controlling federal limitations period, the general rule is that a state limitations period for an analogous cause of action is borrowed and applied to the federal claim, provided that the application of the state statute would not be inconsistent with underlying federal policies. Mr. Justice Powell – opinion. Justice Brennan filed an opinion concurring in part and dissenting in part in which Justice Marshall joined. Justice Stevens concurred in the judgment in part and filed an opinion dissenting in part in which Chief Justice Burger and Justices White and Rehnquist joined.

FIDUCIARY OBLIGATION

Seminole Nation v. United States, 316 U.S. 286 (1942) **On appeal of the dismissal of the Seminole Nation's petition, the Court found that the Seminole Nation was not entitled to additional allowances on Claims One, Three, and Four. With respect to Claim One, the Court determined that the Seminole Nation released its claim by a subsequent treaty. With respect to Claim Three, the Court surmised that the Government satisfied the treaty's requirement to support the Seminole Nation's schools because the schools actually received the benefit of money paid to the tribal treasurer. The Court rejected Claim Four**

because the Government fulfilled the treaty requirement for the construction of an agency building. With respect to Claims Two and Five, the Court remanded the case to the U.S. Court of Claims because the lower court did not make any factual findings regarding the Government's breach of fiduciary duty growing out of its treaty obligations. The Court reasoned that the Government's disbursement of money to satisfy treaty obligations to representatives of the Seminole Nation with the knowledge that they were faithless to their own people would constitute a clear breach of the Government's fiduciary obligation.

The Seminole Nation decision has been cited in numerous cases as authority for the application of fiduciary principles to the government in the administration of Indian affairs. Such cases usually concern the manner in which the United States has managed Indian property. It is held that the federal trust duty extends to protection of Indians from their own improvidence.

A fiduciary relationship necessarily arises when the government assumes such elaborate control over forests and property belonging to Indians. All the necessary elements of a common-law trust are present: a trustee, a beneficiary, and a trust corpus.

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, or a trust or fiduciary connection.

The existence of a trust relationship between the United States and an Indian or Indian tribe includes as a fundamental incident the right of an injured beneficiary to sue the trustee for damages resulting from a breach of the trust. Mr. Justice Murphy – opinion. Mr. Justice Jackson dissenting.

Pyramid case – but see Nevada v. United States.

Cheyenne-Arapaho Tribes v. United States, 512 F.2d 1390 (Ct. Cl. 1975) The **tribes alleged that the federal government breached its fiduciary responsibility by not investing tribal funds. The court agreed, without**

touching the waiver of sovereign immunity issue, and ruled that the government has a responsibility to invest the funds in "prudent" areas, similar to a private trust duty. Before Davis, Nichols, and Kunzig, Judges.
Davis – opinion. Nichols, Judge (concurring)

Joint Tribal Council of Passamaquoddy Tribe v. Morton, 388 F. Supp. 649 ***(D. Me. 1975), aff'd, 528 F.2d 370 (1st Cir. Me. 1975)*** **After defendant federal officials refused to initiate litigation against intervenor state for intervenor's alleged mismanagement of plaintiff tribe's lands and funds, plaintiffs, tribe and tribal council, sought a preliminary injunction. Defendant complied with the district court's order to commence litigation. Plaintiffs sought a declaratory judgment that the Indian Nonintercourse Act, 25 U.S.C. § 177 applied to plaintiff tribe and that § 177 established a trust relationship between the United States and plaintiff tribe. The district court ruled in plaintiffs' favor on all points. Defendants and intervenor sought review. The appellate court found that the lack of federal recognition was not conclusive that plaintiff tribe was not protected by § 177. The appellate court affirmed the district court's judgment because plaintiff tribe was entitled to federal protection under § 177 as that the plain language of the statute included plaintiff tribe and since the statute imposed a trust relationship between plaintiff tribe and the federal government, which was never severed, defendants could not deny plaintiffs' request to litigate on the basis that there was no trust relationship.**

Nonintercourse Act imposes upon the federal government a fiduciary's role with respect to protection of the lands of a tribe covered by the Act seems to us beyond question, both from the history, wording and structure of the Act and from the cases cited above and in the district court's opinion. The purpose of the Act has been held to acknowledge and guarantee the Indian tribes' right of occupancy, *United States v. Santa Fe P. R. Co., 314 U.S. 339, 348 (1941)*, and clearly there can be no meaningful guarantee without a corresponding federal duty to investigate and take such action as may be warranted in the circumstances.

We emphasize what is obvious, that the "trust relationship" we affirm has as its source the Nonintercourse Act, meaning that the trust relationship pertains to land transactions which are or may be covered

by the Act, and is rooted in rights and duties encompassed or created by the Act. Congress or the executive branch may at a later time recognize the Tribe for other purposes within their powers, creating a broader set of federal responsibilities; and we of course do not rule out the possibility that there are statutes or legal theories not now before us which might create duties and rights of unforeseen, broader dimension. But on the present record, only the Nonintercourse Act is the source of the finding of a "trust relationship," and neither the decision below nor our own is to be read as requiring the Department of the Interior to look to objects outside the Act in defining its fiduciary obligations to the Tribe.

An exercise of congressional power over Indian affairs which would simply confiscate the interest of the Indians would violate the guarantees of fundamental fairness embodied in the Due Process Clause.

The principle that Congress must exercise its power over Indian affairs consistently with the Due Process Clause of the Fifth Amendment lies at the heart of the recent decision in *Delaware Tribal Business Committee v. Weeks*.

The validity of a given legislative solution involving tribal property rights depends on whether it can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians. The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute.

While Congress has broad latitude in determining what is best for the Indians, it cannot use its extensive guardianship powers as a device for simply transferring Indian lands to non-Indians without either compensation or any other means of improving the Indians lot. That would not be an exercise of guardianship, but an act of confiscation.

If Congress should choose to act in some capacity other than guardian, it may only do so through an exercise of its powers of eminent domain upon payment of just compensation. Gignoux, District Judge.

Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977) **Appellee unrecognized Indian tribe filed an action against appellants, federally recognized Indian tribes and Secretary of the Interior, seeking**

a declaration of its rights to receive funds under 25 U.S.C. §§ 1291-1297. The funds were being distributed to redress the breach of a tribal land treaty and appellee alleged that its exclusion violated its equal protection rights under the Due Process Clause of the Fifth Amendment. The district court rendered judgment in favor of appellee and enjoined further distributions. The appellate court affirmed and appellants sought review. The Court reversed, ruling that Congress' omission of appellee from the distribution did not offend due process and was tied rationally to the fulfillment of Congress' unique obligation toward the Indians. Appellee was not a recognized tribal entity; it was simply individual Indians with no vested rights in any tribal property. The statute distributed tribal, not individually owned, property. Appellee had previously been excluded from a distribution of tribal assets. Congress deliberately limited the distribution under the statute to avoid problems that might attend a wider distribution.

The statement in *Lone Wolf* that the power of Congress "has always been deemed a political one, not subject to be controlled by the judicial department of the government," however pertinent to the question then before the Court of congressional power to abrogate treaties has not deterred this Court, particularly in this day, from scrutinizing Indian legislation to determine whether it violates the equal protection component of the Fifth Amendment. "The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute." Mr. Justice Brennan – opinion. Mr. Justice Blackmun filed an opinion concurring in part and concurring in result, in which Mr. Chief Justice Burger joined. Mr. Justice Stevens dissented and filed opinion.

*Tucker Act (Act of March 3, 1887, ch. 359, 24 **Stat.** 505, 28 **U.S.C.** § 1491)*

*Indian Tucker Act (§ 24 of ICCA, 28 **U.S.C.** § 1505)*

Mitchell Cases

United States v. Mitchell, 445 U.S. 535 (1980) (Mitchell I) **The Quinault allottees and tribe filed claims for money damages pursuant to the Indian Tucker Act alleging that the U.S. breached its fiduciary duty by mismanaging timber (clear-cutting, etc.). In *Mitchell I* (1980), the Court ruled that the General Allotment Act only created a limited trust relationship that would not sustain money damages.** Mr. Justice

Marshall – opinion. Mr. Justice White filed a dissenting opinion in which Mr. Justice Brennan and Mr. Justice Stevens, joined.

United States v. Mitchell, 463 U.S. 206 (1983) (Mitchell II) **In *Mitchell II*, the court found that the pervasive federal regulation of Indian timber resources did serve as a substantive federal law basis, creating a federal trust obligation, the breach of which would be compensable in money damages.** Mr. Justice Marshall – opinion. Justice Powell dissented and filed opinion in which Justices Rehnquist and O'Connor joined.

United States v. White Mountain Apache Tribe, 537 U.S. 465 (2003) Government had to pay $14 MM for repair of Fort Apache Military Reservation.

United States v. Navajo Nation, 537 U.S. 488 (2003) Lease **8580 between the Navajo Tribe and the predecessor of Peabody Coal Company (Peabody) established a maximum royalty rate of 37.5 cents per ton of coal, but made that figure subject to reasonable adjustment by the Secretary on the 20-year anniversary of the Lease and every ten years thereafter. The 37.5 cents per ton rate yielded about 2 percent of the gross proceeds realized by Peabody.**

The Tribe's claim for compensation did not derive from any liability-imposing provision of the IMLA or its implementing regulations. No provision of the IMLA or its regulations contained any trust language with respect to coal leasing. Justice Ginsburg – opinion. Justice Souter filed dissenting opinion in which Justices Stevens and O'Connor joined.

Cobell v. Kempthorne, Case No. 1:96CV01285 (D.D.C. 2008)

FEDERAL CONFLICT OF INTEREST

Nevada v. United States, 463 U.S. 110 (1983) **In 1913 the United States sued to adjudicate water rights to the Truckee River for the benefit of the Pyramid Lake Indian Reservation and the planned Newlands Reclamation Project. Thirty-one years later, in 1944, the United States District Court for the District of Nevada entered a final decree in the case pursuant to a settlement agreement. The issue thus presented 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 this claim on the merits. Case was res judicata. In separate case Tribe awarded Eight Million Dollars. Justice Rehnquist – opinion. Justice Brennan filed a concurring opinion.

PART II

FISHING RIGHTS

United States v. Winans, 198 U.S. 371 (1905) **APPEAL from the Circuit Court of the United States for the District of Washington to review a decree dismissing a bill to enjoin any obstruction of the fishing rights in the Columbia river, secured to the Yakima Indians by the treaty of 1859. *Reversed* and remanded for further proceedings. The right of taking fish "at all usual and accustomed places in common with the citizens of the territory" of Washington, and of "erecting temporary buildings for curing them," secured to the Yakima Indians by the treaty of 1859, 12 Stat. 951, survives the private acquisition of lands bordering on the Columbia river by grants from the United States or state of Washington. Patents issued by the Land Department to lands bordering on the Columbia river, though absolute in form, can grant no exemption from the fishing rights secured to the Yakima Indians by the treaty of 1859.** Mr. Justice McKenna delivered the opinion of the court. Mr. Justice White dissents.

United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974) **The United States, on its own behalf and as trustee for several western Washington Indian tribes, later joined as intervenor-plaintiffs by additional tribes, filed suit against the State of Washington and others, seeking declaratory and injunctive relief concerning off-reservation treaty right fishing. Treaty rights were reserved to the descendants of the treaty Indians, without limitation in time, excepting as Congress might determine. In negotiating treaties, an exclusive right of fishing was reserved by the Indian tribes within the area and boundary waters of their reservations, wherein tribal members might make their homes if they chose to do so; and the tribes also reserved the right to off-reservation fishing "at all usual and accustomed grounds and stations" and agreed that all citizens of the territory might fish at the same places in common with tribal members.** The District Court, Boldt, Senior District Judge.

GAMING

Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310 (5th Cir. Fla. 1981), cert. denied, 455 U.S. 1020 (1982)* **The Seminoles were the first tribe to enter into the bingo gaming industry. Their endeavors encouraged other tribes to begin gaming enterprises on reservations as a step towards greater economic self-sufficiency. The State of Florida challenged the Tribe's right to conduct gaming under the State's assumption of civil jurisdiction under Public Law 280. Circuit Judge Morgan held that: (1) the State statute permitted bingo games to be played by certain qualified organizations, subject to state restrictions and as such was "civil/regulatory" rather than "criminal/prohibitory." Under Public Law 280, and absent congressional approval, states do not have regulatory authority over tribes. Thus (1) the State of Florida could not enforce its statute against the tribe, and (2) Indians as well as non-Indians may play bingo at the tribal facility. The Court distinguished state law prohibiting certain conduct from state law permitting the conduct at issue, subject to regulation. Since gaming was not entirely prohibited, the State gaming statute was found to be regulatory and outside of the scope of Public Law 280.**

California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) **The State of California and certain counties sought to regulate gaming conducted by Cabazon and Morongo Bands of Mission Indians, federally recognized Indian Tribes, occupying reservations in Riverside County, California. Each Band, pursuant to an ordinance approved by the Secretary of the Interior, conducted bingo games on its reservation. The Cabazon Band also had a card club at which draw poker and other card games were played. The games were open to the public and were played predominantly by non-Indians coming onto the reservations. The gaming operations provided a major source of employment for tribal members, and the profits were the Tribes' sole source of income.**

The State's interest in preventing infiltration of gaming by organized crime could not withstand the compelling federal and tribal interests supporting tribal gaming operations, including tribal sovereignty, the Congressional goal of Indian self-government, and the federal encouragement of tribal self-sufficiency and economic development. The State's regulation would impermissibly infringe on tribal

government. Justice White – opinion. Justice Stevens filed a dissenting opinion, in which Justices O'Connor and Scalia joined.

Indian Gaming Regulatory Act of 1988, 25 ***U.S.C.*** *§§ 2701-2721; National Indian Gaming Commission; Jan. 3, 2008 Artman Guidance*

Doe v. Santa Clara Pueblo, 154 P.3d 644 (N.M. 2007) **Jane Doe arose from two cases in which casino patrons filed suit in New Mexico state court alleging negligence and other causes of action for damages for personal injuries, and asserted that the state court had jurisdiction by virtue of the waiver of immunity and forum selection clauses of the gaming compacts each Pueblo had signed with the State.** Bosson, Justice. We concur: Edward L. Chávez, Chief Justice, Patricio M. Serna, and Petra Jimenez Maes, Justices. Pamela B. Minzner, Justice (Dissenting).

INDIAN COUNTRY

18 **U.S.C.** § 1151.

Alaska v. Native Village of Venetie, 522 U.S. 520 (1998) **Government dissolved the reservation and put the land into a corporation scheme with tribal members as shareholders. The court holds that the Indian corporation land does not constitute "Indian country" under 18 U.S.C. § 1151. To be a dependent Indian community, must meet two requirements: (1) land must be set aside by the federal government for use of the Indians as Indian land, and (2) there is federal supervision over the use of the land.** Justice Marshall.

State v. Romero, 142 P.3d 887 (N.M. 2006). **The N.M. Supreme Court, Serna, J., held that: (1) State lacked jurisdiction to prosecute Native American defendants for crimes committed within exterior boundaries of their respective pueblos, and (2) conveyance of land designated as Indian country to non-Native American did not extinguish status of land as Indian country. Cited *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962).** Justice Serna – opinion. We concur: Richard C. Bosson, Chief Justice and Pamela B. Minzner, Justice, Petra Jimenez Maes, Justice (Specially Concurring), Edward L. Chávez, Justice (Specially Concurring).

Post-Romero Legislation

Congress enacted Indian Pueblo Lands Act Amendments of 2005, **Pub. L**. No. 109-133, § 1, 119 Sta. 2573, *reprinted in* 25 **U.S.C.** §331, affirming tribal and federal jurisdiction over offenses committed by or against Indians "anywhere within the exterior boundaries of any grant from a prior sovereign, as confirmed by Congress or the Court of Private Land Claims to a Pueblo Indian tribe of New Mexico."

STATUTES OF GENERAL APPLICABILITY

Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99 (1960) – Tuscarora Rule **Court stated as general principle that federal statutes of general applicability, that do not mention tribes, apply to Indian tribes, which became known as "Tuscarora Rule." Many courts, such as Tenth Circuit, have argued that Tuscarora Rule is wrong and that tribes are not obligated to follow federal laws of general applicability.** Mr. Justice Whittaker delivered the opinion of the court. Mr. Justice Black, Mr. Chief Justice Warren and Mr. Justice Douglas dissented (Great nations, like great men, should keep their word." Id. at 142.

LABOR AND EMPLOYMENT LAW

Morton v. Mancari, 417 U.S. 535 (1974) **The federal employees claimed that the statute establishing the preference was impliedly repealed by the subsequent enactment of federal legislation forbidding racial discrimination in employment. They also claimed that, if not repealed, the statute was unconstitutional because it violated the Due Process Clause. The Court held that the statute had not been impliedly repealed and that it did not violate due process. The Court ruled that (1) the lower court erred in finding that the statute was impliedly repealed because repeals by implication were not favored and there was no affirmative showing of a congressional intent to repeal the statute; (2) the federal government had a legitimate interest arising out of its special relationship with the Indian tribes; (3) the preference established in the statute was reasonably related to that governmental interest; and (4) the preference in favor of Native Americans was not the kind of invidious discrimination that the civil rights legislation sought to eliminate.**

The court has held that the category Indian and the tribal subcategories such as Arapaho or Mescalero Apache are not racial categories at all but political one, because they refer to the tribe constituted as a political

body, not the tribe constituted as a racial group. The BIA regulations required that to be eligible for the preference, an individual must be one-fourth or more degree Indian blood and be a member of a federally recognized tribe. At most, this definition contains one political element, membership in a federally recognized tribe. But it also has a second and openly genetic requirement that has nothing to do with the politics. However, the existence of sovereignty might suggest a different conclusion: the tribe, not Congress or the constitution sets the fundamental norms governing members of the tribe. The equal protection clause has a special and different meaning in Indian country.

Should the court apply strict scrutiny or minimal rational basis review is subject to controversy? Both in due process and equal protection cases, the court has said that federal legislation must be rationally related to furtherance of the federal trust responsibility to Indians. Mr. Justice Blackmun.

Indian Educators Federation v. Kempthorne, Civil Action No. 2004-0959 (March 31, 2008). **Decision in the Federal District Court of the District of Columbia opened up Indian preference to "all" positions at Interior that "directly and primarily" relate to Indian programs. Currently, the policy is limited to the BIA and other posts that were transferred out of the BIA to other agencies. It is uncertain whether this decision will be appealed.**

INDIAN PREFERENCE UPHELD

AFGE v. United States, 330 F.3d 513 (D.C. Cir. 2003), cert. denied, 540 U.S. 1088 (2003), **Indian preference upheld in Department of Defense contract award.**

Employment cases cited in seminars.

*OSHA 29 **U.S.C.** § 651(b)*

Donovan v. Navajo Forest Products Industries, 692 F.2d 709 (10th Cir. 1982) Court of Appeals, Barrett, Circuit Judge

Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985) Sneed, Circuit Judge

Reich v. Mashantucket Sand & Gravel, 95 F.3d 174 (2d Cir. 1996) Tribally **owned and operated construction business was cited and fined for OSHA violations. Court found that OSHA did not affect tribe's exclusive right of self-government in purely intramural matters, and thus OSHA applied to this tribal construction business.**

Unclear Legal Guidance (Forest Products v. Coeur d'Alene)

Tribal Commercial Activities

Congressional Direction (ERISA 29 ***U.S.C.*** *§§1001 et seq.)*

National Labor Relations Act 29 ***U.S.C.*** *§§ 141-187 (2000)*

NLRB v. Pueblo of San Juan, 276 F.3d 1186 (10th Cir. ***N.M.*** *2002)* **Tenth Circuit held that despite lack of reference to tribes in § 14(b) of NLRA, which allows states and territories to prohibit agreements requiring membership in labor organization as condition of employment, San Juan Pueblo Indian Tribe could enact such a prohibition. Holding was based on Pueblo's "retained inherent sovereign authority" to govern its own territory.**

San Manuel Indian Bingo and Casino v. N.L.R.B.**, 475 F.3d 1306 (D.C. Cir. Feb. 2007),** ***reh'g en banc denied*** **(D.C. Cir. June 8, 2007)**

In contrast, D.C. Circuit held that NLRA applied to a casino operated by San Manuel Band of Serrano Mission Indians ("Band") on San Manuel Indian Reservation in San Bernardino County, California. Casino is wholly owned and operated by Band and is located entirely within San Manuel Indian Reservation. Band petitioned for rehearing on March 26, 2007. Band will not appeal adverse decision to U.S. Supreme Court.

[Peter C. Schaumber, a Bush appointee who was designated Chairman of the NLRB last month, said he was extremely disappointed when his colleagues overturned 30 years of precedent and subjected tribes to federal labor law. Back in March 2004, he authored the sole dissent to the decision that has sent shock waves through Indian Country.

"I thought the board [was] turning a blind eye towards retained tribal sovereignty and the principles of federal Indian law that protect them," Schaumber said.

Schaumber, a former federal prosecutor, said the 2004 ruling is now being expanded at the expense of tribes. He cited a more recent case in which a Regional Director of the NLRB ignored language in a treaty that he said should have prevailed. "I will dissent in those decisions that expand San Manuel," Schaumber said, referring the 2004 precedent involving the San Manuel Band.

The sentiments were echoed by Phillip B. Wilson, a labor relations consultant who worked with the Saginaw Chippewa Tribe. Even though the union lost an organizing vote -- and a second union withdrew its petition for an election -- he said the NLRB won't even consider sovereignty arguments from tribes.

"You're going to get a rubber-stamp 'San Manuel applies to this, please move along,'" Wilson said.

Wilson, who works for the LRI Management Services of Oklahoma, accused the NLRB are pre-judging tribal disputes. He said the regional directors, in the Saginaw Chippewa case and another one involving the Mashantucket Pequot Tribal Nation of Connecticut, issued decisions as quickly as one day after tribal briefs were submitted.

"The decisions clearly had already been written before the briefs were due," Wilson told attendees of the conference.

Backed by tribes and tribal organizations, the San Manuel Band took its challenge to the 2004 NLRB ruling to the D. C. Cir. but lost. The tribe declined to seek review from the U.S. Supreme Court.

"Tribes should prepare for a new era," said attorney D. Michael McBride, who moderated the panel. "The shift is dramatic."

The NLRA was first passed in 1935, a year after the IRA. The NLRA makes no mention of tribes although state and local governments are notably exempt from its provisions.

For decades, the NLRB took the same approach towards tribes and refused to apply labor law to on-reservation activities. The NLRB only applied when a tribe went off the reservation, according to the decisions.

But the San Manuel ruling put the focus back to the reservation. The board said it would apply the NLRA on a case-by-case basis by looking at the nature of the tribal enterprise and whether it impacts non-Indians.

Tribal casinos are more commercial in nature than a governmental operation, according to the NLRB. And if they employ a significant number of non-Indians, federal labor law will apply, the San Manuel decision states.]

Title VII of Civil Rights Act, 42 ***U.S.C.*** *§§ 2000(e)-2000(e)-17 (2000); EO 11246.*

Title VII - Wardle v. Ute Indian Tribe, 623 F.2d 670 (10th Cir. Utah 1980) **Involved a nonmember police officer who brought suit under Indian Civil Rights Act. Court held that Title VII's exemption of Indian tribes controlled over more general prohibitory provisions contained in other statutes.**

Title VII - Dille v. Council of Energy Resource Tribes, 801 F.2d 373 (10th Cir. Colo. 1986) **Held that a female employee could not bring a sex-discrimination suit under Title VII against an organization composed solely of Indian tribes. Unlikely Congress intended to protect individual Indian tribes, but not collective efforts of tribes.**

Title VII - Myrick v. Devils Lake Sioux Mfg. Corp., 718 F. Supp. 753 (D.N.D. 1989) **The corporation was owned 51% by an Indian tribe and 49% by a non-Indian. The court held that Title VII of the Civil Rights Act does not provide an exemption to enterprises that have mixed ownership.**

Title VII Indian Preference Exemption

*Dawavendewa v. Salt River Project Agric. Improvement & Power Dist., 154 F.3d 1117 (9th Cir. **Ariz.** 1998)*

*Dawavendewa v. Salt River Project Agric. Improvement & Power Dist., 276 F.3d 1150 (9th Cir. **Ariz.** 2002) ("Dawavendewa II"), cert. denied, 537 U.S. 820 (2002)*

*EEOC v. Peabody W. Coal Co., 400 F.3d 774 (9th Cir. **Ariz.** 2005), cert. denied, 126 S. Ct. 1164 (2006).*

*Fair Labor Standards Act ("FLSA"), 29 **U.S.C.** §§201-219 (2000)*

FLSA - Reich v. Great Lakes Indian Fish & Wildlife Comm'n, 4 F.3d 490 (7th Cir. Wis. 1993) **Court refused to apply FLSA, partly as a symbol of comity and partly in recognition of sovereignty. However, court was careful to narrow its holding to that of government employees who are exercising powers of tribal government.**

*FLSA - Snyder v. Navajo Nation, 371 F.3d 658 (9th Cir. **Ariz.** 2004)* **Ninth Circuit held in that law enforcement officers of Navajo Nation Division of Public Safety are not entitled to protections of Fair Labor Standards Act ("FLSA"). While FLSA is a law of general applicability, tribal law enforcement is a traditional governmental function and is appropriate to exempt from scope of FLSA.**

FLSA - Chao v. Matheson, 2007-WL-1830738, No. C-06-5361 (W.D. Wash., June 25, 2007) **In June, 2007, the United States District Court for the Western District of Washington concluded that the Fair Labor Standards Act (FLSA) applies to a business which operates on tribal land and is owned by a member of the tribe on whose land he operates his business.**

*Americans with Disabilities Act, 42 **U.S.C.** §§ 12101-12213*

Florida Paraplegic Ass'n v. Miccosukee Tribe of Indians, 166 F.3d 1126 (11th Cir. Fla. 1999) Title III of Americans with Disabilities Act ("ADA"), which requires places **of public accommodation to be accessible to persons with disabilities, does not exclude tribes. Eleventh Circuit ruled, however, that it cannot be enforced by private persons against Indian**

tribes in non-Indian forums because Congress did not expressly waive tribal immunity from suit. 42 U.S.C. § 12181

*Age Discrimination in Employment Act ("ADEA"), 29 **U.S.C.** §§ 621-634 (2000)*

ADEA - EEOC v. Cherokee Nation, 871 F.2d 937 (10th Cir. Okla. 1989) **Tenth Circuit en banc held that Age Discrimination in Employment Act ("ADEA") did not apply to Cherokee Nation Department of Health and Human Services because of rights of self-governance guaranteed by Cherokee Treaty. Cherokee Nation had treaty right "to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country." No clear indication of Congressional intent to abrogate tribal sovereignty rights.**

ADEA - EEOC v. Fond du Lac Heavy Equip. & Constr. Co., 986 F.2d 246 (8th Cir. Minn. 1993) **Eighth Circuit Court of Appeals held that ADEA did not apply to a tribally-owned construction company that did work both on and off reservation. Fond du Lac court stated general rule in Tuscarora, "does not apply when the interest sought to be affected is a specific right reserved to the Indians."**

ADEA - EEOC v. Karuk Tribe Hous. Auth., 260 F.3d 1071 (9th Cir. Cal. 2001) **Ninth Circuit held that ADEA did not apply to a tribal Housing Authority because role of tribal housing was integrally related to self-governance.**

Tribal Jurisdiction

FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311 (9th Cir. Idaho 1990), cert. denied, 499 U.S. 943 (1991) **Ninth Circuit held that FMC's mineral leases on lands owned by Tribes or individual Indians satisfied test established in Montana v. United States, 450 U.S. 544, 565 (1981), stating that tribal jurisdiction was appropriate where there are "consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." Tribe's labor laws applicable to FMC.**

Macarthur v. San Juan County, 497 F.3d 1057 (10th Cir. Utah 2007), cert. denied, 128 S. Ct. 1229 (2008) **With the exception of activities of special service district's board member, Indian tribe did not possess regulatory authority over county's and special service district's employment-related activities and therefore tribal court lacked jurisdiction over employees' claims against defendants other than CEO, and although tribal court arguably possessed regulatory authority over board member as a member of the tribe, court would exercise its discretion to decline to enforce the tribal court orders in regard to board member."**

State Workers' Compensation Laws

*40 **U.S.C.** § 290 Does Not Apply to Tribal Employers (Act of June 25, 1936, 49 **Stat.** 1938)* ***White Mountain Apache Tribe v. Industrial Comm'n, 696 P.2d 223 (Ariz. Ct. App. 1985); Swatzell v. Industrial Comm'n, 277 P.2d 244 (Ariz. 1954), (petitioner was a non-Indian employee); Tibbetts v. Leech Lake Reservation Business Committee, 397 N.W.2d 883 (Minn. 1986).***

*40 **U.S.C.** 290 May Apply to Tribal Member Employers on Indian Reservation*

State ex rel. Workforce Safety & Ins. v. JFK Raingutters, LLC, 733 N.W.2d 248 (ND 2007).

*40 **U.S.C.** § 290 Does Apply to Non-Indian Employers on Indian Reservation (Johnson and Idaho)*

Begay v. Kerr-McGee Corp., 682 F.2d 1311 (9th Cir. Ariz. 1982) **Arizona workers' compensation statute interpreted to apply to Indian reservations and was applied to permit application on Navajo Nation; *Johnson v. Kerr-McGee Oil Indus.*, 631 P.2d 548 (Ariz. Ct. App. 1981); *State ex rel. Industrial Comm'n v. Indian Country Enters.*, 944 P.2d 117 (Idaho 1997).**

Nez v. Peabody Western Coal Co., Inc., No. SC-CV-28-97 (Nav. S. Ct. September 22, 1999), Slip Op. **Navajo Supreme Court held that while 40 U.S.C. § 290 allowed Arizona Industrial Commission to award worker's compensation benefits to a Navajo employee injured on job, it did not**

preclude Navajo Nation courts from exercising jurisdiction over subsequent personal injury suit against employer over same injuries.

Navajo Preference in Employment Act ("NPEA")

Cabinets Southwest Inc. v. Navajo Nation Labor Commission, SC-CV-46-03 (Nav. S. Ct. 2/10/04) **Cabinets, a subsidiary of the Navajo Housing Authority ("NHA") argued that the Navajo Preference in Employment Act ("NPEA") did not apply because Cabinets operated off the reservation. Cabinets entered into a lease with the Navajo Nation for a parcel of land located outside the territorial jurisdiction of the Navajo Nation but owned in fee by the Navajo Nation. After terminating two employees, Cabinets argued that the NPEA did not apply to it because it acted outside the territorial jurisdiction of the Navajo Nation. Rejecting this claim, the Navajo Nation Supreme Court held that the NHA lease stated that Navajo law applies. Also, Cabinets' articles of incorporation specified application of Navajo law. The Navajo Nation Court held that a party that elected to incorporate under Navajo law must abide by Navajo law as a condition of their existence.**

Kesoli v. Anderson Security Agency, SC-CV-01-05 (Nav. S. Ct. October 12, 2005) **Security company supervisor (Kesoli) was terminated for shouting at his subordinates. Kesoli argued that his employer, Anderson, did not have "just cause" to terminate his employment. Anderson argued that it had no choice but to terminate Kesoli's employment, because his conduct in shouting at his subordinates could constitute "harassment" for which Anderson could be liable under the NPEA.**

Employment At Will – Caution on Tribal Lands

Dilcon Navajo Westerner/True Value Store v. Jensen, No. SC-CV-52-98 (Nav. S. Ct. 2000) **The Navajo Nation by ordinance requires that Navajo employees may only be terminated for cause upon written notification. 15 N.N.C § 604(b)(1). Also, Navajo employees have reduction in force preference.**

Potential for Conflict between Tribal and Federal Labor Law

Astaris LLC; cite to E.E.O.C. v. Peabody.

LIQUOR CASES

United States v. Sandoval, 231 U.S. 28 (1913) **Whether and to what extent Indian communities within the United States shall be dealt with as dependent tribes requiring the protection of the United States are questions for Congress. The lands of the Pueblo Indians in New Mexico, though held in communal fee- simple ownership by the Indians of each pueblo, are subject to the legislation of Congress and the exercise of its guardianship over Indians. Citizenship is not an obstacle to the exercise by Congress of its power to enact laws for the protection of tribal Indians as a dependent people.** Mr. Justice Van Devanter.

Regulation of Liquor in Indian Country: 18 ***U.S.C.*** *§ 1154 (a); Act of May 24, 1949, 63* ***Stat.*** *94, 18* ***U.S.C.*** *§ 1154(c); Act of August 15, 1953, 67* ***Stat.*** *586, 18* ***U.S.C.*** *§ 1161*

United States v. Mazurie, 419 U.S. 544 (1975) Martin **and Margaret Mazurie operated the Bull Bar in Fort Washakie, Wyoming within the boundaries of the Wind River Reservation, but on privately owned fee land. The ability of the Tribal Council to regulate the conduct of the non-Indian bar owners on non-Indian fee land had been upheld in a prior Supreme Court case. Cited *Seymour* and *Worcester*.** Justice Rehnquist – opinion.

Rice v. Rehner, 463 U.S. 713 (1983) **Rehner, a member of the Pala Tribe, was a federally licensed Indian trader operating a general store on the Pala Reservation in San Diego, California. The Pala Tribe had adopted a tribal ordinance permitting the sale of liquor on the reservation providing that the sales conformed to state law. Rehner then sought an exemption from the State law requiring a state license for the retail sale of distilled spirits for off-premises consumption. The Court upheld the requirement as not preempted by federal law or an infringement of tribal sovereignty.**

Concurrent state and federal jurisdiction over the use and distribution of alcoholic beverages had a long-standing history. Justice O'Connor – opinion. Justice Blackmun filed a dissenting opinion in which Justice Brennan and Justice Marshall joined.

Hornell Brewing Co. v. Rosebud Sioux Tribal Court, 133 F. 3d 1087 (8th Cir. ***S.D.*** 1998) **Breweries brought action against tribal court, tribal judge, and descendants of Indian spiritual and political leader, asserting that tribal court lacked jurisdiction over descendants' claim challenging use of leader's name in manufacture, sale, and distribution of malt liquor. The Court of Appeals, Lay, Circuit Judge, held that: (1) breweries' manufacture, sale, and distribution of malt liquor did not occur on reservation land, and tribal court thus did not have jurisdiction over suit, and (2) breweries' advertising of malt liquor on Internet was not basis for tribal court jurisdiction.**

RELIGION CASES

Protection of American Indian Religious Freedom

The American Indian Religious Freedom Act of 1978, 42 ***U.S.C.*** *§ 1996*

United States v. Dion, 476 U.S. 734 (1986) **Dwight Dion, Sr., a member of the Yankton Sioux Tribe, was convicted of shooting four bald eagles on the Yankton Sioux Reservation in South Dakota in violation of the Endangered Species Act. Legislative history reflected Congress' intent to protect the bald and golden eagles, subject to allowing tribes to take eagles for religious purposes upon securing a permit from the Secretary of Interior.** Justice Marshall.

Protection of First Amendment Rights (Cantwell v. Conn., 310 U.S. 296 (1940)

Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) Organizations **and individuals contested Forest Service's plans to permit timber harvesting and road construction in area of national forest that was traditionally used for religious purposes by members of three American Indian tribes in northwestern California. Justice O'Connor, held that: (1) it was appropriate to address merits of First Amendment issue, which it appeared reasonably likely was necessary to decisions below, and (2) free exercise clause did not prohibit government from permitting timber harvesting and road construction in area in question. Government had taken many ameliorative steps. The *Lyng* Court never reached the compelling governmental interest test normally applied under the First Amendment because the tribes did not prove to the**

majority that the government's actions were sufficient to prohibit the free exercise of their religion. Justice O' Connor opinion. Justice Brennan filed a dissenting opinion in which Justices Marshall and Blackmun joined. Justice Kennedy did not participate.

Employment Div. v. Smith, 494 U.S. 872 (1990) R**eview of determination that their religious use of peyote, which resulted in their dismissal from employment, was "misconduct" disqualifying them from receipt of Oregon unemployment compensation benefits. The Supreme Court, Scalia, J., held that: (1) free exercise clause did not prohibit application of Oregon drug laws to ceremonial ingestion of peyote, and (2) thus state could, consistent with free exercise clause, deny claimants unemployment compensation for work-related misconduct based on use of drug.** Justice Scalia – opinion. Justice O'Connor filed opinion concurring in judgment, in which opinion Justices Brennan, Marshall and Blackmun joined as to Parts I and II only. Justice Blackmun filed dissenting opinion, in which Justices Brennan and Marshall join. AIRFA Amendment of 1994 (ok to peyote).

Religious Freedom Restoration Act of 1991 ("RFRA") struck down.

American Indian Religious Freedom Act Amendments of 1994

City of Boerne v. Flores, 521 U.S. 507 (1997) **(Rational basis not strict scrutiny – zoning regulation of Church expansion. RFRA struck down.)**

TAXATION AND REGULATION

What Are the Things You Need to Know in a Tax Conflict Case?

Warren Trading Post Co. v. Arizona State Tax Comm'n, 380 U.S. 685 (1965) **(licensed trader on Navajo Reservation).** Mr. Justice Black. *See* ***Department of Taxation & Fin. v. Milhelm Attea & Bros.***

Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973). **Mescalero Apache Tribe protested New Mexico use tax assessment based on purchase price of materials used to construct two ski lifts at ski resort and sought refund of sales tax paid on basis of gross receipts of the ski resort from sale of services and tangible property. Supreme Court, Mr. Justice White, held that state could impose nondiscriminatory gross receipts tax**

on ski resort operated by tribe on off-reservation land that tribe leased from the federal government under the Indian Reorganization Act, but that provision in Indian Reorganization Act that any lands or rights acquired pursuant to any provision of the Act shall be exempt from state and local taxation barred use tax that state sought to impose on personalty that tribe purchased out of state and which had been installed as a permanent improvement at the resort. Mr. Justice White – opinion. Mr. Justice Douglas filed dissenting opinion in which Mr. Justice Brennan and Mr. Justice Stewart concurred.

McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973) **(tax of Navajo individual income earned entirely on Navajo Reservation).** Mr. Justice Marshall.

***Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation, 425 U.S. 463 (1976)* (cigarette tax on non-Indians upheld, vendor license tax and personal property taxes on Reservation invalid).** Mr. Justice Rehnquist.

Bryan v. Itasca County, 426 U.S. 373 (1976) **(mobile home tax on reservation – cited Title IV of Civil Rights Act of 1968 re Public Law 280).** Mr. Justice Brennan.

Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980) **(cigarette tax on non-member Indians upheld).** Mr. Justice White – opinion. Mr. Justice Brennan filed opinion concurring in part and dissenting in part in which Mr. Justice Marshall joined. Mr. Justice White. Mr. Justice Stewart filed opinion concurring and dissenting in part. Mr. Justice Rehnquist filed opinion concurring in part, concurring in result in part, and dissenting in part.

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) **(state tax on fuel on non-Indian logging company doing business on reservation preempted by extensive federal logging regulation). ("Bracker Test")** Marshall, J., Burger, C. J., Brennan, White, Blackmun, J., Joined. Stewart, J., Powell, Rehnquist, and Stevens, J., joined in dissent. Powell, J., filed dissent.

Central Mach. Co. v. Arizona State Tax Comm'n, 448 U.S. 160 (1980) **(federal licensed trader w/o license or reservation locus not subject to**

state gross receipts tax by state – preempted by Indian Trader statute). *See Department of Taxation & Fin. v. Milhelm Attea & Bros.* Marshall, J., opinion Burger, C. J., and Brennan, White, and Blackmun, J., joined. Stewart, J., filed a dissenting opinion, Powell, Rehnquist, and Stevens, J., Joined. Powell, J., filed dissenting opinion.

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) **(Tribe has sovereign right to tax).** Justice Marshall – opinion. Justice Stevens filed a dissenting opinion in which Chief Justice Burger and Justice Rehnquist joined.

Ramah Navajo Sch. Bd. v. Bureau of Revenue, 458 U.S. 832 (1982) ***(federal preemption case, stating a "rigid rule" of state taxing powers in Indian Country does not exist).*** **Supreme Court, Justice Marshall, held that federal law preempted a state tax imposed on gross receipts that a non-Indian construction company received from tribal school board for construction of school for Indian children on the reservation, since federal regulation of construction and financing of Indian educational institutions is both comprehensive and pervasive, burden imposed by state through its taxation of gross receipts paid to contractor necessarily impeded the clearly expressed federal interest in promoting the quality and quantity of educational opportunities for Indians, and state asserted no specific, legitimate regulatory interest to justify the imposition of its gross receipts tax.** Justice Marshall – opinion. Justice Rehnquist dissented and filed opinion in which Justice White and Justice Stevens joined.

Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195 (1985) **(Sec. of Interior approval not required for Navajo severance tax authority).** Chief Justice Burger. Justice Powell took no part in the consideration or decision of this case.

Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985) **(No state tax on tribal royalty income).** Justice Powell – opinion. Justice White filed dissenting opinion in which Justice Rehnquist and Justice Stevens joined.

Montana v. Crow Tribe of Indians, 484 U.S. 997 (1988) **30% coal severance tax preempted. In 1972, with the approval of the Department of the Interior and pursuant to the Indian Mineral Leasing Act of 1938 (IMLA), Westmoreland Resources, Inc., a non-Indian company, entered into a mining lease with the Tribe for coal underlying the ceded strip.**

After executing the lease, Westmoreland signed contracts with its customers, four utility companies, allowing it to pass on to the utilities the cost of valid taxes. Westmoreland and the Tribe renegotiated the lease in 1974. The amended lease had an extendable ten-year term, and set some of the highest royalties in the United States. In 1975, Montana imposed a severance tax and a gross proceeds tax on all coal produced in the State, including coal underlying the reservation proper and the ceded strip. Westmoreland paid these taxes without timely pursuit of the procedures Montana law provides for protests and refunds. Some six months after the State imposed its taxes, the Crow Tribal Council adopted its own severance tax. The Department of the Interior approved the Tribe's tax as applied to coal underlying the reservation proper but, because of a limitation in the Tribe's constitution, did not approve as to coal beneath the ceded strip. In July 1975, the State imposed a severance tax and a gross proceeds tax on all coal produced in Montana, including coal underlying the reservation proper and the ceded strip. See Mont. Code Ann. §§ 15-23-701 to 15-23-704, 15-35-101 to 15-35-111 (1979). The severance tax rate applicable to the ceded strip coal was 30 percent of the contract sales price of the coal extracted; the gross proceeds tax rate was approximately 5 percent of the contract sales price. During the relevant periods, Westmoreland paid approximately $46.8 million in severance taxes to the State and $11.4 million in gross proceeds taxes to Big Horn County. Westmoreland paid these taxes without timely pursuit of the procedures Montana law provides for protests and refunds. Montana's taxes, as applied to the ceded strip coal, the Court of Appeals held, were both "preempted by federal law and policies," as reflected in the IMLA, and "void for interfering with tribal self-government." The Tribe had a vital interest in the development of its coal resources; the State's taxes had "at least some negative impact on the ... marketability [of the Tribe's coal];" and Montana's coal tax exactions were not "narrowly tailored" to serve only the State's "legitimate" interests. "Montana's coal taxes burdened the Tribe's economic interests by increasing the costs of production by coal producers, which reduced royalties received by the Tribe."

Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) **(State and tribe have concurrent taxing authority)** Justice Stevens – opinion.

Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991) **(Similar to *Colville* – cigarette tax only applicable in Indian**

Country to non-Indian and non-member sales. Trust land shares immunity, not just formal reservation land.) Supreme Court, Chief Justice Rehnquist. Justice Stevens concurred.

County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251 (1992) **(County may tax fee land on Reservation. Indian General Allotment Act permitted county to impose ad valorem tax on reservation land patented in fee pursuant to Act but did not allow county to enforce its excise tax on sales of such land.** Justice Scalia. Justice Blackmun filed opinion concurring in part and dissenting in part.

Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114 (1993) **(Oklahoma could not impose income taxes or motor vehicle taxes on tribal members who lived in "Indian Country." It is enough that the member live in "Indian country." Congress has defined Indian country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States. Sac and Fox reservation had been disestablished.)** Justice O'Connor – opinion.

Department of Taxation & Fin. v. Milhelm Attea & Bros., 512 U.S. 61 (1994) **(*Colville* case –taxes on non-Indians and non-members and reporting upheld. Indian traders are not wholly immune from state regulation that is reasonably necessary to the assessment or collection of lawful state taxes.)** Justice Stevens.

Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995) **(State could not apply its motor fuels tax to fuels sold by tribe in Indian country as incidence of tax was on tribe, and (2) state could tax income of all persons, Indian and non-Indian alike, residing in state outside of Indian country. If legal incidence of tax rests on non-Indians, no categorical bar prevents enforcement of tax; if balance of federal, state, and tribal interests favors state, and federal law is not to contrary, state may impose levy and may place on tribe or tribal members "minimal burdens" in collecting toll.) ("Chickasaw Rule")** Justice Ginsburg – opinion. Justice Breyer concurred in part and dissented in part and filed opinion in which Justice Stevens, Justice O'Connor, and Justice Souter joined.

Montana v. Crow Tribe of Indians, 523 U.S. 696 (1998) **In this follow-up case to the 30% Montana state coal severance tax, the Crow Tribe sought to have the $46.8 million in severance taxes Westmoreland, its lessee, paid to the State and $11.4 million in gross proceeds taxes paid to Big Horn County. "In "equity and good conscience," the United States and the Tribe urged, Montana should pay over for the benefit of the Tribe all moneys illegally collected, together with interest thereon. Neither the Tribe nor the United States requested, as additional or alternate relief, recovery for the Tribe's actual financial losses attributable to the State's taxes." Id. at 707-708. The Court relied on its precedent that "[A]s a rule, a nontaxpayer may not sue for a refund of taxes paid by another." The Court relied on its precedent that "[A]s a rule, a nontaxpayer may not sue for a refund of taxes paid by another." Thus, the Court denied disgorgement of the taxes to the Tribe that had been improperly assessed against the Tribe's mineral lessee, Westmoreland. Tribe does not get $58MM paid by Westmoreland to State of Montana for 30% severance tax.** Justice Ginsburg wrote opinion. Justice Souter, with whom Justice O'Connor joins, concurred in part and dissented in part.

Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103 (1998) Unanimous opinion. **Allotment of the Minnesota reservation lands of respondent Leech Lake Band of Chippewa Indians (Band) was implemented through the Nelson Act of 1889, which provided for the reservation land to be alienated from tribal ownership in three ways: under § 3, parcels were allotted to individual Indians as provided by the GAA; under §§ 4 and 5, pine lands were sold at public auction to non-Indians; and under § 6, agricultural lands were sold to non-Indian settlers as homesteads. After Congress ended the allotment practice, the Band began purchasing back parcels of reservation land that had been allotted to individual Indians or sold to non-Indians. Based on this Court's decision, in *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation,* 502 U.S. 251, 253-254, that a county could assess ad valorem taxes on reservation land owned in fee by individual Indians or the tribe that had originally been made alienable when patented under the GAA, petitioner Cass County began assessing such taxes on 21 parcels of reservation land that had been alienated under the Nelson Act and reacquired by the Band. Thirteen of the parcels had been allotted to Indians and the remaining eight had been sold to non-Indians. The Band paid the taxes, interest, and penalties under protest**

and filed suit seeking a declaratory judgment that the county could not tax the parcels. The District Court granted the county summary judgment, holding that the parcels were taxable because, under *Yakima*, if Congress has made Indian land freely alienable, states may tax the land.

Held: **State and local governments may impose ad valorem taxes on reservation land that was made alienable by Congress and sold to non-Indians, but was later repurchased by the tribe. When Congress makes Indian reservation land freely alienable, it manifests an unmistakably clear intent to render the land subject to state and local taxation, and the repurchase of the land by an Indian tribe does not cause the land to reassume tax-exempt status since the subsequent repurchase of reservation land by tribe did not manifest any congressional intent to reassume federal protection of that land and to oust state taxing authority, particularly when Congress explicitly relinquished protection many years earlier.** Judge Thomas delivered the opinion for a unanimous Court.

Arizona Dep't of Revenue v. Blaze Constr. Co., *526 U.S. 32 (1999)* **(State may tax contractor for work done on federal lands for federal government. Analogous rule on tribal lands - State may tax federal contractor for work done on tribal lands for federal government. Citing United States v. New Mexico, 455 U.S. 720 (1982)).** Justice Thomas.

Sac & Fox Nation of Missouri v. Pierce, 213 F.3d 566 (10th Cir. 2000) **(Court could not determine economic impact of state motor fuel tax on tribe so case remanded.)** Court of Appeals, Baldock, Circuit Judge

Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001) **(No to Navajo Nation hotel occupancy tax on trading post hotel owned by non-Indian on fee land with incidence of tax on hotel consumer; no consensual relationship or imperiling of tribal political integrity (*Montana* straight up analysis.))** Justice Rehnquist. Justice Souter concurred and filed an opinion in which Justices Kennedy and Thomas joined.

Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95 (2005) **Kansas' motor fuel tax applies to the receipt of fuel by off-reservation non-Indian distributors who subsequently deliver it to the gas station owned by, and located on the Reservation of, the Prairie Band Potawatomi**

Nation (Nation). The station is meant to accommodate reservation traffic, including patrons driving to the casino the Nation owns and operates there. Most of the station's fuel is sold to such patrons, but some sales are made to persons living or working on the reservation. The Nation's own tax on the station's fuel sales generates revenue for reservation infrastructure. The Nation sued for declaratory judgment and injunctive relief from the State's collection of its tax from distributors delivering fuel to the reservation. Granting the State summary judgment, the District Court determined that the balance of state, federal, and tribal interests tilted in favor of the State under the test set forth in *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136. The Tenth Circuit reversed, agreeing with the Nation that the Kansas tax is an impermissible affront to its sovereignty. The court reasoned that the Nation's fuel revenues were derived from value generated primarily on its reservation–*i.e.*, the creation of a new fuel market by virtue of the casino–and that the Nation's interests in taxing this reservation-created value to raise revenue for reservation infrastructure outweighed the State's general interest in raising revenues.

Held: **Because Kansas' motor fuel tax is a nondiscriminatory tax imposed on an off-reservation transaction between non-Indians, the tax is valid and poses no affront to the Nation's sovereignty. The *Bracker* interest-balancing test does not apply to a tax that results from an off-reservation transaction between non-Indians.** Justice Thomas – opinion. Justice Ginsburg, with whom Justice Kennedy joins, dissenting.

State Tax Decisions Re Indian Issues

Gaming Compacts

State-Tribal Cooperative Tax Credit Agreements

Anderson & Middleton Lumber Co. v. Quinault Indian Nation, 929 P.2d 379 (Wash. 1996) The Supreme Court of Washington held that the state court had *in rem* jurisdiction over a lumber company's suit, as a tenant-in-common with the Quinault Indian Nation, to quiet title and partition alienable and encumberable fee-patented property within the reservation, notwithstanding the Nation's sovereign immunity.

Goodman Oil Co. v. Idaho State Tax Comm'n, 28 P.3d 996 (Idaho 2001) **(No to fuel tax where incidence was on Indian in Indian Country. Idaho fuel tax and transfer fee statutes imposed legal incident of tax on Indian Tribe as retailer rather than on distributor, thus tax is invalid. Hayden-Cartwright Act did not provide congressional authorization for state to impose fuel tax on sale of fuel to Indians on Indian reservations within state. State legislation passed to overrule *Goodman*.)**

Pourier v. ***S.D.*** *Dep't of Revenue*, 658 N.W.2d 395 (S.D. 2003), *cert. denied*, 124 S. Ct. 2400 (2004) **(Corporation owned by the tribe or an enrolled tribal member residing on the Indian reservation and doing business on the reservation for the benefit of reservation Indians is an enrolled member for the purpose of protecting tax immunity. By finding that incorporation under state law deprives a business of its Indian identity, we would force economic developers on reservations to forgo the benefits of incorporation in order to maintain their guaranteed protections under federal Indian law.)**

Sanchez v. Santa Ana Golf Club, Inc., 104 P.3d 548 (N.M. Ct. App. 2004), cert. denied, 106 P.3d 578 (N.M. 2005) **New Mexico Court of Appeals held that entities under tribal control are extended the same sovereign immunity as the tribe itself. IRS Revenue Ruling supporting this decision.**

KEY NEW MEXICO TAX CASES

O'Cheskey v. Hunt, 512 P.2d 961 (N.M. 1973). **Supreme Court, McManmus, C.J., held that for the state to impose its income and gross receipts tax in such circumstances would constitute interference with matters which treaties and statutes have left to the exclusive province of the federal government and the Indians themselves. Relied on *McClanahan*.**

Eastern Navajo Indus. v. Bureau of Revenue, 552 P.2d 805 (N.M. Ct. App. 1976), cert. denied, 430 U.S. 959 (1977). **Where Indians held a 51% majority of stock which they purchased with loans from federal government under program designed to facilitate Indian self-help, and where funds used by Navajo housing authority to form corporation were obtained from Indian Business Development Fund which was subject to federal regulation defining 'Indianess,' assessment by Bureau**

of Revenue of gross receipts tax on corporation constituted illegal interference with Indian self-government and would be annulled. Relied on *O'Cheskey v. Hunt.*

*Mescalero Apache Tribe v. O'Cheskey, 625 F.2d 967 (10th Cir. **N.M.** 1980), cert. denied, 450 U.S. 959 (1981).* **Mescalero Apache Tribe brought suit against New Mexico Revenue Commissioner, and others, challenging state's right to levy its gross receipts tax on moneys received by non-Indian contractors for work on a resort complex and other projects within the boundaries of the state. Tax upheld.**

Bien Mur Indian Mkt. Ctr. v. Taxation & Revenue Dep't, 772 P.2d 885 (N.M.App. 1988). **Taxpayer did not have agency relationship with member of Indian tribe exempting it from liability for state gross receipt taxes on its sale of cigarettes on Indian reservation; tribal member made no financial contribution to commencement or operation of business, let taxpayer's president make all decisions concerning business, and was paid uniform sum each month without being involved in operation of business. Followed *Colville.***

***New Mexico Taxation & Revenue Dep't v. Laguna Indus.**, 855 P.2d 127 (N.M. 1993)* **The Court of Appeals, Apodaca, J., held that Indian trader statute preempts gross receipts tax paid on services performed on pueblo by Raytheon for entity owned by pueblo.**

State and Federal Personal Income Taxes Applicable to Indian Allotment Owners (Allottees)

Generally, individual American Indians are subject to federal income taxation, even if their income is earned in Indian country, unless exempted by treaty, statute, or Act of Congress. Tribal membership does not exempt an Indian from federal taxation. Choteau v. Burnet, 283 U.S. 691 (1931); United States v. Brown, 824 F. Supp. 124 (S.D. Ohio 1993). See IRS Rev. Rul. 54-456; 154-2 C.B. 49.

***Squire v. Capoeman,* 351 U.S. 1 (1956)**

***United States v. Rickert,* 188 U.S. 432 (1903)**

***Big Eagle v. United* States, 300 F.2d 765 (Ct. Cl. 1962) (Royalties)**

***United States v. Daney*, 370 F.2d 791 (10th Cir. Kan. 1966) Bonus income from signing an oil and gas lease.**

***Stevens v. Commissioner*, 452 F.2d 741, 744-746 (9th Cir. 1971)**

***Asenap v. United States*, 283 F. Supp. 566 (W.D.Okla. 1968)**

***Wynecoop v. Commissioner*, 76 T.C. 101 (1981) Third party mineral lessee.**

***U.S. v. Mottaz*, 476 U.S. 834 (1986) Forced fee patent can't be set aside if barred by statute of limitations.**

State laws of descent and partition apply. 25 U.S.C. 348.

Salary of tribal officials subject to federal personal income tax. Commissioner v. Walker, 326 F.2d 261 (9th Cir. 1964) Per diem payments made to tribal council member are also subject to federal personal income tax. *Hoptowit v. Commissioner*, 709 F.2d 564 (9th Cir. 1983).

Income of tribal member from cattle grazing on tribal trust land held taxable. *Holt v. Commissioner*, 364 F.2d 38 (8th Cir. 1966), *cert. denied*, 386 U.S. 931 (1967).

Income from tribal members on rents from tribal trust lands held taxable. *Anderson v. United States*, 845 F.2d 206 (9th Cir.), *cert. denied*, 488 U.S. 966 (1988).

Income of Indian logging subcontractor from logging on reservation lands held taxable. *Fry v. United States*, 557 F.2d 646 (9th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978).

PART III

NATURAL RESOURCES

Lease (Definition)

Easement (Definition)(Strate, Red Wolf, Big Horn, TAT)

License (Definition)

Option (Definition)

Severed Estates

Overview of an Exploration Project

Geological and Geophysical Data Acquisition

Drilling a Well

Joint Operating Agreement

Master Service Agreements

Regulatory Issues [NHPA, ARPA, NAGPRA, AIRFA, NEPA]

Other Activities

Midstream Activities (Gathering)

Downstream (Gas Processing, Refining, Transportation)

Lapse of Time in Generating Cash Flow

Indian Mineral Development – Applicable Laws and Regulations

Historical References

Indian Mineral Leasing Act of 1938, 25 U.S.C. ***§396a*** *(United States v. Navajo Nation, 537 U.S. 488 (2003))*

Allotted Lands

Indian Mineral Development Act of 1982 [25 ***U.S.C.*** *§§ 2102-3, 25* ***C.F.R.*** *Part 225] (Quantum Exploration, Inc. v. Clark, 780 F.2d 1457 (9th Cir. Mont. 1986))*

Coal-Bed Methane Gas (Amoco Prod. Co. v. Southern Ute Indian Tribe, 526 U.S. 865 (1999))

SMCRA of 1977 (30 ***U.S.C.*** *§§ 1201-1328) Navajo Nation v. United States, 68 Fed. Cl. 805 (2005).* ***SMCRA provision regarding Indian lands, 28 U.S.C. § 1300 does not create an enforceable duty with respect to coal leases.***

Navajo Nation

Surface Leases

Right-of-Ways (Strate, Red Wolf, Big Horn, Henry; Transwestern)

State Condemnation Authority

Plains Electric Generation & Transmission Cooperative, Inc. v. Pueblo of Laguna, 542 F.2d 1375 (10th Cir. N.M. 1976). **Condemnation action brought under the State of New Mexico's power of eminent domain to condemn a right-of-way for electrical transmission lines across Pueblo of Laguna land. The Court of Appeals held that the Act of May 10, 1926 permitting condemnation of Pueblo Indian lands at any time for any purpose without consent of the Secretary of Interior or the Pueblo Indians which the State relied upon had been repealed by implication. "In effect, Plains results in the necessity of obtaining the consent of the Pueblo Indians for rights-of-way across their common land." "Section 1813 of the Energy Policy Act of 2005: Implications for Tribal Sovereignty and Self-Sufficiency," Paul E. Frye, 42 Tulsa L. Rev. 75, 76 (Fall, 2006).**

Anderson & Middleton Lumber Co. v. Quinault Indian Nation, 929 P.2d 379 (Wash. 1996). **The Supreme Court of Washington held that the state court had in rem jurisdiction over a lumber company's suit, as a tenant-in-common with the Quinault Indian Nation, to quiet title and partition alienable and encumberable fee-patented property within the reservation, notwithstanding the Nation's sovereign immunity.**

Cass County Joint Water Res. Dist. v. 1.43 Acres of Land, 643 N.W.2d 685 (N.D. 2002). **In an in rem condemnation action of land held in fee by an Indian tribe, the State of North Dakota was permitted to exercise in rem jurisdiction, despite sovereign immunity of the tribe. The land was not reservation land, aboriginal land, allotted land or trust land, and the court found that the tribe had minimum contacts with the state so as to satisfy due process concerns.**

Free Gas Clause

Royalties (Linowes Commission, OIG Reports, FOGRMA, Supron)

Shoshone Indian Tribe of the Wind River Reservation v. United States, 58 Fed. Cl. 77, 82 (Fed. Cl. 2003) (noting the Secretary's royalty collection and enforcement obligations under FOGRMA).

BP America Production Co. v. Burton, 549 U.S. ___ (2006):

> *23* ***U.S.C.*** *§ 2415(a) 6-year statute of limitations applies only to court actions, not to the administrative payment orders involved in the collection of royalties by the Minerals Management Service under leases issued pursuant to the Mineral Leasing Act of 1920, 41* ***Stat.*** *437, as amended, 30 U.S.C. §181 et seq. Applied Federal Oil and Gas Royalty Management Act ("FOGRMA") and the Federal Oil and Gas Royalty Simplification and Fairness Act of 1996.*

Energy Policy Act of 2005 (TERA) Indian Tribal Energy Development and Self Determination Act of 2005, Title V of the Energy Policy Act of 2005, 109-59, 119 ***Stat.*** *594 (August 8, 2005) – TERA Part 224*

Energy Corridors

State Authority to Regulate Oil and Gas Development on Tribal Land (General cite to New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983)

> ***Assiniboine & Sioux Tribes of Fort Peck Indian Reservation v. Board of Oil & Gas Conservation****, 792 F.2d 782, 795 (9th Cir. Mont. 1986).* **A state agency has no jurisdiction to regulate oil and gas development on tribal lands.**
>
> *Kirkpatrick Oil & Gas Co. v. United States, 675 F.2d 1122 (10th Cir. Okla. 1982).* **Tenth Circuit held that state-compelled communitization of oil and gas lands does not bind the federal government as a landowner without the approval of the Secretary of Interior.**
>
> *Cheyenne-Arapaho Tribes v. United States, 966 F.2d 583, 585 (10th Cir. Okla. 1992) and Woods Petroleum Corp. v. Department of Interior, 47 F.3d 1032 (10th Cir. Okla. 1995), cert. denied sub. nom., 516 U.S. 808 (1995) Lessees* **recognized they needed Secretarial approval of a communitization agreement on Indian trust lands, though they argued such approval had been unreasonably withheld.**

Slade Article on Puzzling Powers.

Forestry Mitchell cases; Navajo Tribe v. United States, 9 Ct. Cl. 336 (1986); Silver v. Babbitt, 924 F. Supp. 976 (D. Ariz. 1995)

Agriculture (IBLA case and new allottee regulations.)

Fires (Feather case – Forest Service land)

Dams

NHPA National Historical Preservation Act of 1966 ("NHPA"), 16 ***U.S.C.*** *§§470 et seq. Pit River Tribe v. United States Forest Serv., 469 F.3d 768, 788 (9th Cir. Cal. 2006) Federal agencies violated their minimum fiduciary duty to tribe by failing to identify traditional cultural properties, as required by NHPA, on leaseholds prior to issuing or extending leases for development of geothermal plant on federal land.*

ENVIRONMENTAL

Tribal Environmental Concerns

National Environmental Policy Act, 42 ***U.S.C.*** *§ 4332(2)(C) (1994) ("NEPA") [Weinberger, Sierra Club, Envir. Defense Fund]*

NEPA Regulations 40 ***C.F.R.*** *§ 1507.3*

NEPA Application to BIA [Davis v. Morton, 469 F.2d 593 (10th Cir. 1972)]

Under case law, EA's are required for proposed actions the environmental effects of which are uncertain. *Shivwits Band of Paiute Indians v. State of Utah*, 428 F.3d 966 (10th Cir. Utah 2005**),** *cert. denied*, 127 S. Ct. 38 (2006).

DOI Manual - NEPA

EPA – Treatment as States ("TAS") Program [State of Montana v. U.S.E.P.A. (Salish & Kootenai Tribes); City of Albuquerque v. Browner, 97 F.3d 415 (10th Cir. ***N.M. 1996), cert. denied, 522 U.S. 965 (1997)*** *(Laguna)]*

Washington, Dep't of Ecology v. United States EPA*, 752 F.2d 1465, 1469 (9th Cir. 1985)* **EPA - RCRA approval of state program with respect to all lands in state does not authorize state regulation over Indian lands.**

Backcountry Against Dumps v. EPA, 100 F. 3d 147 (D.C. Cir. 1996) **(RCRA statute defined tribe as municipality; EPA tried to treat as state in approving tribal environmental plan for hazardous waste disposal. Court said no – statute is clear, end of story. Do not need to reach agency's interpretation of statute.)**

Gros Ventre Tribe v. United States, 469 F.3d 801 (9th Cir. Mont. 2006), cert. denied, 128 S. Ct. 176 (2007)

United States v. FMC Corp., 2006 U.S. Dist. LEXIS 12709 (D. Idaho 2006) **Required company to apply for tribal permits and exhaust tribal remedies in any challenge.**

WATER RIGHTS

Winters v. United States, 207 U.S. 564 (1908) Water **rights necessary for purpose of reservation reserved to tribes.** Justice McKenna – opinion. Mr. Justice Brewer dissents. No prohibition on marketing tribal water.

Arizona v. California, 373 U.S. 546 (1963) **At issue in that case were congressional allocations of Colorado River water, and how much should be deducted from each state's allocation in order to accommodate federal and tribal lands in those states. The United States Supreme Court defined the "practically irrigable acreage" standard, establishing it as the measure for reserved rights. Accordingly, tribes were entitled to an amount of water sufficient to cultivate their practically irrigable acreage.**

State/Tribal Water Disputes

Colorado, Arizona, Montana, Nevada, New Mexico, Oregon, Utah, Washington, Wyoming

State Adjudication (San Carlos Apache)

McCarran Amendment

PART IV

GAME AND FISH TRIBAL REGULATION

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) **Upheld tribe's hunting and game regulations on non-Indians. No concurrent state jurisdiction. Federal preemption. Cite to *Puyallup Tribe v. Dept. of Game, Washington,* 433 U.S. 165 (1977).** Justice Marshall.

South Dakota v. Bourland, 508 U.S. 679 (1993) **State of South Dakota filed action against officials of Cheyenne Sioux Tribe to enjoin tribe from excluding non-Indians from hunting on nontrust lands within reservation or for declaration that taking of tribal lands for dam and reservoir project had reduced Tribe's authority to regulate hunting and fishing on such lands. The United States District Court for the District of South Dakota, Donald J. Porter, J., granted injunction, and appeal was taken. The Court of Appeals for the Eighth Circuit, 949 F.2d 984, affirmed in part and reversed in part, and remanded. Certiorari was granted. The Supreme Court, Justice Thomas, held that: (1) Flood Control Act and Cheyenne River Act abrogated Tribe's rights under Fort Laramie Treaty to regulate hunting and fishing by non-Indians in area taken for dam and reservoir project; (2) fact that compensation under former Act did not specifically include compensation for loss of licensing revenue did not mean that Tribe retained right to regulate hunting and fishing; and (3) inherent sovereignty did not enable Tribe to regulate non-Indian hunting and fishing in taken area. Cited *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977).** Justice Thomas. Justice Blackmun, with whom Justice Souter joined, dissented and filed opinion.

Off-reservation state regulation of treaty hunting and fishing circumscribed.

PUEBLO LANDS ACT OF 1924*, ch. 331, 43* ***Stat.*** *636, as amended by S. 279, 109th Cong, 119* ***Stat.*** *2573 (2005)*

INDIAN CLAIMS COMMISSION ACT OF 1946

Navajo Tribe of Indians v. New Mexico, 809 F.2d 1455 (10th Cir. ***N.M.*** *1987)*

PUBLIC LAW 280 (1953) [Bryan v. Itasca]

TERMINATION

Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968) **Hunting and fishing rights not abrogated by Termination Act and termination of Menominee Tribe.** Justice Douglas. Mr. Justice Stewart and Mr. Justice Black dissented.

SELF-DETERMINATION ERA

Self-Determination Policy

STATE JURISDICTION

Airvator v. Turtle Mountain Mfg. Co., 329 N.W.2d 596 (N.D. 1983) **Airvator held that a corporation created under state law is a creature of the state, notwithstanding the fact that the owners of the corporation may be a tribe or tribal members. Thus, the corporation may be sued in state courts as may any other state-created entity and judgment may be obtained against corporate assets.**

Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408 (1989) **(State may zone open areas of fee land on Reservation, but not closed predominantly tribal area.)** Supreme Court, Justice White, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, announced the judgment of the Court in Nos. 87-1697 and 87-1711 and dissented in No. 87-1622, holding that Indian tribes did not have authority to zone fee lands in reservation's "open" area. Justice Stevens, joined by Justice O'Connor, announced the judgment of the Court in No. 87-1622 and concurred in the judgment in Nos. 87-1697 and 87-1711, holding that tribe had authority to zone property in those areas of its reservations that were closed to general public. Justice Blackmun, joined by Justices Brennan and Marshall, filed an opinion concurring in judgment in No. 87-1622 and dissenting in Nos. 87-1697 and 87-1711. Applied *Montana.*

South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998) **(Landfill site on disestablished reservation land subject to State law, not federal law. Statute opening unallotted land to settlement had language of cessation and payment of sum to Sioux for cession. Also, demographics and tribal legislation supported presumption of disestablishment.)** Justice O'Connor.

Am. Vantage Cos. v. Table Mt. Rancheria, 292 F.3d 1091 (9th Cir. Cal. 2002), cert. denied, 540 U.S. 820 (2003). **Tribal corporations may be citizens of a state depending on how and where they are incorporated.**

TRIBAL GOVERNMENT - RECOGNITION OF GOVERNING BODY

Harjo v. Andrus, 581 F.2d 949 (D.C.Cir. 1978) **(The District Court found that the Creeks' right to self-government had been violated. It then framed its relief to redress that harm by allowing the Creeks to re-establish a constitutional government according to their own desires through a tribal referendum. Remedy upheld, not an abuse of Court's discretion.)**

TRIBAL JURISDICTION OR LACK THEREOF

Williams v. Lee, 358 U.S. 217 (1959) **A non-Indian federally licensed Indian trader of a general store in Arizona on the Navajo Indian Reservation sued a Navajo Indian and his wife who live on the Reservation in state court to collect for goods sold them on the Reservation on credit. Arizona state courts do not have jurisdiction over a civil suit by a non-Indian against an Indian where the cause of action arises on an Indian reservation.** Justice Black.

Fisher v. District Court of Sixteenth Judicial Dist., 424 U.S. 382 (1976) **(Adoption – Northern Cheyenne Tribe, no state jurisdiction, all parties members and reside on tribal land).** Per Curiam.

*Indian Civil Rights Act, 25 **U.S.C.** §§ 1301 et seq.*

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) **(ICRA – federal action limited to habeas corpus).** Justice Marshall. Mr. Justice Rehnquist joined in parts I, II, IV and V of the court's opinion. Mr. Justice White filed a dissenting opinion.

Joe v. Marcum, 621 F.2d 358 (10th Cir. 1980) **(No garnishment of wages on Navajo Nation. Marcum worked for Utah International. --- sought to enforce default judgment in state court for non-payment of credit to an off-reservation, non-Indian lending agency by garnishment of wages. Garnishment is statutory remedy – not required. Some states and tribes**

do not have this remedy. Violate Treaty of 1868 and State had not assumed civil jurisdiction over tribe).

Montana v. United States, 450 U.S. 544 (1981) **(No tribal regulation of fishing of non-members on fee lands within reservation – must have consensual relationship or conduct must imperil tribal health safety or welfare to assert tribal jurisdiction over non-Indians).** Justice Stewart. Justice Blackmun filed an opinion dissenting in part, in which Justice Brennan and Justice Marshall joined. Justice Stevens filed a concurring opinion.

Cases related to Montana

No Tribal Jurisdiction: Strate v. A-1 Contractors, 520 U.S. 438 (1997) **(No tribal jurisdiction on state highway crossing Reservation. Car accident between two non-tribal members on state highway crossing Fort Berthold Reservation).** Justice Ginsburg.

No Tribal Jurisdiction: ***Burlington Northern R.R. v. Red Wolf, 196 F.3d 1059 (9th Cir. Mont. 1999****), cert. denied,* **529 U.S. 1110 (2000) (No tribal jurisdiction on railroad crossing Crow Indian Reservation). Cited *Strate, Montana, Wilson v. Marchington*, 127 F.3d 805 (9th Cir. Mont. 1997), *cert. denied*, 523 U.S. 1074 (1998); *Montana DOT v. King*, 191 F.3d 1108 (9th Cir. Mont. 1999).**

No Tribal Jurisdiction: ***Big Horn County Elec. Coop. v. Adams, 219 F.3d 944 (9th Cir. Mont. 2000).*** **Electric cooperative which held right-of-way easements over Indian reservation lands for its transmission and distribution systems brought suit against officials of Indian tribe, challenging tribe's imposition of 3% ad valorem tax on all utility property located on tribal or trust lands within reservation. Cooperative's rights-of-way were equivalent of non-Indian fee land, for purposes of determining tribe's regulatory jurisdiction; (2) tribe lacked regulatory authority to impose ad valorem tax against cooperative, overruling Burlington Northern R.R. Co. v. Blackfeet Tribe, 924 F.2d 899; and (3) tribal sovereign immunity was not violated by order enjoining further collection of tax, but was violated by refund of taxes previously collected. Cited *Strate, Montana, Red Wolf*.**

No Tribal Jurisdiction: ***Reservation Tel. Coop. v. Henry, 278 F.Supp.2d 1015 (D.N.D. 2003)*** **(Telephone lines crossing tribal trust lands on Fort Berthold Reservation.)**

McDonald v. Means, 309 F.3d 530 (9th Cir. Mont. 2002) "We conclude that BIA roads constitute tribal roads not subject to Strate, and that the BIA right-of-way did not extinguish the Tribe's gatekeeping rights to the extent necessary to bar tribal court jurisdiction under Montana."

No Tribal Jurisdiction: Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001)

No Tribal Jurisdiction: Nevada v. Hicks, 533 U.S. 353 (2001) **Tribal Court lacked jurisdiction over tribal member's civil rights and tort action filed against State officials in their individual capacities arising from execution of search warrant on allotted land within reservation for evidence of off-reservation poaching crime.** Justice Scalia. Justice Souter filed concurring opinion, in which Justices Kennedy and Thomas joined. Justice Ginsburg filed concurring opinion. Justice O'Connor filed opinion concurring in part and concurring in the judgment, in which Justices Stevens and Breyer joined. Justice Stevens filed opinion concurring in judgment in which Justice Breyer joined.

Plains Commerce Bank v. Long Family Land & Cattle, 491 F.3d 878 (8th Cir. 2007), cert. granted, 128 S. Ct. 829 (Jan. 4, 2008) (No. 07-411). (Tribal civil jurisdiction.)

TRIBAL ACCESS TO STATE COURT

Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Engineering, P.C., 476 U.S. 877 (1986) ("Wold II") **(Tribe may use state court to bring civil action without having to waive all tribal immunity in all cases. Tribe brought suit against non-Indian engineering firm for negligence in design and construction of water system on Reservation. No cause of action for this conduct under Tribal Code, so they went to state court).** Justice O'Connor. Justice Rehnquist filed dissenting opinion in which Justice Brennan and Justice Stevens joined.

EXHAUSTION OF TRIBAL COURT REMEDIES

National Farmers Union Ins. Cos. v. Crow Tribe National Farmers Union Ins. Cos. v. Crow Tribe **(Must exhaust tribal court remedies before going to federal court on question of tribal jurisdiction. Crow child hit by bus on state school property within boundaries of Crow Reservation).** Justice Stevens.

Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987) **Insurer brought action seeking declaration that it had no duty to defend or indemnify insured with respect to incident which was subject of suit against the insurer in tribal court. The Supreme Court, Justice Marshall, held that: (1) tribal court should be permitted to determine its own jurisdiction in the first instance; (2) exhaustion of tribal court remedies was required as a matter of comity, not as a jurisdictional prerequisite; (3) exhaustion of tribal remedies requires that tribal appellate courts be given opportunity to review determinations of lower tribal courts; and (4) alleged incompetence of tribal courts is not among exceptions to exhaustion requirement.** Justice Marshall. Justice Stevens filed an opinion concurring in part and dissenting in part.

CRIMINAL STATUTES

Major Crimes Act, 18 ***U.S.C.*** *§1153 (1885)*

General Crimes Act, 18 ***U.S.C.*** *§1152 [Referred to as Indian Country Crimes Act]*

Assimilative Crimes Act, 18 ***U.S.C.*** *§13*

CRIMINAL CASES

United States v. McBratney, 104 U.S. 621 (1882) **The State of Colorado has jurisdiction of the crime of murder committed by a white man upon a white man within the Ute Reservation and within the limits of the State of Colorado.**

Ex parte Crow Dog, 109 U.S. 556 (1883) **The district court of the Territory of Dakota administered the local law of the Territorial government and, being invested by act of Congress with jurisdiction to administer the laws of the United States, had all the authority of circuit and district courts. The term "Indian country" embraces all land within**

the limits of the United States to which the Indian title has never been extinguished, except that which lies within the exterior geographical limits of a state, and which was not excepted from the jurisdiction of that state at the time of its admission into the Union. Where district courts of territory have, by law, the jurisdiction of district and circuit courts of the United States, the district courts of the territory may, in that character, take cognizance of offenses against the laws of the United States, although committed within an Indian reservation, where the reservation is situated within the space which is constituted by the authority of Territorial government the judicial district of such court.

The rationale behind prosecuting murders is social retribution in which punishment must match the crime. The tribes claim sovereignty to punish and the government claim jurisdiction to punish the murderer. Now what does it mean to be sovereign? Sovereignty is the power to govern oneself without external interference. Sovereign power is inherent and is a source in itself. What is jurisdiction? Jurisdiction is a spatial power to exercise power of government and is not inherent. So the federal government is claiming jurisdiction under the Indian country crime act which gives the federal government to prosecute certain crimes committed on reservations. The court held that federal jurisdiction is invalid because the statute excludes the type of crime committed here. The federal argument is that the Indians gave away their sovereignty via treaty. The court held that treaty does not include such a surrender of sovereignty.

United States v. Kagama, 118 U.S. 375 (1886) **In 1885, as a popular reaction against the Crow Dog ruling, Congress passed the Major Crimes Act which extended the jurisdiction of federal courts to a list of seven serious crimes when committed among Indians in Indian country. The Kagama case challenges the constitutionality of this act. There are about three ways that a statute or legislation could be unconstitutional: (1) acts that are prohibited by the constitution; (2) when the authority for the act is delegated to another entity by the constitution; and (3) the act violates some right that is expressly protected by the constitution.**

Act Cong. March 3, 1885 provides that all Indians committing certain crimes "against the person or property of another Indian or other person, within the boundaries of any state of the United States, and within the limits of any Indian reservation, shall be subject to the same

laws, tried in the same courts, and in the same manner, and subject to the same penalties, as are all other persons committing any of the same crimes within the exclusive jurisdiction of the United States." Held, that this is a valid and constitutional law, for, so long as the Indians preserve their tribal relations, they owe no allegiance to the state in which they live, and the state has no power over them; but being within the limits of the United States, they are subject to acts of Congress.

Talton v. Mayes, 163 U.S. 376 (1896) **The crime of murder committed by one Cherokee Indian upon the person of another within the jurisdiction of the Cherokee nation is not an offence against the United States, but an offence against the local laws of the Cherokee nation; and the statutes of the United States which provide for an indictment by a grand jury, and the number of persons who shall constitute such a body, have no application.**

The Fifth Amendment to the Constitution does not apply to local legislation of the Cherokee nation, so as to require all prosecutions for offences committed against the laws of that nation to be initiated by a grand jury in accordance with the provisions of that amendment.

The question whether a statute of the Cherokee nation which was not repugnant to the Constitution of the United States or in conflict with any treaty or law of the United States had been repealed by another statute of that nation, and the determination of what was the existing law of the Cherokee nation as to the constitution of the grand jury, is solely a matter within the jurisdiction of the courts of that nation, and the decision of such a question in itself necessarily involves no infraction of the Constitution of the United States.

Talton's premises that tribal sovereign powers pre-existed the constitution and were not affected by the dominant society's general laws unless the Congress expressly limited those powers can be traced to Worcester and Crow Dog.

Draper v. United States, 164 U.S. 240 (1896) **States have the power to punish for crimes committed on a reservation or Indian lands by other than Indians or against Indians.**

PART V

United States v. Antelope, 430 U.S. 641 (1977) One **defendant was convicted of second degree murder. The other two defendants were convicted of burglary, robbery, and first degree murder under the felony murder provisions of 18 U.S.C. § 1111, as made applicable under the Major Crimes Act to Indians enrolled as tribe members. Defendants claimed a non-Indian charged with the murder of a non-Indian within Indian country would have been subject to prosecution only under Idaho law, which did not contain a felony murder provision. The state prosecution would have had to prove premeditation and deliberation, elements not required under § 1111. The Court held (1) Congress had the power to regulate Indian tribes under U.S. Const. art. 1, § 8; (2) federal regulation of Indian affairs was not based upon impermissible racial classifications, but upon their membership as quasi-sovereign tribal entities; (3) defendants were not subjected to federal criminal jurisdiction because they were of the Indian race, but because they were enrolled members of a tribe; (4) it was of no consequence that the federal statutory scheme differed from a state criminal code; and (5) the challenged statutes did not violate due process or equal protection.** Mr. Chief Justice Burger.

United States v. Marcyes, 557 F.2d 1361 (9th Cir. 1977) **Appellants sold fireworks on an Indian reservation. A magistrate denied their motions to dismiss on the grounds that the Assimilative Crimes Acts were inapplicable. Appellants were convicted for possessing fireworks illegal under state law and thus in violation of §§ 13, 1152. The district court affirmed their convictions. On appeal, the court held that the ACA was applicable to Indian reservations by 18 U.S.C. § 1152.**

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) **Non-Indians contended that they could not be tried in the Suquamish Indian Provisional Court even though they were residents of the reservation. The Court agreed. The Court noted that by acknowledging their dependence on the United States in the Treaty of Point Elliott, the Suquamish were in all probability recognizing that the United States would arrest and try non-Indian intruders who came within their reservation. Moreover, even ignoring treaty provisions and congressional policy, the Court held that Indians did not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress.** Justice Rehnquist. Mr. Justice Marshall, with whom Mr. Chief Justice Burger joined, filed a dissenting opinion.

United States v. Wheeler, 435 U.S. 313 (1978) **(No double jeopardy in being tried for crime by tribal and federal court. Statutory rape case tried first in tribal court.)** Mr. Justice Stewart.

Solem v. Bartlett, 465 U.S. 463 (1984) **The inmate's crime was committed on a portion of a reservation which had been opened for settlement by non-Native Americans in the Cheyenne River Act of 1908. The inmate claimed that the opened portion remained Native American country and that the State lacked criminal jurisdiction to prosecute him for the attempted rape. In determining whether the Act diminished the reservation boundaries, the court looked at the Act's language, the events surrounding the passage of the Act, and the treatment of the land after the Act was passed. The court found that the language of the Act did not indicate that Congress intended to diminish the reservation boundary. Subsequent circumstances indicated that the land at issue did not lose its Native American character. As the land on which the inmate committed his crime was not removed from the reservation by the Act, the State lacked jurisdiction to prosecute the inmate.**

The first and governing principle is that only Congress can divest a reservation of its land and diminish its boundaries. Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise. Diminishment, moreover, will not be lightly inferred. Our analysis of surplus land Acts requires that Congress clearly evince an "intent . . . to change . . . boundaries" before diminishment will be found. The most probative evidence of congressional intent is the statutory language used to open the Indian lands. Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all un-allotted opened lands. Justice Marshall.

Duro v. Reina, 495 U.S. 676 (1990) **Non-Indians contended that they could not be tried in the Suquamish Indian Provisional Court even though they were residents of the reservation. The Court agreed. The Court noted that by acknowledging their dependence on the United States in the Treaty of Point Elliott, the Suquamish were in all probability recognizing that the United States would arrest and try non-**

Indian intruders who came within their reservation. Moreover, even ignoring treaty provisions and congressional policy, the Court held that Indians did not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress. Justice Kennedy. Justice Brennan dissented and filed opinion in which Justice Marshall joined.

"Duro Fix" – **Congress amended ICRA to give tribal courts criminal jurisdiction over all Indians (both members and non-members).**

Hagen v. Utah, 510 U.S. 399 (1994) **The town in which defendant, an Indian, committed a crime lay on land within the former boundaries of a reservation. The court looked to three factors to determine whether the reservation had been diminished: the statutory language used to open the Indian lands, the historical context surrounding the passage of the surplus land acts, and who actually moved onto the opened reservation lands. The court held that the restoration of un-allotted reservation lands to the public domain evidenced a congressional intent with respect to those lands inconsistent with the continuation of reservation status. The court held that the "jurisdictional history," as well as the current population, which consisted mostly of non-Indian residents, demonstrated a practical acknowledgment that the reservation was diminished and that a contrary conclusion would disrupt the justifiable expectations of the people living in the area. Thus, the state courts properly exercised criminal jurisdiction over defendant. Cite to *DeCoteau v. District County Court for Tenth Judicial Dist., 420 U.S. 425 (1975) [disestablishment of Lake Traverse Indian Reservation in South Dakota].*** Justice O'Connor. Justice Blackmun filed dissenting opinion in which Justice Souter joined.

United States v. Lara, ***541 U.S. 193 (2004)*** **Tribal member assaults a federal officer while removing him from the reservation per tribal order. Both tribe and feds prosecute D and D claims violation of the double jeopardy clause. The double jeopardy clause doesn't apply to tribal and federal prosecutions because the tribe is acting as an independent sovereign. Upheld Duro-fix.**

Means v. Navajo Nation, 432 F.3d 924 (9th Cir. Ariz. 2005), *cert. denied, 127 S. Ct. 381 (2006)* Upheld Duro-fix.

AN ANALYTICAL APPROACH TO CRIMINAL JURISDICTION IN INDIAN COUNTRY

Was the Locus of the Crime in Indian Country?

Does Public Law 280 or a Specific Jurisdictional Statute Apply?

Was the Crime Committed by or against an Indian?

Which Defendant-Victim Category Applies?

Crimes by an Indian against an Indian

Crimes by an Indian against a Non-Indian

Crimes by a Non-Indian against an Indian

Crimes by a Non-Indian against a Non-Indian

Victimless and Consensual Crimes by an Indian

Victimless and Consensual Crimes by a Non-Indian

Tribal Officers (Cross-Commissioned or Not) authorized to Stop Persons for Violations of Federal, State and Tribal Laws Occurring within Exterior Boundaries of Reservation

*Ortiz-Barraza v. United States, 512 F.2d 1176 (9th Cir. **Ariz.** 1975)* **The court held that a tribal police officer employed by the Papago Indian tribe (not a BIA police officer nor cross-deputized as a state officer) "was authorized to investigate within the reservation state and federal law violations thought to have been committed by non-Indian offenders." Ortiz-Barraza at 1181. Also, the officer had probable cause to stop and search defendant's vehicle as it proceeded across the reservation from the direction of the Mexican border. The court further noted that "…that the power to regulate is only meaningful when combined with the power to enforce… The power of the Papago to exclude non-Indian state and federal law violators from the reservation would be meaningless were the tribal police not empowered to investigate such violations. Obviously, tribal police must have such power." *Ortiz-Barraza* at 1180.**

See also United States v. Becerra-Garcia,* 397 F.3d 1167 (9th Cir. *Ariz.* 2005),** *cert. denied, 547 U.S. 1005 (2006) Upholding an automobile stop of non-Indian by tribal rangers on Tohono O'odham Nation and detention of driver until turned over to federal Drug Enforcement Authorities; *State v. Schmuck,* 850 P.2d 1332 (Wash. 1993),** *cert. denied, 510 U.S. 931 (1993)* **upholding an automobile stop by Suquamish Indian Tribal police officer of a non-Indian driving motor vehicle on public road within the reservation and detention of driver until turned over to State police; *Ryder v. State,* 648 P.2d 774 (N.M. 1982), upholding an automobile stop by Mescalero Apache Indian Tribal police officer of a non-Indian driving motor vehicle on public road within the reservation and detention of driver until turned over to cross-commissioned BIA police officer.**

Strate Recognizes Need for Tribal Police Automobile Stops

Sovereign Immunity of Tribal Officials

The tribes' sovereign immunity extends to tribal officials when acting in their official capacity and within the scope of their authority such that an ICRA-type action could not be brought against the tribal officials conducting the RCs as long as they act within the confines of their authority. *See Linneen v. Gila River Indian Cmty., 276 F.3d 489, 492 (9th Cir. Ariz. 2002), cert denied, 536 U.S. 939 (2002)*. In *Linneen,* the Plaintiffs were detained on tribal land where they had taken their dogs for a walk in the desert. They alleged that they were detained in custody for over three hours, that they were told they were guilty of various offenses that would result in jail time, that their possessions would be impounded and their dogs destroyed, and that a gun was held to their heads. Charges filed against them for criminal trespass were later dismissed. The Ninth Circuit upheld the District Court's dismissal of the case against tribal officials based on tribal sovereign immunity that extended to the tribal officers acting in their official capacities. The Court stated: 'Indian Tribes have long been recognized as possessing the common law immunity from suit traditionally employed by sovereign powers'. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). 'This immunity extends to tribal officials when acting in their official capacity and within the scope of their authority.' *United States v. Oregon*, 657 F.2d 1009 (9th Cir. 1981)." Accordingly, the defendants are clothed with absolute immunity. *Linneen* at 492.

INDIAN CHILD WELFARE ACT OF 1978

Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989) Justice Brennan – opinion. Justice Stevens dissented and filed opinion in which Chief Justice Rehnquist and Justice Kennedy joined.

Indian Child Welfare Act of 1978 [Cites for state courts adopting Indian family exception – Ca., Indiana, Kansas, Kentucky, Louisiana, Missouri, Montana, Tennessee, Wash.] [BIC test – Alaska]

INDIAN CULTURE AND ART

Protection of American Indian Cultural Resources

*National Museum of the American Indian Act of 1989, **Pub. L**. No. 101-185, amended in 1996 to address repatriation.*

NAGPRA

*Pueblo of San Idlefonso v. Ridlon, 103 F.3d 936 (10th Cir. **N.M.** 1996)* **Patrimony object returned to SIP.**

Article in New Mexican on UC Berkeley (ARPA)

ARPA

Article in New Mexican on Civic Center (ARPA)

*Authenticity of Indian Art (Indian Arts and Crafts Act of 1990, **Pub. L**. No. 101-644)*

American Indian Museum Act (Smithsonian)

Theft of Indian Art

Chilkat Indian Village v. Johnson, 870 F.2d 1469 (9th Cir. Alaska 1989) (federal and tribal cases) Theft **of art from Alaskan village. Tribal court, not federal court, had jurisdiction over conversion action.**

Chilkat Indian Vil., No. 90-01 (Chilkat Tr. Ct. Nov. 3, 1993)

Eagles and Migratory Birds

Endangered Species Act

Migratory Bird Treaty Act

Wild Bird Conservation Act - Title I of P.L. 102-440

Marine Mammal Protection Act

Lacey Act, as Amended, 16 ***U.S.C.*** *§§ 3371-3378*

The National Stolen Property Act

Cultural Patrimony

Preservation of Art and Cultural Property

Livingston v. Ewing, 601 F.2d 1110 (10th Cir. 1979) **Portal of Palace of Governors. Followed *Morton v. Mancari*.**

Portal of the Palace of the Governors **Current lawsuit.**

AREAS OF LAW INVOLVED IN INDIAN PRACTICE

THANK YOU FOR COMING

Justice Rehnquist*:*

Moe (cigarette taxes on non-Indians) – state tax

Oliphant (no criminal jurisdiction)

Nevada (Orr Ditch)

Brendale (zoning) – state zoning

Potawatomi (cigarette taxes on non-members) – state tax

Atkinson (no hotel tax – no jurisdiction on fee land within reservation, absent Montana exception) – tribal tax