American Indian Law Syllabus – Fall 2007 – Professor Collins

Readings. From Getches, Wilkinson & Williams, Cases and Materials on Federal Indian Law, 5th ed. (West 2005), this syllabus, and postings on the course web site. Prepare one assignment for each class.

Home Page. The course home page is on the LexisNexis Web Courses site, http://webcourses.lexisnexis.com/webapps/portal/frameset.jsp.

Final Examination. Expect an essay final to which you should bring your casebook, supplement, and syllabus. You may also bring your class notes and personal outlines. Analytical issues will be based on current law. Because Supreme Court decisions are authoritative precedents, discussion of principal cases in your answers is more important than in common-law courses. Only students who appear on the seating chart are eligible to take the final exam.

Questions. (1) You may ask questions in the Discussion Forum on the course home page or by email to richard.collins@colorado.edu. (2) Visit my office, Room 426. Office hours this semester are Wednesdays from 2.30 to 3.30. You are welcome any time I am in, except that during the hour before my classes, please come only for an urgent reason. This semester, I have classes on Tuesday and Thursday afternoons in addition to Indian Law. (3) Make an appointment for an office visit, by email or orally after class.

Reference Books and Websites. The most important reference texts are the original (1941) edition of Felix S Cohen's Handbook of Federal Indian Law, and the 1982 and 2005 editions of the same work. The 1982 edition is cited in the casebook in several places. Some important primary sources on Indian law are available on line. For example, http://digital.library.okstate.edu/kappler/ (Kappler's Indian laws and treaties) and http://memory.loc.gov/ammem/amlaw/lwss-ilc.html (Royce maps of Indian land cessions).

Assignments

1. 1-40.

These readings are background for the course and need not be read with the close attention needed for legal analysis. See also Jonathan B. Taylor and Joseph P. Kalt, American Indians on Reservations: A Databook of Socioeconomic Change between the 1990 and 2000 Censuses (2005), published by the Harvard Project on American Indian Economic Development, available at www.ksg.harvard.edu/hpaied/key.htm.

2. 41-71 (class discussion 58-71).

Many class members, possibly all, read Johnson v M'Intosh in Property I. The version in our present casebook is better edited. As the Court recited it, Johnson and Graham claimed land in Illinois under a 1775 purchase from the Piankeshaw Indian Nation. The United States bought the same land from the Piankeshaws under one or more later treaties, between 1795 and 1808. In

1815 and 1818, the Government patented (granted) parcels of the land to M'Intosh, and Johnson and Graham sued him to contest title.

One of the original purchasers was named Johnson; the claimants in the case were his son and grandson. For many years before the lawsuit, they had unsuccessfully lobbied the U. S. government to recognize their title by executive or legislative action. They could not sue the U. S. to contest title because of sovereign immunity, so they had to wait until there was a private owner to sue. There is evidence that the case was collusive. It was decided on the pleadings, M'Intosh did not contest any facts claimed by plaintiffs, and the geography does not match—land at issue in the case was not located within the areas purchased in 1775. This was a test case, indicated by the Court's reference to the 1773 purchase from the Illinois Indian Nation and by the presence of Daniel Webster as counsel for plaintiffs.

The Court at pages 65-66 referred to the debate about whether tribal title of Native Americans based on hunting or other uses of land involving only occasional human presence should be recognized. Some European settlers argued not, the "terra nullius" or wasteland claim, invoking Locke's labor theory of value, the leading international law authority of the day (Emmerich de Vattel), and other theorists. But the Supreme Court and Congress rejected the argument and recognized tribal title based on any kind of use or possession. See Mitchel v. United States, 34 U.S. (9 Pet.) 711, 746 (1835).

This does not mean that purchases of Native American land were fair. There was often coercion or fraud, and many violations of law had inadequate legal redress, an issue we'll examine in our next class. These defects increased after 1814, when tribes ceased to be a threat to the security of the United States, and again after1829, when President Jackson defied court rulings favoring Indians.

The tribes involved in *Johnson* were paid twice for the land, and the earlier deals appear relatively fair. Many examples of clear unfairness toward Native Americans can be found, but the transactions in this case were likely not among them.[1] In light of the facts of *Johnson* and the legal rule recognizing tribal title based on any kind of use, in what sense did the case involve conquest? Assuming that these sales were voluntary, what was imposed on these Indian nations and when?

Rhetoric aside, the principal legal rules discussed in the case were: (1) European nations and their American successors divided the Americas by a deal among themselves to respect the first to discover territory new to them, modified by the results of their many wars with each other, such as Québec, of purchases, such as Louisiana and Florida, and of New World conquests, such as the Mexican War. The *Johnson* Court called this the rule of discovery. (2) Ownership of land acquired by conquest will not be questioned by the conqueror's courts. The unusual aspect of the *Johnson* opinion is openly admitting this. (3) England and other European nations adopted national rules of preemption, forbidding private purchases from Indian nations without sovereign

[1] For example, the later treaties by which the United States acquired tribal title from these Indian nations followed their military defeat, so the tribes were under duress to agree to them. The balance of power was otherwise in 1773 and 1775. Also, by the time of the later purchases, the two tribes had been severely reduced by smallpox and other disasters.

consent. This rule governed the *Johnson* case.[2] The rule has been statutory law of the United States since 1790, now codified at 25 U. S. Code § 177. This statute governs any transfer of tribal title since that date.

The other important aspect of *Johnson* was the Court's description of tribal title as a "right of occupancy" and of the interest of the British Crown, later the United States government, as a fee or fee simple. This terminology denigrated the Indian title and gave it an aura of impermanence, encouraging those who wanted to minimize the Indian right, although it rarely had direct legal consequences. The usage traces to the Court's prior decision in Fletcher v Peck, cited on page 69. It arose from the Court's attempt to deal with the longstanding governmental practice of conveying land subject to the Indian title. The Court decided to sustain the practice, so it had to come up with a theory of what interest was conveyed in those transactions. As we shall see, the governmental "fee simple" later evolved into a trustee's fee simple, a concept more favorable to tribes rhetorically if not legally.

3. 72-112 (class discussion 87-112).

Cherokee Nation exposed a major gap in the constitutional scheme. The Constitution's provisions for diversity jurisdiction in federal courts were intended to overcome local prejudice in state courts. But diversity required a person to be either a citizen of another American state or of a foreign government, and Indians were neither. How much this actually mattered is uncertain because Indian people and tribes were seldom able to file recorded lawsuits during the 19th Century. Also, they were often located in territories, where all the courts were federal. In practice, all reported litigation by tribes prior to 1900 involved (1) the so-called Five Civilized Tribes of the Indian Territory (Cherokees, Choctaws, Creeks, Seminoles, and Chicksaws; or (2) New York state tribes suing in New York state courts; or (3) Pueblo tribes in New Mexico. Moreover, as we'll see in the next assignment, the Cherokees eventually won their legal cause on the merits, yet a determined President Jackson overrode the victory.

4. 112-31

What was the legal basis for the Court's decision, that is, why were Georgia's laws invalid in Cherokee country? The *Worcester* decision was and is the Court's most important on the subject of Indian law. Its analysis of the legal standing and interpretation of Indian treaties was the foundation for numerous later decisions by all branches of government.

A crucial predicate for *Worcester* was the American rule, derived from the Supremacy Clause of the Constitution and decisions enforcing it, that self-executing[3] treaties can be directly enforced by the courts. In England and other European countries, courts cannot enforce treaties until and

[2] Johnson and Graham alleged in the alternative that they had consent of the British Crown for their purchases, but the courts held otherwise. Had they sustained that claim, they might have won the case.

[3] Treaty provisions are self-executing when their terms confer rights and duties directly, as most provisions in Indian treaties did. The terms of other provisions require legislation for implementation; these provisions are not judicially enforceable without enabling legislation.

unless domestic legislation provides for statutory rights. Had the U. S. adopted the English rule, Indian treaties would likely have become relics under President Jackson.

5. 140-58

The events in *Crow Dog* occurred in a territory, not a state, avoiding any issue of federalism. Contrast the two cases in the next assignment.

6. 158-76

Note 2 on pages 162-63 illustrates a frequent tactic of those who coveted Indian land—to argue that federal "wardship" or trusteeship was slavery, so the Indian people should be "free" to lose their land. The General Allotment Act discussed later in the assignment was a related move, albeit less direct.

The Indian Land Consolidation Act, page 174 note 4, was further amended in 2004 to promote consolidation consistent with the Supreme Court's decisions.

7. 176-99

In 2000, Congress repealed section 1 of the General Allotment Act (quoted at page 173 note 1). As many of you know, Senator Henry Teller (quoted at pages 168-69) was from Colorado. This was unusual; most congressional supporters of Indian rights were from eastern states.

8. 199-207, 215-21, 226-34

Pages 221-26 (not assigned) summarize modern federal statutes governing many aspects of Indian affairs. Because the important statutes are addressed in detail later in the book, the reading is omitted here as duplicative.

From the outset, federal Indian law has had an obvious racial or ethnic basis. Modern Court decisions finding racial discrimination "suspect" made a contest like *Mancari* inevitable. Was the Court's explanation on page 231, that the Indian preference under review was not racial, satisfactory? The law review excerpts and notes at pages 245-55 (not assigned) pursue the question whether Indian people are a racial group for purposes of the Constitution's equal protection principle and related civil rights statutes.

Rice v. Cayetano, pages 235-44 (not assigned), overturned Hawaiian state laws that favored persons of Native Hawaiian ancestry over others, holding that they violated the 15th Amendment's ban on racial discrimination in voting. The majority and concurring opinions distinguished federal Indian law; the dissenters embraced it.

For Hawaii, an aspect of the issue returned in a legal attack on the admissions policies of Kamehameha Schools, a private co-educational college preparatory institution with campuses on three islands. It was established in 1887 under the will of Bernice Pauahi Bishop, a direct descendant

of King Kamehameha the Great. Bishop's will established a trust, the largest private landowner in the State. Income from the trust operates the Schools.

The Schools' admissions policy prefers Native Hawaiians, as Pauahi intended. Legal challenges based on federal civil rights laws have so far favored the Schools, but narrowly. See Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate, 470 P.3d 827 (9th Cir. 2006) (in banc), *cert. dismissed*, 127 S.Ct. 2160 (2007). The Court of Appeals in banc voted 8-7 in favor of the Schools. The cert. petition was dismissed because the parties settled the case on confidential terms.

The casebook further examines Hawaii at pages 917-46, which we'll not reach in this course.

9. 258-59, 266-88

The *Shoshone* case, pages 259-62 (not assigned), held that tribal title includes ownership of timber and minerals. *Sioux Tribe*, pages 263-66 (not assigned), involved Indian reservations set aside by executive order of the President out of the public domain. The Supreme Court sustained presidential authority to do this but in *Sioux Tribe* held that tribes obtained no legally protected property interest in such reservations unless recognized by Congress in a statute.

These decisions and others created two classes of Indian title, title recognized in a treaty or statute or by purchase or gift and protected by the 5th amendment, and unrecognized title, either original or executive order, that is not protected and can be extinguished without just compensation. All land possessed by tribes or Indians today is in recognized title, though aboriginal title claims to other lands persist.

The readings on the Indian Claims Commission at pages 281-88 are rather dense. Read for general information, not doctrinal niceties, but note the "no interest" rule on pages 283-84.

The international decision in favor of the Dann sisters, pages 289-94 (not assigned), was rejected by the U. S. government. See note 1 on pages 294-95. Chapter 14 of the casebook, which we'll not reach in this course, addresses selected international and comparative law perspectives.

10. 295-315

These pages concern so-called "eastern land claims" that resulted from the policy of the federal government to treat tribes in the original states as subject to state rather than federal control, a policy reversed in modern times by the judicial decisions related in the book.

Eastern tribes lost two important decisions in 2005. In City of Sherrill v. Oneida Indian Nation of New York, 544 U.S. 197 (2005), the Court sustained the defense of laches to hold that tribal trust land within the City was not immune from local property taxes. In Cayuga Indian Nation of N.Y. v. Pataki, 413 F. 3d 266 (2d Cir. 2005), *cert. denied* 126 S. Ct. 2022 (2006), the court upheld a laches defense to the Cayugas' ejectment and damages claims for lands wrongfully taken between 1795 and 1807, overturning a $248 million trial court judgment in their favor.

11. 315-17, 323 (note 2)-40.

Dion and the note cases in these readings apply the rules of interpretation introduced at pages 127-31. Consider how these rules were applied in other decisions we have studied.

At page 337, the book notes that the Supreme Court also interprets federal statutes in favor of Indian rights in cases where no treaty is involved, citing leading modern cases applying the rule. Its most important ancestor was United States v. Alaska Pacific Fisheries, 248 U.S. 78, 89 (1918), cited at page 588. The rules for interpreting treaties in favor or Indians resemble rules for interpreting contracts. Is the rule for statutory interpretation, when no treaty or other bargain is involved, justified? How? In considering this question, consider the plenary power rule of *Lone Wolf*, pages 182 and 315-16.

Regarding the note at pages 337-40 on federal statutes, see also San Manuel Indian Bingo & Casino v. National Labor Relations Board, 475 F.3d 1306 (D.C. Cir. 2007), where the court sustained NLRB authority over employment relations at the tribe's gaming operation. The court distinguished commercial operations from governmental, limiting NLRB authority to the former. The time for the tribe to petition for certiorari had not expired when this note was written.

12. 340-65

Federal statutes and judicial opinions use trust terminology, inducing litigants to invoke rules from private trust law. The analogy is imperfect in many respects. A private trustee is selected by a person who establishes a trust, owes undivided loyalty to trust beneficiaries, and can be supervised or replaced by a court of equity. Many trust duties and powers are spelled out in the trust instrument. The U. S. government has general loyalties to all its citizens and specific duties under countless other laws, most of its trust duties were not clearly spelled out in advance, and supervision by courts is severely limited by sovereign immunity and statutes.

Regarding note 2 on page 343, in Cherokee Nation of Oklahoma v. Leavitt, 543 U.S. 63 (2005), the Court held that when a tribal government agrees to supply health services that the Indian Health Service would otherwise have provided under the Indian Self-Determination and Education Assistant Act, 25 U.S.C. §450, the tribe is entitled to the "contract support costs" promised by the government in its annual funding agreement.

Regarding the *Cobell* case, pages 353-56, Judge Lamberth continued to issue orders against the Government. In one opinion, he stated:

> Alas, our "modern" Interior department has time and again demonstrated that it is a dinosaur—the morally and culturally oblivious hand-me-down of a disgracefully racist and imperialist government that should have been buried a century ago.

229 F.R.D. 5, 7 (D.D.C. 2005). In its appeal, the Government asked that Judge Lamberth be removed from the case for bias against it, and the Court of Appeals granted the request. Cobell v. Kempthorne, 455 F.3d 317 (D.C. Cir. 2006), *cert. denied*, 127 S. Ct. 1876 (2007).

13. 365-88

Until modern times, the Supreme Court distinguished Indians from non-Indians. The *Wheeler* opinion marked a subtle shift in discourse by differentiating tribal members from nonmembers, the latter term of course including members of other tribes. The change had no relevance to the *Wheeler* case, but as later readings show, it soon had legal consequences that are still being worked out.

14. 388-413

The Navajo Supreme Court is due to visit the Law School next week, October 15-17. It is possible members of the Court will visit one of our classes.

15. 414-34

16. 434-55

17. 456-75

Federal statutes and Court decisions have made Indian country a term of art. It side-steps the linguistic hurdle of searching for an act of "reserving" to establish a "reservation."

Regarding the unconstitutional delegation issue discussed in note 5 on pages 472-73, South Dakota again raised the issue to challenge the decision of the Secretary of the Interior, acting under the new regulations, to place the land involved in the 1995 8th Circuit decision, 69 F. 3d 878, into trust. But in South Dakota v. United States Dep't of Interior, 423 F. 3d 790 (8th Cir. 2005), *cert. denied*, 127 S. Ct. 67 (2006), the court upheld the Secretary's action, relying on the language and legislative history of the IRA rather than the revised regulations.

18. 475-92

We considered the Major Crimes Act in connection with *Kagama*, page 158. As the book says, the Indian Country Crimes Act, punishing interracial crimes, is older, tracing to 1790; it was interpreted in *Crow Dog*, page 153. Its interpretation in *McBratney*, page 478, defying the express words of the statute, was quasi-constitutional.

As *Antelope* makes clear, Indian country jurisdiction can benefit or harm a particular Indian defendant. Why has the Supreme Court always treated jurisdiction under these statutes as exclusive of state jurisdiction, rather than concurrent, despite lack of any specific statutory claim of exclusive jurisdiction?

An important point to emphasize in the analytical note at pages 488-92 is made at the top of page 489, differentiating general federal crimes from the rest of the analysis. If an Indian commits a general federal crime outside Indian country, he or she is subject to the same jurisdiction as any other person. If within Indian county, the analysis at pages 337-38 applies.

Pages 492-508 (not assigned) analyze Public Law 280, a federal statute that conferred jurisdiction on the courts of specified states. See the list at the bottom of page 493.

19. 509-36

The Court's use of history in *Oliphant* and *Duro v. Reina*, page 518, was flatly inconsistent. In *Oliphant*, the Court relied on the universal practice in the 19th Century of treating Indian people as legally distinct from non-Indians, on grounds that mixed history, law, and racism. In *Duro*, that history was tossed out the window. Why?

Regarding the case of Russell Means, page 535 note 2, Means filed a petition for a writ of habeas corpus in federal court after losing his appeal in the Navajo courts. The federal court denied the motion, and Means appealed to the Ninth Circuit. The court affirmed, holding that *Lara* established "definitively" that "an Indian tribe may exercise inherent sovereign judicial power in criminal cases against nonmember Indians for crimes committed on the tribe's reservation." Means v. Navajo Nation, 432 F.3d 924, 931 (9th Cir. 2005), *cert. denied*, 127 S.Ct. 381 (2006). The court rejected Means' equal protection attack on the statute.

20. 536-54

21. 554-79

Preemption is the Supreme Court's modern term for invalidation of state law under the Supremacy Clause of Const. art. VI, that is, for an occasion when a federal statute or treaty trumps a state law. Recall our discussion of *Worcester*. The Court often recites that the governing rule for preemption is intent of Congress or of a treaty, although most hard decisions involve situations where Congress or treaty makers had no clear intent. On occasion Congress puts explicit "pro-preemption" or "anti-preemption" clauses in federal statutes, but these often do not anticipate actual disputes. A notorious example is the preemption provision in the cigarette labeling statute, the reach of which spawned many, inconclusive lawsuits.

An important practical approach to preemption law is to recognize that each legal field has its own history and precedents, so that applying a preemption decision from one legal field to another distorts the discourse. Hence, in Indian law one should look to other Indian law decisions, not to labor law or ERISA or atomic energy

22. 579-95

In the Blackfeet case, page 586, note the subtle difference in the legal theory of the case between majority and dissent. The dissent, not quoted in the book, relied on the rule of interpretation that repeals by implication are not favored, so the 1924 tax consent remained in force. What was the majority's response?

In Wagnon v. Prairie Band Potawatomi Nation, 126 S. Ct. 676 (2005), the Court rejected the Prairie Band's challenge to Kansas's gasoline tax applied to reservation retail sales on the ground that the incidence of the tax was on off-reservation wholesales to non-Indian distributors.

Pages 595-606 (not assigned) cover federal environmental laws that accord distinct authority to Indian nations, treating them in some respects on the same level as state governments.

23. 607-27

In Ford Motor Company v. Todecheene, 394 F.3d. 1172 (9th Cir. 2005), the Ninth Circuit applied the *Montana* test to hold that the Navajo tribal courts lacked civil adjudicatory jurisdiction over Ford Motor Company for a product liability action arising out of a Ford Explorer roll-over accident. The accident occurred on trust land on the Navajo Reservation and claimed the life of an on-duty Navajo law enforcement officer. Neither of the *Montana* exceptions was found to apply, even though the Explorer had been purchased by the tribe as a patrol vehicle for the Navajo Department of Public Safety with financing provided by Ford's wholly-owned subsidiary. But on petition for rehearing, the court withdrew the opinion, 488 F.3d 1215 (9th Cir. 2007), stating:

> The tribal court did not "plainly" lack jurisdiction under the second exception, recognized in *Montana* v. *United States*, 450 U.S. 544, 565 (1981), to the general rule that tribes do not have jurisdiction over non-members. *See Boozer* v. *Wilder*, 381 F.3d 931, 935 (9th Cir. 2004) (requiring exhaustion unless the tribal courts plainly lack jurisdiction). As such, the appeal is stayed until Ford exhausts its appeals in the tribal courts.

24. 627-49

25. 649-53, 679-83, 689-702

Comity and full faith and credit are complex subjects treated here only briefly.

Pages 653-78 (not assigned) address the Indian Child Welfare Act, a federal statute intended to redress widespread removal of children from Indian families by state welfare and adoption agencies. This complex statute gives tribes and Indian parents the right to intervene in a state child custody case and in some circumstances requires removal of the case to a tribal court. There is extensive litigation under the statute, including cases handled by C. U.'s Indian Law Clinic.

Reservation economic development is an enormously important question for tribes, whose members are often forced to leave Indian country out of necessity.

26. 703-11, 722-37

The *Cabazon* case, page 724, arose in California, a state subject to Public Law 280—see the syllabus note at assignment 18. However, the crucial point in *Cabazon* did not depend on that statute and would have been the same in any state. How did the nature of state regulation and taxation differ from that in the Colville case, page 566?

The Seminole Tribe case, pages 731-33 and often read in first-year Con Law, appears to have been a loss for tribal interests, but many who follow Indian gaming think of it as a blessing in disguise. Can you see why?

27. 738-56

28. 756-72

In Navajo Nation v. United States Forest Svc., 479 F.3d 1024 (9th Cir.2007), several tribes and other plaintiffs challenge expansion of, and snowmaking on, the Arizona Snowbowl ski area on San Francisco Peaks in northern Arizona. The court held that the Forest Service's approval of the use of treated sewage effluent to make artificial snow violated RFRA.

The *Harjo* decision, pages 770-71, was reversed on appeal based on the defense of laches. 415 F.3d 44 (D.C. Cir. 2005).