Course description: The term “sovereignty” broadly refers to the power of governments to make and enforce their own laws. The United States Constitution recognizes three sources of sovereignty: the federal government, states, and Indian tribes. All three sovereigns have a “primal need,” in Charles Wilkinson’s memorable phrase from *Blood Struggle*, “to assert their right to self-determination, their right to live well by their own rules.” Yet the exercise of sovereign authority by each of these three governments often influences or impedes the power of the others. This is especially so in high-priority areas such as law enforcement and public safety, business taxation, regulation and licensing, land and water use, and the protection of public health and the environment. This course explores the manner in which sovereign Indian tribal governments assert criminal and civil jurisdiction to make and enforce their own laws within the American constitutional system.

Class schedule: Thursdays, August 27–December 3, 2008, 4:15 pm–5:55 pm (except November 26 for Thanksgiving), Wolf Law Building, Room 305, University of Colorado School of Law, Boulder.

Course paper: All students must complete a substantial piece of writing that meets the course requirements (30-40 pages). Proposed paper topics must be submitted in the form of a concise (one-to three-page) written outline to Professor Eid for comment and approval on or before Thursday, October 15th. Draft papers are due Thursday, November 19th.

During the final three classes, each student must make a brief in-class presentation on his/her approved paper topic and findings to date. THE DEADLINE FOR ALL COMPLETED COURSE PAPERS IS THURSDAY, DECEMBER 10th, AT 5 PM.

Grading: The paper will count for 75 percent of the student’s final grade. The remaining 25 percent will be based on class participation.

Contact information: Professor Eid is most easily reached at eidt@gtlaw.com. He can also be reached on his personal cell phone at (303) 720-9002, or by contacting Cynthia Carter at the Law School.

Class schedule and readings: All readings should be completed prior to class.

August 27th

Class #1: Tribal Sovereignty and the Jurisdictional Maze

Generations of state and federal officials have left their own stamp on Indian country. One result of these shifting attitudes is the so-called jurisdictional maze, which complicates both criminal and civil jurisdiction. This introductory session focuses on the criminal law and the federal government’s historical interest in exercising exclusive jurisdiction over non-Indians who commit Indian Country crimes; the federalization of tribal justice with the Major Crimes Act in 1885; the General Allotment Act of 1887 and subsequent jurisdictional “checkerboard” effect; the McBratney-Draper doctrine and increased state involvement; renewed support for tribal self-governance and the Indian
Reorganization Act of 1934; Public Law 280 and the Termination Era; the Indian Civil Rights Act and the tribal self-determination movement; and Oliphant v. Suquamish Indian Tribe, 433 U.S. 191 (1978), holding that tribes lack criminal jurisdiction over non-Indians. We likewise examine how tribal governments are seeking to preserve and explore their traditional and customary law against the backdrop of shifting state and federal policies.

Reading:


September 3rd

Class #2: When Tribes & States Collide: Nevada v. Hicks

Floyd Hicks is a member of the Fallon Paiute-Shoshone Tribes of Western Nevada and resides on that reservation. Nevada state game wardens executed state-court and tribal-court search warrants in 1991 to search Hicks's home for evidence of an off-reservation crime. Hicks challenged the validity of the search and filed a tort action against the tribal judge, the tribal officers, the state wardens in their individual and official capacities, and the State of Nevada in the Tribal Court in and for the Fallon Paiute-Shoshone Tribes. That court held that it had jurisdiction over the claims, a holding affirmed by the Inter-Tribal Court of Appeals of Nevada.

The state officials and Nevada then filed an action in federal district court seeking a declaratory judgment that the tribe lacked jurisdiction. The U.S. District Court granted summary judgment to Hicks on the issue of jurisdiction, and also ruled that the state officials would have to exhaust any claims of qualified immunity in the tribal court. The U.S. Court of Appeals for the Ninth Circuit affirmed, concluding that the fact that respondent's home is located on tribal land within the reservation was sufficient to support tribal jurisdiction over civil claims against non-tribal members arising from their activities on that land. In *Nevada v. Hicks*, the U.S. Supreme Court reversed.

Guest presenter: Jennifer Harvey Weddle, shareholder and co-chair, American Indian Law Practice Group, Greenberg Traurig LLP, Denver and president of the Colorado Indian Bar Association. Ms. Weddle was part of the legal team that represented Floyd Hicks in the U.S. Supreme Court.

Reading:


September 10th

Class #3: The Role of the Federal Government in Fostering Tribal Economic Development

The American Recovery and Reinvestment Act of 2009 gives Indian tribal governments the ability to use a new kind of tax-exempt bond, called Tribal Economic Development Bonds (“TEDBs”), to finance economic development projects in the same way that state and local governments have long used tax-exempt bonds and other financing instruments. TEDBs are intended to help address a lingering disparity between tribal governments and their state and local counterparts with respect to federal incentives to promote economic development and infrastructure. Our guest is former Colorado state Senator Penfield Tate, a bond attorney and expert in public finance who will discuss how tribes are using TEDBs and how the federal government can further incentivize economic development within Indian country.
**Guest presenter:** Penfield Tate, shareholder, Greenberg Traurig LLP, Denver.

**Reading:**


**September 17th**

**Class #4: Strengthening State and Local Respect for Tribal Sovereignty**

This class explores how Native leaders are strengthening respect for tribal sovereignty in their off-reservation working relationships with state and local governmental officials. The Executive Secretary of the Colorado Commission of Indian Affairs, Ernest House, Jr., a member of the Ute Mountain Ute Tribe, will discuss matters such as protecting the civil rights of Native Americans who live and work off-reservation, the identification and repatriation of ancestral remains and cultural resources; and inter-governmental efforts to improve public safety in reservation border communities such as Cortez, Colorado.

**Guest Presenter.** Ernest House, Jr., Executive Secretary, Colorado Commission of Indian Affairs

**Reading:**

*George Lurie, “Ernest House, Jr. Following in His Family’s Footsteps,”* The Durango Herald (May 22, 2005).

*Barbara Perry, “The Role of Community Perceptions of Police in Minimizing the Reporting of Hate Crime Against Native Americans,” Faculty of Social Science, University of Ontario Institute of Technology (unpublished manuscript, 2006) (used with permission).

**September 24th**

**Class #5: Federal Oversight & Tribal Criminal Justice**

This session addresses the interplay between the federal oversight and tribal criminal justice. Our guest presenter is Janelle Doughty, Director of the Department of Justice & Regulatory for the Southern Ute Indian Tribe. The first Southern Ute tribal member ever to hold this cabinet-level position, Director Doughty is the recipient of the *Public Safety Director of the Year Award* from the National Native American Law Enforcement Association. She was recently appointed by the Attorney General of the United States to his national advisory committee on Native American issues.

**Guest presenter:** Janelle F. Doughty, MSW, Director, Department of Justice & Regulatory, Southern Ute Indian Tribe.

**Reading:**

*Testimony of Janelle F. Doughty before the U.S. Senate Committee on Indian Affairs (Sept. 18, 2008).

October 1st

Class #6: Tribal Courts in the Federal Constitutional System

This class focuses on tribal judicial systems, the rule of law, and the interplay between tribal and federal adjudication. Federal criminal law now recognizes the importance of prior tribal court convictions and protection orders, and off-reservation courts are increasingly asked to extend Full Faith and Credit to each. What is the proper role of tribal courts in the federal Constitutional system? Should the depth and consistency with which tribal courts protect criminal defendants’ Due Process and other civil rights always be on a par with that of defendants in state or federal court criminal proceedings? Under what circumstances beyond habeas corpus relief, if any, should tribal court decisions be appealed to the federal courts? Should the Indian Civil Rights Act be modified to increase penalties and permissible terms of incarceration? We will also discuss tribal courts’ civil sanctions, including fines, exclusion and banishment, and judicial access to the federal court system within Indian country, including Native American participation in federal trials and grand juries.

*Testimony of Troy A. Eid before the U.S. Senate Committee on Indian Affairs (June 25, 2009), especially pages 17-20.


October 8th

Class #7: The Indian Gaming Regulatory Act & Its Implications for Tribal Sovereignty

In 1988, Congress enacted the Indian gaming Regulatory Act (“IGRA”) with the stated purpose of ensuring that Indian tribes are the primary beneficiaries of gaming operations. Some tribes manage their own gaming operations and facilities; others engage private contractors to assist them with various aspects of the business. Gaming itself is often controversial, and compact agreements negotiated between Indian tribes and state governments have sparked protracted litigation in many parts of the country. The federal government’s ongoing oversight role has sometimes been another source of friction. More generally, the presence of gaming operations within Indian country, and the employment and revenue generated from casinos and related enterprises, can have a major impact on tribal life and traditional values and culture. Our guest presenter is Diandra Benally, an enrolled member of the Navajo Nation who serves as the Assistant General Counsel to the Fort McDowell Yavapai Nation in Arizona. Ms. Benally’s recent awards include New Mexico Young Lawyer of the Year.

Guest presenter: Diandra Benally, Assistant General Counsel, Fort McDowell Yavapai Nation, Arizona.

Reading:

October 15th

PROPOSED PAPER TOPICS DUE

Class #8: Tribal Strategies for Protecting and Expanding Jurisdiction: A Litigator’s Perspective

Steven J. Bloxham has spent his extensive litigation career representing Indian tribes, including the Navajo Nation and the Colorado River Indian Tribes, in water rights adjudication, natural resource issues, jurisdictional disputes relating to the Montana doctrine, and other complex civil matters. In this session, Mr. Bloxham explores practical strategies, inside and outside the courtroom, for how Indian tribes can seek to preserve and extend their sovereignty in the wake of recent federal court decisions, such as Carcieri v. Salazar, that have frequently been adverse to tribal interests.

Guest presenter: Steven J. Bloxham, Fredericks Peebles & Morgan LLP, Sacramento, CA

Reading:
*Carcieri v. Salazar, 566 U.S. __ (Feb. 24, 2009).*

October 22nd

Class #9: Tribal Sovereignty and International Indigenous Rights

Issues concerning indigenous peoples are increasingly significant in many countries and in the United Nations, the World Bank, the Organization of American States, and other international institutions. This class will discuss the concept of international indigenous rights; the nature and meaning of the right to self-determination; tensions between individual rights and group rights; and minority rights regimes in international law. We will look specifically at the efforts of two Western Shoshone sisters to challenge U.S. land claims practices in the international arena and how those efforts have been received domestically. Jennifer Harvey Weddle leads the discussion in a return engagement.

Guest presenter: Jennifer Harvey Weddle, shareholder and co-chair, American Indian Law Practice Group, Greenberg Traurig LLP, Denver

Reading:

*Letter of the European Parliament to Bruce Babbitt, Secretary of the Interior, regarding the case of Carrie and Mary Dann of the Western Shoshone Nation (February 24, 1998) (unpublished).*


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October 29th

Class #10: Enforcing the Federal Trust Responsibility

The scope and enforceability of the federal government’s trust responsibility to Indian tribes is frequently litigated. The most recent U.S. Supreme Court decision is *Navajo Nation v. United States*, 556 U.S. __ (April 6, 2009) (“Navajo Nation II”). The Court rejected the Navajo Nation’s claim for damages for an asserted breach of fiduciary duty by the Secretary of the Interior in connection with a royalty rate increase for a coal lease on tribal trust land. Our guest presenter for this session is one of the country’s leading experts on federal Indian law and the trust doctrine, Paul Frye, who represented the Navajo Nation throughout litigation leading to and including *Navajo Nation II*. Mr. Frye has represented the Navajo Nation in numerous other cases, including the Tenth Circuit’s recent ruling in *Hydro Resources, Inc. v. U.S. Environmental Protection Agency*. That case held that certain land owned by that company in the “checkerboard” area of the Navajo Nation Eastern Agency in Northwestern New Mexico is “Indian country” for purposes of federal law.

**Guest presenter:** Paul E. Frye, Frye Law Firm, PC, Albuquerque.

**Readings**


*Hydro Resources, Inc. v. U.S. Environmental Protection Agency*, No. 07-9506 (10th Cir., April 17, 2009).

November 5th

Class #11: The View from the Tribal General Counsel’s Office

The General Counsel of the Ute Mountain Ute Tribe, Peter Ortego, will offer perspectives on how tribes assert their sovereignty and manage relationship with state and federal lawmakers and regulators. Discussion topics include criminal justice and law enforcement; the Tribe’s casino, hotel and travel center operations; the regulation of tobacco and alcohol sales; oversight and governance of Tribal programs and enterprises; managing development projects by private enterprises on the reservation; water rights adjudication and allocation issues; and attempts by state officials to tax activities on the Tribe’s lands. Mr. Ortego will also discuss cooperation between the Tribe and the State of Colorado on the Brunot Treaty on off-reservation hunting and fishing.

**Guest Presenter:** Peter Ortego, General Counsel, Ute Mountain Ute Tribe.

**Reading**


*Will Sands, “Casinos Flourish in Four Corners,” The Durango Telegraph* (July 3-9, 2003).
November 19\textsuperscript{th}

**DRAFT PAPERS DUE**

**Class #12: Federal Criminal Prosecution in Indian Country**

This class reviews the key federal statutes which apply to Indian country, including the Indian Country Crimes Act (also known as the General Crimes Act) and the Major Crimes Act, and the interplay among federal, tribal and state officials in the delivery of criminal justice services. We will also focus on when and how to assimilate state criminal laws to Indian country offenses, as well as the McBratney-Draper doctrine, which extends exclusive state jurisdiction to criminal offenses involving only non-Indians.


**Readings:**


November 26\textsuperscript{th} (no class).

December 3\textsuperscript{rd}

**Class #13: Paper Presentations**

Students present the initial findings of their research and make individual presentations to the class.

December 10\textsuperscript{th}

**COMPLETED CLASS PAPERS DUE AT 5 PM MOUNTAIN TIME.**