

University of California, Hastings College of the Law

INDIAN LAW

Spring Semester 2012
Professor John D. Leshy

Course Syllabus and Other Helpful Information

Mondays, 9:40-11:50 AM; Wednesdays, 10:50–11:50 AM
Room 314, 198 McAllister St.

The text is Getches, Wilkinson, Williams and Fletcher, Federal Indian Law: Cases and Materials (West Pub. Co., 6th ed. 2011).

For sources beyond the casebook to develop your grasp of this quite complex material, you may wish to consult a single volume treatise (occasionally updated), authored by a team of experts headed by former Hastings Dean Nell Newton, Felix Cohen's Handbook of Federal Indian Law (2005). It is on reserve in the Law Library. Also, Ninth Circuit Judge (and former law professor) William Canby has authored a fine nutshell, American Indian Law, now in its 5th edition (2009), and it is also on reserve.

Contacting me: My office is Room 382, Kane Hall. The best way to contact me is my email, leshyj@uchastings.edu. My office phone is (415) 565-4726.

Office hours: I am usually available Monday afternoon 2-5 PM, and often available at other times during the week. It is best to email me in advance to arrange a specific time to talk.

Final exam: A 3-4 hour open-book exam, probably a combination of essay and multiple choice. More details to follow toward semester's end. I have exams and model answers from 2002 and 2009 on file online and in the Library. There may be others on file from other professors who have taught the course here.

Grading: Final grade based primarily on the final exam, but I reserve the right to make a half-grade adjustment up or down (e.g., B+ to A-) to reflect extraordinary contributions to class discussion or extraordinary disinterest. Downward departures will be based on chronic failure to participate in class discussion and/or to attend class without excuse.

Laptops prohibited: I do not permit the use of laptops in the classroom in this course. I have found that many students simply cannot resist the distraction of web-surfing and otherwise using them for non-class purposes, to the detriment of themselves and others. I understand the

inconvenience this can create for note-taking, but several semesters of experience, including positive feedback from many students, convince me the benefits of banning laptops outright outweigh this cost, and are superior to any alternative control method.

Clickers: I may be using clickers in the classroom. Several academic studies report excellent results with the use of this simple technology, and students and I have found it helpful in classes over the last couple of years. I'll let you know in the first week (I'm checking on the availability of the technology in this classroom). The way it works, for those of you unfamiliar with it, is that I will occasionally (perhaps 3 times per class hour) show powerpoint slides with questions and multiple choice answers. You will signal your answer through your clicker. I will close the balloting, and the cumulative results for the entire class are revealed on the screen. N.B.: It is all anonymous; responses by individuals are not recorded or revealed, to me or anyone else. Sometimes I will give you a minute or two to discuss the issue with students around you, and then take a revote. (Studies show this can be an effective learning technique.) Usually we will have a general discussion of the issue posed by the question and the answers. The clicker questions are, in other words, used to organize a good deal of the material for class discussions.

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The assignments below are set out in the order in which we will cover them. The first week's assignments are specifically indicated below. We will take up succeeding assignments in order.

The exact class day we take up specific material will depend upon our pace. I will indicate at the end of each class session approximately what I expect to cover at the next session or two. I may make some (relatively minor) adjustments in coverage during the semester, also depending on our pace.

I will provide you with 3-5 **handouts** over the course of the semester, and I will also post electronic versions on the course website. The first handout is available now on the website, and will shortly be in the bookstore. You should read the material in the handouts that are keyed to the assigned materials in the text as a matter of course – I do not separately indicate those pages in the assignments below.

These handouts serve several purposes:

- (1) They pose questions for you to consider as you do the reading. I recommend you read the questions before, and again after, you read the cases and other assigned materials. I draw heavily upon them in posing questions to you in class, although I will not slavishly follow them. And some of the questions raised in the handout will be posed to you in class on powerpoint for "clicker" use.
- (2) They occasionally contain some assigned reading material, supplementing the casebook.

(3) They may sometimes make adjustments in the reading assignments from what is in this syllabus. **The assignments in the handout control over those in this syllabus in the event of conflict.**

For these reasons, you should pay careful attention to the handouts. Most of my students report that they found them very helpful.

The reading assignments are specific; when pages are assigned, read all cases, notes and other materials on those pages unless otherwise directed. Generally speaking, you should read everything in the text on the assigned topic unless the handout says to omit it. If the handout says to omit a case, you should read any notes before and after it unless otherwise directed.

The notes in the textbook often contain citations to other materials. You are **not** expected to read these additional materials, although sometimes they may be helpful if you're having trouble grasping the topic at hand.

To give you an idea of what I expect you to get out of this course, I am including "learning outcomes" on the last page of this syllabus, after the reading assignments.

Early in the semester, read, for general background on Indians and Tribes, Chapter 1 (Indians and Indian Law), pp. 1-29 (to Williams excerpt), pp. 41-42, and p. 952 (which has a very brief introduction to the topic in other parts of the world). I'm not assigning pp. 42-57, but you might find interesting its explanation of the evolution of European thought toward native peoples in the "New World" following Columbus's "discovery."

Assignment One: First (two hour) class on January 9. We will, after I give some introductory remarks, take up the three seminal Supreme Court decisions (often called the "Marshall trilogy" after their author) that form the foundation of Indian Law.

Read pp. 43-44, then starting with the note on p. 59 to the end of chapter 2 on p. 73. Read the introductory three paragraphs in Chapter 3 (74-75), then from pp. 84 (starting with Section B) to Section E on p. 128. This is a good bit of reading, but much of it is general background to understand the context of the three cases we will discuss in class: Johnson v. McIntosh, p. 64, Cherokee Nation v. Georgia, p. 105, and Worcester v. Georgia, p. 113.

Then we will turn to the assignments below. Each indicates the cases and topics of primary focus of the class discussion. In setting out page assignments below, I will sometimes not indicate precisely where on a particular page we start or stop, but it should be obvious - read from or to the beginning of a case or section on the page given unless I indicate otherwise. I also indicate the principal cases/topics we will cover each day in class discussion. The handouts and the casebook contain a number of questions for discussion that we will address in class, through clickers and otherwise.

As you can see below, we have 26 classes (39 class hours) and 19 topics, which vary somewhat in length and complexity. I will indicate at the end of each class what we will cover in the next class or two. Generally speaking, I figure about 20-25 pages of text (which has generally bigger type and fewer words per page than most casebooks) per classroom hour, though this varies considerably with the nature of the material.

Two: History, Continued: Treatymaking Era. Read pp. 128-139. Class discussion will focus on U.S. v. Washington and Winans.

Three: History, Continued: Reservations, End of Treatymaking, Expanding Federal Power: Read pp. 140-52 fairly quickly, then read 153-165. Class discussion will focus on Crow Dog, Kagama, and Sandoval.

Four: History, Continued: The Allotment and Indian Reorganization Act Eras. Read pp. 165-76; skim the Estlin excerpt on 176-82 just to get the basic facts involved in Lone Wolf; then read pp. 183-to section C on p. 200. Class discussion will focus on Lone Wolf and the Indian Reorganization Act.

Five: History, Concluded: Termination, Self-Determination, and Indians and Equal Protection: Read pp. 200-242. Class discussion will focus on Menominee, Morton v. Mancari, and Rice v. Cayetano.

Six: Tribal Property Interests, including a brief detour to Alaska: Read pp. 243 to the section on “Monetary Awards ...” at the bottom of p. 279. Then read the material on the Alaska Native Claims Settlement Act on pp. 888-93. Class discussion will focus on Shoshone, Sioux, Montana, and Tee-Hit-Ton.

Seven: Reviving Indian Claims to Land and Defining a Tribe: Read pp. 280-305. Class discussion will focus on County of Oneida, City of Sherrill v. Oneida Nation, and the tribal definition issues.

Eight: Federal Power over Indians; Treaty Abrogation. Read the introductory note on pp. 305-06, then read section 2, treaty abrogation, pp. 313-29. Class discussion will focus on Dion and the questions raised in the notes.

Nine: The Federal Trust Responsibility: Read pp. 329-66. Class discussion will focus on Seminole, Navajo Nation, Pyramid Lake Paiute Tribe v. Morton, and U.S. v. Sioux Nation.

Ten: The Reach of Tribal Sovereignty: Read pp. 367-394. Class discussion will focus on Talton v. Mayes, Wheeler, the ICRA (notice on p. 380, bottom, which of the rights in the U.S. Constitution’s Bill of Rights are not included), and Santa Clara Pueblo v. Martinez.

Eleven: Tribal Sovereign Immunity and Tribal Judicial Systems: Read pp. 395-412 (to the Raymond Austin excerpt), pp. 426 (starting with subsection b) to end of chapter on p. 446. Class discussion will focus on Kiowa Tribe and Williams v. Lee.

Twelve: Federal Limitations on Tribal Sovereignty and Jurisdiction: Read pp. 447-70. Class discussion will focus on Solem and the reservation disestablishment issues, Carcieri and on taking Indian land in trust. There will likely be some supplemental material on this in a Handout.

Thirteen: Federal Criminal Jurisdiction: Read pp. 470-88. Class discussion will focus on Antelope and some problem cases arising from the cookbook on pp. 483-488. Why do you suppose Congress has not fixed this crazy-quilt pattern?

Fourteen: Public Law 280. Read pp. 488-505. Class discussion will focus on the statute and on Bryan v. Itasca County. Because California is a PL 280 state, this is especially important here.

Fifteen: Judicial Limitations on Tribal Criminal Jurisdiction in Indian Country: Read pp. 505-27. Class discussion will focus on Oliphant, Duro (in notes, pp. 515-16), and Lara.

Sixteen: Judicial Limitations on Tribal Civil Jurisdiction in Indian Country: Read pp. 528-31, p. 546 (starting with the Note) to section B on p. 588; and read the Note on Resolving Jurisdictional Disputes by Cooperative Agreement, pp. 634-635. Class discussion will focus on Montana, Strate v. A-1 Contractors, Nevada v. Hicks, and Plains Commerce Bank.

Seventeen: Economic Development in Indian Country: Some Challenges and Problems: Read pp. 665-77; 697-708.

Eighteen: Indian Gaming: Read pp. 708-26; there will likely be more material in the Handout. Class discussion will focus on Cabazon Band and on IGRA and the questions raised by it.

Nineteen: Protecting Indian Religion and Culture: Read entire chapter, pp. 727-65. Class discussion will focus on Lyng, the Clinton Executive Order (noted on p. 741), Smith, the Religious Freedom Restoration Act (p. 72) and the developments since then.

Depending upon our pace, if we have time, we may dip a little into taxation in Indian country (very complex!), Indian water rights, and hunting and fishing rights. Let me know if you have a particular interest in any of these topics.

Indian Law - Learning Outcomes.

At the end of the course, students should be able to

(A) summarize clearly and succinctly the major eras in the history of U.S. policy toward Indian tribes and tribal governments, and explain the legacy and current implications of that history in federal Indian law.

(B) articulate the origin and current scope of tribal governance authority over Indians, non-Indians, and land within Indian reservations, demonstrating how the reach of that sovereignty may differ in different contexts; e.g., criminal and civil, and by subject matter such as contracts, torts, and family law.

(C) express clearly the scope and enforceability of the federal trust responsibility for Indians in particular contexts, and the limited circumstances under which state law may operate in Indian country.

(D) describe the basic legal framework governing subject matters of great importance in Indian country, including gaming, hunting and fishing regulation, and protection of cultural and religious practices, and identify the cutting edge issues or unresolved questions in those areas.

(E) develop and articulate legal and policy arguments to expand or restrict tribal sovereignty in a range of contexts, demonstrating the ability to persuasively marshal reasons and judicial precedents to support particular results.