

2009

## American Indian Law Research for State Courts

Nancy Carol Carter  
*University of San Diego*

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Carter, Nancy Carol, "American Indian Law Research for State Courts" (2009). *Court Review: The Journal of the American Judges Association*. 277.

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# American Indian Law Research for State Courts

Nancy Carol Carter

**A**merican Indian law commonly describes the body of law by which the United States government regulates its relationship to Indian tribes and Native American citizens. First explorations of Indian law tend to surprise and intrigue the researcher. Unique legal rules characterize the field and extensive historical research may be required. Basic legal principles that govern a factual situation involving non-Indians may not apply to an Indian-law case of similar facts. Appellate decisions may lack broad applicability because they are so closely tied to treaty language or the history of a single tribe. Questions involving Indian law are beginning to arise in new contexts and have become more complex. Specialty legislation applies to Alaska Natives and questions about the legal status of Native Hawaiians and their land rights remain unresolved. Increasingly, there are efforts to invoke international human-rights standards and to use comparative law in the analysis of domestic indigenous issues. Assumptions must be avoided in favor of careful research on every point.

## AMERICAN INDIAN LAW RESEARCH IS DIFFERENT

Once viewed as an esoteric legal cul-de-sac, Indian law was short on research sources. The subject had no law-school casebook until 1973. In the absence of an academic treatise, it long relied on the *Handbook of Federal Indian Law*<sup>1</sup> written as a federal government guide by Felix Cohen in 1942. The ubiquitous nutshell series did not deal with the topic of American Indian law until 1981.

Awareness of American Indian law has dramatically increased, helped in part by the Indian-rights movement and increased and effective legal advocacy. Media coverage has brought popular attention to specialized legislation like the Native American Graves Protection and Repatriation Act of 1990,<sup>2</sup> national news when Indian tribes claimed the ancient bones of Kennewick Man in a protracted legal dispute. Extensive coverage of an ongoing class action alleging federal fiduciary failures in the management of Indian trust funds is alerting many for the first time that the federal government serves as a trustee for some Native Americans. Conflicts over religious practices and disputes over areas claimed as sacred sites have been widely reported. Likewise, the emergence of Indian gaming and new tribal economic power has drawn a great deal of attention to the once obscure field of Indian law. Academia has seen a growth in Native American studies programs and more law schools than ever teach courses in American Indian law and offer graduate law degrees in the field.

For researchers, this higher profile is a welcome development because many more scholars and legal commentators are

working in the field. Over the past 30 years, an increase in the production of books, articles, microform, websites, and digitized original documents has largely overcome the former scarcity and inaccessibility of American Indian law materials. Researchers are thus confronted with the classic challenge of selecting the most authoritative sources from an array of possibilities, a particular challenge in a field fraught with political questions, rich with advocacy literature, and tied to a history of national policy fluctuations and reversals.

Further complications arise because American Indian tribes govern and adjudicate. As governments with sovereign powers, they join the federal government and state governments to form a triangle of competing jurisdictional powers. While the federal government claimed preemption over Indian affairs from the earliest history of the United States and recognized the powers of tribes to be self-governing, Congress has subsequently legislated federal intrusions into tribal affairs and extended the jurisdictional powers of states into tribal lands and over tribal citizens. Cases that appear to be relevant legal precedent may have arisen during a period when jurisdictional lines were different than in the present instance. Likewise, legislation may still be on the books, although very basic elements of the legal relationship have altered. Notably, this is an area of domestic law in which treaties matter, so historical context is always important. The field of Indian law is also plagued by ambiguity and troublesome legal black holes, sometimes created by inattentive legislative drafting. Too often Congress does not specify whether tribal governments are intended to be subject to legislative or regulatory provisions, or that an action intentionally and mindfully conflicts with prior legislation or treaty terms.

## FOUR BASIC INDIAN-LAW REFERENCES

The Internet provides quick access to many of the once arcane sources of American Indian law, but four works in traditional printed format are recommended for basic reference.

The only treatise in the field is the one-volume *Cohen's Handbook of Federal Indian Law, 2005 Edition*.<sup>3</sup> This work updates and expands upon the 1982 edition, which had used Felix Cohen's 1942 *Handbook* as the starting point for producing an Indian-law treatise. Researchers may also come across a 1958 edition of Cohen's classic work. This Department of the Interior rewrite was produced during the period when federal policy was to terminate the federal-tribal relationship and to downplay tribal self-government and Native American land rights. This official government work is criticized for bias and poor legal scholarship. When federal policy changed completely, the 1958 work was set aside as obsolete.

## Footnotes

1. FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* (1942).
2. 25 U.S.C. §§ 3001-3013 (2006).

3. COHEN'S *HANDBOOK OF FEDERAL INDIAN LAW* (Nell Jessup Newton, ed., 2005).

As with every good treatise, *Cohen's* 2005 edition is an excellent starting point to gain an overview of the law and to find citations to the leading cases and statutes. The book provides a concise history of federal Indian policy and explains interpretive principles applied in Indian law. A chapter is devoted to the tribal-state relationship, and others to topics such as civil and criminal jurisdiction, taxation, environmental regulation, and rights regarding water, hunting, fishing, and gathering. A chapter on the Indian Child Welfare Act<sup>4</sup> may be particularly useful to state court researchers.

Federal judge and former law professor William C. Canby, Jr., contributes a very useful work with his *American Indian Law in a Nutshell*.<sup>5</sup> A new edition was recently published. While the nutshell format is necessarily truncated, Canby's work is regarded as a scholarly standout in this series. He presents a valuable history of Indian policy and serves up an excellent introduction to the main themes and principles of Indian law. This work is useful for background, identification of issues, and discussions of prominent cases and legislation.

Works with an obvious viewpoint usefully highlight issues, and two are recommended for a basic collection. Stephen L. Pevar's *The Rights of Indians and Tribes: The Authoritative ACLU Guide to Indian and Tribal Rights*<sup>6</sup> is a quick starting point for basic questions about the civil rights of tribal members and tribal rights under federal law. Subject coverage is fairly complete but succinct; the question-and-answer style is practical and to the point. Extensive footnotes lead to primary sources for further research.

State attorneys general interact closely with tribes. These lawyers practice on the knife edge of the federal-tribal-state jurisdictional conflict and deal directly with issues arising from the existence of Indian reservations and the operations of tribal governments and tribal courts within state boundaries. That experience has produced the *American Indian Law Deskbook*<sup>7</sup> by the Conference of Western Attorneys General. The work aims at a broad audience by keeping legal jargon to a minimum and focusing on a clear and straightforward presentation of topics such as Indian lands, criminal jurisdiction in Indian country, water rights, and tribal sovereignty in the context of Indian gaming, environmental matters, and child welfare. A treatment of the statutory and judicial foundations of Indian law is included, along with extensive analysis of federal and state court decisions. The first edition of this deskbook was criticized by one Indian-law scholar as a legal brief in favor of extending state powers into Indian country. Subsequent editions are credited with achieving more balance, but awareness of the viewpoint is relevant when consulting this widely relied upon and useful reference book.

#### **PRIMARY SOURCES: UNITED STATES STATUTES, CODES, AND LEGISLATION**

Tribal governments and the lives of their citizens are heavily touched by federal law and always have been. This means that contemporary researchers in the field of Indian law often look back to the earliest days of the republic for relevant case and statutory law. The works of Charles J. Kappler and Felix S. Cohen aid historical statutory research in Indian law. Kappler's *Indian Affairs: Laws and Treaties*<sup>8</sup> (now digitized and online) devotes four of its five volumes to statutes. A Department of Interior update of Kappler's work includes laws in force as of 1967. The original 1942 edition of Cohen's *Handbook of Federal Indian Law* has an "Annotated Table of Statutes and Treaties."

As final authority, the *United States Statutes at Large*<sup>9</sup> must be relied upon in most instances. However, exacting historical statutory research also will lead to the earliest federal codification, the *Revised Statutes of the United States*.<sup>10</sup> All laws included in this edition were reenacted as positive law, meaning that the text of laws published in the *Revised Statutes* replaces the *Statutes at Large* as the authoritative source.

Most laws pertaining to Indians and currently in force are codified at Title 25 of the *United States Code*. However, other important legislation is scattered throughout the federal codes. Title 18, for example, contains definitions of Indian country and jurisdictional legislation for crimes and criminal procedure involving certain Indians. Statutory research in contemporary Indian law may be conducted online or in the General Index volumes of *United States Code Annotated* or *United States Code Service*. Use of an annotated code is especially helpful in this field where policy changes can set entirely new directions for legislation.

New and pending legislation on Indian affairs is easily tracked through various online sources, including Thomas, the Library of Congress congressional information source (<http://thomas.loc.gov/>), and the Senate Committee on Indian Affairs home page (<http://indian.senate.gov/public/>). The House of Representatives does not have a separate committee on Indian affairs, and parcels out legislative work on Indian-law matters to various committees.

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4. 25 U.S.C. §§1901-1963 (2006).
5. WILLIAM C. CANBY, *AMERICAN INDIAN LAW IN A NUTSHELL* (5th ed. 2009).
6. STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES: THE AUTHORITATIVE ACLU GUIDE TO INDIAN AND TRIBAL RIGHTS* (3d ed. 2002).
7. *AMERICAN INDIAN LAW DESKBOOK* (3d ed., 2004).
8. C. KAPPLER, *INDIAN AFFAIRS: LAWS & TREATIES* (1904) (online

- from Oklahoma State University, available at <http://digital.library.okstate.edu/Kappler/>).
9. The official source of laws and resolutions passed by Congress, *Statutes at Large* contains every public and private law arranged in chronological order by the date of passage. Other documents are included, such as treaties with Indian tribes.
10. Containing all laws in force on Dec. 1, 1873, the *Revised Statutes* were published in 1875.

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Legislative history is often illuminating for Indian-law matters, but only a few compiled legislative histories have been published within the field. The best sources for finding citations to relevant legislative history documents are case law and the often exacting and detailed tracking of legislative history found in student law-

review notes or comments. Many historical documents of the United States Congress are now digitized and searchable in full text, making the once tedious task of compiling a legislative history much easier. The *United States Congressional Serial Set*<sup>11</sup> available in paper, on microform, and in a digital collection is a treasure trove of legislative history material.

**PRIMARY SOURCES: TREATIES**

Today, ratified treaties remain important primary sources of Indian law. Following the tradition of the colonial powers in America, the United States entered into treaties with Indian tribes from its earliest years. The form and ratification procedures for Indian treaties were the same as for any international treaty. Likewise, an Indian treaty can be unilaterally abrogated by the United States, as can treaties with other countries.

The formal end of treaty making came in 1871 as the House of Representatives asserted its determination to wield more control over Indian affairs. By this date, great tracks of land already had been shifted away from Indians and tribes were a waning military power. Incentives for treating with tribes were on the decline. At the same time that Congress ended treaty making, it reaffirmed the national obligations created by treaties in existence. After 1871, agreements were made between tribes and the federal government or its agents. These executive agreements have been enforced similarly to treaties.

The continuing force of Indian treaties partially accounts for the inability to generalize about Indian law. Federal obligations to individual tribes can vary greatly, depending on treaty terms. Treaty rights can survive the termination of the special federal-tribal relationship denoted by federal recognition. Treaties also may act as a proscription on tribal rights and powers. Contemporary litigation over hunting, fishing, and water rights, including the power of a state to regulate activities on Indian land, often involves treaty interpretation. Approximately 80% of the 375 treaties ratified by the United States Senate have been the subject of litigation.

The resolution of Indian-law questions may require study of an original treaty text. It also may be necessary to confirm the treaty's continuing validity, to study the circumstances sur-

rounding treaty negotiations, trace the tribal and federal courses of conduct under a treaty, and find all administrative, executive, or judicial interpretations of treaty terms.

While there are many sources of treaty texts, including many Internet postings, legal research demands a text with unquestionable authoritativeness. However, classic compilations of treaty texts, such as the Department of State publication, *Treaties in Force*,<sup>12</sup> exclude Indian treaties. Researchers must look to the *United States Statutes at Large* as the official and authoritative source of Indian-treaty texts. Volume 7 is a compilation of Indian treaties entered into from 1778 through 1845. The treaties are in chronological order and are indexed by tribal name. After Volumes 7 and 8 (the first compilations of Indian and non-Indian treaties), texts of treaties were regularly published in a separate section at the end of each *Statutes* volume. Indian treaties are intermingled with all others. They are indexed within each volume by tribal name and also listed under the index headings. Volume 16 of the *Statutes* carries the last substantial number of Indian treaties, although stray treaty texts do show up in later volumes, as they were found and published. In addition to furnishing official treaty texts, *Statutes at Large* can be used to trace subsequent congressional action in furtherance of treaty obligations. For example, appropriations for meeting treaty obligations to furnish supplies, schools, and farm implements to tribes are easily researched through the index of the *Statutes*.

For quick reference to treaties, the original or online version of Charles J. Kappler's *Indian Affairs: Laws and Treaties*<sup>13</sup> may be consulted. Volume 2 is a reliable compilation of Indian treaties presented in chronological order. The index to Volume 2 doubles as a guide to the name and number of treaties signed by various tribes, although the most careful researcher must note that Kappler did not break out individual tribal names from confederated groups.

Constitutionally, all treaties are the supreme law of the land. But treaties are subject to interpretation, modification, and abrogation. That Congress can unilaterally abrogate an Indian treaty by enacting legislation that conflicts with treaty terms is not in doubt.<sup>14</sup> The degree to which Congress is required to explicitly express its intent to abrogate has been the subject of litigation and court interpretation. Gauging the present force and effect of an Indian treaty is not an easy matter, but Charles D. Bernholz has provided a highly useful aid citing all references to Indian treaties in cases decided by the United States Supreme Court between 1799 and 2001.<sup>15</sup>

**PRIMARY SOURCES: CASE LAW**

Judicial interpretation established basic tenets of Indian law in the first decades of American legal history and continues to shape the field to this day. Federal case law is of prime impor-

11. Commonly called the "Serial Set," this publication collects House and Senate documents and reports and some executive-branch materials from 1817 to the present. Earlier federal documents are published in the *American State Papers*.  
12. Washington, D.C.: U.S. G.P.O., 1944-. This Department of State publication provides citations to bilateral and multilateral treaties in force as of January of the current year and is now

online at: <http://www.state.gov/s/l/c8455.htm>.  
13. Kappler, *supra* note 8.  
14. *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616 (1871); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).  
15. CHARLES D. BERNHOLZ, *AMERICAN INDIAN TREATIES AND THE SUPREME COURT: A GUIDE TO TREATY CITATIONS FROM THE OPINIONS OF THE UNITED STATES SUPREME COURT* (2004).

tance, although state courts hear an increasing number of Indian-law cases.

Leading Indian-law cases are identified in Cohen's *Handbook of Federal Indian Law* and the other basic research source books described above. The National Indian Law Library of a Boulder, Colorado, public-interest law firm – the Native American Rights Fund – has for several years published a collection of leading cases. Previously titled *Top Fifty: A Collection of Significant American Indian Law Cases from the United States Supreme Court*, the latest edition of the work is called *Landmark Indian Law Cases*.<sup>16</sup> It reprints in chronological order 53 cases that resolve important questions or set forth broad principles of federal Indian law and are useful to lawyers, scholars, judges, and other practitioners of Indian law. A basic subject index is provided, along with an alphabetical index by case name. No interpretive information is included.

Law-school casebooks are useful compilations of illustrative cases and other readings. In *American Indian Law: Native Nations and the Federal System, Fifth Edition*,<sup>17</sup> the authors' stated approach is to merge jurisprudence, history, comparative law, ethnology, and sociology to bring meaning to the tribal-federal relationship. There is also an effort to accurately portray Indian tribal perspectives and voices on questions of federal Indian law.

The fifth edition of *Cases and Materials on Federal Indian Law*<sup>18</sup> provides a history of federal Indian law and policy in Part I and federal Indian law in its contemporary perspective in Part II, covering topics like the federal-tribal relationship; tribal sovereignty, federal supremacy, and states' rights; the jurisdictional framework; criminal- and civil-court jurisdiction; taxation and regulation of reservation economic development; Indian religion and culture; water rights; fishing and hunting rights; rights of Alaska natives and native Hawaiians; and comparative and international legal perspectives.

A new 2008 casebook, *American Indian Law, Cases and Commentary*,<sup>19</sup> aims to provide an introduction to the legal relationships between American Indian tribes and the federal government and the individual states. It incorporates the foundational cases with statutory text.

A historic collection was brought together in 1900 when the Commissioner of Indian Affairs was funded to compile a digest of court decisions (federal, state, territorial), opinions of the attorney general, and Interior Department decisions. This Bureau of Indian Affairs *Digest of Decisions Relating to Indian Affairs* is a key source of nineteenth-century judicial thought on Indian law.<sup>20</sup>

## PRIMARY SOURCES: PRESIDENTIAL PROCLAMATIONS AND EXECUTIVE ORDERS

The president of the United States has been an involved and powerful maker of Indian law and policy. Between 1855 and

1919 (when Congress voted itself exclusive power to set aside public lands for Indian reservations), large tracts of public land became reservation land by executive order. The executive also acted to extend federal trust periods over allotted reservation land, redefine reservation boundaries, and otherwise prescribe Indian land holdings. After 1871 when treaty making ended, the diplomacy of Indian affairs continued with negotiated documents looking very much like treaties, but called executive agreements. In other words, agreements were concluded and effectuated by presidential decrees establishing reservations and making land transfers that might once have been accomplished by treaty.

Research in presidential documents may be required to clarify issues involving reservation land, or the reserved rights of a tribe, or even the potential jurisdictional powers of a state over aspects of Indian life on a reservation. This kind of research was once complicated by the lack of a consistent numbering scheme for proclamations and orders and their haphazard publication. Now, the pre-1936 historical documents are organized and indexed and, with the creation of the *Federal Register* in 1936, newly issued proclamations are sequentially numbered and consistently published.

Legally, there is no difference between presidential proclamations and executive orders, but modern custom assigns weighty business to executive orders, while proclamations are more often used for ceremonial pronouncements. Indian-law researchers will encounter historical anomalies in this pattern and must regard both proclamations and executive orders as substantial sources of law.

The *CIS Index to Presidential Executive Orders and Proclamations* (1987) indexes more than 74,000 executive orders and proclamations issued from 1789 through 1983, with texts appearing in a companion set of microfiche. The subject index may be approached by tribal name or terms like Indian reservations. Research by geographical area may also yield results. Under Minnesota territory, for example, there are several references to Indian matters. Proclamations from 1846 forward (but not executive orders) are published in a separate section of each volume of *Statutes at Large*, most of which are available through online databases or at free Internet sites.

The United States Government Printing Office produced two volumes of *Executive Orders Relating to Indian Reservations, 1855-1922*.<sup>21</sup> This publication usefully arranges executive orders geographically by the state in which the Indian reservation is located. An index by reservation name is provided for

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16. NATIONAL INDIAN LAW LIBRARY, COMP. (AALL PUBL. SER. 65, 2002).

17. ROBERT N. CLINTON, CAROLE E. GOLDBERG, AND REBECCA TSOSIE, EDS. (2007).

18. DAVID H. GETCHES, CHARLES F. WILKINSON, AND ROBERT A. WILLIAMS, EDS., 2004.

19. ROBERT T. ANDERSON, BETHANY BERGER, PHILIP P. FRICKEY, AND

SARAH A. KRAKOFF, EDS., 2008.

20. H.R. Doc. No. 538 (2d Sess. 1901), reprinted Kraus, 1973.

21. Issued in various editions by the United States Government Printing Office, with the 1912 edition combining two volumes in one as the most commonly relied upon. Reprinted commercially by Scholarly Resources, 1975.

**[A]dministrative rules establish the procedure by which a tribal group is federally recognized as being in a government-to-government relationship with the United States.**

the first volume, but not the second. The complete table of contents does, however, make it easy to find orders relating to a particular reservation.

Finally, this is yet another area in which Charles J. Kappler's *Indian Affairs: Laws and Treaties*<sup>22</sup> can be helpful. Kappler is one of the best sources for early proclamations and executive orders relating to Indian law and policy. The table of contents of the "Laws" volumes lists

"Executive Orders Relative to Indian Reservations" in a state-by-state arrangement. Proclamations also are listed with a brief explanation of their content, e.g., "Ponca lands, Indian title extinguished."

**PRIMARY SOURCES: ADMINISTRATIVE MATERIALS**

The lives of Native Americans are influenced by administrative agency programs, rules, regulations, and decisions to a greater degree than most citizens. As a threshold matter, administrative rules establish the procedure by which a tribal group is federally recognized as being in a government-to-government relationship with the United States. Administrative contact also flows from the federal responsibility to provide services to Indians in fulfillment of treaty obligations or in furtherance of the federal trust responsibility. Trust responsibility can be of a general nature, growing from the history of federal dealings with a group of Indians, or it can be tied to property held in trust by the federal government for individuals or tribes.

Federal administrative rules and regulations relating to Indians, particularly Bureau of Indian Affairs organization and operation, are gathered in Title 25 of the *Code of Federal Regulations (CFR)*, but several other titles contain relevant entries. Research on administrative aspects of Indian law conceivably can lead to any federal agency or department, including the Bureau of Land Management, Office of Economic Opportunity, and the Departments of Agriculture, Commerce, Education, Health and Human Services, etc. The Office of Tribal Justice serves as the primary channel of communication for Native Americans with the Department of Justice, and helps coordinate a broad range of Native American issues with all other federal entities. Some of the issues that come to the Office of Tribal Justice include: religious freedom, protection of sacred sites, environmental enforcement in Indian country, gaming issues, taxation of Indian tribes, tribal justice systems, law enforcement, Public Law 280 policy, and international indigenous rights. The Office of Tribal Justice maintains a website at <http://www.usdoj.gov/otj/>.

The *Code of Federal Regulations* is updated annually while

*Federal Register* keeps up-to-date with proposed and newly adopted administrative rules and regulations. The formerly daunting work of administrative-law research has been mercifully transformed by the United States Government Printing Office's GOP Access website (<http://www.gpoaccess.gov/index.html>) providing instant keyword access to rules and regulations in the *CFR* and *Federal Register*.

The federal administration of Indian affairs has been delegated to the Department of the Interior since 1849. The Bureau of Indian Affairs (BIA) is a major division within the Department. Twelve BIA area offices across the country administer its local and tribal units. The statutory authority for the BIA is established in the first sections of Title 25 of the *United States Code*; organizational information is found in Title 25 of the *Code of Federal Regulations* and at the BIA website (<http://www.doi.gov/bia/>).

A major responsibility of the BIA is to determine whether a tribe will be legally recognized under federal law. "Recognition" is a term of art describing federal acknowledgment of a government-to-government relationship between an Indian tribal entity and the United States. Federal recognition is a watershed legal determination affecting all manner of tribal rights, privileges, and obligations. Services delivered by the BIA and other agencies, as well as immunity from certain state laws, are conditioned upon federal recognition.

The BIA historically made ad hoc and unexplained decisions about the recognition of tribes. As an increased number of Indian groups sought federal recognition and experienced long waits, the shrouded BIA procedures drew criticism. Complaints eventually led to the 1978 establishment of a formal administrative process for reviewing petitions from tribal groups. The process was substantially revised in 1994 and today is handled by the Office of Federal Acknowledgment (OFA). This office operates with notice and public comment according to procedures published in the *Code of Federal Regulations* for establishing that an American Indian group exists as a tribe.<sup>23</sup>

The BIA has completely opened the process, and its website has comprehensive information on the disposition of petitions for acknowledgment. Researchers wanting to know if tribal groups in their state have applied for acknowledgment will find a list of pending petitions organized by state on the BIA website. The BIA is mandated to regularly publish a list of recognized tribes in the *Federal Register*. Because the list is officially titled Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, its retrieval by keyword on the GPO Access website is not instinctual. More convenient access is through a link on the BIA website.

Administrative handling of recognition by the BIA has long created friction among states, Congress, Indian groups, and the agency – a conflict made more combustible by the possibility that newly recognized tribes will initiate gaming operations. While largely a delegated administrative process, recognition remains a congressional prerogative and recognition is occasionally achieved or restored through the passage of a bill spe-

22. Kappler, *supra* note 8.

23. 25 C.F.R. § 83.1 (2009).

cific to a single Indian governmental entity. The testimony and documents used in a determination of tribal status create a valuable research record, delineating tribal history and the course of dealings between a tribe and the federal government, and collect in one place otherwise difficult-to-assemble information.

Historic research in administrative law relating to Indians leads back to the *Official Opinions of the United States Attorney General*.<sup>24</sup> The frequent exercise of executive authority over Indian affairs, particularly after 1871, heightens the value of attorney general opinions advising the president and executive agents in Indian-law matters. Attorney general opinions are strongly persuasive, although they are not binding on executive officers or the courts. Taxation, leasing, reservation boundaries, trust matters, and general land questions have all been frequent subjects for attorney general opinions on Indian affairs. Attorney general opinions for the nineteenth century are more easily accessed than contemporary ones.

The solicitor is the chief legal officer of the Department of the Interior. Within the Solicitor's Office there is a Division of Indian Affairs. When requested by the secretary or another officer of the Department, the solicitor renders opinions on Indian matters. These opinions are not binding on courts, but are often accorded great weight. More frequently, these opinions are the last word on a subject because few are appealed or litigated. In the field of Indian law, Solicitor opinions have interpreted statutes, determined the status of Indian lands, defined tribal powers, and analyzed many other important issues. Most early Solicitor opinions were inaccessible to the researcher until the 1979 publication of *Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs, 1917-1974*.<sup>25</sup>

New appeals boards were created in 1970 to consolidate the quasi-judicial functions of the Department of the Interior. Two boards were to deal exclusively with Indian matters. A third, the Interior Board of Land Appeals, eventually took over some Indian cases. The functions and published decisions of the boards are important to researchers in the administrative law area. All fall under the Office of Hearings and Appeals.

Appeals on decisions of the Bureau of Indian Affairs and of other Department of the Interior officials in matters of Indian probate, lease agreements, grants and funding, and Indian entitlement under federal legislation are reported in the United States Department of the Interior Board of Indian Appeals' *Decisions*, beginning in 1970.

Appeals from decisions on land selection under the Alaska Native Claims Settlement Act are published in volumes one through seven of the United States Department of the Interior Alaska Native Claims Appeals Board *Decisions*. After the Alaska Native Claims Appeals Board was abolished in 1982, cases arising under the Alaska Native Claims Settlement Act were transferred to the Interior Board of Land Appeals which

began publishing *Decisions* in 1970.

Administrative decisions and legal opinions rendered by the United States Department of the Interior, including those on Indian matters, are published in the official *Decisions of the Department of the Interior*, dating back to 1881. Coverage is selective and can include decisions of the Solicitor and decisions from any of the boards of the Office of Hearings and Appeals. For the Indian law researcher, this set is one of the most readily accessible administrative law sources and the best indexed.

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#### **A HIDDEN RESOURCE: INDIAN-CLAIMS REPORTS**

Despite federal immunity, Indian tribes were occasionally provided a mechanism for lodging a claim against the federal government. Executive commissions, Congress, and federal and special courts have all acted to hear disputes and determine remedies for tribal claims. However, in the decade after the Court of Claims was created in 1855 to hear claims against the federal government, Indian claims were specifically barred. Consequently, claims by Indian tribes against the government could not be brought in any forum. From time-to-time Congress responded to petitions by passing jurisdictional acts that allowed a specific tribal grievance to go before the Court of Claims. Under this system, only 142 Indian-claims cases were adjudicated in 90 years.

In 1946 Congress created the Indian Claims Commission (ICC) as a temporary tribunal to hear every pre-1946 Indian claim against the United States. Claims arising after August 13, 1946, were to be heard in the Court of Claims. The causes of action could be based on legal, equitable, or even "moral" grounds, including failure of the government to deal fairly and honorably with Indians. Within the five-year period for filing ICC claims, over 600 dockets were set (some cases were split into multiple dockets). No personal claims of individual Indians were accepted. Generally, claims related to compensation for land ceded to the federal government by treaty.

The ICC first made a determination on the claimant tribes' title and the specific amount of land ceded. Next, the value of the land at the time of transfer was determined. If past compensation to the tribe was found inadequate, a cash settlement (without interest) was awarded. Finally, the commission considered General Accounting Office evidence of any federal gratuities granted a tribe or payments made to the tribe under

24. U.S. DEPT. OF JUSTICE., OFFICIAL OPINIONS OF THE ATTORNEYS GENERAL OF THE UNITED STATES: ADVISING THE PRESIDENT AND HEADS OF DEPARTMENTS, IN RELATION TO THEIR OFFICIAL DUTIES (1873- ).

25. U.S. DEPT. OF THE INTERIOR., OFFICE OF THE SOLICITOR, OPINIONS OF THE SOLICITOR OF THE DEPARTMENT OF THE INTERIOR RELATING TO INDIAN AFFAIRS, 1917-1974 (2 vols., 1979).

**Justice Sandra Day O'Connor described tribes as a "third sovereign," standing with states and the federal government.**

treaty terms. All federal compensation to the tribe was offset against the award.

The Indian Claims Commission was expected to complete its work in ten years, but its life was extended several times by Congress. The ICC was finally dissolved on September 30, 1978, at which time it transferred about 100 pending cases to the Court of Claims (now called the United

States Court of Federal Claims).

The decisions of the ICC are published in various formats, but the most convenient access is the digitized 43 volumes and index (incomplete) available online through Oklahoma State University (<http://digital.library.okstate.edu/icc/index.html>). The hidden resource of the ICC is an exceptionally rich evidentiary record. There are transcripts of testimony and written reports from anthropologists, archaeologists, economists, forestry experts, geographers, geologists, historians, and linguists whose expertise helped commissioners determine the extent of tribal land holdings and their value. This is a source of tribal history, a record of the course of dealings between tribes and the federal government, and a documented background of tribal land holdings within state borders. Unfortunately, the records of the U.S. Indian Claims Commission containing this evidence are hard to access, but have been reproduced in microform<sup>26</sup> and collected by major libraries. Indexing is incomplete, but some help is found in *Index to the Expert Testimony Before the ICC: The Written Reports*.<sup>27</sup>

### RESEARCHING TRIBAL LAW

American Indian tribes are self-governing, autonomous entities that may legislate, regulate, police, and adjudicate. Justice Sandra Day O'Connor described tribes as a "third sovereign,"<sup>28</sup> standing with states and the federal government. With more Indian tribes being recognized and with the reinvigoration of tribal governments and tribal courts, and with the renewed economic power of some tribes, an increasing number of citizens and lawyers are encountering the third American sovereign. These interactions can be confusing because there is little understanding that tribes are politically acknowledged governmental units – with sovereign immunity – not simply racial defined groups, and that tribal law is unique to each Indian nation.

The primary sources of a tribe's law can include the tribal constitution, tribal code, miscellaneous laws, statutes, ordinances, and administrative regulations. Only a few tribes formally publish their tribal codes. If the tribal courts issue writ-

ten opinions, they also constitute primary law for the tribe, but some tribes adhere to orally transmitted, non-written, customary law. Primary sources affecting tribal law may also include treaties with the United States government, agreements and executive orders specific to the tribe, and federal laws applicable to the tribe.

In 1993, an estimated 170 tribes had a court system; today more than 280 tribal courts are operational. The *United States Tribal Courts Directory*<sup>29</sup> provides tribal court contact information, listing administrators, judges, and whether or not opinions are published.

There are three types of tribal courts functioning in the United States: (1) traditional courts, which are most prevalent in the Southwest where pueblo cultures were somewhat insulated from the massive breakdown of tribal social and political traditions in the second half of the nineteenth century; (2) tribal courts or IRA courts, which are the predominate model and are authorized by tribal constitutions and apply tribal law (often established under the provisions of the Indian Reorganization Act and as a replacement for Courts of Indian Offenses); and (3) Courts of Indian Offenses (also called "CFR courts" because their authority and operational rules are specified by the Bureau of Indian Affairs in the *Code of Federal Regulations*).

Researching tribal law requires persistence, but the online Tribal Law Gateway at the National Indian Law Library (<http://www.narf.org/nill/>) offers access to a large collection of tribal codes and constitutions. This electronic gateway also links to tribal law documents found elsewhere. Tribal court opinions are selectively published in the *Indian Law Reporter*,<sup>30</sup> but the best way to find tribal court decisions is online. Two websites offering tribal court decisions are the National Tribal Justice Resource Center (<http://www.ntjrc.org/>) and the Tribal Law and Policy Institute (<http://www.tribalinstitute.org/>). These websites have a great deal of other information and are excellent starting points for research on tribal law and government, tribal courts, and tribal judges.

### RESEARCHING TRIBAL-STATE INTERSECTIONS

Jurisdictional issues and controversies have long been a center point of tribal-state-federal contact. This is an area requiring the careful research suggested in the introduction: it is innately complicated, and over the years, the rules have drastically changed. There is also inconsistency from state-to-state. Reference to *Cohen's Handbook of Federal Indian Law* and *Indian Law in a Nutshell* will provide an informed backdrop for further research specific to the state and tribal jurisdictional question at issue. For a policy discussion of this issue, see *Building on Common Ground: A National Agenda to Reduce Jurisdictional Disputes Between Tribal, State, and Federal Courts*, a report with recommendations sponsored by the State Justice Institute, Conference of Chief Justices, the Native American

26. *Expert Testimony Before the Indian Claims Commission* [microform] (1973- ).

27. NORMAN A. ROSS, COMP. AND ED., *INDEX TO THE EXPERT TESTIMONY BEFORE THE ICC: THE WRITTEN REPORTS* (2001).

28. Sandra Day O'Connor, *Lessons from the Third Sovereign*, 33 TULSA

L.J. 1 (1997).

29. APRIL SCHWARTZ, *UNITED STATES TRIBAL COURTS DIRECTORY* (3d ed. 2008).

30. Published by the American Indian Lawyer Training Program since 1974.

Tribal Courts Committee of the National Conference of Special Court Judges of the American Bar Association, the National American Indian Court Judges Association, and the National Center for State Courts. This report is posted on the Tribal Court Clearinghouse website (<http://www.tribal-institute.org>) under the “State Law” tab.

The appropriate treatment of tribal court outputs poses questions for states. While the full-faith-and-credit clause of the United States Constitution requires every state to respect and enforce the judgments of other states, there is no single mandate to guide state courts in handling tribal court judgments and orders. With mixed results, federal legislation has occasionally included a full-faith-and-credit provision, such as the Violence Against Women Act<sup>31</sup> requirement that tribes and states respect each others’ protection orders. But as a general matter, each state must adopt court rules on this point. Some are looking to comity, the doctrine allowing enforcement of foreign judgments in domestic courts, as a legal theory for the enforcement of tribal judgments. Other states are less caught up in the theoretical considerations, but find that controversy impedes timely solutions. Minnesota worked on the issue for years with a joint task force of tribal judges and state judges. Wisconsin and South Dakota set a fairly high bar, but North Dakota and Oklahoma were early adopters of a reciprocal approach. The 1994 Oklahoma court rule is posted on the Oklahoma State Courts Network at <http://www.oscn.net>.<sup>32</sup>

Minnesota legislators have access to *Indians, Indian Tribes, and State Government*,<sup>33</sup> a guidebook discussing major issues between tribes and state government, including criminal and civil jurisdiction, gaming, liquor regulation, taxation, human services, and education. Loaded with maps and statistics, this remarkable document was written by legislative analysts in the Research Department of the Minnesota House of Representatives and can serve as a model for any state seeking to make informed policy decisions.

Some innovative work on a broad spectrum of other tribal-state issues results from the teamwork of the National Conference of State Legislatures (NCSL) and the National Congress of American Indians. Their State-Tribal Relations Project is addressing several specific, substantive issues between states and tribes. Both organizations claim a commitment to education and practical problem solving. The project maintains a list of all the state committees and commissions on Indian affairs (<http://www.tribal-institute.org>).

An excellent website for tapping into state-tribal reports and shared information is that of the previously cited Tribal Court Clearinghouse. Under the “State Law” tab there are pages of “Tribal-State Relations” information with excellent links. Researchers can access state gaming compacts, tax agreements, and the increasingly important law-enforcement agreements (more than 200 tribes now have a police force). This page also links to policy papers and a host of other resources and organizations. Unlike just a decade ago, Internet research on best practices for almost any aspect of the state-tribal law is likely to be profitable and informative.



*Nancy Carol Carter has been a student of American Indian law since attending the University of Oklahoma and serving as an editor of the American Indian Law Review. She is a professor of law at the University of San Diego and has spoken and published extensively on the law and literature of federal Indian law and Native American groups. She created and maintains the University of San Diego Native American Website, which chronicles the original inhabitants of San Diego County, and the online Indian Nations Archives: How to Build a Tribal Legal History linked from the National Indian Law Library Tribal Law Gateway.*

31. 42 U.S.C. § 13701 (2000).

32. Rules of District Courts, Title 12, Chapter 2, Appendix B, Rules for District Courts in Oklahoma, Rule 30—Standard for Recognition of Judicial Proceedings in Tribal Faith and Credit.

33. HOUSE RESEARCH DEPARTMENT, *INDIANS, INDIAN TRIBES, AND STATE GOVERNMENT* (4th ed. 2007), available at <http://www.house.leg.state.mn.us/hrd/pubs/indiangb.pdf> (last visited July 15, 2009).

## AMERICAN JUDGES ASSOCIATION FUTURE CONFERENCES

### 2010 Midyear Meeting

Tucson, Arizona  
May 19-21  
Loews Ventana Canyon Resort  
\$189 single/double

### 2010 Annual Conference

Denver, Colorado  
Westin Tabor Center  
October 3-8  
\$205 single/double

### 2011 Midyear Meeting

Hilton Head, South Carolina  
Westin Hilton Head Island  
April 14-16  
\$209 single/double

### 2011 Annual Conference

San Diego, California  
Westin Gaslamp  
September 11-16  
\$249 single/double