Chapter One

INTRODUCTION: INDIANS AND INDIAN LAW

SECTION A. THE STUDY OF INDIAN LAW

1. WHAT IS FEDERAL INDIAN LAW?

The field of federal Indian law involves a distinct body of law that regulates the legal relationships between Indian tribes and the United States. In turn, notions of federalism dictate a unique relationship limiting the reach of state laws over tribes. The tribes, their members, and lands held by both are dramatically affected by federal Indian law.

Tribal law, as found in modern-day tribal constitutions and codes, and in tradition and custom as interpreted by tribal courts, affects and in turn is affected by federal Indian law. Increasingly, federal and state courts enforce tribal law according to general legal principles such as full faith and credit and comity. Congress in recent years has passed specific legislation giving legal recognition to tribal law and jurisdictional authority within the United States legal system.

The body of federal Indian law—expressed in separate volumes of the United States Code and the Code of Federal Regulations, in some 380 treaties, in hundreds of opinions of the Solicitor of the Department of the Interior, in thousands of cases, and in scores of law review articles—is expanding rapidly. The Supreme Court often decides more Indian cases than the numbers of Indians relative to the population as a whole would seem to justify. The proliferation of Indian law suggests two significant points, both accurate: First, the interests and rights of more than Indians are concerned. Second, Indians, more than any other ethnic group, are subject to extensive legal regulation of their rights.

The field of Indian law implicates other branches of legal study such as real property, international law, administrative law, constitutional law, water law, federal jurisdiction, procedure, contracts, criminal law, and others. But a case is not automatically an Indian law case because of the race of any litigant. The dispute must arise within Indian country

(which includes all land within the boundaries of an Indian reservation) or be governed by one of the relatively few Indian treaties or statutes that apply outside of Indian country.

Indian policy often has shifted abruptly. Yet Congress regularly enacts new laws to implement changed policy without abolishing old laws that were intended as instruments of an earlier policy. Typically, current goals and interests of the dominant society have been reflected in Indian policies without regard to their particular wisdom for Indians. But promotion of non-Indian goals and interests has sometimes converged with Indian desires for recognition and protection of valuable Indian rights. Thus, treaties signed more than two centuries ago are given legal force today still, under well-established principles of federal Indian law.

Federal Indian law has been described as "complex" or "anomalous." Many rights and obligations are unique to the federal-tribal relationship, and many principles are different for different groups of Indians because they have been singled out for special legislation, because of their treaty provisions, or because of their geographic location. Nevertheless, there is a far greater coherence than is usually understood. Federal Indian law focuses on three central sets of concerns:

- Tribal sovereignty and Indian property rights
- Federal power and obligations
- Jurisdiction over the reservation

Tribal Sovereignty and Indian Property Rights. Originally, Indians governed themselves free of outside interference or control. As the New World was colonized something had to be done about the continent's aboriginal inhabitants. Very early it was apparent that the tribes could be contained or decimated by force. But the costs in lives, materiel, time and conscience were far too great. Indians were in the way; their lands were needed for settlement and the frontier was too vast to defend against attacks by "hostile Indians." Thus, the United States' policy of negotiating land cessions in treaties and agreements, with certain promises and rights in return, was born of necessity and convenience. It drew on an age-old theory of the colonizing nations of Europe that arrogated to Christian "discoverers" the right to extend their dominion and sovereignty over aboriginal peoples.

One of the ingredients of the process, however, was treatment of tribes as political entities to the extent necessary to procure their consent to cession of their right to occupy the land. The process of obtaining Indian lands and containing the tribes was largely done by recognizing them as sovereigns, then negotiating agreements with their representatives. The motive was as much to facilitate expedient colonization by the Europeans as it was to deal humanely with natives. It put the colonizing nation and its successors in the position of the exclusive purchaser of Indian title (as against other Europeans) and it limited that "title" to a right of occupancy. The legal legacy became a source of

foundational principles that were incorporated in the law of the United States when it was founded and which persist today in federal Indian law.

By the time the Constitution was adopted, there was a long tradition of dealing with tribes as entities capable of making treaties. Treatymaking with them indicated the tribes' legal capacity as nations. Sovereignty of tribes continues today as an important principle for understanding Indian legal relations. Congressional legislation and a long line of cases issued by the Supreme Court has affirmed that tribes retain important powers of self-government within Indian country.

The relationship of Indians to the federal government, however, is described as "dependent," with the tribes relying on the United States for protection. The European nations presumed an exclusive right to deal with and extinguish the Indians' land titles. To preserve its monopoly over land transactions, a European "discoverer" would offer military protection from encroachment and harassment by non-Indians. The colonizing nations, and later the United States, agreed to continue such protection in return for the Indians' pledges of peace and fealty to these stronger sovereigns. Later treaties ceded vast tracts of western land to the government to open the way for white settlement. Often the government insisted that it was incapable of protecting the Indians against the settlers' encroachment in such a large area of the country and the tribes most oftentimes reluctantly complied. Sometimes when they did not Congress passed legislation to diminish tribal holdings and open the lands anyway. Thus treaties securing lands to Indians in perpetuity, or "forever," are viable and enforceable, but they are subject to the federal powers as discussed below.

Another result of the legal relationship of tribes with the United States is that Indian people continue to be ruled by their own laws on the reservation. Today tribal governments exercise legislative, judicial, and regulatory powers and it is clear that their basic authority is derived from their aboriginal sovereignty, though additional powers can be delegated, or recognized and affirmed by Congress. Indeed, Indian governments, with federal government support and cooperation, are rapidly expanding their operations to implement their jurisdictional power over the reservation through tribal courts, zoning ordinances, taxation bureaus, environmental controls, business and health regulation, and fisheries and water management codes.

So long as sovereign tribal rights are not voluntarily ceded by the tribes in treaties or in other negotiations approved by Congress, or they are not extinguished by Congress, they continue in existence. Rights not specifically ceded in a treaty or agreement, or not regarded under principles of federal Indian law as inconsistent with the tribes' status as dependent on the United States, are considered to be reserved. And when cessions are made or rights are extinguished they are to be construed narrowly as affecting only matters specifically mentioned. Thus, the doctrine of reserved rights dictates that a treaty silent on

whether the Indians retained hunting and fishing rights should be read as implying the continued existence of such rights. The courts infer a purpose on the part of both the government and tribes that such rights would not be lost or taken away in providing for the future existence of the tribe unless it is done expressly. So if Congress passes legislation to terminate a tribe's federal relationship rooted in a century-old treaty, and removes the status of its members as Indians under federal laws, tribal hunting and fishing rights will still survive if the new legislation is silent as to them.

It is under the reserved rights doctrine that Indians have first call on much of the West's invaluable water resources. Tribes are entitled to enough water to meet their present and future needs from such over-committed rivers as the Colorado in the parched Southwest and the Missouri on the Great Plains. The right may be exercised notwithstanding the established uses and needs of non-Indian farmers and communities on the same streams. This situation has created serious concerns among water users in the arid West.

Indians control other significant resources. They reserved with their lands (and in a few cases beneath ceded lands) rights to extensive deposits of coal, oil, uranium, and other minerals. Use and development of these resources is consistent with the purposes of Indian reservations: "civilizing" the Indians and providing them with the means to a livelihood within their homelands. Decisions as to how and when (indeed, whether) they will be developed rest with the tribes. The right of self-government may be the most valuable reserved right and one that certainly was within the purposes of Congress and the tribes as they negotiated their future rights and relations.

Federal Power and Obligations. The treaties and agreements with tribes and two centuries of special legislation for Indians have established a unique legal relationship. There are several aspects to the relationship. One function of the federal role in Indian affairs is to preempt the exercise of state power over much of the area. Another is to carry out special obligations toward the tribes and their members.

Exercise of federal legislative power over Indian matters flows primarily from authority delegated to Congress by the Indian Commerce Clause of the United States Constitution, which confers power "to regulate Commerce * * * with the Indian Tribes." Beginning with an act to regulate trade and intercourse with Indians (1 Stat. 137) passed by the first Congress, that power has been used extensively. The first Trade and Intercourse Act passed in 1790, among other things, formalized the role of the federal government as a necessary participant in Indian land transactions—an ultimately protective provision designed to monopolize land transactions in the federal government and to prevent loss of Indian lands through sharp dealings by non-Indians. The principle traces to the original colonizing nations who were concerned more with defining their prerogatives as against other colonizers than with providing protection to the Indians. The 1790 Act and its successors underlie viable Indian

land claims. Thus, tribes in eastern states have established their rights in claims to large areas of land taken in transactions that did not conform with the Act.

There are numerous special programs for Indians. Most relate to protecting and developing Indian lands, assisting tribal governments, and addressing special educational and health needs of individual Indians. There is an explicit federal statutory preference for hiring Indians in the Bureau of Indian Affairs and Indian Health Service. The Supreme Court's validation of the preference four decades ago can be juxtaposed against its contemporary decisions on minority preferences in admission to public universities. Throughout the period, the Indian hiring preference has never been viewed as a suspect racial classification by the Court. Neither has it ever been justified as an attempt to reverse years of pervasive discrimination. Rather, the modern Supreme Court has continued to view this unique right of tribal Indians under United States law as part of fulfilling a trust relationship between sovereign entities. Congress implements this trust relationship under the Indian Commerce Clause and other provisions of the Constitution.

It is always important to remember that the power of Congress is so vast in the field of Indian affairs that it may even be used to eradicate the country's pledges to the tribes without their consent. Congress can abrogate treaty promises as old as the country, alter tribal powers of self-government, and extinguish not only title to land, but even the special relationship of a tribe to the federal government.

Congress' extensive power is not unlimited, however. Although no exercise of congressional power limiting or terminating Indian tribal rights has been set aside, the Supreme Court has said that it will review such actions to assure that they are rationally tied to the fulfillment of Congress' unique obligation toward Indians. And to the extent that Congress has not diminished Indian rights, the courts have said that they will enforce them.

The federal government's unique relationship of trust to the tribes has generated a number of important legal principles protecting Indian rights. Courts, for example, have insisted that the Executive department conduct its dealings with Indians by the highest fiduciary standards. Where a conflicting public duty of an official charged with responsibilities to Indians would lead to a decision or action contrary to Indian interests, the official should not act to the Indians' detriment. Often, though, officials have not behaved consistently with this legal duty.

Jurisdiction over the Reservation. Jurisdiction over the reservation is always a hotly contested issue in federal Indian law. State police power under the Tenth Amendment is attenuated in Indian country. The exercise of the federal government's legislative power excludes most state jurisdiction within the boundaries of reservations. The very estab-

lishment of a reservation for the "exclusive use and occupancy" of a tribe is an act that preempts state authority in conflict with that purpose. Thus, most state laws—important laws controlling zoning, environmental degradation, domestic relations and child welfare—do not extend to Indians in Indian country. Similarly, Indian lands, some 56 million acres, cannot be taxed by states or counties. The same applies to transactions with Indians that occur there. The existence of reservations as jurisdictional islands within state boundaries is supported by the exercise of federal authority. Exclusion of the state's control is said to be necessary to carry out the federal government's purpose in establishing the reservations. None of this means that states automatically accept every assertion of tribal immunity from state law on the reservation.

Indian rights have produced leading controversies over federalism. Federal courts have held that treaties reserved to Indians the right to attempt to harvest up to 50 percent of the salmon and steelhead from many of the nation's greatest fishing waters, including Puget Sound and the Columbia River. The importance of commercial and recreational fishing to the economy of the Northwest precipitated a refusal, even by state courts, to abide by a federal court recognition of such Indian rights. The Supreme Court noted in a 1979 Indian fishing rights decision that "except for some desegregation cases, the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century." These conflicts are not new: it is said that an 1832 decision in favor of the Cherokee Nation of Georgia prompted President Andrew Jackson to render his famous challenge: "John Marshall has made his decision; now let him enforce it."

The presence of three separate sovereigns in Indian country—tribal, federal, and state—creates a patchwork of jurisdictional rules and principles that has puzzled many a student of Indian law. Jurisdiction over a crime in Indian country may depend on the races of the perpetrator and victim, land ownership, the nature of the offense, and the state in which it occurs. Indian police and courts handle offenses in their territory but federal laws have given the United States law enforcement authority over many crimes. And courts have acknowledged that where tribal interests are not affected (i.e., when Indians and their lands are not involved), states may have authority to enforce their laws in the Indians' territory.

In addition to the place of tribal, federal, and state prerogatives in Indian law, one can almost add a fourth basic category: change. Indian law is a dynamic field, responding to changes in national policy and needs, and to changes occurring in Indian country throughout the United States as well.

2. WHY STUDY INDIAN LAW?

The study of Indian law may be more important than ever before in the nation's history. There are practical reasons related to the growing number of legal encounters. Legislation expands each year and litigation in Indian law remains important after its most active period in history during the 1970s and 1980s. Since then the numbers of cases have declined but the activism of the Court has increased.

A basic understanding of federal Indian law is vital to the success of any major business undertaking involving Indians and their land. This knowledge, then, is essential for attorneys representing tribes and for those representing entities and individuals having dealings with tribes. Indian real estate is used heavily by non-Indians who lease it for agriculture and industry. Tribes themselves engage in development through tribal corporations and in concert with non-Indian business entities. The extensive energy resources on some reservations lead to dealings between tribes and the oil and mineral industries. Casinos have flourished on some reservations since a federal law allowed tribes to legalize gambling following a Supreme Court ruling that state gambling laws do not apply on Indian reservations.

Indian legal issues are not confined to big business transactions. The general practitioner or public lawyer can become involved in an otherwise simple case affecting Indian land or people and will need to call upon federal Indian law. Litigation arising out of an adoption involving an Indian child or an automobile accident on the reservation can present complex jurisdictional and choice of law questions. A consumer collection matter may present jurisdictional difficulties that exist nowhere else. The applicability of a state excise tax to a reservation sale of a carton of cigarettes may turn on a detailed reading of the taxing law in light of Indian law principles.

Indian law in the United States also is cited by courts in other countries. Native groups around the world are moving to establish rights to land, natural resources, sovereignty, and cultural integrity. As the materials in Chapter 14 show, foreign nations often have looked to doctrine developed in this country in resolving their internal disputes over the rights of aboriginal peoples.

Another reason for studying Indian law is the understanding it fosters for the dominant society and its legal system. The response of the legal system to Indian issues tells a great deal about that system and about the tenor and contemporary morality of society. Consider the reaction of the system to Indian legal rights. The rights are valuable assets and can be tools for cultural survival. But they also can be

changed at the will of Congress. Extraordinary Indian rights held under old laws and the results of recent court decisions are cast into uncertainty by the threat of congressional abrogation and by a reluctance or refusal by federal and state authorities to observe them. Wisconsin state citizens seeking the abrogation of Indian fishing rights, Montanans objecting to tribal jurisdiction, Wyoming irrigators opposing Indian water rights, and New Yorkers resisting Indian land claims at times advocate congressional alteration of Indian rights to avoid upsetting non-Indian expectancies.

Indian legal rights are among the oldest in our society. They were not created by the United States in haste or under pressure from a superior power. Nor were they an exercise in altruism. Rights were recognized in order to provide a means for the occupation and sovereignty of the United States to be extended across the continent with a minimum of human and material costs, and without offending prevailing moral and religious precepts. The United States got what it bargained for, but the Indian rights that survive are sometimes attacked as granting too much to too few. In a system that reveres ancient rights, challenges to venerable principles are unusual in other settings. Respect for long-established rights, enforcement of transactions that were valid when made, and upholding property rights even if it means some people have more wealth than others, are basic tenets of the American system. But Indian law reveals a stark exception to the "rules of the game." Thus, politicians may urge abrogation of Indian rights on the basis that they are "old" or "inequitable." Is it a ground for ignoring or doing away with a family's century old, munificent trust that it is too old or that it unfairly benefits only a few persons? Would it be appropriate for Congress to take back the huge grants of land given to railroads because the quid pro quo—assistance in opening up transportation to the West—has long since been given?

Ultimately, one should ask whether Felix Cohen, the greatest of all Indian lawyers, was making an overdrawn point about the old promises when he discussed the role of Indian law in our public law system:

> [T]he Indian plays much the same role in our American society that the Jews played in Germany. Like the miner's canary, the Indian marks the shift from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith.

Felix S. Cohen, *The Erosion of Indian Rights, 1950–53,* 62 Yale L.J. 348, 390 (1953).