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Cases and Materials on Federal Indian Law (6th Edition)

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**Cases and Materials on Federal Indian Law (6th
Edition)**

*David H. Getches, Charles F. Wilkinson,
Robert A. Williams, Jr. and Matthew L.M.
Fletcher*

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Dedicated to

Vine Deloria, Jr. (1933–2005)
Legal scholar, author, mentor, friend

and

Wilma Mankiller (1945–2010)
Courageous and visionary tribal leader

Whose legacies are celebrated
by this book on Federal Indian Law.

PREFACE

It is difficult to imagine another field of law so dynamic as Indian law. In the thirty years since our first edition was published, Indian law has expanded at warp speed (at least relative to the typical pace for change in the law). Thus, updating a casebook is a more challenging and thoroughgoing task than it is in most other fields. More than eighty percent of the cases in this volume did not exist when the first edition came out in 1978. Moreover, the apparent directions of the law have shifted along with theoretical perspectives offered by the growing number of scholars who contribute to Indian law. A brief history of the evolution of this work is illustrative.

During the mid-1970s, David Getches, Charles Wilkinson, and Daniel Rosenfelt prepared the first edition after several years of representing Indian tribes and groups through legal services programs, particularly the Native American Rights Fund (NARF). The content and organization was based on materials prepared at NARF to train Indian legal services attorneys. At that point the field seemed arcane, but the authors believed it had promise as an intellectually exciting subject, charged with potent implications for a largely forgotten minority group and great symbolic force for our system of law. Teachers in a few law schools, including Professors Wilkinson and Rosenfelt who had become full-time law teachers, were offering Indian law courses. Fortunately, Professor Monroe Price had developed his pioneering casebook which appeared in 1973.

West Publishing Company took a considerable risk in accepting the first edition of this book for publication, doubting that there would be a sufficient market. Everyone's expectations were exceeded as courses proliferated in the nation's law schools and in undergraduate programs, and as enrollments in them increased. The organizing themes of the first edition are preserved here. The book proceeds from the foundation cases in Indian law, standing as landmarks in a rich historical landscape. The periods of history are classified in ways that are now standard and the organization was adopted in other works such as the 1982 edition of Felix S. Cohen's *Handbook of Federal Indian Law*, recently updated in 2005. The analysis of certain issues (e.g., preemption in Indian law) has been accepted by scholars and courts and the analytical approach to criminal jurisdiction has been used widely in classes and teaching materials.

By the time of the second edition in 1986, Professors Getches and Wilkinson found it necessary to integrate a remarkable spate of Supreme Court decisions that had applied the foundation cases in modern contexts—taxation, regulation, water rights, and fishing rights conflicts. With considera-

ble fealty, the Court carried forward the fundamental principles of federal preemptive powers, tribal sovereignty, and limited state authority in Indian country. A few decisions suggested curious aberrations. Since the second edition, the case law represented in the book has focused almost entirely on United States Supreme Court decisions, with some tribal court cases added to convey an understanding of how the increasingly sophisticated tribal judicial systems function. Provocative, new Indian law scholarship was added, along with materials on applications of Indian law principles to Alaska Natives, Native Hawaiians, and indigenous peoples in other countries.

The third edition saw several major changes. The addition of Professor Williams as an author gave the book greater historical depth and sharpened the moral questions raised in studying the subject, with the inclusion of his original research revealing precedents for the foundations of Indian law tracing to medieval times. Similarly, the growing body of materials in critical race studies could be well-represented because of Professor Williams' leadership in that field. And he also enriched the book's coverage of international and comparative materials.

Most striking in the third edition was the inclusion of new cases that were apparently out of step with the most venerable and reliable principles in the field and seemed to be built on the "aberrations" included in the second edition. This phenomenon, as the first pages in many Indian law articles of this period illustrate, led newcomers to the field to describe it in terms of its complexity and confusion. Indeed, the Supreme Court had become especially active in protecting non-Indian rights and property and began to write opinions that created exceptions to established, two hundred year-old principles; they could be read as carving out new principles.

The fourth edition confirmed a continuing trend of Supreme Court decisions that departed from the foundation cases that constituted most of the first edition and which still dominate the first part of the book. The effect of these decisions was to erode and fragment the territory where tribal law prevails, and suggested a serious undermining of tribal sovereignty, even as tribes were becoming more competent and determined to govern.

The fourth edition also added new material on reservation economic development, examining the role and importance of tribal sovereignty in this area where tribes continue to gain ground economically. Legalized gambling, which has proven to be lucrative for many tribes, was also covered in more detail than in earlier editions.

The fifth edition demonstrated that in many ways, Indian law has reached a crossroads. New Supreme Court decisions suggested that the Justices are deeply divided over fundamental questions in the field. One of the Justices has gone so far as to say that Indian law is "schizophrenic," and the decisions added to the fifth edition on important issues such as the scope of the federal trust responsibility to tribes, the extent of congressional plenary power over Indian affairs, and limits on tribal sovereignty over non-members revealed that the Rehnquist Court fomented instability and unpredictability in the field. The fifth edition also added new materials on tribal courts and

tribal customary law, protection of Indian sacred sites on public lands, and comparative and international human rights developments.

The sixth edition, with the inclusion of author Matthew L.M. Fletcher, argues for the first time that Native nations have moved into a new era of law and policy—nation-building. Self-determination has helped to propel Native nations into an era of building modern and successful nations, and this edition incorporates materials on the reality of ground-level tribal governance that draw on Professor Fletcher’s expertise and experience concerning tribal law and tribal courts. The Supreme Court’s dissonance on the foundational principles of federal Indian law—this will be the first edition of the casebook unable to report on a significant advance or defense of tribal interests in the federal courts—has motivated Native nations to advance the field in legislative and regulatory arenas. Further, given the approval by the Obama Administration of the United Nations Declaration on the Rights of Indigenous Peoples, Native nations may be looking farther outward to assert their basic human rights as indigenous peoples.

As with prior editions, we are deeply indebted to many colleagues who contributed to the content and direction of the book. Among those whose comments, suggestions, and ideas were influential are: Professor Barbara Cosens of the University of Idaho furnished valuable information on tribal water rights settlements. Professor Kate Fort offered excellent commentary on the Indian Child Welfare Act materials. We also thank Wenona Singel, John Petoskey, and Zeke Fletcher, who commented on and supplied materials for the tribal courts and gaming materials.

We also want to acknowledge the fine research and editorial assistance of University of Colorado Law School student Anne Mariah Tapp, Class of 2012, and University of Arizona Rogers College of Law students Katherine C. Belzowski, LL.M., Grant Christensen, LL.M., Joseph Ezzo, Jr., Class of 2012, Jill Marie Kappus, LL.M., Sherri L. Mitchell, Class of 2011.

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A word on our use of excerpted material is in order. In addition to our edited versions of judicial decisions we include abridgements of the copyrighted articles and other material with permission. Our acknowledgments to the authors and other copyright holders begin on the next page. In reprinting excerpts of cases and other materials we have indicated our omissions of text with “ * * * ” while preserving the author’s indication of omissions from quoted material by use of “ . . . ”. We have, however, omitted citations to cases and other authority without notation. Footnotes in the original work also have been eliminated without notation, although where they are included

in the excerpt, we have used the original numbering. Footnotes signaled with an asterisk and the notation “Ed.” were added by us.

D.H.G.
R.A.W.
C.F.W.
M.L.M.F.

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