

2005

Cohen's Handbook of Federal Indian Law

Barbara L. Creel

University of New Mexico - School of Law, creel@law.unm.edu

Gloria Valencia-Weber

University of New Mexico - School of Law, valenciaweber@law.unm.edu

Christine Zuni Cruz

University of New Mexico - School of Law, zunicruz@law.unm.edu

Kenneth Bobroff

University of New Mexico - School of Law, kipbobroff@gmail.com

Kevin Washburn

University of New Mexico - School of Law, washburn@law.unm.edu

See next page for additional authors

Follow this and additional works at: https://digitalrepository.unm.edu/law_facbookdisplay

 Part of the [Indian and Aboriginal Law Commons](#)

Recommended Citation

Creel, Barbara L.; Gloria Valencia-Weber; Christine Zuni Cruz; Kenneth Bobroff; Kevin Washburn; and John LaVelle. "Cohen's Handbook of Federal Indian Law." (2005): 1622 pages. https://digitalrepository.unm.edu/law_facbookdisplay/65

This Book is brought to you for free and open access by the School of Law at UNM Digital Repository. It has been accepted for inclusion in Faculty Book Display Case by an authorized administrator of UNM Digital Repository. For more information, please contact amywinter@unm.edu.

Authors

Barbara L. Creel, Gloria Valencia-Weber, Christine Zuni Cruz, Kenneth Bobroff, Kevin Washburn, and John LaVelle

**COHEN'S
HANDBOOK OF
FEDERAL INDIAN
LAW**

2005 EDITION



QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call:

Shirley Lam-Lewis, J.D. 1-800-424-0651 Ext. 3246
Molly H. Miller, J.D. 1-415-616-4564
Outside the United States and Canada please call (415) 908-3200

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at (800) 833-9844
Outside the United States and Canada, please call (518) 487-3000
Fax number (518) 487-3584
Customer Service Website <http://www.lexisnexis.com/custserv/>

For information on other Matthew Bender publications, please call:

Your account manager (800) 223-1940
Outside the United States and Canada, please call (518) 487-3000

Library of Congress Card Number: 2005021550
ISBN 0-327-16444-1

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis, the knowledge burst logo, and Michie are trademarks of Reed Elsevier Properties Inc, used under license. Matthew Bender is a registered trademark of Matthew Bender Properties Inc.

Copyright American Indian Law Center, Inc., Albuquerque, New Mexico © 2005
Originally published in 1941.

All Rights Reserved.

No copyright is claimed in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material exceeding fair use, 17 U.S.C. §107, may be licensed for a fee of 1 dollar per page per copy from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, MA. 01923, telephone (978) 750-8400.

Editorial Offices
744 Broad Street, Newark, NJ 07102 (973) 820-2000
201 Mission St., San Francisco, CA 94105-1831 (415) 908-3200
www.lexis.com

MATTHEW  BENDER

Statement on Fair Use

LexisNexis Matthew Bender recognizes the balance that must be achieved between the operation of the fair use doctrine, whose basis is to avoid the rigid application of the copyright statute, and the protection of the creative rights and economic interests of authors, publishers and other copyright holders.

We are also aware of the countervailing forces that exist between the ever greater technological advances for making both print and electronic copies and the reduction in the value of copyrighted works that must result from a consistent and pervasive reliance on these new copying technologies. It is LexisNexis Matthew Bender's position that if the "progress of science and useful arts" is promoted by granting copyright protection to authors, such progress may well be impeded if copyright protection is diminished in the name of fair use. (See *Nimmer on Copyright* § 13.05[E][1].) This holds true whether the parameters of the fair use doctrine are considered in either the print or the electronic environment as it is the integrity of the copyright that is at issue, not the media under which the protected work may become available. Therefore, the fair use guidelines we propose apply equally to our print and electronic information, and apply, within §§ 107 and 108 of the Copyright Act, regardless of the professional status of the user.

Our draft guidelines would allow for the copying of limited materials, which would include synopses and tables of contents, primary source and government materials that may have a minimal amount of editorial enhancements, individual forms to aid in the drafting of applications and pleadings, and miscellaneous pages from any of our newsletters, treatises and practice guides. This copying would be permitted provided it is performed for internal use and solely for the purpose of facilitating individual research or for creating documents produced in the course of the user's professional practice, and the original from which the copy is made has been purchased or licensed as part of the user's existing in-house collection.

LexisNexis Matthew Bender fully supports educational awareness programs designed to increase the public's recognition of its fair use rights. We also support the operation of collective licensing organizations with regard to our print and electronic information.

Cohen's Handbook of Federal Indian Law 2005 Edition

Board of Authors and Editors

Editor-in-Chief

Nell Jessup Newton
Dean and Professor of Law
University of Connecticut School of Law

Executive Editors

Robert T. Anderson
Assistant Professor of Law and Director,
Native American Law Center
University of Washington School of Law

Judith V. Royster
Professor of Law and Co-Director, Native
American Law Center
University of Tulsa College of Law

Carole E. Goldberg
Professor of Law & Director, Joint Degree
Program in Law and American Indian
Studies
UCLA School of Law

Joseph William Singer
Professor of Law
Harvard Law School

John P. LaVelle
Professor of Law
University of New Mexico School of Law

Rennard Strickland
Philip Knight Professor of Law
University of Oregon School of Law

Associate Editor

Bethany R. Berger
Assistant Professor of Law
Wayne State University Law School

Contributing Authors

Kenneth Bobroff
Professor of Law
University of New Mexico School of Law

University of California, Hastings College
of the Law

Gavin Clarkson
Assistant Professor
University of Michigan School of
Information, School of Law, and Native
American Studies

Richard B. Collins
Professor of Law
University of Colorado School of Law

Jo Carrillo
Professor of Law

Barbara L. Creel
Assistant Federal Public Defender
Portland, Oregon
N. Bruce Duthu

Professor of Law
Vermont Law School

Philip P. Frickey
Richard W. Jennings Professor of Law
University of California at Berkeley School
of Law (Boalt Hall)

David Getches
Dean and Raphael J. Moses Professor of
Natural Resources Law
University of Colorado School of Law

Lorie M. Graham
Associate Professor of Law
Suffolk University Law School

Sarah Krakoff
Associate Professor of Law
University of Colorado School of Law

Robert Laurence
Robert A. Leflar Distinguished Professor of
Law
University of Arkansas, Fayetteville School
of Law

Stacy Leeds
Associate Professor of Law
University of Kansas School of Law

Vicki J. Limas
Professor of Law, Associate Dean of
Students, and Co-Director, Native American
Law Center
University of Tulsa College of Law

Melody MacKenzie
Assistant Professor & Director, Center for
Excellence in Native Hawaiian Law
University of Hawaii Richardson School of
Law

Richard Monette
Associate Professor of Law and Director,
Great Lakes Indian Law Center
University of Wisconsin Law School

Valerie J. Phillips
Assistant Professor of Law
University of Tulsa College of Law

Frank Pommersheim
Professor of Law
University of South Dakota School of Law

G. William Rice
Associate Professor of Law and Co-
Director, Native American Law Center
University of Tulsa College of Law

Lindsay G. Robertson
Orpha and Maurice Merrill Professor of
Law & Faculty Director, Center for the
Study of American Indian Law and Policy
University of Oklahoma College of Law

Pat Sekaquaptewa
Lecturer in Law & American Indian Studies
& Director, Native Nations Law & Policy
Center
UCLA School of Law

Alex Tallchief Skibine
S.J. Quinney Professor of Law
University of Utah S.J. Quinney College of
Law

Dean Suagee
Of Counsel
Hobbs, Straus, Dean & Walker, LLP

Melissa L. Tatum
Professor of Law and Co-Director, Native
American Law Center
University of Tulsa College of Law

Gloria Valencia-Weber
Henry Weihofen Professor of Law
University of New Mexico School of Law

Kevin Washburn
Associate Professor of Law
University of Minnesota Law School

Mary Christina Wood
Professor of Law and Dean's Distinguished
Faculty Fellow
University of Oregon School of Law

Kevin J. Worthen
Dean and Professor of Law
J. Reuben Clark Law School, Brigham
Young University

Christine Zuni Cruz
Professor of Law
University of New Mexico School of Law

Dedication

To LUCY KRAMER COHEN (1907-)

For her contributions to the first edition of this work and her constant support of the project.

TABLE OF CONTENTS

WHAT IS FEDERAL INDIAN LAW?

CHAPTER 1 HISTORY & BACKGROUND OF FEDERAL INDIAN POLICY

- § 1.01 Why History Matters
- § 1.02 Post-Contact and Pre-Constitutional Development (1492-1789)
- § 1.03 The Formative Years (1789-1871)
- § 1.04 Allotment and Assimilation (1871-1928)
- § 1.05 Indian Reorganization (1928-1942)
- § 1.06 Termination (1943-1961)
- § 1.07 Self-Determination and Self-Governance (1961-present)

CHAPTER 2 PRINCIPLES OF INTERPRETATION

- § 2.01 The Field of Federal Indian Law
- § 2.02 Canons of Construction
- § 2.03 Federal Laws of General Applicability

CHAPTER 3 INDIAN TRIBES, INDIANS, AND INDIAN COUNTRY

- § 3.01 The Primary Definitions of Indian Law
- § 3.02 Definition of Tribe
- § 3.03 Definition of Indian
- § 3.04 Indian Country

CHAPTER 4 INDIAN TRIBAL GOVERNMENTS

- § 4.01 Inherent Tribal Sovereignty
- § 4.02 Federally Imposed Limitations on Tribal Powers
- § 4.03 Congressional Authorization of Tribal Powers
- § 4.04 Tribal Governments
- § 4.05 Tribal Law
- § 4.06 Tribal Voting Rights and Election Law
- § 4.07 Specific Native Groups

CHAPTER 5 TRIBAL/FEDERAL RELATIONSHIP

- § 5.01 Sources of Federal Power Over Indians
- § 5.02 Scope of Federal Authority over Indian Affairs
- § 5.03 The Role and Power of the Bureau of Indian Affairs

TABLE OF CONTENTS

- § 5.04 Limitations on Federal Power
- § 5.05 Enforcement of the Federal-Indian Trust Against the Executive
- § 5.06 Indian Claims Against the United States
- § 5.07 The Role of International Law

CHAPTER 6 TRIBAL/STATE RELATIONSHIP

- § 6.01 General Principles Regarding Tribal and State Authority Over Indian Affairs
- § 6.02 Tribal Governing Power
- § 6.03 State Governing Power in the Absence of Federal Authorization
- § 6.04 State Jurisdiction Through Federal Authorization
- § 6.05 Tribal-State Cooperative Agreements

CHAPTER 7 CIVIL JURISDICTION

- § 7.01 Relation Between Legislative and Adjudicative Jurisdiction
- § 7.02 Tribal Jurisdiction
- § 7.03 State Jurisdiction
- § 7.04 Federal Jurisdiction
- § 7.05 Sovereign Immunity
- § 7.06 Choice of Law
- § 7.07 Enforcement of Judgments

CHAPTER 8 TAXATION

- § 8.01 Introduction
- § 8.02 Federal Taxes
- § 8.03 State Taxes
- § 8.04 Tribal Taxes
- § 8.05 The Problem of Multiple Tribal and State Taxation
- § 8.06 Status of Persons or Entities Taxed

CHAPTER 9 CRIMINAL JURISDICTION

- § 9.01 Introduction
- § 9.02 Federal Adjudicative Jurisdiction
- § 9.03 State Jurisdiction
- § 9.04 Tribal Jurisdiction
- § 9.05 Double Jeopardy

TABLE OF CONTENTS

- § 9.06 Establishing Locus/Conduct Occurring Both Inside and Outside of Indian Country
- § 9.07 Authority of Law Enforcement Officers
- § 9.08 Extradition
- § 9.09 Punishment, Incarceration, and Writ of Habeas Corpus

CHAPTER 10 ENVIRONMENTAL REGULATION IN INDIAN COUNTRY

- § 10.01 Sources of Environmental Authority in Indian Country
- § 10.02 Tribes as Primary Regulators under Federal Statutes
- § 10.03 Federal Pollution Control Regulations
- § 10.04 Federal Regulation of Wastes and Hazardous Materials
- § 10.05 Federal Environmental Response and Remediation Statutes
- § 10.06 Enforcement of Environmental Laws
- § 10.07 Federal Environmental Assistance to Tribes
- § 10.08 Environmental Impact Assessment

CHAPTER 11 INDIAN CHILD WELFARE ACT

- § 11.01 Legislative History and Purpose
- § 11.02 The Scope of ICWA: Threshold Requirements
- § 11.03 Jurisdiction and Enforcement of Judgments
- § 11.04 Procedural Protections in State Court
- § 11.05 Substantive Rights of the Child, Tribe, and Parent
- § 11.06 Constitutionality of the Indian Child Welfare Act
- § 11.07 The Existing Indian Family Doctrine
- § 11.08 Relation of ICWA to the Adoption and Safe Families Act of 1997

CHAPTER 12 INDIAN GAMING

- § 12.01 The Emergence of Gaming
- § 12.02 The Indian Gaming Regulatory Act
- § 12.03 Classes of Gaming
- § 12.04 Land Available for Gaming
- § 12.05 Tribal-State Compacts
- § 12.06 Remedies for Refusal to Bargain in Good Faith
- § 12.07 Other Remedies

TABLE OF CONTENTS

CHAPTER 13 FEDERAL INDIAN LIQUOR LAWS

- § 13.01 Federal Statutory Scheme
- § 13.02 State and Tribal Authority

CHAPTER 14 CIVIL RIGHTS

- § 14.01 Citizenship
- § 14.02 Rights of Indians as United States Citizens and Residents of the States
- § 14.03 Federal Constitutional Rights of Individual Indians
- § 14.04 Civil Rights of Persons Under Tribal Authority

CHAPTER 15 TRIBAL PROPERTY

- § 15.01 The Importance of the Indian Land Base in Preserving Tribal Existence and Sovereignty
- § 15.02 Tribal Property
- § 15.03 Trust Status
- § 15.04 Forms of Tribal Property
- § 15.05 Territorial Scope
- § 15.06 Federal Restraint on Alienation
- § 15.07 Land Acquisition and Consolidation
- § 15.08 Protection of Tribal Property against Unauthorized Use
- § 15.09 Extinguishment and Taking
- § 15.10 Tribal Personal Property

CHAPTER 16 INDIVIDUAL INDIAN PROPERTY

- § 16.01 Individual Interests in Tribal Property
- § 16.02 Individual Original Indian Title
- § 16.03 Allotments
- § 16.04 Trust Personality
- § 16.05 Inheritance, Wills, and Probate

CHAPTER 17 NATURAL RESOURCES

- § 17.01 Tribal Control of Natural Resources
- § 17.02 Surface Uses
- § 17.03 Mineral Resources

TABLE OF CONTENTS

§ 17.04 Forest Resources

CHAPTER 18 HUNTING, FISHING, AND GATHERING RIGHTS

- § 18.01 Aboriginal Hunting, Fishing, and Gathering Rights
- § 18.02 Origin of Reserved Hunting, Fishing, and Gathering Rights
- § 18.03 On-Reservation Indian Hunting, Fishing, and Gathering Rights
- § 18.04 Off-Reservation Hunting, Fishing, and Gathering Rights
- § 18.05 The Effect of International Agreements
- § 18.06 Regulation of Nonmember Activities in Indian Country
- § 18.07 Termination and Abrogation of Hunting, Fishing, and Gathering Rights
- § 18.08 Cooperative Agreements, Compacts, and Comanagement

CHAPTER 19 WATER RIGHTS

- § 19.01 Relation between Indian and State Water-Law Systems
- § 19.02 Sources of Indian Water Rights
- § 19.03 The Reserved Rights Doctrine
- § 19.04 Regulation of Water Rights
- § 19.05 Determination of Water Rights
- § 19.06 Federal Protection of Indian Water Rights

CHAPTER 20 TRIBAL CULTURAL RESOURCES

- § 20.01 Nature and Ownership of Indian Cultural Resources
- § 20.02 Protection and Repatriation of Cultural Resources

CHAPTER 21 ECONOMIC DEVELOPMENT

- § 21.01 Tribal Economic Development
- § 21.02 The Legal Dimensions of Development
- § 21.03 Tribal Finance
- § 21.04 Government Programs to Promote Development

CHAPTER 22 GOVERNMENT SERVICES FOR INDIANS

- § 22.01 Introduction
- § 22.02 Indian Self-Determination and Education Assistance Act: P.L. 93-638

TABLE OF CONTENTS

§ 22.03 Education

§ 22.04 Health Care

§ 22.05 Housing

§ 22.06 Social Services and Financial Assistance

§ 22.07 Support for Tribal Justice Systems and Legal Services

TABLE OF CASES

TABLE OF STATUTES

INDEX