FEDERAL INDIAN LAW PROFESSOR BIBER

LAW 286.5 FALL 2018

 Handout #1 – 8/22/18

**SYLLABUS**

GOALS

 The goals for this class are for students to be able to:

* Apply the major provisions of Federal Indian Law to circumstances that are likely to be relevant for clients or to important policy scenarios,
* Understand the relevant historical, cultural, political, and socioeconomic context of Federal Indian Law so as to be able to provide effective advice for clients and to contribute in a meaningful way to policy debates,
* Read, interpret, analyze, and critique treaty, administrative, and legislative materials commonly used in the field,
* Debate and explore major policy issues in Federal Indian Law and to develop their own perspectives on those issues
* Understand client goals and how to ethically advance those goals within the relevant legal framework
* Work together as a class to accomplish all of the above goals, consistent with the law school’s honor code

These goals relate to the following Berkeley Law learning outcomes for the course:

* Knowledge and understanding of substantive and procedural law;
* Legal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context;
* Exercise of proper professional and ethical responsibilities to clients and the legal system;
* Using the law to solve real-world problems and to create a more just society

MATERIALS

 The casebook for this course is American Indian Law: Cases and Commentary (3rd ed.) (abbreviated as CB on the syllabus). This syllabus is tentative, and will be revised as the semester proceeds.

 There is also supplemental reading that will be available on the Web through the following sources:

(a) Lexis or Westlaw

(b) Hein on-line (available at <http://heinonline.org/HOL/Welcome> or at http://www.law.berkeley.edu/library/dynamic/online.php?node=online#indexH)

(c) JSTOR (available at <http://www.jstor.org/> or at <http://www.law.berkeley.edu/library/dynamic/online.php?node=online#indexJ>)

(d) course website (available at <https://calcentral.berkeley.edu/> or at <https://ucberkeley.instructure.com/>).

Both Hein and JSTOR can be accessed for free from computers on the UCB campus. The syllabus indicates which supplemental reading is available from which source **in bold**. If you have any problems or difficulties accessing the materials please do not hesitate to let me know.

I may also hand out other supplementary material in the form of handouts. These Handouts are numbered and dated. I suggest that you keep these with your class notes or in a separate folder so that by the end of the semester you will have all of them. I also distribute handouts and other announcements through the course website. Please check our web page frequently.

I do frequently use powerpoint slides as an aid for course instruction. I will post those slides on the course website, at the latest, shortly after the class session in which they have been used.

SCHEDULE OF CLASSES

 Generally we will meet on Wednesdays in **Room 244** at the scheduled time of 3:35-6:15 p.m.  We will have a 15 minute break roughly half-way through each class session.

CLASS DISCUSSIONS AND DISCUSSION MATERIALS

 We will spend approximately the last 30 minutes to one hour of the class on discussions, problem solving, and guest lectures. Our goal in this section of the class is to connect the doctrine that we are learning to real world problems for tribes, Native Americans, and the Indian and non-Indian residents of Indian country. I also hope to give you an opportunity to apply the doctrine in ways that will help you learn that doctrine better, and develop basic professional skills in legal analysis, client problem solving, professional ethics, and oral presentation. Our discussions will be based on materials that I will assign for reading in advance of the class. These materials are listed in the syllabus for each week’s class under the Discussion heading. For some weeks I will also provide questions, roles, or additional background information to help guide your preparation for the class.

OFFICE HOURS

 My office is 436 North Addition and his telephone number is 643-5647. My e-mail is ebiber@law.berkeley.edu. I am available to talk with you after every class as needed. Regular office hours will be held on **Thursdays, 9:30 AM to 12:30 PM**. If you are unable to make those office hours, please contact me and I will try to find another time frame to meet.

GRADING

Your grade in this class will be determined as follows: Final examination 90%. Class participation 10%.

FINAL EXAMINATION

 There will be a take-home final examination during the law school final exam period. It will be 6 hours in length. The exam is open book, meaning that you may use your casebook, reader, class handouts and any other material that you have prepared. No commercial outlines or other materials are allowed. There will be a review session focused on the exam at the end of the semester.

CLASS PARTICIPATION

I expect everyone to participate in class. I will divide the class into groups of approximately 3-5 students. Each group will be responsible for preparing for a specific class, and each member of the group can expect to be called on during that class. I may assign specific roles or specific material for members of the group to prepare for that class. While I will focus on calling on the students in the group that is on-call for that class, I reserve the right to call on any student in class at any time. Your class participation grade will be based on your participation when your group is on-call or when I call on you at random. Student participation based on volunteering in class or questions asked in class will not affect your class participation grade. I strongly encourage volunteers and questions. There may come a time in the class when I need to move the discussion forward and not all questions can be answered. But I encourage you then to bring those questions to my office hours where we can discuss them fully. The bCourses website also has a discussion board feature where you can participate and add additional thoughts outside of the class period.

CROSS-ENROLLMENT

 I encourage graduate students from other departments to cross-enroll in this class. Cross-enrollment requires the permission of the instructor – please talk to us after class during the first week of classes if you wish to cross-enroll. I will discuss your prior background and experience in order to determine whether this class is suitable.

INTERNET USAGE IN CLASS

 Both laptop computers and the Internet can be a valuable component of the learning experience in the classroom, and I encourage you to use them where appropriate. However, in using both your laptop and Internet access during class, I ask that you be respectful of your classmates, the class, and us. Please limit your use of the computer and the Internet to class-related activities, and please do not use your computer and the Internet in a way that detracts from your or your classmates’ ability to contribute to the discussion in the classroom.

**Week 1: Introduction, Logistics, Colonial History (Aug. 22)**

* Casebook pp. 1-49 (Colonial background, *Johnson v. McIntosh*, Trade and Intercourse Acts)
* Discussion: Discussion questions (posted on course website)
* Discussion: Current-day controversies in the Federal Indian Law.
	+ Washington Redskins as a racial slur. Read: <http://www.nytimes.com/2016/05/22/sports/football/redskins-poll-prompts-a-linguistic-debate.html>; <http://www.uspto.gov/sites/default/files/news/USPTO_Official_Statement_on_TTAB_decision_in_Blackhorse_v_Pro_Football_Inc.pdf>
	+ Trump and Indian casinos. Read: <http://www.latimes.com/politics/la-na-pol-trump-american-indians-20160617-snap-story.html>
	+ Upstate New York tribal land claims. Read: <http://www.nytimes.com/2000/05/16/nyregion/battle-over-iroquois-land-claims-escalates.html>
* Discussion: Materials on current conditions on Indian reservations. Watch the video at: <https://www.youtube.com/watch?v=Hdt9ZBQy7WM&noredirect=1> For additional background, go to: <http://wapo.st/pineridgekids>

**Week 2: 19th Century History (Aug. 29)**

* Casebook pp. 50-105 (Removal, *Cherokee Nation v. Georgia, Worcester v. Georgia*, Reservations, Federal Plenary Power, *Ex Parte Kan-Gi-Shun-Ca*, *United States v. Kagama*)
* Discussion: Removal..
	+ Readings on Seminole Land Rights in Florida (posted on course website).
	+ Readings on Cherokee Removal (posted on course website)
	+ Andrew Jackson State of Union Address on removal (posted on course website)
	+ Joseph C. Burke, The Cherokee Cases: A Study in Law, Politics, and Morality, 21 Stan. L. Rev. 500, 529-30 (1969) (available on Hein)
	+ Background for role play assignments (posted on course website)

**Week 3: 20th Century History (Sept. 5)**

* Casebook pp. 105-163 (Allotment, *Lone Wolf v. Hitchcock*, *United States v. Winans*¸ Indian New Deal, Termination, Self-Determination, Backlash, *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wisconsin*)
* Discussion: Fractionation
	+ Casebook pp. 242-248 (*Cobell v. Norton* through note 1 after the case)
	+ Indian Land Tenure Foundation, fractionated ownership, at <https://www.iltf.org/land-issues/fractionated-ownership>
	+ *Hodel v. Irving*, 481 US 704 (1987)(invalidating the Indian Land Consolidation Act, an attempt at addressing fractionated ownership) (Read Parts I and III of the majority opinion)
	+ Land Buy-Back Program for Tribal Nations, U.S. Dept. Interior, at:  <https://www.doi.gov/buybackprogram>
	+ Kristina McCulley, The American Indian Probate Reform Act of 2004: The Death of Fractionation or Individual Native American Property Interests and Tribal Customs? 30 American Indian Law Review 401 (2005) (read Parts III, IV and V).
	+ Discussion questions (posted on course website)

**Week 4: Federal Power (Sept. 12)**

* Casebook pp. 165-208 (Statutory Interpretation Principles, *Menominee Tribe of Indians v. United States, United States v. Dion, Reich v. Great Lakes Indian Fish and Wildlife Comm’n*¸ Equal Protection, *Morton v. Mancari*, *Rice v. Cayetano*)
* Discussion: California tribes and Executive Order reservations.
	+ Readings on history of California tribes.
		- Excerpts from Indians of California (Prologue, p. 3-21) (on course website)
		- National Park Service summary of history of Native Americans in California:
			* <https://www.nps.gov/parkhistory/online_books/5views/5views1c.htm>
			* <https://www.nps.gov/parkhistory/online_books/5views/5views1d.htm>
		- Excerpts from Indians of California (Chapter 7, p. 171-186, Epilogue p. 203-217) (on course website)
		- Casebook pp. 229-30 (Executive Order reservations)
		- Executive Order creating Yurok Reservation (materials posed on course website)
		- Discussion questions on California tribes and Yurok tribal rights (materials posted on course website)

**Week 5: Defining a Tribe and Indian Country (Sept. 19)**

* Casebook pp. 251-286 (Tribal Definition, *United States v. Sandoval*, *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, *Mashpee Tribe v. Town of Mashpee,*  Federal Acknowledgement of Tribal Status, Indian Country, *Solem v. Bartlett, Hagen v. Utah, South Dakota v. Yankton Sioux Tribe*)
* Discussion: Role play based on a federal tribal recognition decision
	+ <http://www.nytimes.com/2016/06/28/nyregion/schaghticoke-tribe-connecticut-fights-for-piece-of-casino-industry.html>
	+ *In re Federal Acknowledgment of the Tolowa Nation*, Docket No. IBIA 14-086 (2016), found at <http://www.bia.gov/cs/groups/xofa/documents/text/idc1-033217.pdf>
	+ Background materials on role play for Tolowa Nation acknowledgment (posted on course website)

**Week 6: Tribal Property and Territorial Restoration (Sept. 26)**

* Casebook pp. 208-229 (Takings Claims by Tribes, *Tee-Hit-Ton Indians v. United States, United States v. Sioux Nation*); Casebookpp. 295-307 (Land Claims Litigation, *County of Oneida v. Oneida Indian Nation, City of Sherrill v. Oneida Indian Nation of New York)*
* Discussion: Indian identity
	+ Article on racial categorization in Virginia: <https://www.washingtonpost.com/local/how-a-long-dead-white-supremacist-still-threatens-the-future-of-virginias-indian-tribes/2015/06/30/81be95f8-0fa4-11e5-adec-e82f8395c032_story.html>
	+ Gerald Torres and Kathryn Milun, Translating *Yonnondio* By Precedent and Evidence: The Mashpee Indian Case, 1990 Duke L.J. 625 (Parts II, III, IV.C and V)
	+ “Who Gets to Decide Who Is Native American?” at <http://www.npr.org/2012/08/09/158494223/who-gets-to-decide-who-is-native-american>

**Week 7: Tribal Sovereignty (Oct. 3)**

* Casebook pp. 321-362 (Sources of Tribal Sovereignty, *Talton v. Mayes, United States v. Wheeler*, Indian Civil Rights Act, *Santa Clara Pueblo v. Martinez*¸ Tribal Rights and Women’s Rights, Tribal Sovereign Immunity, *Michigan v. Bay Mills Indian Community*)
* Discussion: Tribes that do not have fully written constitutions/legal systems
	+ Yurok Tribal Constitution (posted on course website)
	+ Hopland Band of Pomo Indians, Environmental Code (posted on course website)
	+ Background materials for discussion (posted on course website)

**Week 8: State versus Tribal Sovereignty I (Oct. 10)**

* Casebook pp. 391-443 (*Williams v. Lee*, *Warren Trading Post*, *McClanahan v. State Tax Commission of Arizona*, Public Law 280, *Bryan v. Itasca County*, *Washington v. Confederated Tribes of the Colville Reservation*, *White Mountain Apache Tribe v. Bracker*)

**Week 9: State versus Tribal Sovereignty II; Indian Child Welfare Act (Oct. 17)**

* Casebook pp. 454-462 (*Cotton Petroleum Corporation v. New Mexico*)
* Casebook pp. 486-520 (*Mississippi Band of Choctaw Indians v. Holyfield, Adoptive Couple v. Baby Girl*)
* Discussion: Guest speaker Rovianne Leigh on ICWA and practice in tribal courts (materials to be posted on course website)

**Week 10: Indian Gaming; Tribal Jurisdiction over Non-Members I (Oct. 24)**

* Casebook pp. 448-453 (*California v. Cabazon Band of Mission Indians, Rice v. Rehner*)
* Casebook pp. 462-486 (Indian Gaming Regulatory Act; *Rumsey Indian Rancheria of Wintun Indians v. Wilson, In re Gaming Related Cases, Colorado River Indian Tribes v. National Indian Gaming Commission*)
* Casebook pp. 521-537 (*Oliphant v. Suquamish Indian Tribe*)
* Discussion: Role play on legalization of marijuana
	+ Read pages 183-200 (from Division 10. Marijuana up to Section 34018) and pages 204-06 (Section 8 to Section 8.5) of the California initiative to legalize marijuana (posted on course website)
	+ Discussion Questions on marijuana legalization (posted on course website)

**Week 11: Tribal Jurisdiction over Non-Members II (Oct. 31)**

* Casebook pp. 537-580 (*Montana v. United States, Merrion v. Jicarilla Apache Tribe, Brendale v. Confederated Tribes and Bands of the Yakima Indian Reservation, National Farmers Union Insurance Companies v. Crow Tribe of Indians, Iowa Mutual Insurance Co. v. LaPlante, Strate v. A-1 Contractors*, *Atkinson Trading Co. v. Shirley*)*,*
* Discussion: Case study on creative solution to civil jurisdiction problems: Yurok tribe and illegal marijuana grows (Guest speaker: Scott Williams)
	+ Yurok Tribe Controlled Substances Ordinance (posted on course website)
	+ Newspaper coverage of marijuana cultivation on the Yurok Reservation (posted on course website)
	+ Discussion Questions on marijuana cultivation on the Yurok Reservation (posted on course website)

**Week 12: Tribal Jurisdiction over Non-Members III; Criminal Jurisdiction on Tribal Lands (Nov. 7)**

* Casebook pp. 580-590 (*Nevada v. Hicks*); Casebook pp. 592-93 (notes 2 and 3).
* Casebook pp. 307-319 (Indian Country Crimes Act, Major Crimes Act)
* Casebook pp. 594-620 (*Duro v. Reina, United States v. Lara*).
* Discussion: Practice problems on tribal jurisdiction.

**Week 13: Environment and Natural Resources I (Nov. 14)**

* Casebook pp. 629-653 (*United States v. Shoshone Tribe*¸ *United States v. Navajo Nation, City of Albuquerque v. Browner, Arizona Public Service Co. v. Environmental Protection Agency*)
* Discussion: TBD

**Week 14: Environment and Natural Resources II; Water Rights (Nov. 28)**

* Casebook pp. 443-48 (*New Mexico v. Mescalero Apache Tribe*)
* Casebook pp. 668-688 (*Washington v. Washington State Commercial Passenger Fishing Vessel Association)*
* Excerpts from United States v. Washington (on course website)
* Casebook p. 688-704(*Minnesota v. Mille Lacs Band of Chippewa Indians, State v. Buchanan*)
* Casebook pp. 707-718 (*Winters v. United States, Arizona v. California*).
* Discussion: TBD