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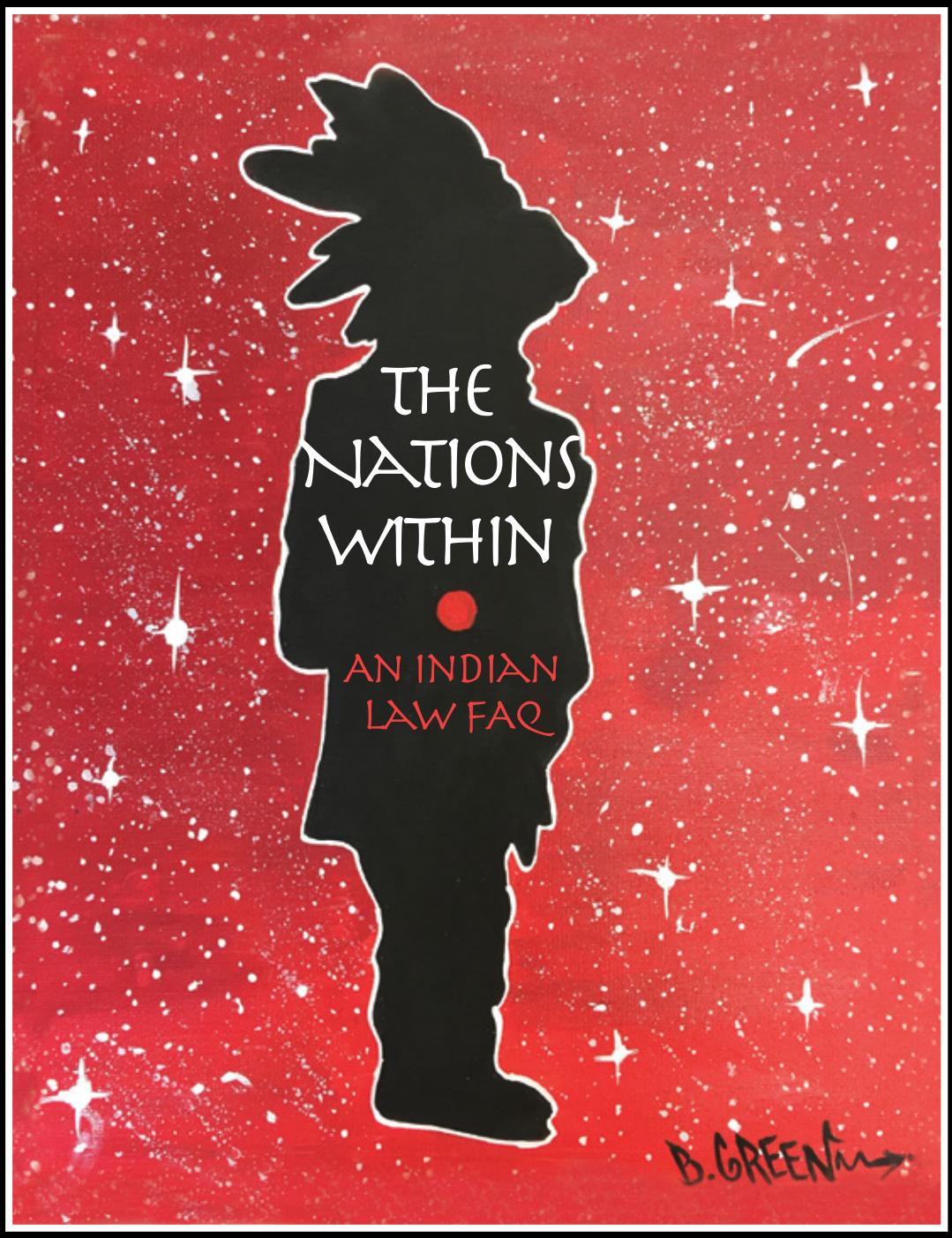

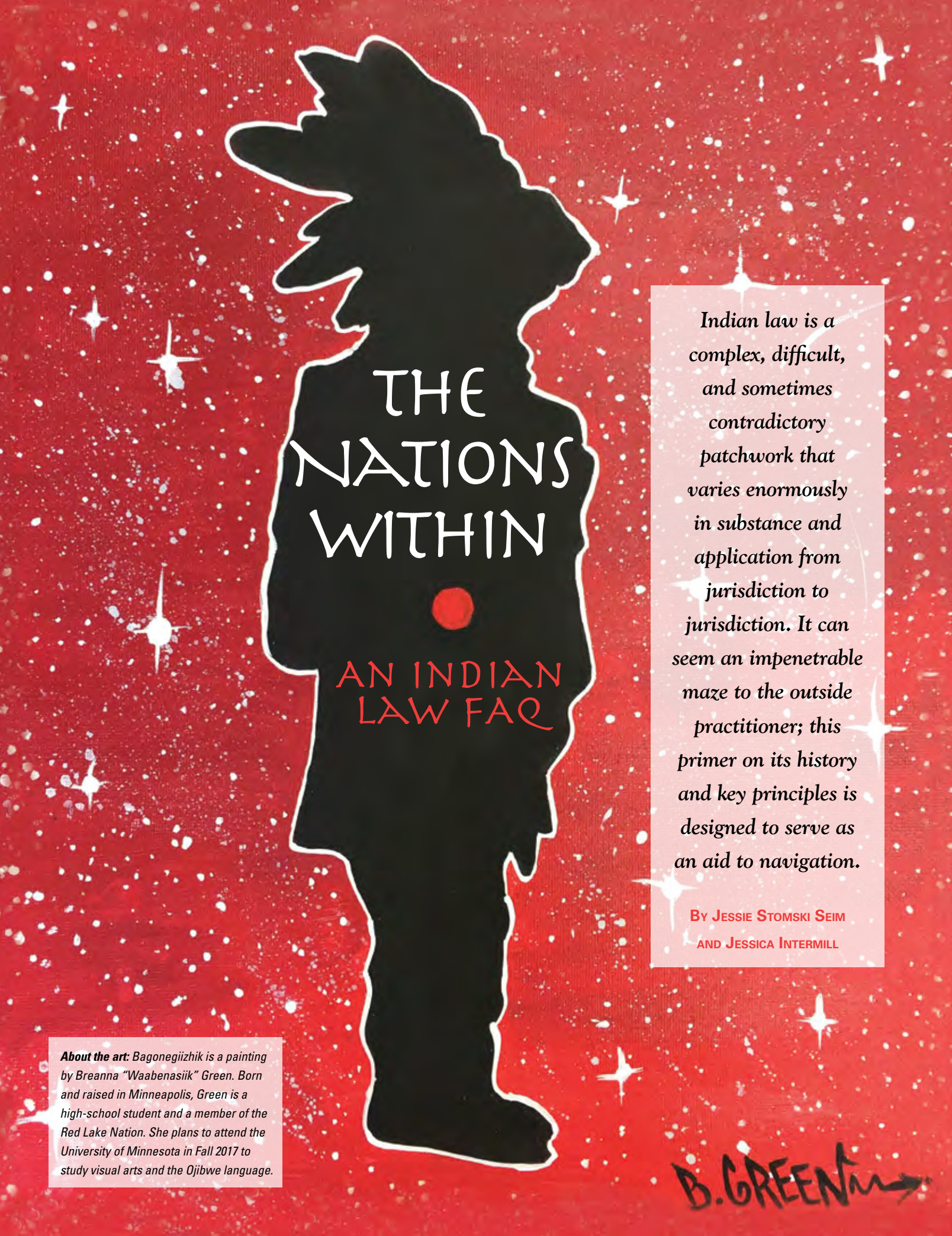

THE NATIONS WITHIN

AN INDIAN LAW FAQ

Indian law is a complex, difficult, and sometimes contradictory patchwork that varies enormously in substance and application from jurisdiction to jurisdiction. It can seem an impenetrable maze to the outside practitioner; this primer on its history and key principles is designed to serve as an aid to navigation.

By Jessie Stomski Seim and Jessica Intermill

About the art: *Bagonegiizhik is a painting by Breanna "Waabenasiik" Green. Born and raised in Minneapolis, Green is a high-school student and a member of the Red Lake Nation. She plans to attend the University of Minnesota in Fall 2017 to study visual arts and the Ojibwe language.*

B. GREEN

So you know that Minnesota is the English transliteration of Mnisota, a Dakota word meaning sky-tinted water. You've heard that the Minnesota Chippewa bands' hunting and fishing rules differ from those of the state, and that Duluth and the Fond du Lac band have been sparring for a while. And you've headed to a tribal casino once or twice. But do you know how many tribes are within Minnesota's borders? Within the United States?

And what do you know about Indian law? How comfortable would you be if a casino slip-and-fall or an on-reservation transaction crossed your desk? Before you answer, let's take a look at what Indian law is, where it comes from, and some of the unique challenges the subject presents.

What is an Indian tribe?

Indian tribes are "separate sovereigns pre-existing the Constitution."[1] But there is no single definition of an "Indian tribe." Tribes may refer to themselves as "tribes," "nations," "pueblos," "bands," or "rancherias," and may organize themselves in any manner of organizational structure. Each government—tribal, federal, and state—decides for itself whom to recognize as a tribe. For example, a group may call itself a tribe and be recognized by a state, but not by the federal government. Many groups are not recognized as tribes by state or federal governments, but may still be treated as tribes by other tribes.

For the most part, though, federal Indian law only applies to tribes who are "federally recognized." This status most often results from tribal application to the United States Department of the Interior. One tribe was recognized just this year, bringing the total number of federally recognized tribes in the United States to 567.

Federal recognition does not equal similarity. Historical experiences (including alliances as well as removal, termination, and restoration, discussed below) and cultural identities are particular to each tribe. For example, of the 11 federally recognized tribes in Minnesota, seven of these are Anishinaabeg (known in English as Ojibwe or Chippewa) communities, and four are Dakota (Sioux) oyate ("people" or "nations"). Whereas contact with French traders strongly influenced the history of the Anishinaabeg communities, the U.S./Dakota conflict features prominently in the history of the Dakota oyate. And each of these tribes' historical experience differs greatly from, for example, those of southeastern pueblos.

Who is an Indian?

In the law, "Indian" is a term of art. For purposes of federal law, "Indian" means a member of a federally recognized tribe, and it is generally appropriate to use the terms "Indian" or "tribal member." Different jurisdictional rules often apply depending on whether the parties are "tribal member Indians" (members of the tribe on whose Indian country a claim accrues), "nonmember Indians" (members of a tribe, but not the tribe on whose Indian country the claim accrues), or non-Indian (not a member of any tribe). Some tribes impose residency requirements that restrict membership or privileges to those who are born in or reside in the tribe's territory. Others impose blood quantum or descendency requirements. The underlying principle is that each tribe sets the terms of its own membership.

Outside of Indian law, "native American" is a prevalent phrase for a person of indigenous heritage, but it is most appropriate to ask each person you're working with how they identify themselves.

What is Indian country?

Territorial boundaries feature heavily in Indian law. Federal Indian law relies on the phrase "Indian country" to describe the territory comprising a tribe's reservation and any land held by the United States in trust for the tribe. Anyone (including members, nonmembers, a tribe, a state, and the federal government) can hold title to parcels of land within a reservation. The United States can hold land in trust both on and outside of a tribe's reservation, and sometimes does so for tribes that have no recognized reservation. Different jurisdictional rules often apply depending on whether a claim arises inside or outside of a tribe's Indian country, and a tribe's power is typically at its height on trust land.

In what ways are Indian tribes like other governments?

Tribes' inherent sovereignty allows them to organize and govern for the benefit of their citizens. Like state governments, tribes with sufficient means run their own education, human service, police, fire, court, and other government systems. They create jobs and manage programs relatied to a variety of civic purposes, including eldercare, the environment, and cultural resources. Some tribes have three or more separate branches of government, although the pervasive governance model empowers the tribal council to govern the affairs of the tribe. And like other governments, tribes' inherent sovereignty immunizes them from claims unless an effective waiver of immunity allows suit.

Why is the relationship between Indian tribes and everyone else so complex?

There are three principal reasons, and they correspond to the three types of governments that may (or may not) have jurisdiction in any Indian law case:

1. Each tribe is a distinct nation with its own political system (often including its own court) that enacts and enforces its own constitution, codes, and other law. Often, this tribal law applies to transactions and disputes with non-Indians.
2. The federal body of law addressed to Indians and tribes is sweeping and contradictory. Over the two centuries that Congress and the Supreme Court have built Indian law, federal policy has swung from treating tribes as sovereign governments to actively attempting to eliminate tribes back to supporting tribal sovereignty. Vestiges of each of these eras, described in more detail below, persist today.
3. States frequently have intergovernmental agreements, statutes, and case law that apply to their interactions with tribes. But sometimes federal Indian law completely divests state jurisdiction over tribes. Whether state law applies is regularly a fundamental question of Indian law cases.

Knowing which body of law to apply and how it intersects with the law of other applicable government powers is essential.

What is federal Indian law?

Indian law is the body of federal law addressed to how the United States treats (and allows the states to treat) tribes and Indians. It is governed by the Constitution, federal statutes, treaties, and common law.

The U.S. Constitution includes two specific references to Indians and tribes.[2] These clauses textually committed power over Indian affairs to Congress. But they also recognized—from our country's founding—that Indian tribes are sovereign governments that the United States must engage with on a government-to-government basis.

Congressional power over Indian affairs is "plenary," making Indian law the rare area of law where Congress can legislate without regard for its spending power or whether the legislation affects interstate commerce.

Treaties, like statutes, are the "supreme law of the land."[3] Treaties remain relevant—and often controlling—even though they may be several centuries old.

Finally, Indian law is also a rare bastion of federal common law. Although the Supreme Court often says it defers to

(and sometimes does defer to) Congress on questions of Indian law, it has nevertheless cut several Indian law doctrines from whole cloth. The very foundation of Indian law—an 1823 decision—admits that it essentially made up new rules. It describes but then engages in the "extravagant… pretension of converting the discovery of an inhabited country into conquest[.]"[4]

Has federal Indian law changed over time?

Dramatically. As the needs of the fledgling United States evolved, so too did Indian law.

1600 – 1788, Tribal Independence: From the earliest European contact through the Revolutionary War, France, England, and eventually the United States dealt with Indian tribes on a nation-to-nation basis. Tribes generally governed their own polities and economies free from outside interference.

1788 – 1828, Federal Encroachment: The founders were well aware of many tribes' allegiance to the Crown and of the national need to make peace with the original inhabitants of the land they sought to govern. Congress quickly relied on its "Indian commerce clause" power to enact a series of Trade and Intercourse Acts that began to treat tribes as semi-independent "domestic, dependent nations" whom the U.S. was obliged to protect, but over whom Congress had plenary power.

1828 – 1887, Removal and Relocation: As non-Indian settlers moved westward, the federal government faced pressure to make additional lands available. With the inauguration of Andrew Jackson, efforts to push the Indians westward became explicit. A number of tribes were forcibly removed from their lands. Others "benefited" from a reservation-based system that furthered the twin goals of westward expansion (by demanding million-acre cessions from tribes in exchange for the promise to protect those tribes on discrete reservations) and "civilization" of the Indians (by focusing assimilation activities on reservations' concentrated Indian populations). The reservations were most often created by treaties that were accomplished by persuasion, coercion, and sometimes swindle.

1887 – 1934, Allotment: With the close of the Civil War, federal officials refocused their attention on Indian policy. Some believed that Indians would benefit from increased assimilation, principally through owning and cultivating individual land parcels, and then through forced participation in off-reservation boarding schools. At the same time, non-Indians coveted reservation land that was unavailable for settlement. Government officials slaked non-Indian land thirst and continuing desires to "civilize" Indians with "allotments." They assigned 80 and 160 acre plots on reservations to Indian individuals and families, and then sold the "surplus" reservation land to non-Indians. Allotment policy assumed that tribes would disappear as their land bases dwindled.

1934 – 1953, Indian Reorganization: In 1928, a blistering federal report offered a thorough exposition of the United States' failure to protect Indians, their land, and their cultural resources. Allotment had been enormously successful in lodging title into the hands of non-Indian interests, but it left the now-isolated and fractured tribes in shambles. Congress responded with the 1934 Indian Reorganization Act.[5] The Act reversed federal course. For the first time, Congress actively worked to protect tribal governments and what remained of tribal land bases. Even so, congressional recognition of tribal self-governance was limited. Strongly paternalistic provisions still required the Secretary of the Interior to, for example, approve tribal constitutions and tribes' decisions to hire attorneys.

1953 – 1968, Termination: Federal policy reversed again when Congress adopted a "termination" policy. That policy simply ended the United States' relationship with many tribes, pretending they longer existed. The results were catastrophic for terminated tribes, which lost all federal assistance. Public Law 280 gave certain states mandatory jurisdictional authority over tribes[6] and allowed other states the opportunity to assume voluntary jurisdiction over tribes. That switch left jurisdictional and resource gaps as federal officials pulled out of tribal territories.

1968 – Present, Self-Determination: Assimilationist ideals finally began to fade by the late '60s. In 1970, President Nixon issued a statement that set the current course of federal Indian policy. He stressed the importance of the trust relationship and government-to-government treatment, and called for legislation maximizing tribal autonomy over tribal affairs. Although the Supreme Court has tended to narrow tribal powers, the legislative and executive branches remain committed to strengthening tribes and the United States' relationship with tribes.

This 500-year history remains ever relevant because legacies of each of these eras persist and overlap in Indian law questions today. For example, the effects of allotment and PL 280 persist in jurisdictional questions; reorganization-era secretarial-approval requirements remain in many tribal constitutions; and some tribes are still working to regain federal recognition that they lost to termination even as they seek to enforce treaty rights.

Do treaties really still matter today?

Yes, because the United States said they would. The United States' promises in each "contract between two sovereign nations"[7] varied from treaty to treaty, but almost all expressly recognized tribal sovereignty. Many expressly assured tribes of the federal government's protection.

In 1903, the Supreme Court held that Congress can unilaterally abrogate Indian treaties at will.[8] It has since done so frequently. But where Congress has not abrogated treaty rights, they endure.

For example, as Minnesota reacts to the Lake Mille Lacs walleye decline, it must do so in tandem with the Mille Lacs Band of Lake Superior Chippewa. This flows from the Supreme Court's 1999 recognition that "the Chippewa retain the usufructuary rights guaranteed to them under the 1837 Treaty" because Congress has never abrogated those rights.[9] The band's continuing governance and take rights are not unearned benefits, but negotiated legal rights. In this case, enduring hunting and fishing rights were the price of the land that became Wisconsin and Minnesota.

Okay, but why can tribes operate casinos?

Following decades of federal policies that shredded tribal economies, Indian tribes resorted to bingo and other gaming to try to raise governmental revenue. When states threatened to close the operations, tribes brought the cases to federal courts. In 1987, the Supreme Court reaffirmed that "Indian tribes retain attributes of sovereignty over both their members and their territory," and held that at least where a state regulates but does not prohibit an activity, the tribe may separately regulate the activity in its Indian country.[10] Under this civil-regulatory/criminal-prohibitory distinction, if a state regulated gaming (for example by licensing charitable bingo), then each tribe within that state could offer similar games even if they do not comply with state law.

Congress responded quickly with the Indian Gaming Regulatory Act.[11] IGRA rebalanced state, federal, and tribal authority by creating a federal oversight body (the National Indian Gaming Commission) and requiring tribes and states to negotiate Indian gaming offerings. At the same time, it recognized tribes' "exclusive right to regulate"[12] Indian gaming, and required that tribal governments be the sole owners and primary beneficiaries of gaming. Borne out of necessity, gaming became a primary tool for tribes—which lack any effective tax base—to raise governmental revenue for impoverished tribal communities.

But Indian gaming has had uneven results. As Justice Sonia Sotomayor recently wrote, "[o]ne must . . . temper any impression that Tribes across the country have suddenly and uniformly found their treasuries filled with gaming revenue."[13] Recent industry data shows that less than 20 percent of Indian gaming facilities account for roughly 70 percent of Indian-gaming revenues. Indeed, only about half of federally recognized tribes operate gaming establishments.[14]

IGRA requires gaming tribes to use gaming revenue for five limited purposes:

- to fund tribal government operations or programs;
- to provide for the general welfare of the tribe and its members;
- to promote tribal economic development;
- to donate to charitable organizations; and
- to help fund operations of local government agencies.

Contrary to mainstream misconception, relatively few of the gaming tribes issue per capita payments to tribal members. Most often, tribal casinos are job creators (for members and non-members) in areas where there are few jobs available. They fund police departments, schools, and elder care. And they are a major catalyst for community growth and economic development, allowing many tribes to diversify their holdings into other types of business ventures.

So who has civil jurisdiction in Indian country?

It depends. Jurisdiction is the most significant and mind-bending issue that Indian law practitioners face. It turns on whether the parties are Indian or not, where the incident falls on the criminal/prohibitory versus civil/regulatory spectrum, and the status of the land on which an incident occurs. Determining the "who" and the "where" are critical to determining whether a tribe, the United States, a state, or some combination of these governments has jurisdiction.

As a general matter, tribes have inherent criminal and civil jurisdiction over tribal affairs and members. Tribes also are likely to have civil jurisdiction over nonmembers operating on trust land. For fee lands within a reservation, tribes tend not to have jurisdiction over nonmembers, but can adjudicate disputes arising out of and regulate (*e.g.* through taxation and licensing) the activities of nonmembers who: (a) have consensual relationships with the tribe or its members; or (b) engage in conduct that threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. Under this test, courts have, for example, found that a tribe has jurisdiction over:

- nonmember employees of a casino located on the tribe's trust land;
- contracts between a tribe and non-tribal business where the conduct at issue takes place on the reservation; and
- off-reservation polluters who threatened a tribal water supply.

The Supreme Court has trended toward narrowing these exceptions, though, and a case that will be decided next term will once again consider this subject.

10 Practice Pointers for Non-Indian Law Practitioners

Transactional

Things to keep in mind if a potential deal with an Indian tribe or a tribally owned business lands on your desk.

1. There are many opportunities for your business clients to engage in Indian country; do not dissuade a client based on lack of familiarity or antiquated notions.
2. Understand which body of substantive law will apply to a transaction, and which government will have regulatory and adjudicatory authority. Regardless of choice-of-law provisions, be sure to review the tribe's constitution and tribal-code chapters related to business and jurisdiction.
3. If a deal has anything to do with gaming, the parties must mind the Indian Gaming Regulatory Act, 25 U.S.C. §§2701 *et seq.*, consider whether it applies, and weigh its ramifications. For example, all "management contracts" under the statutory framework require National Indian Gaming Commission approval. Without that approval, all management contracts are void *ab initio*.
4. It is best to discuss a potential waiver of sovereign immunity up front as a threshold item.

Litigation

Things to keep in mind if a dispute with an Indian tribe or a tribally owned business arrives on your docket.

5. Understand which court(s) have jurisdiction, and which do not. For example, Indian tribes and their unincorporated entities can never sue or be sued in diversity because they are not citizens of any state. And even if concurrent jurisdiction exists between a tribal court and a federal or state court, doctrines of tribal-court exhaustion, comity, and Indian law preemption and infringement may make the tribal court venue most appropriate.
6. If there is a chance the dispute will end up in tribal court, research the law of the particular tribe. That law may be published online, or you may have to request the tribal code from the tribal court. Pay attention to court procedure as well as applicable substantive law. Note that some (but not all) tribes look to federal or state law to fill gaps where no tribal law exists on a particular point or issue. Also seek to understand the role that traditional peacekeeping practices may play. Be sure to gain admission to a tribal court before appearing in that court.
7. Treaty rights and on-reservation property ownership status may shape the dispute, especially if your client is a federal, state, or local unit of government.
8. Be willing to give your client hard advice. If there is no clear and express sovereign-immunity waiver to cover your client's claim, you will save your client time and money by not bringing a lawsuit that will just be dismissed.

Any Tribe-Related Matter

9. If you and your client find yourselves in the middle of an Indian-law matter and it's unfamiliar territory, consider enlisting Indian law co-counsel or referring the matter out. An expert in this area will be able to run the traps efficiently and effectively, but is unlikely to "steal" your client, since many Indian law practitioners work exclusively in that area.
10. When you are engaging with an Indian tribe on behalf of your client, inventory any personal hesitations you have and then work to leave bias, preconceived notions, and fear of the unknown at the door.

What about criminal jurisdiction in Indian country?

At the same time that the Supreme Court has narrowed tribal civil jurisdiction, Congress continues to expand tribal criminal jurisdiction. In 1990, the Supreme Court announced that tribes could only exercise criminal jurisdiction over their own members—not over non-Indians and not even over nonmember Indians.[15] Congress responded with legislation allowing tribes to prosecute nonmember Indians (but not non-Indians).

That "fix," though, left a glaring jurisdictional gap. In many cases with non-Indian offenders, *no government* had jurisdiction to bring charges. The Justice Department estimates that one in three native women have been raped or assaulted in their lifetimes.[16] Let that sink in. Of reported on-reservation attacks, at least 86 percent of the victims' attackers were non-Indian.[17] But tribes couldn't prosecute these attackers because they were not Indian. Non-PL 280 states could not prosecute these attacks because the crime occurred on a reservation. And the feds often didn't prosecute because the attack wasn't "bad enough" to trigger federal jurisdiction. Every day, crime after crime *could not* be prosecuted in any jurisdiction.

Congress addressed this in the Violence Against Women Reauthorization Act of 2013.[18] Tribes are now able to exercise their sovereign power to investigate, prosecute, convict, and sentence both Indians and non-Indians who assault Indian spouses or dating partners or violate a protection order in Indian country. The statute doesn't address every crime that occurs in the jurisdictional gap, but it is a start.

If a tribe has jurisdiction, does that mean the state and the federal governments don't?

No. Even when a tribe has jurisdiction over a matter, the United States often has concurrent jurisdiction. In more limited circumstances, a state may also have jurisdiction. Because Minnesota is a PL 280 state, it has criminal/prohibitory jurisdiction over Indians in Indian country with the exception of the Red Lake Indian Reservation. But PL 280 does not give Minnesota civil/regulatory jurisdiction over Indians in Indian country. For example, the Minnesota Supreme Court has held that driver-licensing and vehicle-registration laws are civil/regulatory, so the state can't enforce them against Indians in Indian country.[19] In contrast, the state's laws concerning underage consumption of alcohol (which flatly ban rather than regulate conduct) are criminal/prohibitory, and the state can rely on PL 280 to enforce those laws against Indians in Indian country.[20]

Importantly, even where concurrent jurisdiction exists, matters of tribal-court exhaustion and comity can tip the scales in favor of tribal-court jurisdiction in the first instance. In those cases, the tribal court would hear any tribal law, state law, and federal law claims.

Where can I learn more about Indian law and the latest legal developments?

This article is barely a beginning. *Bench & Bar* now includes the latest Indian-law developments in its Notes & Trends section, and plans to cover additional topics. For additional information about Indian law, both of the authors of this article are available to answer questions. *Cohen's Handbook of Federal Indian Law*[21] offers a comprehensive treatment, and the Turtle Talk website[22] provides daily primary-source updates on Indian law decisions and legislation. ▲

Join the discussion at mnbenchbar.com

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Notes

[1] *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (quotation omitted).

[2] U.S. Const. Art I, Sec. 2, Cl. 3 ("Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and *excluding Indians not taxed*, three fifths of all other Persons.") (emphasis added); U.S. Const. Art I, Sec. 8, Cl. 3 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, *and with the Indian Tribes*[.]") (emphasis added).

[3] U.S. Const. Art. VI, cl. 2 (Supremacy Clause).

[4] *Johnson v. M'Intosh*, 21 U.S. 543, 591, (1823).

[5] 25 U.S.C. §§461 *et seq.*

[6] Pub.L. 280, §7, 67 Stat. 588, 590 (1953) (now 25 U.S.C. §1321, as amended). Public Law 280 affords states criminal jurisdiction over Indians in Indian Country, and civil jurisdiction over individual-Indian disputes (but not jurisdiction over Indian tribes).

[7] *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979).

[8] *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903).

[9] *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 175 (1999).

[10] *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987) (quotation omitted).

[11] 25 U.S.C. §§2701 *et seq.*

[12] 25 U.S.C. §2701(5).

[13] *Bay Mills*, 134 S. Ct. at 2043 (Sotomayor, J., concurring).

[14] *Id.*

[15] *Duro v. Reina*, 495. U.S. 676, 688 (1990).

[16] Patricia Tjaden & Nancy Thoennes, U.S. Dep't of Just., NCJ 183781, *Full Report of the Prevalence, Incidence, and Consequences of Intimate Partner Violence Against Women: Findings from the National Violence Against Women Survey* (2000).

[17] Amnesty International, *Maze of Injustice: The Failure to Protect Indigenous Women from Sexual Violence in the USA*, 4 (2007), available at *http://www.amnestyusa.org/pdfs/MazeOfInjustice.pdf* (last visited 8/12/2015).

[18] Violence Against Women Reauthorization Act of 2013, S. 47, 113th Cong. (2013).

[19] *State v. Stone*, 572 N.W.2d 725, 731 (Minn. 1997).

[2-] *State v. Robinson*, 572 N.W.2d 720, 724 (Minn. 1997).

[21] Nell Jessup Newton, *Cohen's Handbook of Federal Indian Law* (2012 ed.).

[22] *www.turtletalk.wordpress.com*