Native American – U.S. law
Take home exam #1
Due Monday, 10/4, at class time

Congressional committees that have responsibility for Indian affairs have staffs, and the committee members also generally have a staff person of their own with responsibility for the subject. The staff personnel have considerable power. The problem for the tribes is that there is frequent staff turnover. Every couple of years the tribes' attorneys have to start all over at the beginning again in educating the newcomers about the law and the tribes' positions on needed and forthcoming legislation affecting their interests.

The attorneys have to review with their clients what seem to both clients and attorneys to be the critical issues that need to be broached with the committees and legislators. Invariably, tribal sovereignty tops the list.

You represent a coalition of tribes. You are to meet with them to work out the next re-education of staff that will take place following the forthcoming election. You have been asked to submit a proposal about what should be taught the staff about tribal sovereignty -- the law of it, its background and its present status. What would you propose is the most important issue – are the most important issues – to address?

You will have to be highly selective. Staff personnel have time for only a brief summary. They like to get a broad picture, but they also know that the committee and its members will demand particulars and examples as well. Repeat: You will have to be highly selective – three pages with at least 1" margins and type of no less than 12 pt. size. What do you choose to say?
Senator Slade Gorton has introduced a bill in the Senate that would add to state authority in Indian Country. A key provision would limit tribal court jurisdiction to cases and controversies involving tribal membership, domestic relations among tribal members, rules of inheritance for tribal members, and tribal members' violation of tribal laws (but with a limit to punishment no greater than one year in jail and/or $1000). State courts would have exclusive jurisdiction to try all other cases according to state law, except where existing statutes reserve exclusive jurisdiction to federal courts or provide for concurrent state and federal court jurisdiction. (Appropriations will be made for states to the degree necessary to support their exercise of jurisdiction in Indian Country.) The intention of the measure is to make it clear that tribal courts are for tribal members only, and then only in with respect to the enumerated subjects.

The Senate Committee on Indian Affairs has scheduled hearings on the bill. You represent a coalition of tribal courts. What is the best argument you can make in two pages that inherent tribal sovereignty, the long course of tribal-U.S. relations, and the Constitution prohibit Congress from enacting the bill into law.

(Your primary focus should be on the material studied in this unit beginning with page 373.)

Due Wed., Oct. 6, at class time.
10/8/04

To: Indian law participants

From: Milner Ball

Re: Yesterday continued.

Problem No. 1, p. 707

2. Crime charged? Murder
   A. Federal crime of national applicability? No. Therefore an enclave crime.
3. Allen Rodgers
   A. Status? Indian
   B. Any treaties/statutes specially governing. Check treaties in force and U.S.C.. Any likely to be found? What is the effect of the fact that the reservation boundaries have been extinguished?
   C. 18 U.S.C. § 1153 crime? Yes
   D. Rodgers qualify under § 1153? Yes (Indian and “other person”)
   E. Which sovereign has jurisdiction? U.S. yes; Okla. no; Tribe maybe (see Wetsit and comments pp 659, 661). Tribes likely to assert jurisdiction? No. Why? Several reasons including 25 U.S.C. § 1303 (7)
   F. Governing procedure? 18 U.S.C § 3242
   G. 18 U.S.C. crime, i.e. is there overlap with § 1153?
      1. Is murder included in “the general laws of the U.S.” Check the U.S.C. (Other than § 1153), and see last full paragraph p. 663. If not, § 1152 is not triggered.
      2. On the complexities (including incorporation of state law first in § 13, and then in 1152, involved re-read p. 667.
      3. If § 1152 is not limited to lesser crimes and there is overlap between it and 1153, is 1153 exclusive? On overlap generally see opp. 669-70 (text and fnn.). On the specific question, see p. 668 n. 148.
Indian Law

Last two-page memo, due Tuesday, October 22

Land, water, fish, and game have always been central to the life of tribes. They are so now, but within a new and changing context. As the tribes lay plans for their worlds¹ in the next century, what are the most important legal developments, doctrines, and arguments that you would advise them to take into account in their decision-making about land, water, fish, and game? You may take into account the question of taxation as well as earlier-studied cases like Montana.

¹I use the word “world” rather than “natural resources” since the very concept of resources carries with it Euro-American notions of nature as an exploitable thing. This social-scientific, economic notion of nature carries over into conceptions of people, “labor resource” for example instead of “laborers” or “people who work.” For Indians, the earth is “Mother” rather than resource.
Native American Law
10/27/04
Second interim exam
Due 11/2/04

Based upon the materials studied so far in the course, what is the best argument (what are the best arguments) that tribal sovereignty is affirmed in: (1) the Supreme Court’s jurisprudence of preemption; or (2) the Court’s opinions on taxation in Indian Country; or (3) the statutory and federal common law of criminal jurisdiction in Indian Country; or (4) the Court’s opinion on the civil jurisdiction of tribal courts. [Choose one of the four.]

Same rules as last time: minimum 12 pt. type; minimum one inch margins; maximum three pages. Again you will have to be selective. Again you must save the originals when I return them to be handed in together with the first exam and the final one.

This question poses a challenge. It requires that you work against the grain. We have mostly noted the way in which the Court’s opinions appear to be eroding or assaulting tribal independence and authority. But attorneys for the tribes must construct arguments that use the existing material and, while acknowledging its negative content, put the best light on it and show how it supports tribal sovereignty. That is what you are asked to do. And it is not a quixotic task. Realistic possibilities can be discerned. Remember the saying: That argument is best which grants most to the other side.
Red Cloud, the great war and political leader of the Sioux, made decisions keeping seven generations in mind: the three before his own and the three after. Modern Sioux leaders try to do the same. Assuming that kind of perspective and based on the material we have covered, what would you think is/are the best legal strategy(ies) to pursue or the best, presently available legal tool(s) to employ in protecting tribal self determination? Why do you think so? How would you implement the strategy or use the tools? You will need to be selective and precise. You may, but certainly do not have to, pick a particular, central legal or tribal issue (land, economic development, jurisdiction, etc.)