



RESTATEMENT OF THE LAW THE LAW OF AMERICAN INDIANS

Preliminary Draft No. 3

(February 5, 2015)

SUBJECTS COVERED

- CHAPTER 1** Federal–Tribal Relations (§§ 1-9 and 12 approved to go to Annual Meeting;
§ 10 not yet approved; § 11 is new)
- CHAPTER 2** Tribal Governance Authority (black letter and Comment only)
- CHAPTER 4** Tribal Economic Activities (black letter only)
- APPENDIX** Black Letter of Preliminary Draft No. 3

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**Restatement of the Law
The Law of American Indians
Preliminary Draft No. 3**

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**Restatement of the Law
The Law of American Indians**

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The typical ALI Section is divided into three parts: black letter, Comment, and Reporter’s Notes. In some instances there may also be a separate Statutory Note. Although each of these components is subject to review by the project’s Advisers and Members Consultative Group and by the Council and Annual Meeting of the Institute, only the black letter and Comment are regarded as the work of the Institute. The Reporter’s and Statutory Notes remain the work of the Reporter.

The Council approved the initiation of this project in September 2012.

Earlier versions of Chapter 1 are contained in Council Draft No. 2 (2014), Discussion Draft No. 2 (2014), Preliminary Draft No. 2 (2014), Council Draft No. 1 (2013), the Discussion Draft (2013), and Preliminary Draft No. 1 (2013). Earlier versions of Chapters 2 (black letter and Comment only) and 4 (black letter only) are contained in Council Draft No. 2 (2014); draft outlines of these two Chapters can be found in Discussion Draft No. 2 (2014) and Preliminary Draft No. 2 (2014).

REPORTERS' MEMORANDUM

To: Advisers and MCG

From: Matthew L.M. Fletcher, Wenona T. Singel, and Kaighn Smith Jr.

Date: January 30, 2015

Re: Restatement of the Law, The Law of American Indians, Preliminary Draft No. 3, including Chapters 1, 2, and 4

Overview

We present 10 Sections of Chapter 1 that have been provisionally approved by the ALI Council in January 2015. There have been some changes to these Sections since our last meeting and we present them to you now. There are also two Sections of Chapter 1 that the ALI Council did not consider that we present to you, one of which is entirely new. We also present preliminary draft black letter for portions of Chapters 2 and 4.

Chapter 1 – approved Sections

The ALI Council voted favorably on §§ 1 through 9 and § 12. These Sections will next go to a vote before the ALI membership at May's Annual Meeting.

Since our last meeting, the ALI has secured for us a consultant on ALI style. We have routinely faced questions and comments on whether certain rules best constitute black-letter law, or fit better as Comments, or as Reporters' Notes. Our ALI style consultant, the delightful Ruth Sternglantz, has been instrumental in helping us move the project forward.

Sections 1 through 3 should take up some of our time. There is no serious controversy over substance, but there are many questions about what constitutes useful black letter. We've decided to take structural recommendations from Harvey Perlman and dramatically simplify the black letter in these Sections. Comments on whether the new language adequately conveys the correct substance will be extremely helpful.

Section 9 on the general trust relationship should also take up some time. We've decided to take the recommendation of Chief Judge Wood and move this Section earlier in the Chapter, probably between §§ 3 and 4. We have not made that change here in order to preserve the redlining of Word's track changes, and would also hope for comments on whether to make the move, and where the Section should go if we do make the move.

Sections 4 through 8 and 12 have not changed much in terms of substance, but have been amended to conform to ALI style.

Of note, however, we have eliminated or significantly scaled down discussion of areas of continuing controversy, most notably the question of whether federal equitable defenses apply to treaty rights and the question of whether *Chevron* deference trumps the canons of construction of Indian statutes.

Section 10 and the new § 11 are presented to the Advisers for comment. We took verbatim language recommended by Ed Kneedler in 2014 to serve as the black-letter law. Dan Rey-Bear suggested language for Comment *c* and Notes that is new to the Advisers, and we present it to you for the first time. Section 11 is new, and pretty rough. We anticipate a great deal of discussion on these two Sections. Again, the ALI Council did not vote on these Sections yet.

Chapter 2, subchapters 1 and 2

These materials are new for everyone and we hope to have time for extensive discussion. We currently have rough black letter, Comments, and some Illustrations. Reporters' Notes are intermittent.

Chapter 2, subchapter 3

This subchapter, on the Indian Child Welfare Act, is rough and very incomplete. We'd love comments and suggestions here, but do not anticipate discussing this subchapter given the full slate of other materials we have.

TABLE OF CONTENTS

<i>Section</i>	<i>Page</i>
Reporters' Memorandum	ix
CHAPTER 1 FEDERAL–TRIBAL RELATIONS	
Reporters' Introduction	1
Note on the Foundational Principles of Federal Indian Law	1
Historical Note	3
Demographic Note	20
Note on Leading Secondary Materials	21
Note on Indian-Law Terminology	25
GENERAL TERMS	
§ 1. Indian	26
§ 2. Recognized and Nonrecognized Indian Tribes	32
§ 3. Indian Country	47
AMERICAN INDIAN TREATY LAW	
§ 4. American Indian Treaties	58
§ 5. Canons of Construction of Indian Treaties	78
FEDERAL LEGISLATION	
§ 6. Congressional Authority	86
§ 7. Canon of Construction of Indian Statutes	110
§ 8. Political-Status Classification	124
FEDERAL–TRIBAL TRUST RELATIONSHIP	
§ 9. General Federal Trust Relationship with Indian Tribes and Individual Indians	139
§ 10. Suits by Indians and Tribes Against the United States for Money Damages	185
§ 11. Suits by Indians and Tribes Against Federal Officials for Specific Relief	202
MISCELLANEOUS	
§ 12. Reservation Boundaries	205

CHAPTER 2
TRIBAL GOVERNANCE AUTHORITY

Reporters’ Introductory Note.....213
Note on Terminology for this Chapter.....213

Subchapter 1 – Tribal Sovereignty in General

§ 20. Inherent Tribal Governance Authority.....213
§ 21. Plenary Tribal Governance Authority over Indian Lands and Indian
 People.....214
§ 22. Congressional Authority over Internal Tribal Governance214
§ 23. The Inapplicability of the United States Constitution to Indian Tribes216

Subchapter 2 – The Powers of Indian Tribes

§ 24. The Power to Adopt a Form of Government216
§ 25. The Power to Define Tribal Membership/Citizenship Criteria.....216
§ 26. The Power to Regulate Domestic Relations217
§ 27. The Power to Prescribe Rules of Inheritance.....217
§ 28. The Power to Tax.....218
§ 29. The Power to Exclude.....218
§ 30. The Power to Regulate the Use and Disposition of Property219
§ 31. The Power to Establish Justice Systems219
§ 32. The Power to Administer Justice220
§ 33. Sovereign Immunity.....220
§ 34. Powers over Nonmembers221
§ 35. Tribal-Court Exhaustion Rule.....222
§ 36. Tribal-Court Inherent Powers224
§ 37. Tribal-Court Power to Enforce Foreign Judgments and Orders224
§ 38. Enforceability of Tribal-Court Judgments and Orders in State and
 Federal Courts224

Subchapter 3: The Indian Child Welfare Act

Introductory Note About the Indian Child Welfare Act

§ 40. Application of the Indian Child Welfare Act.....225

§ 41. Tribal Jurisdiction over Indian Child-Welfare Matters225

§ 42. Full Faith and Credit to Tribal Laws, Orders, and Judgments.....226

§ 43. Tribal Placement Preferences226

§ 44. Indian Custodians.....226

§ 45. State-Court Jurisdiction227

§ 46. Obligation to Notify Indian Tribe(s).....227

§ 47. Right to Intervene in State-Court Indian Child-Welfare Matters228

§ 48. Transfer of Indian Child-Welfare Matters Where Tribe Has Exclusive
Jurisdiction.....229

§ 49. Transfer of Indian Child-Welfare Matters Where Tribal and State Court Share
Concurrent Jurisdiction.....229

§ 50. Active Efforts Toward the Prevention of the Breakup of an Indian
Family231

§ 51. Termination of the Rights of an Indian Parent.....231

**CHAPTER 4
TRIBAL ECONOMIC ACTIVITIES**

Subchapter 1

Indian Tribes as Economic Regulators

§ 60. Tribal Regulatory Powers232

§ 61. Tribal Adjudicatory Powers.....232

§ 62. Tribal Authority over the Economic Activity of Members and Nonmembers232

§ 63. Federal Preemption of Tribal Authority233

§ 64. State Authority.....233

Subchapter 2
Indian Tribes as Economic Actors

§ 65. Tribal Economic Enterprises.....	233
§ 66. Sovereign Immunity of the Tribe.....	234
§ 67. Sovereign Immunity of Subordinate Economic Organizations of the Tribe	234
§ 68. Sovereign Immunity of Tribal Business Associations.....	234
§ 69. State-Court Jurisdiction over Actions to Enforce Tribal Economic Obligations Arising in Indian Country	235
§ 70. Federal-Court Jurisdiction over Suits to Enforce Economic Obligations of Tribes and Their Economic Enterprises	235
§ 71. Federal Diversity Jurisdiction over Indian Tribes and Subordinate Economic Organizations	236
§ 72. Federal Diversity Jurisdiction over Tribal Business Associations	236
§ 73. Application of Tribal Exhaustion Doctrine in Federal Court	236
§ 74. Application of Tribal Exhaustion Doctrine in State Court	237
§ 75. Application of Tribal Law Absent Waiver	237
§ 76. Federal Approval of Contracts with Indian Tribes	237
Appendix. Black Letter of Preliminary Draft No. 3	239

APPENDIX
BLACK LETTER OF PRELIMINARY DRAFT NO. 3

§ 1. Indian

An “Indian” is any person officially acknowledged as an Indian by a federally recognized Indian tribe, see § 2, or by treaty or statute.

~~(a) An Indian is a person with political recognition as an Indian and a degree of Indian ancestry, subject to tribe-specific exceptions.~~

~~(b) Persons without Indian ancestry may be considered Indians by political recognition through treaty, statute, or tribal adoption.~~

~~(c) Persons who self-identify as Indians but who are not members of federally recognized Indian tribes and cannot demonstrate political recognition are not Indians.~~

~~(d) Federally recognized Indian tribes have authority to determine their own membership or citizenship criteria.~~

~~(e) Indians are citizens of the United States.~~

~~(f) Indians are citizens of the states in which they reside.~~

§ 2. Recognized and Nonrecognized Indian Tribes

(a) An “Indian tribe” is an entity consisting of citizens or members from any extant or historical tribe, band, nation, or other group or community of Indigenous peoples in the United States.

(b) A “recognized Indian tribe” is any Indian or Alaska Native tribe, band, nation, pueblo, village, or community that:

(i) the Secretary of the Interior; or

(ii) Congress subject to its plenary authority as restated in § 6; or

(iii) a federal court

acknowledges to exist as an Indian tribe.

(c) An Indian tribe not recognized as restated in subsection (b) is “nonrecognized” but may be recognized by a State for state-law purposes within the borders of the State.

~~(a) An Indian tribe is a governmental entity, including its citizens or members, that is any extant or historical tribe, band, nation, or other group or community of Indigenous peoples in the United States.~~

~~(b) An Indian tribe may be recognized by the federal government or by a state government, or may be a nonrecognized tribe.~~

~~(c) Congress has plenary authority to affirm, acknowledge, and recognize the sovereignty of Indian tribes. See § 6 on congressional legislative jurisdiction.~~

~~(d) Subject to Congress's plenary authority, see § 6, the Executive branch has authority to affirm, acknowledge, and recognize the sovereignty of Indian tribes under 25 U.S.C. §§ 2, 9, and 479a.~~

~~(e) Federally recognized Indian tribes and their individual members or citizens are eligible to receive services from the federal government. See § 9 on the trust relationship.~~

~~(f) Congressional recognition or acknowledgment of an Indian tribe is a nonjusticiable political question.~~

~~(g) An Indian tribe whose sovereignty is not recognized by the federal government is a nonrecognized Indian tribe.~~

~~(h) States may affirm, acknowledge, and recognize the sovereignty of Indian tribes not recognized by the federal government, within state borders for state-law purposes.~~

~~(i) Federal courts may enforce certain statutory rights of nonrecognized Indian tribes, provided the tribal claimant demonstrates entitlement to the rights.~~

§ 3. Indian Country

~~(a) Indian country serves as the primary territorial boundary between Indian tribes and states. Land is considered "Indian country" if it is:~~

~~(b) Indian country includes reservation land, dependent Indian communities, Indian allotments, trust land, unceded lands, and restricted fee land.~~

(1) Reservation land ~~is land~~ lawfully set aside for the benefit of an Indian tribe or tribes, usually through a treaty, federal statute, or Executive order.

(A) Lands patented to both Indians and non-Indians within extant reservation boundaries are Indian country.

(B) State rights-of-way running through an Indian reservation remain part of the reservation and therefore Indian country.

(2) ~~AD~~ dependent Indian ~~communities~~ community ~~include Indian lands~~ that ~~are is~~ neither a reservations nor an allotments, but ~~have~~ has been set aside by the

federal government for the benefit of Indians and tribes, and ~~are-is~~ under federal superintendence.

(3) ~~Allotments~~ An allotment held in trust status by the Interior Secretary for the benefit of an Indian allottee or an allottee's heirs or spouse are Indian country, even if subject to a restriction on alienation or encumbrance.

(4) ~~Land-h~~ Held in trust status by the Interior Secretary for the benefit of Indian tribes or individual Indians within or without reservation boundaries ~~is Indian country.~~

(5) Unceded lands owned or occupied by Indian tribes or individual Indians ~~are Indian country.~~

(6) Land owned in fee by an Indian or Indian tribe upon which Congress or the Interior Secretary has placed a restriction of alienation or encumbrance ~~is Indian country.~~

~~(c) In general, land within Indian country is under the criminal jurisdiction of the federal government and federally recognized Indian tribes.~~

~~(d) Tribal and tribal member activities in Indian country usually are exempt from state regulation and taxation. [Cross-reference to Chapter 3]~~

§ 4. American Indian Treaties

(a) ~~Indian treaties are contracts between sovereigns.~~

~~(b)~~ Indian treaty rights and related federal obligations continue in force until and unless the Congress abrogates the rights, or the treaty signatories agree to amend the treaty. See § 6 on congressional legislative jurisdiction.

(c) State laws and regulations conflicting with Indian treaty provisions are invalid.

(d) In general, Indian treaties ratified by the Senate and declared by the President under the Treaty Power are self-executing.

(e) In general, Indian treaties are not a grant of rights to Indian tribes but a grant of rights from them, with reservations of all rights that are not granted.

(f) ~~Indian treaty rights are not subject to federal common-law defenses or state-law defenses.~~

~~(g) In many instances, suits to interpret or enforce Indian treaty rights may not continue in the absence of either the federal government or affected Indian tribes.~~

~~(h) Indian treaties with States are invalid absent consent of Congress.~~

§ 5. Canons of Construction of Indian Treaties

(a) A treaty must be liberally interpreted in favor of the Indians ~~or~~ tribes in question.

(b) A treaty must be construed as the Indians understood it at the time of the treaty negotiation.

(c) Doubtful or ambiguous expressions in a treaty must be resolved in favor of the given Indian tribe.

(d) Treaty provisions that are not clear on their face may be interpreted from the surrounding circumstances and history.

§ 6. Congressional ~~Legislative Jurisdiction~~Authority

(a) Congress possesses broad authority to legislate in respect to Indian tribes and individual Indians, subject to applicable constitutional limitations. See § 7.

(1) The Indian Commerce Clause, Article I, Section 8, Clause 3 of the Constitution, authorizes Congress to regulate commerce with Indian tribes, subject to constitutional limitations ~~by the Eleventh Amendment~~.

(2) Treaties with Indian tribes, and legislation enacted in accordance with Indian treaties, made under Article II, Section 2, Clause 2, ~~enhance~~ authorize Congressional ~~authority~~ to deal with Indian-affairs matters. See §§ 4, 5.

~~(3) The Territory and Property Clause, Article IV, Section 3, Clause 2, empowers Congress to regulate lands owned or supervised within Indian country.~~

~~(4) The general trust relationship between the United States and Indian tribes and individual Indians ~~enhances~~ authorizes Congressional Indian-affairs authority.~~ See § 9.

(b) Congressional Indian-affairs enactments that work a taking of vested ~~tribal or~~ Indian or tribal property rights are subject to a takings and just-compensation analysis, under the Fifth Amendment.

(c) Congressional Indian-affairs enactments generally are not subject to challenge under the Tenth Amendment.

(d) Congressional Indian-affairs enactments generally are ~~reviewable under the rational-basis tests~~ subject to judicial review. See § 8.

§ 7. Canon of Construction of Indian Statutes

(a) Congressional acts addressing Indian affairs ~~are~~ must be construed liberally in favor of the Indians, with ambiguous provisions interpreted to the benefit of Indians and Indian tribes.

(~~ba~~) The canon of statutory construction does not apply when the federal statute is not ambiguous, when the federal statute does not address Indian affairs, or when two or more tribes are in opposition.

~~(b) Federal agency interpretations of ambiguous Indian affairs statutes are not given deference when an alternative interpretation of the statute favors tribal interests, and the statute was clearly intended to benefit Indians and tribes.~~

§ 8. Political-Status Classification

(a) Indian tribal status is a political classification, not based on racial characteristics, and not subject to strict scrutiny under the Fifth Amendment.

(b) State laws creating classifications based on tribal membership in federally recognized tribes are not invalid under the Fourteenth Amendment where the state action is consistent with the federal government's trust responsibility. See § 9.

§ 9. General Federal Trust Relationship with Indian Tribes and Individual Indians

(a) ~~The United States' trust relationship with~~ There is a general trust relationship between the United States and Indian tribes and their members and individual Indians is arising from a government-to-government relationship of preexisting sovereigns.

(b) ~~The general trust relationship extends to non-treaty tribes as well.~~

~~—(e) In the exercise of its powers arising from and accruing through the federal trust relationship, Congress possesses **broad** plenary legislative authority. See § 6. Congressional enactments rationally related to the fulfillment of the United States’ unique trust relationship to Indian people and Indian tribes are **not disturbed** valid. See § 8.~~

~~(dc) The general trust relationship extends to the Secretary of the Interior, who has authority to **independently** promulgate regulations necessary to administer Indian-affairs policies **without express legislative authorization**.~~

~~(e) **The United States’ trust relationship with Indians and tribes authorizes the federal government to safeguard property rights of Indians and tribes.**~~

~~(1) **The United States may not confiscate Indian and tribal property rights or abrogate tribal treaty rights without just compensation. See § 6 on the applicability of the Fifth Amendment.**~~

~~(2) **Ambiguous statutes are construed so as to not result in the taking of Indian and tribal property rights or in the abrogation of tribal treaty rights. See § 7 on the applicability of the canons of construction.**~~

~~(3) **Congress may authorize the Executive branch to bring property claims on behalf of individual Indians and Indian tribes.**~~

~~(f) **The United States’ trust relationship with Indians and tribes authorizes the federal government to promote tribal self-government.**~~

~~(g) **The United States’ trust relationship with Indians and tribes authorizes the federal government to provide services to Indians and tribes, including without limitation education, housing, health care, and the preservation of law and order.**~~

§ 10. Suits by Indians and Tribes Against the United States for Money Damages

A suit by an Indian or an Indian tribe against the United States for money damages is cognizable if the plaintiff alleges the Government has failed faithfully to perform a duty established by statute or regulation and if the plaintiff shows that the duty-imposing statute

or regulation underlying the claim can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duty.

§ 11. Suits by Indians and Tribes Against the ~~United States~~Federal Officials for ~~Equitable and Other~~Specific Relief

A suit by an Indian or Indian tribe against a federal official for specific relief is cognizable if the plaintiff demonstrates that the defendant has failed to perform a duty established by a federal statute or regulation. [~~Black letter to come~~]

§ 12. Reservation Boundaries

(a) Only Congress can divest an Indian Reservation of its land and diminish its boundaries.

(b) A reservation is not terminated nor are reservation boundaries diminished unless Congress clearly indicates its intention to do so.

(c) Courts consider several factors in analyzing whether Congress intended to diminish a reservation, including: explicit reference to cession or other language evidencing the present and total surrender of all tribal interests in reservation land; an unconditional commitment from Congress to compensate the Indian tribe for its opened land; events surrounding the passage of a surplus land act that reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation; and the treatment, character, and demographic history of the opened land since ~~diminishment~~Congressional action.