

Indigenous Governance Law
Law B584 A, B, C - 2 Credits Winter 2021

Professor

Eric D. Eberhard, JD, LL.M

Office Location: William H. Gates Hall, Room 326

Office Hours: By Appointment

Course Description:

British colonial policies alternated between recognition of the sovereignty of Indigenous communities and their dominion over people and territory and efforts to limit or extinguish Indigenous sovereignty using force, treaties, and the imposition of law. This course provides a framework for understanding the contemporary laws of former British colonies with respect to the sovereignty of Indigenous communities in Canada and the United States; the grounding of those laws in the history of modern nations as colonies of Great Britain and the historical and contemporary impacts of settler colonialism on the governance of Indigenous communities. Enrollment is limited to students who have taken A565, American Indian Law or who secure permission from the instructor.

Learning Objectives:

This seminar is intended to:

- Provide you with a basic understanding of the foundational laws and policies governing the Indigenous peoples in Canada and the United States and the authority and right of those people to be self-governing in their homelands.
- Strengthen your core skills in critical thinking and legal analysis and writing.

Required Text, PDF Course Materials and Reading Assignments:

Required Text:

WILLIAM STRUNK, JR., THE ELEMENTS OF STYLE: CLASSIC EDITION 2018
(Richard De A'Morelli ed., 2018) (ISBN 978-1-64399-000-2)

PDF Course Materials:

The course materials will be available on the TWEN web page for the course in PDF format in the course materials folder and can be downloaded, copied, or printed. The TWEN web page is at this link:

<https://lawschool.westlaw.com/manage/homepage.aspx?task=coursehomepage&courseid=295029>

Depending on developments in the law during the quarter, some additional course materials may be made available in PDF format and will be posted on TWEN in the course materials folder when they become available. It is possible that we will see major developments in the areas of inherent powers of tribal governments, Indian child welfare, cultural resource protection and consultation.

Reading Assignments and Written Questions

The reading assignments for each class are listed below. All assigned reading is required. Any material that is not required, but which you may find helpful will be separately identified as “Optional Reading.” Class participation is required. You should be prepared to discuss the material in class every day. Reading assignments are sequential and for the dates indicated. **On or before noon on Monday of each week during the quarter you are required to submit to me via e-mail two questions you have based on the reading assignments for that week.** They can be related to a specific holding in a case, a comparison of one case to another, the differences in the majority and dissenting opinions, the burden of proof of a party to a case, the context in which the court decided the case, how the case fits into the historical arc and the governing precedents of Aboriginal law in Canada and federal Indian law in the United States, how the courts applied the constitution or a statute or similar inquiries.

We will rely on primary source materials for the required reading. I have edited some of those to save everyone time. Any material that I have edited is clearly marked on the material.

Protocol for Class Meetings via Zoom

As a result of COVID-19, classes will not meet in person, but will meet instead via [Zoom](#).

Unless you lack the technology to do so, you are expected to join the class using video as well as audio and not merely audio. Other expectations include:

- Muting your microphone upon entering the Zoom classroom.
- Keeping your video feed on (not a still picture or black screen) during class.
- Using the “raise hand” feature and/or raising your hand when you wish to speak.
- Unmuting your microphone when called upon and muting it again once you are done speaking.

I understand that some of you may have distractions during class, such as children in the background. Do not worry about it and do the best that you can to focus and not distract the class under the circumstances.

Podcasting or Recording of Lectures

Lectures are provided for instructional purposes only and remain the intellectual property of the instructor. All other uses are prohibited. Lecture material is covered by copyright (Title 17, United States Code), and lectures may not be audio- or video-recorded.

Class sessions in this course are taught live, and you are expected to attend in person. As a courtesy to those who are unable to attend a class session in person due to illness or for other reasons—or for those who want to review something that was said in class—the class will be recorded via Zoom and available to be reviewed by students enrolled in the class. **Continued enrollment in this course is considered consent to being audio and video-recorded for this purpose.**

Attendance

I assume that you are in the class because of a desire to learn the law involved and that you will attend and participate accordingly. Reading the assignments is required. Class participation and preparation are important and will be a factor in your final grade. Every student will have several opportunities to volunteer to present a case or other required reading to the class. With a few exceptions, the format will be discussion as opposed to lecture. Attendance will be checked each week. If you are ill or cannot attend a class for any reason, please notify me by e-mail in advance whenever possible and as soon as possible after the class if prior notice is not possible. We will adhere to the ABA standards for attendance.

E-mail

I will communicate with you throughout the quarter by e-mail. Consistent with the Rules of Professional Conduct, it is your responsibility to check your e-mail regularly and to respond in a timely way to e-mail when appropriate. I will use e-mail to distribute material or to advise you that new material is available on the TWEN site for the class. I will also use e-mail to notify you of any last-minute changes for a particular class or to schedule appointments to meet with you. If you would like to schedule an appointment to meet with me, please let me know by e-mail.

Access and Accommodation:

I want to make sure that you can attend class and do so comfortably and conveniently. If you have already established accommodations with Disability Resources for Students (DRS), please communicate your approved accommodations to me at your earliest convenience so we can discuss your needs.

If you have not yet established services through DRS, but have a temporary health condition or permanent disability that requires accommodations (conditions include but are not limited to; mental health, attention-related, learning, vision, hearing, physical or health impacts), you are welcome to contact DRS at 011 Mary Gates Hall or 206-543- 8924 or uwdrs@uw.edu or

disability@uw.edu

DRS offers resources and coordinates reasonable accommodations for students with disabilities and/or temporary health conditions.

It is the policy and practice of the University of Washington to create inclusive and accessible learning environments consistent with federal and state law.

Religious Accommodations

Washington state law requires that UW develop a policy for accommodation of student absences or significant hardship due to reasons of faith or conscience, or for organized religious activities. The UW's policy, including more information about how to request an accommodation, is available at [Religious Accommodations Policy](https://registrar.washington.edu/staffandfaculty/religious-accommodations-policy/) (<https://registrar.washington.edu/staffandfaculty/religious-accommodations-policy/>).

Accommodations must be requested within the first two weeks of this course using the [Religious Accommodations Request form](https://registrar.washington.edu/students/religious-accommodations-request/) (<https://registrar.washington.edu/students/religious-accommodations-request/>)

Access to the Gallagher Law Library:

The Library is a great resource for all your research and reference needs. You can contact the Library by emailing lawref@uw.edu, which will send your question directly to the virtual reference office and staff. The virtual reference office is staffed Monday - Friday, 8:00 a.m. - 5:00 p.m. for the entire quarter, but feel free to email at any time and they will respond during open hours. Librarians are also available to meet with you remotely either one-on-one or as a small group. To see all of the ways the Library is here for you, check out the Law Students Services page, available at: <https://guides.lib.uw.edu/law/lawstudents>.

Additionally, to assist you in the remote learning environment, Library staff created asynchronous video content on a wide variety of research topics. You can find all of the available videos from this landing page: <https://guides.lib.uw.edu/law/gallaghervideos>. Check back frequently as new content will be added as it is produced.

Student Learning Technologies (UW-IT) Support

Contact help@uw.edu or 206-221-5000 for UW NetID and general networking support. UW-IT maintains a help desk at the Odegaard Undergraduate Library

Course Evaluation:

Course evaluations are available online during the last full week of classes. Class time will be made available on **March 3rd** for completing your evaluation.

Guests and Visitors:

Guests and visitors are welcome to observe the class with my prior approval.

Writing Requirement:

This course requires all students to do the research and writing necessary to produce a paper on a topic of their own choice.

Length and Format

The paper you write should not be **less** than 12 pages and must not be **more** than 15 pages in length, including a bibliography or footnotes. MJ and graduate degree candidates from disciplines other than law may use a bibliography that is consistent with the requirements of the Chicago Manual of Style. JD and LL.M. students must use footnotes that conform to the Bluebook form of citations. Footnotes are an important part of legal writing and analysis. A bibliography or endnotes are not acceptable for JD and LL.M students.

Your name, the course number and name, and the date your paper is submitted should appear on the first page of the paper in the upper right corner. Do not use a title page. Pages should be numbered sequentially at the bottom of the page. Text should be double spaced and use 12-point font with one-inch margins. Footnotes should be in 10-point font and single spaced.

Required Content

Your paper should be your own original work and should rely on primary sources of law. It should not quote extensively from secondary sources or simply summarize one or more secondary source. The paper should include:

- I. An introduction with an opening story, the identification of the issue presented in the opening story, your thesis statement, and a brief roadmap for the rest of the paper.
- II. An explanation of the background and context for the topic of your paper.
- III. A discussion of the arguments in support of your thesis.
- IV. A discussion of the arguments against your thesis.
- V. Your conclusion

Style and Grammar:

Use and follow the rules in *The Elements of Style*. Be sure you proofread your writing carefully and use available software to check spelling and grammar. Use a dictionary and/or a thesaurus to check proper usage of words and terms if you are unsure of their meaning.

Due Dates

Your paper topic and thesis are due on **January 24th**. Your detailed outline is due on **February 17th**. Final papers must be submitted to me by e-mail on or before **March 19th at 5:00 PM**. No extensions of time will be permitted except in cases of extreme hardship or emergency.

Grades

Grades will be based on (1) your work on your paper, (2) your preparation for and participation in class, the questions you submit in writing each week, and (3) your attendance.

Your paper will count for up to 60 percent of your grade as follows: Complexity

of topic	10
points	
Identification of judicial precedents/governing law	15
Grammar, spelling, citation form, style	15
Analysis of issues, use of precedents/governing law	20

Class participation and attendance will count for up to 40 percent of your final grade. Participation in discussions during class will be weighed based on quality, not quantity, and will include the questions you submit each week, questions asked during class, the complexity of the issues you raise and the discussions joined during class.

Reading Assignments

Week 1 – January 6th – Course Overview; Marshall Cases & Inherent Powers

Fletcher v. Peck, 10 U.S. 87 (1810) (Edited)

Johnson v. M'Intosh, 21 U.S. 543 (1823) (Edited)

Cherokee Nation v. Georgia, 30 U.S. 1 (1831) (Edited)

Worcester v. Georgia, 31 U.S. 515 (1832) (Edited) Optional

Reading

Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D.L. REV. 627 (2006)

U.S. Constitution, Art. I, Sec. 8, cl.3; Art. VI, cl. 2

Week 2 – January 13th Implied Divestiture

United States v. Kagama, 118 U.S. 375 (1886)

Williams v. Lee, 358 U.S. 217 (1959)

Dewi Ioan Ball, *Williams v. Lee (1959) - 50 Years Later: A Reassessment of One of the Most Important Cases in the Modern Era of Federal Indian Law*, 2010 MICH. ST. L. REV. 391 (2010)

Morton v. Mancari, 417 U.S. 535 (1974)

Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978)

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980)

Montana v. U.S., 450 U.S. 544 (1981)

Justice Johnson Quotes on the Scope of Inherent Authority (2020)

Optional Reading

Kiowa Tribe of Okla. v. Manufacturing Techs., Inc., 523 U.S. 751 (1998)

Lewis v. Clarke, 137 S. Ct. 1285 (2017)

Congressional Waivers of Tribal Sovereign Immunity (PDF)

William Wood, *It Wasn't An Accident: The Tribal Sovereign Immunity Story*, 62 AM. U.L. REV. 1587 (2013)

Week 3 – January 20th Writing Workshop; Current Issues in Federal Indian Law: Law Enforcement & Child Welfare

U.S. V. Cooley, 919 F3d 1135 (9th Cir. 2019)

U.S. v. Cooley – U.S. Petition for Certiorari

Cooley Brief in Opposition to the U.S. Petition

U.S. Reply to Cooley Opposition

Optional Reading

Crow Tribe and NCAI Brief in Support of the Petition

National Indigenous Women's Resource Center Brief in Support of the Petition

Brackeen v. Bernhardt, 937 F3d 406 (5th Cir. 2019) Brief of Individual Plaintiff Appellees Federal Appellants' En Banc Brief

Optional Reading

Chad and Jennifer Kay Brackeen State of Texas Brief *Brackeen v.*

David Bernhardt Amicus Brief of State of Ohio

Week 4 – January 27th Religious Freedom – Paper Topic and Thesis Due

Sherbert v. Verner, 374 U.S. 398 (1963)

Wisconsin v. Yoder, 406 U.S. 205 (1972)

Bowen v. Roy, 476 U.S. 693 (1986)

Lyng v. Northwest Indian Cemetery Protective Assn., 486 U.S. 439 (1988)

Employment Div. Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990)

Navajo Nation v. U.S. Forest Service, 535 F.3d 1058 (9th Cir. 2008) *cert denied*, 129 S. Ct. 2763 (2009).

Access Fund v. U.S. Dept. of Agriculture, 499 F.3d 1036 (9th Cir. 2007)

Optional Reading

Kristen A. Carpenter, *Limiting Principles and Empowering Practices in American Indian Religious Freedoms*, 45 Conn. L. Rev. 387 (2012)

American Indian Religious Freedom Act, 42 U.S.C. §§ 1996-1996a Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–2000bb-4 (2013)

City of Boerne v. Flores, 521 U.S. 507 (1997) (holding that RFRA was unconstitutional as applied to the states because the Fourteenth Amendment did not authorize Congress to extend the guarantees of the First Amendment to the states).

Burwell v. Hobby Lobby, 573 U.S. 682 (2014)

U.S. v. Friday, 525 F.3d 938 (10th Cir. 2008) (Eagle Feathers)

U.S. v. Wilgus, 638 F.3d 1274 (10th Cir. 2011) (Eagle Feathers) 42 U.S.C. §§ 2000cc-2000cc-5 (Religious Exercise in Land Use and Institutionalized Persons) (Prisoners)

Week 5 – February 3rd – Cultural Resource Protection – The Duty to Consult

Executive Order 13007 – Sacred Sites (1996)

Executive Order 13175 – Consultation and Coordination with Indian Tribal Governments (2000)

Executive Order 13647 White House Council on Native American Affairs (2013)

United Nations Declaration on the Rights of Indigenous Peoples (2008)

Morton v. Ruiz, 415 U.S. 199 (1974)

Oglala Sioux Tribe of Indians v. Andrus, 603 F.2d 707 (8th Cir. 1979)

Lower Brule Tribe v. Deer, 911 F.Supp. 395 (D.S.D. 1995)

Winnebago Tribe of Nebraska v. Babbitt, 915 F.Supp 157 (D.S.D. 1996)

Wyoming v. Jewell, 136 F. Supp.3d 1317 (D.WY. 2015)

Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, 255 F.Supp.3d 101
(D.D.C. 2017)

Optional Reading

Robert Miller, *Consultation or Consent: The United States' Duty to Confer with American Indian Governments*, 91 N.D.L. REV. 36 (2015)

Chantal Carriere, *Federal Approval of Oil Pipelines and Indigenous Consultation in the United States after Standing Rock and Keystone XL: Lessons from Canada on the Limits of Industry-Indigenous Consultation*, 42 HOUS. J. INT'L L.321 (2020)

S. James Anaya, *Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples*, ARIZONA LEGAL STUDIES: DISCUSSION PAPER NO. 16-42 (2016)

Week 6 – February 10th – Cultural Resource Protection – NEPA and NHPA

National Environmental Policy Act (NEPA) 42 U.S.C. §§ 4321-4370m-12

Preservation Coalition Inc. v Pierce 667 F.2d 851 (9th Cir. 1982) *Colorado*

River Indian Tribes v Marsh 605 F.Supp. 1425 (C.D. CA. 1985)

Southwest Center for Biological Diversity v Babbitt 150 F.3d 1152 (9th Cir. 1998)

54 U.S.C. 306108 Effect of Undertaking on Historic Property (NHPA § 106)

NHPA Definitions 54 U.S.C. § 300301 NHPA Tribal Provisions §§ 302701 - 302706

Abenaki Nation of Mississquoi v Hughes 990 F.2d 729 (2nd Cir. 1993)

Narragansett Indian Tribal Historic Preservation Office v Federal Energy Regulatory Commission 949 F.3d 8 (D.C. Cir. 2020)

Optional Reading:

LAUREN REDNISS, *OAK FLAT: A FIGHT FOR SACRED LAND IN THE AMERICAN WEST* (2020)

Week 7 – February 17th – Archaeological Resources and Antiquities Act

Archaeological Resources Protection Act 16 U.S.C. §§ 470aa-470mm

U.S. v Gerber 999 F.2d 1112 (7th Cir. 1993) *cert. denied* 510 U.S. 1071(1994)

Winnemem Wintu Tribe v US Dept of Interior 725 F.Supp.2d 1119 (E.D.CA. 2010)

National Monuments (Antiquities Act) 54 U.S.C.§ 320301

State of Alaska v Carter 462 F.Supp. 1155 (D. AK. 1978)

National Mining Assn. v Fowler 324 F.3d 752 (D.C. Cir. 2003) *Utah*

Assn of Counties v Bush 455 F.3d 1094 (10th Cir. 2006)

Optional Reading

Sarah Krakoff, *Public Lands, Conservation, and the Possibility of Justice*, 53 Harv. C.R.-C.L. L. Rev. 213 2018

Week 8 – February 24th – Native American Grave Protection and Repatriation Act

Native American Grave Protection and Repatriation Act 25 U.S.C. §§ 3001 et seq.

Trafficking in Native American human remains and cultural items 18 U.S.C. § 1170

Na Iwi O Na Kupuna O Mokapu v Dalton 894 F.Supp. 1397 (D. HI.1995)

U.S. v. Corrow 119 F.3d 796 (10th Cir. 1997) *cert. denied* 522 U.S. 1133 (1998)

Thorpe v Borough of Thorpe 770 F.3d 255 (3rd Cir. 2014) *cert. denied* 577 U.S. 914 (2015)

Bonnichsen v U.S. 367 F.3d 864 (9th Cir. 2004)

San Carlos Apache Tribe v U.S. 417 F.3d 1091 (9th Cir. 2005)

Optional Reading

C. TIMOTHY MCKEOWN, IN THE SMALLER SCOPE OF CONSCIENCE: THE STRUGGLE FOR NATIONAL REPATRIATION LEGISLATION, 1986-1990 (2012)

Native American Languages Act

25 U.S.C. §§ 2901 et seq.

42 U.S.C. §§ 2991b-2 et seq.(Funding Authorization)

Indian Arts and Crafts Act

25 U.S.C. §§ 305 et seq.

18 U.S.C. § 1159 Misrepresentation of Indian produced goods and products

Week 9 – March 3rd – Aboriginal Law in Canada

Royal Proclamation of 1763

The Constitution Acts of 1867 and 1982

Powers of Parliament § 91(24) Indians and land reserved for the Indians

Exclusive Powers of Provincial Legislatures §§ 92 and 92A Enact laws governing property and civil rights, development, conservation and management of all non-renewable natural resources, power generation and mining, except to the extent such laws conflict with laws enacted by the parliament.

Canadian Charter of Rights and Freedoms § 25 No abrogation or derogation of Aboriginal rights under treaties or the Royal Proclamation of 1763 or pursuant to a land claims agreement.

Rights of Aboriginal Peoples § 35 Existing Aboriginal rights recognized and affirmed for Indian, Inuit and Metis peoples.

Indian Act

St. Catherine's Milling and Lumber Co. v. R, Vol. XIII S.C.C. 577 [1886]

Calder v. British Columbia Attorney General, [1973] S.C.R. 313

R. V. Sparrow [1990] 1 S.C.R. 1075 (S.C.C.)

Delgamuukw v. British Columbia [1997] 3 S.C.R. 1010

Truth & Reconciliation Commission of Canada -Executive Summary (2015)

Week 10 – March 10th – Aboriginal Law in Canada

Haida Nation v. British Columbia, [2004] 3 S.C.R. 511

Tsilhqot'in Nation v. British Columbia, [2014] 2 S.C.R. 257

Ktunaxa Nation v. Minister of Forests, [2017] 2 S.C.R. 386

Tsleil-Waututh Nation v. Atty. Gen 2018 FCA 153

Papers are Due on or before March 19th at 5:00 P.M. and should be submitted by e-mail to ee23@uw.edu