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DePaul Law Review

Volume 23
Issue 4 *Summer 1974*

Article 8

Price: Law and the American Indian: Readings, Notes and Cases

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LAW AND THE AMERICAN INDIAN: READINGS, NOTES AND CASES, by MONROE E. PRICE. New York: Bobbs-Merrill. Bibliography; index; notes; table of cases. 1973. Pp. xxxiv+807. $16.50 cloth.

*S. Bobo Dean**

In the past decade a number of judicial decisions and legislative developments have re-emphasized the role of Indian tribes as significant components in the American governmental system. The courts and the Congress have recently given ample indication that in their view Indian tribes are here to stay.[1] These developments indicate a remarkable change in mood from the early 1950's when serious consideration was being given on Capitol Hill and within the Administration to the dissolution of Indian tribal governments.

The publication of the first legal casebook in the field of federal Indian law is a reflection of the growing importance of this area of the law and of the increasing need for lawyers, as well as for non-Indians generally, to accept the "Indian country" as a permanent jurisdictional fact.

In the absence of any other similar volume, this casebook has now taken a place beside Felix Cohen's classic, *Federal Indian Law*, as an important tool in the exploration of the complex legal rules applicable to Indian tribes and tribal Indians.

Law and the American Indian is obviously intended for a variety of audiences. In this reviewer's opinion it will serve best the law students and non-lawyers who lack extensive exposure to the field. This work covers, within a practicable compass, most significant areas of federal Indian law. However, the book is not intended as a treatise, in the Cohen sense, in which the answers (or the best available answers) on any point of federal Indian law can be uncovered with patience. Instead, the casebook provides a variety of cases and other materials which differ substantially in their reliability as "good law." For pedagogical purposes this approach has its uses. The practicing attorney, however, will need to use the casebook with considerable care and may find in a number of areas (for example, land tenure and economic development) that the selected biography is more useful than the materials actually included in the text.

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1. *See, e.g.*, McClanahan v. State Tax Commission, 411 U.S. 164 (1973); State and Local Fiscal Assistance Act of 1972 § 108(b)(4), 31 U.S.C. § 1227(b)(4) (Supp. II, 1972).

Professor Price has organized the casebook around five major areas: concepts of sovereignty; state authority in Indian matters; property concepts in federal Indian law; land tenure, use and development; and tribal government. This system of organization lacks the lucid flow of Felix Cohen's treatise, but—again for pedagogical purposes—this approach usefully concentrates attention on certain basic developments in case law where most of the so-called "principles" of federal Indian law are to be found.

Until fairly recently, federal Indian law was largely a matter of the judicial formulation of rules on such matters as what a tribe is, what the extent of its powers are, what its rights to land or other property are, etc. Federal Indian law thus lends itself particularly to the case law method of instruction and law professors privileged to teach federal Indian law will find the casebook, especially the first two chapters covering sovereignty and state power, useful. These two chapters provide a good general survey of the development of the concept of Indian tribal sovereignty, the scope of federal authority in Indian affairs, and the relationship between the states and the Indian tribes.

This section of the casebook also will be useful to the practicing attorney without prior experience in federal Indian law who suddenly needs to know what kind of a legal entity an Indian tribe is. It will be important, however, for attorneys using the book as a research tool to keep in mind that materials, such as the nineteenth century decisions on the power of states in the Indian country (*Cisna, Bailey*, and *Doxtater*), which are certainly no longer good law, are included only for purposes of historical explanation.

Price included materials, especially in the chapter on land tenure, land use, and economic development, that will stimulate discussion on controversial issues. In these materials, and particularly in the notes and the excerpt from the Price article, *Lawyers on the Reservation: Some Implications for the Legal Profession*, there are factual errors and distortions in emphasis, the overall effect of which is to give an impression of hopeless wrong-headedness on the part of most of those currently involved in any effort to promote a better material standard of living on Indian reservations.

For example, it is not correct, as reported on page 617 of the casebook, that "the Oglala Sioux of Pine Ridge Reservation are pressing for the return of valuable Black Hills land 'temporarily' borrowed by the United States for an artillery range during World War II" for several different reasons, not the least of which is that the Black Hills, which was taken from the Sioux in the nineteenth century, is confused with the Pine Ridge Aerial Gunnery Range, which was taken in the 1940's. Those two areas are many miles apart and, in response to the Oglala Sioux Tribe's "pressing," Congress had already provided, in 1968, for the repurchase at a preferential price by the former owners of the Gunnery Range lands. The congressional action was prior to the publication of Professor Price's article. This error should not have been perpetuated in a casebook published in 1973.[2]

2. *See* 16 U.S.C. §§ 441(j) *et seq.* (1970).

Professor Price is also incorrect, or at least badly out of date, in describing in a footnote on the same page "development" on the Mississippi Choctaw reservation as being limited to training Choctaw families for jobs in New Orleans and Cleveland. The Mississippi Band of Choctaw Indians is currently engaged in one of the most determined and aggressive reservation development programs, and substantial numbers of Choctaws are finding jobs in the local community.

It is in the general approach to economic development that these materials are most dangerously misleading. Federal and tribal efforts to create jobs for Indian people and to increase the income which Indian people can derive from their land seem to be regarded suspiciously as the latest phase in a long-established conspiracy designed to separate the Indian from his traditional culture or from his land. Many tribal leaders will find the emphasis on the danger of development to an Indian's "freedom to pursue a culture or style of life considered worthwhile" as being irrelevant to the pressing needs of the Indian communities which they serve.

These needs are starkly reflected in the data published in Table 14 of the Bureau of the Census *Subject Report, American Indians*, which list the percentage of persons with incomes below the poverty level on a number of characteristic reservations, as follows: Blackfeet, 51.3%; Cherokee, 55%; Cheyenne River, 58.2%; Fort Apache, 55.7%; Gila River, 57%; Hopi, 66.9%; Navajo, 64%; Papago, 78.6%, etc.

The primary need in these reservation communities, as Lloyd Eaglebull, Secretary of the Oglala Sioux Tribe, has said, is "a little food on the table." In preparing a subsequent edition, Professor Price may want to consider re-examining the priorities of concern which his economic development materials now reveal.

The section of the casebook most in need of early revision is the final chapter entitled "Strengthening Tribal Government." The trend toward more effective tribal government is continuing rapidly, and there have been a number of significant developments since the publication of this book. There is now more reason to be optimistic about the future strength of tribal governments than the Price materials indicate. These include the position now taken by the Interior Department that tribal governments in so-called "Public Law 280 states" (*i.e.*, states in which the state government has acquired criminal and civil jurisdiction within Indian reservations) continue to possess civil and criminal jurisdiction within their reservations which they may exercise concurrently with the State.[4] Another such development is the recent holding by the Federal District Court in the Western District of Washington that Indian tribes have criminal jurisdiction over non-Indians committing offenses on tribal lands.[5]

3. U.S. DEP'T OF COMMERCE SOCIAL AND ECONOMIC STATISTICS ADMINISTRATION, SUBJECT REPORT, AMERICAN INDIANS, 1970 CENSUS POPULATION, table 14, at 171 (June 1973).

4. Letter from William Gershuny, Associate Solicitor, Indian Affairs, to Chief, Indian Desk, Law Enforcement Assistance Administration, Mar. 21, 1973; Notice of Determination, 33 Fed. Reg. 13758 (May 25, 1973).

5. Oliphant v. Schlie, 1974-4 INDIAN L. REP. 32 (W.D. Wash. Apr. 5, 1974).

The Secretary of the Interior's continued emphasis on giving Indian tribes the authority to administer Bureau of Indian Affairs programs for their people is another encouraging sign. The casebook includes a portion of former President Nixon's 1970 Message on Indian Affairs, which laid down self-determination as Administration policy. However, few materials are included which indicate how this policy is moving forward. This is an area in which the attorney can play an important role in assuring that Indian tribes are given the fullest opportunity for managing their own affairs in accordance with current Federal policies. It would have been useful to include materials on the laws, regulations, and policies which currently apply to the tribal take-over of BIA programs, as well as the legislative proposals in this field now under consideration in the Congress.[6]

The casebook also fails to cover the significant legal relationships which have developed between Indian tribes and federal agencies other than the Bureau of Indian Affairs. Another important role for attorneys in representing tribal governments should be in assuring that Indian tribes regularly receive their full entitlement under Section 108(b)(4) of the State and Local Fiscal Assistance Act. Presently the Office of Revenue Sharing is failing to include the tax effort of Indian tribes in computing payments to them under the Revenue Sharing Program, and has offered as its only explanation that its staff has been so busy collecting data on non-Indian governments that it has not had an opportunity ". . . to devote our full attention to certain other delayed matters such as collecting tax data for the Indian tribal governments."[7]

Another area to which more attention should be paid in this section of the book is the effort which a number of states have made toward improving their relations with the Indian tribes. South Dakota, for example, has entered into agreements with several tribal governments under which the state collects a sales tax as agent for the tribe on all sales except sales between a non-Indian buyer and a non-Indian seller) which take place on the reservation. State acceptance of the permanence of Indian governmental institutions is a welcome sign.

While there are a number of areas in which the casebook could be strengthened, it is clearly the consequence of dedicated effort and should serve lawyers, law students, and those members of the public who may be interested in the development of federal Indian law.

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6. *See, e.g.*, the Indian Self-Determination and Educational Reform Bill, S. 1017, 93d Cong., 1st Sess. (1973), which has been passed by the Senate.

7. Letter from Office of Revenue Sharing to the Oglala Sioux Tribe, Nov. 26, 1973. On May 31, 1974, the Office of Revenue Sharing finally assured the Oglala Sioux Tribe that it would begin "collecting" tribal tax data and that a payment to correct its failure to include tribal taxes for the years 1972, 1973, and 1974 would be made in 1976. However, other tax collections by other tribal governments are still being ignored.

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Published quarterly under the editorial direction of DePaul law students. Views expressed in this periodical are to be attributed to the authors, and not to the periodical, its editors or DePaul University.