

# Seattle University School of Law Digital Commons

---

Faculty Scholarship

---

1-1-2014

## A Legal Practitioner's Guide to Indian and Tribal Law Research

Kelly Kunsch

Follow this and additional works at: <https://digitalcommons.law.seattleu.edu/faculty>



Part of the [Indian and Aboriginal Law Commons](#)

---

### Recommended Citation

Kelly Kunsch, A Legal Practitioner's Guide to Indian and Tribal Law Research, 2 *AM. INDIAN L. REV.* 484 (2014).

<https://digitalcommons.law.seattleu.edu/faculty/470>

This Article is brought to you for free and open access by Seattle University School of Law Digital Commons. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Seattle University School of Law Digital Commons. For more information, please contact [coteconor@seattleu.edu](mailto:coteconor@seattleu.edu).

## A LEGAL PRACTITIONERS GUIDE TO INDIAN AND TRIBAL LAW RESEARCH

*Kelly Kunsch\**

### INTRODUCTION

This article is a guide to legal research with the specific goal of assisting practitioners. The typical *practitioner* would be an attorney, but many professionals who work within the arena of Indian and tribal law may not have the formal legal training that attorneys do. The article is a discussion of the resources available to research the law, the issues that often arise in the area, and the approaches to take in applying the resources to the issues. It is not a classic bibliography listing resources (often alphabetically), and is not intended to be comprehensive in the resources mentioned.

Acknowledging the rural location of many Indian lands, the article discusses not only the best overall sources for researching Indian law issues, but also attempts to provide suggested alternatives for practitioners who may not have access to commercial databases or nearby law libraries.

Part I of the article introduces the reader to the legal topic of the article and also introduces a type of research tool called “Boolean” searching. Part II describes federal Indian law and the treaties, statutes, cases, compacts, and secondary sources that cover this area of law and how to research them. Part III explains tribal law, why this area of law differs from federal Indian law, and why research in this area is equally important. Finally, Part IV states the conclusion and what the reader should have taken away from reading the article.

---

\* Reference Librarian, Adjunct Professor: Seattle University School of Law. My thanks to *The American Indian Law Journal* members for this forum, their suggestions, and outstanding technical support.

### **A. *Indian Law Versus Tribal Law***

This article is written for a wide audience, with varying familiarity with Indian law; as such, some basic concepts of Indian law are included first as background. One of the most fundamental concepts is the distinction between federal Indian law and tribal law. When attorneys use the phrase “Indian Law,” they usually mean any laws concerning Indian tribes or Indians (where an Indian is treated differently than other United States citizens). It is an all-encompassing phrase that suffices because usually it is an area of law not covered by other topical areas.<sup>1</sup> Particularly with research, it is better to understand the difference between two distinct facets of Indian law: (1) federal Indian law, dealing with the relationship between a tribal government and the federal government (and, by implication, the limited dealings with state government); and (2) tribal law, dealing with the domestic law of any particular tribe; or more generically the domestic laws of various tribes. This piece will discuss researching both areas of Indian law.

### **B. *Legal Research and Boolean Searching***

Before proceeding too far into the particulars of Indian and tribal law research, it is necessary to comment on a general research issue or tactic. That is, Boolean searching (including truncation<sup>2</sup>). For some reason, the word Boolean, and its synonyms<sup>3</sup> typically creates a negative reaction in most law students and lawyers. However, Boolean search logic

---

<sup>1</sup> There are definitely areas of overlap. For example, the Indian Child Welfare Act might be considered part of Indian Law but it is also a part of family law. Similarly, the Indian Gaming Regulatory Act lies within both Indian Law and Gaming Law.

<sup>2</sup> In online searching, truncation refers to the ability to search all forms of a particular word root. See STEVEN M. BARKAN, ROY M. MERSKY & DONALD J. DUNN, FUNDAMENTALS OF LEGAL RESEARCH 527 (2009) (“For example, a researcher may wish to retrieve documents that include either *tort* or *tortious* . . . . Users can . . . us[e] the root “tort” followed by the root expander, an exclamation point (!) . . .” (the exclamation point being the convention for truncation in Lexis and Westlaw)).

<sup>3</sup> “Terms and connectors” is one such synonym. If a law review article can stray from a dry statement of facts, a Boolean search on the subject might look something like: Boolean OR (terms /2 connectors). The parentheses are necessary in the typical search engine.

is simple. In addition, some search engines or databases require its use, and most others can be most fully utilized by employing it.

There are only four Boolean connectors that an attorney needs to know: “AND,” “OR,” “NOT,” and the proximity connector (often represented as “/” or “/n” [where “n” is a number]).<sup>4</sup> The “OR” is used for synonymous terms. The “AND” requires that the terms connected by it both appear in a document. The “NOT” eliminates documents if a specific word appears in it. The proximity connector is similar to “AND” in that it requires that both terms appear in the document. It allows a searcher to narrow the search to require that the terms appear within a limited number of words of each other. For example,

trust /5 lands

requires that the word “trust” be within five words of the word “land”—the order does not matter.<sup>5</sup> So “lands held in trust” would be retrieved as well as “trust lands.”<sup>6</sup>

Essentially, basic Boolean searching is that easy—four connectors. Virtually all search engines and databases use them. The only difference is in the convention for entering searches. Proximity searches, for example, are sometimes done “w/5” or “near5” or “near/5” as well as “/5.” A practitioner should consult the appropriate search help guide to determine the correct convention before searching. How phrases are searched is tied to the way a search engine treats a space between words. Some databases require quotation marks to search a phrase. For example, Westlaw’s Boolean search engine treated a space as an “OR” connector; so,

Indian country

---

<sup>4</sup> The connectors usually do not need to be capitalized (although in some databases they do). They are capitalized here so that it is apparent to the reader when a word is being used or discussed as a connector.

<sup>5</sup> Some databases allow for connectors that specify order but this article will not attempt a comprehensive explanation of Boolean variations.

<sup>6</sup> Most databases will automatically retrieve plurals if the singular is searched. Some databases allow a search to limit a search to just singular or just plural forms.

would have searched for the word “Indian” or the word “country.” Lexis, by contrast, would have searched the above as a phrase. Many times, if you put two words together in a search box, an “AND” connector is inferred. Because of this discrepancy between databases, a practitioner should look at the documentation for a research service or database to determine how to search for an exact phrase.

Finally, most searching allows for truncation or root expansion. This is done to allow searching for various forms of a word with a single string of characters instead of requiring multiple “OR” connectors. In both Lexis and Westlaw, the truncation symbol is an exclamation point. Therefore, the search:

sovereign!

would retrieve documents with “sovereign,” “sovereigns,” and “sovereignty.” Many databases use an asterisk (\*) as a truncation symbol. Again, it is important to look at the search help documentation to determine how to truncate in a particular database. Having covered that essential concept of research, the particular topics of Indian and tribal law can be addressed.

## I. FEDERAL INDIAN LAW

As stated earlier, most of traditional *Indian law* deals with the relationship of Indians and Indian tribes with the federal government. The primary sources that govern the area are the usual ones: statutes, regulations, and cases. There is, however, one additional primary source that is not essential in other areas of research. Those are treaties. Because those help define the specifics of federal and tribal relationships for any particular tribe, they are the most important authority on macro issues.

### A. *Treaties*

Indian treaties create the obligations of the federal government to particular tribes, and the interpretation of them defines the nature and extent of those obligations. When there is a question of what the rights of a particular tribe are, attorneys should look to that tribe’s treaty with the

United States to find the language creating the right to determine its existence and extent. These might seem of interest to only attorneys representing tribes or the federal government. However, the effects of Indian treaties impact the interests of non-Indians as well. For example, Indian fishing rights may allow harvesting of shellfish from private tidelands as well as public waters and lands.<sup>7</sup>

Although treaty language varies, there are numerous similarities in Indian treaties. Felix Cohen, in his original Handbook of Federal Indian Law lays out five important subjects that were typically set out in Indian treaties: the international status of the tribe (including boundaries), dependence of tribes on the United States, commercial relations (including cessions of land, reserved rights in ceded land and payments and services to tribes), jurisdiction, and control of tribal affairs.<sup>8</sup>

Treaty making took place between 1778 and 1871.<sup>9</sup> Treaties from 1778 to 1845 appear in volume seven of *United States Statutes at Large*. Later treaties are spread throughout volumes 9-16. Treaties are also collected in volume two of the well-known *Indian Affairs: Law and Treaties* also referred to as *Kappler*, after its author Charles J. Kappler.<sup>10</sup> The two-volume set was published in 1904 after Congress commanded such a compilation in 1902.<sup>11</sup> It was updated periodically to become seven volumes, although only volume two contains treaties. *Kappler* contains treaties, statutes, and other government documents pertaining to the American Indian. All seven volumes have been digitized and made available through Oklahoma State University.<sup>12</sup>

---

<sup>7</sup> *United States v. Washington*, 157 F. 3d 630 (9th Cir. 1998).

<sup>8</sup> COHEN'S HANDBOOK OF FEDERAL INDIAN LAW at 39 (1941), available at <http://thorpe.ou.edu/cohen.html> (last visited March 17, 2014).

<sup>9</sup> By the act of March 3, 1871, Congress provided "that hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty." 16 Stat. 566, now codified as 25 U.S.C. § 71 (2006).

<sup>10</sup> Charles J. Kappler, *Indian Affairs: Laws and Treaties*, OKLA. STATE UNIV. LIBRARY, available at <http://digital.library.okstate.edu/kappler/> (last visited Feb. 28, 2014).

<sup>11</sup> CONG. REC. May 20, 1902 at 5665.

<sup>12</sup> *Supra* note 10.

As far as citation practices, *The Bluebook* does not include a discussion of Indian treaties, although its discussion of international treaties makes *United States Statutes at Large* the preferred source of citation.<sup>13</sup> It does allow citation of unofficial treaty sources,<sup>14</sup> and a Westlaw search shows numerous references to *Kappler's* compilation. *Kappler* also has references to *Statutes at Large* in its margins.

A final resource for researching treaty texts is *Documents of American Indian Diplomacy* published in 1999.<sup>15</sup> The two-volume set was designed as a supplement to *Kappler*. It contains treaties and documents omitted by *Kappler*,<sup>16</sup> as well as those after *Kappler's* compilation.<sup>17</sup> It also discusses some of the historical context in which the particular groups of treaties were negotiated as well as a brief chapter on how federal treaties were negotiated.<sup>18</sup> History and context can be critical in determining the meaning of treaty words and phrases. That will be discussed in the following section.

### 1. Treaty interpretation

Understanding how to interpret treaty language is almost as important as finding the treaty. As previously noted, the impact of treaty interpretation can reach far beyond tribal members, Indian lands, and federal and state governments. For example, one judge's interpretation of a treaty clause concerning retained fishing rights affected, and continues to affect, recreational anglers, the commercial fishing industry, and many aspects of the environment.<sup>19</sup> In the case known as the *Boldt Decision*,<sup>20</sup>

---

<sup>13</sup> THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION NINETEENTH EDITION Rule 21.4.5 at 189 (2010).

<sup>14</sup> *Id.* at 190.

<sup>15</sup> VINE DELORIA JR. & RAYMOND J. DEMALLIE, DOCUMENTS OF AMERICAN INDIAN DIPLOMACY: TREATIES, AGREEMENTS, AND CONVENTIONS 1775-1979 (1999).

<sup>16</sup> DeLoria and DeMallie are highly critical of Kappler's oversights in his volume II on treaties. *Id.* at 3.

<sup>17</sup> Pages 183-208 contain a chronological list of treaties with references to their written sources. *Id.* at 183-208.

<sup>18</sup> *Id.* at 177-180.

<sup>19</sup> See *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974).

<sup>20</sup> See, e.g., Brian E. Schartz, *Fishing for a Rule in a Sea of Standards: A Theoretical Justification for the Boldt Decision*, 15 N.Y.U. ENVTL. L.J. 314 (2007).

tribes in the Puget Sound region had signed treaties with language that reserved “the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory.”<sup>21</sup> Judge Boldt interpreted this phrase to mean that the treaty tribes had a right to half of the allowable harvest.<sup>22</sup>

Chapter 2 of *Cohen*, “Principles of Interpretation,” discusses interpretation principles of treaties as well as statutes and executive orders affecting Indian tribes.<sup>23</sup> Quoting the Supreme Court, “standard principles of statutory interpretation do not have their usual force in cases involving Indian law.”<sup>24</sup> The cardinal rule of canon is that treaties and similar instruments be liberally construed in favor of the Indians and that “all ambiguities are to be resolved in their favor.”<sup>25</sup> One other noteworthy canon of construction for treaty interpretation is that they are to be construed as the Indians would have understood them at the time they made the treaty.<sup>26</sup> Because of this, historical documents pertaining to tribes may be important in determining meaning. In *Mille Lacs Band of*

---

<sup>21</sup> Treaty with the Nisqualli, Puyallup, etc. (commonly known as Treaty of Medicine Creek), art. 3, Dec. 26, 1854, 10 Stat. 1132, *available at* <http://digital.library.okstate.edu/kappler/vol2/treaties/nis0661.htm> (last visited Feb. 28, 2014).

<sup>22</sup> *United States v. Washington*, 384 F. Supp. at 343.

<sup>23</sup> COHEN’S HANDBOOK OF FEDERAL INDIAN LAW at 109 (2012)[hereinafter COHEN’S HANDBOOK].

<sup>24</sup> COHEN’S HANDBOOK, *supra* note 23, at 113 (citing *Montana v. Blackfoot Tribe*, 471 U.S. 759, 766 (1985)).

<sup>25</sup> COHEN’S HANDBOOK, *supra* note 23, at 113 (citing several United States Supreme Court cases supporting the statement). According to Cohen, the basic canons of construction are: treaties, agreements, statutes and executive orders are to be liberally construed in favor of Indians and all ambiguities are to be resolved in their favor; treaties and agreements are to be construed as Indians would have understood them; and tribal property rights and sovereignty are to be preserved unless Congress’s intent to the contrary is clear and unambiguous. *Id.* at 113-114. See also Phillip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137 (1990)(“according to conventional wisdom, the essential point of the canons [of construction for Indian law] is to encourage narrow construction against invasions of Indian interests and broad construction favoring Indian rights. The canons apply, however, only where congressional intent is unclear . . .”)(reprinted in NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION 937 (2008)).

<sup>26</sup> *Id.* at 114.

*Indians v. Minnesota*,<sup>27</sup> for example, witnesses at the trial included historians, an anthropologist, and a geologist;<sup>28</sup> exhibits included legions of contemporaneous communications by the United States government and by individuals involved in the treaty making. Obviously, this type of research varies depending on the particular treaty, tribe, and words subject to construction. There are also several law review commentaries on interpretation of statutes and treaties concerning Indians.<sup>29</sup>

An attorney researching a treaty should also determine whether courts have previously analyzed it. There is no comprehensive compilation of treaty annotations<sup>30</sup> so it is advisable to run an online case search. Because Indian treaties can be cited a variety of ways, it is probably prudent to run more than one search, or if the attorney is comfortable with search syntax, a single search with synonymous terms for the treaty. These might include the popular name of the treaty, the tribe's name, and the *Statutes at Large* citation. If the issue is particular treaty language, that language should be used as well. If there had been Westlaw in the time of the Boldt decision, an attorney searching for prior cases interpreting the Medicine Creek Treaty for the Nisqually tribe might do something like this:

(treaty /9 "medicine creek" or nisqually or "10 stat. 1132") and "usual and accustomed places"<sup>31</sup>

---

<sup>27</sup> 861 F. Supp. 784 (1994).

<sup>28</sup> *Id.* at 791.

<sup>29</sup> See, e.g., Scott C. Hall, *The Indian Law Canons of Construction v. the Chevron Doctrine: Congressional Intent and the Unambiguous Answer to the Ambiguous Problem*, 37 CONN. L. REV. 495 (2004); Note, *Indian Canon Originalism*, 126 HARV. L. REV. 1100 (2013); Samuel E. Ennis, *Implicit Divestiture and the Supreme Court's (Re)Construction of the Indian Canons*, 35 VT. L. REV. 623 (2011).

<sup>30</sup> In the days of print publishing, Shepard's published a citator, SHEPARD'S UNITED STATES CITATIONS, STATUTES, COURT RULES THAT listed citing cases by *Statutes at Large* citation. That set does not appear to have migrated onto Lexis (entering a "Stat." cite is not recognized in the Lexis incarnation). The "Stat." cite is also not recognized by West's Keycite.

<sup>31</sup> The author is aware of the Boolean connectors preferred by Westlaw (a space is the equivalent to the "or" connector, etc.) but the above search is meant to be more intuitive to a relatively novice searcher. The reason for using the "and" connector between the treaty references and the language is because the analysis of the actual language may

Finally, as previously mentioned, understanding the context of treaty negotiations is useful. This can be a general understanding of the Indian treaty negotiation process, but it can also mean understanding the unique circumstances related to a particular tribe or negotiation. The history of treaty making with Indians is covered in several chapters of volume one of *Treaties with American Indians: an Encyclopedia of Rights, Conflicts and Sovereignty*.<sup>32</sup>

### **B. Statutes**

While treaties create the framework for government-tribal relations for particular tribes, statutes are the primary mechanism for establishing the relationships that apply to all tribes. Although one might think that only practitioners representing tribes need an awareness of these provisions that is hardly the case. For example, it is important to non-tribal casinos competing with tribal casinos to understand the limitations and requirements of a competing business. And certainly every family law practitioner should be aware of the Indian Child Welfare Act and its potential impact on adoption cases.

By way of background, *Worcester v. Georgia*<sup>33</sup> established that dominion over relations between Indian nations and the United States was vested in the federal government rather than state governments. Because of this, most statutes relating to Indians and tribal activities are federal.

Federal statutes are published in the United States Code (U.S.C.). Title 25 of the U.S.C. is titled “Indians,” and contains most of the statutes relating to Indians and Indian tribes. The U.S.C. is available online for free at the United States House of Representatives website<sup>34</sup> and several other

---

occur much later in a decision that the first reference to the treaty (which is the one most likely to have the treaty or tribe name or the *Statutes at Large* citation).

<sup>32</sup> DONALD L. FIXICO, TREATIES WITH AMERICAN INDIANS: AN ENCYCLOPEDIA OF RIGHTS, CONFLICTS AND SOVEREIGNTY 5-208 (2008).

<sup>33</sup> 31 U.S. 515, 561 (1832).

<sup>34</sup> *United States Code*, OFFICE OF THE LAW REVISION COUNSEL, <http://uscode.house.gov/> (last visited Feb. 28, 2014).

places.<sup>35</sup> These versions of the U.S.C. contain the text of the statute and references (called *credits*) giving the dates of enactment and amendment.<sup>36</sup> Annotated codes are especially useful in finding cases or secondary sources that have interpreted or discussed the language in each section. There are two major annotated federal codes: (1) the United States Code Annotated (U.S.C.A.) published by West (Thomson Reuters) and available online via Westlaw; and (2) the United States Code Service (U.S.C.S.) published by Lexis Publishing and available online via the Lexis research service.

If a practitioner is not near a law library that has either of the annotated codes in print and has no access to the online versions, a Boolean search of cases (in a free or low-cost database) can be used as a substitute.<sup>37</sup> Because of its unique combination of numbers, a code citation often makes a good Boolean search. For example, 25 U.S.C. § 2714 is a part of the Indian Gaming Regulatory Act (IGRA) on judicial review under IGRA. If an attorney wanted cases that had discussed the section, a search like:

25 /4 2714

would retrieve those cases. If it turned out that the numbers in the citation also retrieved cases on other topics, the search could be modified by adding language likely to be in the IGRA cases:

25 /4 2714 /25 review!

---

<sup>35</sup> The United States Government Printing Office Fed. Digital Sys. (FDSys) is another access point through the federal government: *See Federal Digital System*, U.S. GOV'T PRINTING OFFICE, <http://www.gpo.gov/fdsys/browse/collectionUSCode.action?collectionCode=USCODE> (last visited Feb. 28, 2014). Cornell University's Legal Information Institute is a commonly used non-government portal: *See Legal Information Institute*, CORNELL UNIV. LAW SCH., <http://www.law.cornell.edu/uscode/text> (last visited Feb. 28, 2014).

<sup>36</sup> The credits are the beginning point for doing legislative history. The process for doing legislative history is beyond the scope of this article.

<sup>37</sup> This "substitute" lacks the organization and editorial enhancements of the commercial annotated codes. It will also lack references to some secondary sources and commentary. It is recommended only in the absence of access to the preferred sources.

(where an exclamation point is the symbol used for truncation)

Following are a few of the major pieces of legislation with some tips for researching them.

The Indian Child Welfare Act (ICWA) is codified at 25 U.S.C. sections 1901-1923 and 1931-1963. The purpose of the act is “to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families . . . .”<sup>38</sup>

The Indian Civil Rights Act (ICRA) is codified at 25 U.S.C. §§ 1301-1303. It was enacted as part of a larger bill on civil rights, rioting, housing, and other issues. It grants “to the American Indians enumerated constitutional rights and protection from arbitrary action in their relationship with tribal governments, State governments, and the Federal Government.”<sup>39</sup> It makes certain guarantees of rights under the Bill of Rights applicable to tribes within tribal land.

Although the major substantive provisions of the Indian Gaming Regulatory Act are codified at 25 U.S.C. §§ 2701 *et seq.*, the criminal provisions are in Title 18 (18 U.S.C. §§ 1166-1168). Its policy is “to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments” and to “shield it from organized crime and other corrupting influences . . . and to assure that gaming is conducted fairly and honestly.”<sup>40</sup>

In general, the best way to begin researching any of these major statutes is to look for a secondary source on the topic. These include treatises and practice manuals on the topic. For example, both the American Bar Association and the Native American Rights Fund have written legal practice guides to the ICWA.<sup>41</sup> In addition, a major treatise on

---

<sup>38</sup> 25 U.S.C. § 1902 (2006).

<sup>39</sup> Sen. Rpt. 90-721, U.S.C.C.A.N. at 1864.

<sup>40</sup> 25 U.S.C. § 2702 (2006).

<sup>41</sup> See *generally* AMERICAN BAR ASSOCIATION, THE INDIAN CHILD WELFARE ACT HANDBOOK: A LEGAL GUIDE TO THE CUSTODY AND ADOPTION OF NATIVE CHILDREN (2007); and NATIVE

adoption or child custody law and probably even family law will have some discussion of the Act.<sup>42</sup> Similarly, there are works on Indian gaming,<sup>43</sup> the Indian Civil Rights Act,<sup>44</sup> and environmental law as it relates to Indian country.<sup>45</sup> There may also be law review articles devoted to a particular issue. References to these might be made in the annotated codes, but searching law review indexes or full-text searching of law journal databases is an effective way to double-check if no articles are found. The more minute the issue, the more likely a relevant law review article will analyze it in greater detail than a practice manual or handbook.

Finally, most of the canons for treaty interpretation are also applicable to statutes including: liberal construction in favor of Indians, ambiguities resolved in their favor, and that “tribal property rights and sovereignty are preserved unless Congress’s intent to the contrary is clear and unambiguous.”<sup>46</sup>

### C. Regulations

While statutes provide the framework for the federal government-Indian relationship, administrative regulations fill in the details of the relationship. Title 25 of the *Code of Federal Regulations* contains the permanent agency rules related to Indians. These include such topics as the procedures for probates involving trust land, human and financial services for eligible Indians, and provisions related to a variety of natural resources. The Bureau of Indian Affairs (BIA), underneath the Department of the Interior,<sup>47</sup> is the agency responsible for most of the regulations

---

AMERICAN RIGHTS FUND, A PRACTICAL GUIDE TO THE INDIAN CHILD WELFARE ACT (2007), available at <http://www.narf.org/icwa/print.htm> (last visited Feb. 28, 2014).

<sup>42</sup> See, e.g., “Adoption of Native American Children,” in JOAN H. HOLLINGER, ADOPTION LAW AND PRACTICE (1988 & Supp. 2012).

<sup>43</sup> See generally, e.g., KATHRYN R.L. RAND & STEVEN ANDREW LIGHT, INDIAN GAMING LAW AND POLICY (2006).

<sup>44</sup> See generally, KRISTEN A. CARPENTER ET AL., THE INDIAN CIVIL RIGHTS ACT AT FORTY (2012).

<sup>45</sup> See generally, e.g., WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW IN INDIAN COUNTRY (2005 & Supp. 2013).

<sup>46</sup> COHEN’S HANDBOOK, *supra* note 23, at 113-114.

<sup>47</sup> The BIA was created as part of the War Department in 1825 and transferred to the Department of the Interior upon its creation in 1849. THE UNITED STATES GOVERNMENT

under Title 25. One useful publication of the BIA is its collection of state gaming compacts.<sup>48</sup>

As alluded to, the compilation of federal administrative regulations is the *Code of Federal Regulations* (CFR). These regulations can be updated using the *Federal Register*, which is also where notices of rulemaking and other agency announcements are formally published. Like the United States Code, the *Code of Federal Regulations* is available online for free from a variety of sites.<sup>49</sup> The Electronic Code of Federal Regulations<sup>50</sup> (ECFR) is most current and user friendly. However, it is not the official version of the code.<sup>51</sup> The *Federal Register* is also available online.<sup>52</sup>

There are also some commonly sought agency notices and actions that are only published in the *Federal Register*. One intermittently published release in the *Federal Register*, that is of particular interest to attorneys working on Indian law issues, is the list of federally recognized tribes. Because there is no publication schedule for it, the best way to search for it is to use the language that the BIA uses in its notices: “Indian Entities” or “Indian Tribal Entities” “Recognized and Eligible to Receive Services . . . .” Such a phrase search in Google or Bing should lead to the *Federal Register’s* list.

---

MANUAL 225. (2012), available at <http://www.gpo.gov/fdsys/pkg/GOVMAN-2012-12-07/pdf/GOVMAN-2012-12-07.pdf> (last visited Feb. 28, 2014).

<sup>48</sup> *Gaming Compacts*, U.S. DEP’T OF THE INTERIOR BUREAU OF INDIAN AFFAIRS, <http://www.bia.gov/WhoWeAre/AS-IA/OIG/Compacts/> (last visited Feb. 28, 2014).

<sup>49</sup> See, e.g., *Legal Information Institute*, CORNELL UNIV. LAW SCHOOL, <http://www.bia.gov/WhoWeAre/AS-IA/OIG/Compacts/> (last visited Feb. 28, 2014).

<sup>50</sup> *Electronic Code of Federal Regulations*, U.S. GOV’T PRINTING OFFICE, <http://www.ecfr.gov/cgi-bin/ECFR?page=browse> (last visited Feb. 28, 2014).

<sup>51</sup> The official version is available online through the Government Printing Office’s FEDSsys site: *Code of Federal Regulations (Annual Edition)*, U.S. GOV’T PRINTING OFFICE, <http://www.gpo.gov/fdsys/browse/collectionCfr.action?collectionCode=CFR> (last visited Feb. 28, 2014).

<sup>52</sup> FED. REGISTER, <https://www.federalregister.gov/> (last visited Feb. 28, 2014); and *Federal Register*, U.S. GOV’T PRINTING OFFICE, <http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=FR> (last visited Feb. 28, 2014).

#### D. Cases

Much of current federal Indian law is the result of case law. It was John Marshall's interpretation in 1831 of the United States Constitution that led to the phrase "domestic dependent nation," which became the foundation for much of Indian law.<sup>53</sup>

For more than a century, West digests and its key number system has been a cornerstone of case law research in America. Decisions involving issues of Indian law received a headnote or headnotes classified under the topic "Indians." The topic contained an outline and each point within the outline received a number corresponding to the issue. That topic and number are the key number. If an attorney has access to a West digest, browsing the outline at the front of the "Indians" topic can be a useful beginning point to see how the editorial staff at West has classified a particular issue. To find cases, the attorney will need access to the digest for the appropriate jurisdiction. With Indian law, that is most likely the *Federal Digest*. The *Federal Digest* (as used here) has been issued in consecutive series and its name has varied (albeit slightly) through the years.<sup>54</sup> Of course, the current value of the key number system for practitioners is the ability to utilize them in a Westlaw search. This can be done in many ways, but following are two examples.

The first type of search is for cases on a subject for which there is a key number on point. If an attorney is looking for cases that discuss tribal membership, a scan of the outline for the topic "Indians" will lead to number 222. Membership. The key number for that issue is: Indians k 222.<sup>55</sup> In the digest, the attorney would page forward until reaching the

---

<sup>53</sup> Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

<sup>54</sup> The original *Federal Digest* includes federal cases prior to 1939; *Modern Federal Practice Digest* contains cases from 1939 to 1960; *West's Federal Practice Digest, 2d* contains cases from 1961 to 1975; *West's Federal Practice Digest, 3<sup>rd</sup>* contains cases from 1975. The dates become less precise with later editions because volumes were issued over a course of years. However, the current edition is *West's Federal Practice Digest, 5<sup>th</sup>* which supplements *West's Federal Practice Digest, 4<sup>th</sup>* which supplements its predecessor. For more on the makeup and use of West digests, consult BARKAN *supra* note 2, at 78-107, and other legal research treatises.

<sup>55</sup> In the book, a key symbol is used rather than the letter "k."

listing for the number at the top of the page to find digests of cases on the issue with citations. A key number search can also be done using Westlaw. First, however, the topic must be translated from a word (here, “Indians”) into a number. There are translation tables in a variety of West publications and they will be apparent when looking at a West headnote. Regardless, the corresponding number to the West topic of Indians is 209. A Westlaw search, then, for cases indexed under that key number is: 209k222.<sup>56</sup> Searching key numbers online provides the capacity to add search terms to a key number search. If an attorney wanted cases dealing with membership challenges brought based on civil rights (perhaps under the Indian Civil Rights Act or some other authority), that search might be: 209k222 and “civil rights”.

The second type of search can be used when there is not a key number on the topic and the attorney wants to limit a search to cases dealing with Indian law. For instance, a typical situation might occur when an attorney wants to see how a custom has been proven in court. The problem arises because most cases using the words or discussing the concepts do so in a context outside of Indian law such as proving custom and/or usage in past business transactions. By limiting the search to only cases that have at least one headnote that has been classified under the topic Indian, an attorney is more likely to find the type of cases sought. This topic search limitation is called a “field” search in Westlaw. The abbreviation for the topic field is “TO” and it is followed by the name of the topic in parentheses. That part of the search would look like this: TO(Indians)<sup>57</sup> and the entire search might look something like this:

prove or proof or evidence /5 custom and TO(Indians)<sup>58</sup>

Key numbers and the topics associated with them are copyrighted and unique to West products. There may, however, be headnotes or index terms in other databases that can be applied to focus searching large

---

<sup>56</sup> Note that there is no spacing and a k is used between the topic number and the number within the topic.

<sup>57</sup> Capitalization is ignored. It is used here to help clarify what is being done.

<sup>58</sup> All of the words “or” and the “and” in the search are connectors.

databases to matters of Indian law. An attorney should look for those in any online search.

For those who do not have access to the *Federal Digest* or Westlaw, there are several free resources that allow searching cases such as Findlaw,<sup>59</sup> Justia,<sup>60</sup> and Google Scholar.<sup>61</sup> As previously stated, anyone using these sites should become familiar with their search conventions to achieve optimal results. Although nearly all internet users have used Google, they might not have used Google Scholar. Google Scholar is a part of Google that limits itself to *scholarly* literature. This includes court decisions. The Google Scholar search screen has two radio buttons below the search box. By clicking on the “Legal Documents” button, and entering search words, Google Scholar will return court decisions. With the retrieval (in Google’s relevance ranking), filters appear that allow users to select particular courts and dates. Google Scholar also has a “How cited” function that acts as a citator—although it merely shows the citing cases and relevant text unlike the additional editorial features of Shepherd’s, KeyCite,<sup>62</sup> and some other citation services.

One final source worth mentioning is *Indian Law Reporter*. For decades, it has been a source of cases in the area of Indian law. It is a loose leaf containing federal, state, and tribal court decisions related to the subject. Today its primary use would be as a current awareness resource rather than a place to do legal research.

### **E. Compacts**

There is one final primary source that needs comment: compacts. Although federal law generally restricts the authority of tribes and states to

---

<sup>59</sup> *Cases and Codes*, FINDLAW, [www.findlaw.com/casecode/](http://www.findlaw.com/casecode/) (last visited Feb. 28, 2014).

<sup>60</sup> *U.S. Court of Appeals Cases*, JUSTIA, <http://law.justia.com/cases/federal/appellate-courts/> (last visited Feb. 28, 2014).

<sup>61</sup> *Google Scholar*, GOOGLE, [scholar.google.com](http://scholar.google.com) (last visited Feb. 28, 2014). An easy way to get to it is to type “google scholar” into Google.

<sup>62</sup> Citators “identify where a specific source (cited authority, case, or statute) has been cited in another source (citing authority).” BARKAN *supra* note 2, at 274. Citators like Shepherd’s and KeyCite also assess the current validity of the cited authority and rate the depth of treatment on particular issues within the cited authority (particularly for cases).

make binding agreements,<sup>63</sup> particular pieces of federal legislation encourage or require negotiation of agreements between the two sovereigns.<sup>64</sup> One commentator has noted “working agreements between tribes and states that resolve jurisdictional or substantive disputes and recognize each entity’s sovereignty--have become a *device of necessity* for tribes and regional governments.”<sup>65</sup> These agreements are usually referred to as *compacts*.<sup>66</sup>

Tribes and states can make agreements on a wide range of issues. These compacts are typically not published or available from a single location. In fact, they are often in the possession of different departments in the state. In Washington, for example, gaming and cigarette compacts are available on the Governor’s Office of Indian Affairs website<sup>67</sup> (as mentioned earlier, gaming compacts are also on the BIA website). In addition, Washington’s Department of Social and Health Services has some child welfare agreements on its site.<sup>68</sup> And although not posted on its website, gas compacts are available from Washington’s Department of Licensing.<sup>69</sup> Because of this, an attorney looking for a tribal contact might try to identify the state department that negotiated the compact and search that website. If it does not appear on the website, contacting the agency is a good follow up. If the department is not clear, one can contact the state’s attorney general’s office because an Assistant Attorney General was likely

---

<sup>63</sup> See Trade and Intercourse Act, 25 U.S.C. § 177 (2006).

<sup>64</sup> Probably the most noteworthy legislation mandating agreement is found in the Indian Gaming Regulatory Act (IGRA).

<sup>65</sup> *Intergovernmental Compacts in Native American Law: Models for Expanded Usage*, 112 HARV. L. REV. 922 (1999).

<sup>66</sup> Probably the most well-known compacts are gaming compacts. See *Gaming Compacts*, U.S. DEP’T OF THE INTERIOR BUREAU OF INDIAN AFFAIRS, [www.bia.gov/WhoWeAre/AS-IA/OIG/Compacts/](http://www.bia.gov/WhoWeAre/AS-IA/OIG/Compacts/) (last visited Feb. 28, 2014).

<sup>67</sup> *Compacts*, GOVERNOR’S OFFICE OF INDIAN AFFAIRS, <http://www.goia.wa.gov/compacts/> (last visited Feb. 28, 2014).

<sup>68</sup> *Office of Indian Policy*, WASH. STATE DEP’T OF LICENSING, [www.dshs.wa.gov/oip/](http://www.dshs.wa.gov/oip/) (last visited Feb. 28, 2014).

<sup>69</sup> See *infra* note 70. For an example see *2012 Tribal Fuel Tax Agreement Report*, WASH. STATE DEP’T OF LICENSING, <http://www.dol.wa.gov/about/docs/TribalFuelTaxAgreementReport.pdf> (last visited Feb. 28, 2014).

involved in the negotiation process.<sup>70</sup> For all of the above sources of primary authority, the history, context, and commentary provided by secondary sources is often valuable. Following is a discussion of them.

#### **F. Secondary Sources**

For most of this country's existence, legal analysis and commentary on Indian law did not exist. In 1941, the first major treatise appeared; it was created only because the federal government needed to understand what it had created in its centuries of negotiation, interaction, and interpretation with and about Indians.<sup>71</sup> Since the turn of the century, writings on Indian law have increased dramatically. The following coverage is not exhaustive (or even close).

The most significant work on the subject is *Cohen's Handbook of Federal Indian Law*.<sup>72</sup> The *Handbook of Federal Indian Law* was written by Felix Cohen and originally published in 1941 by the United States Government, specifically the Department of the Interior.<sup>73</sup> This was the first work on the subject and organized the morass of loosely connected principles surrounding treaties, statutes, cases, and political history into a coherent intellectual body. The *Handbook* was rewritten in 1982 by a group of Indian law scholars, rewritten again in 2005, and revised in 2012.<sup>74</sup> The 2012 version should be relied on for researching the current state of the law. However, the earlier editions continue to have value, particularly Cohen's 1941 work, for his analysis and its historical perspective. It is the Indian law equivalent to Blackstone in England or Holmes in America. It is digitally available for free on the University of Oklahoma's website.<sup>75</sup>

---

<sup>70</sup> The information obtained for this section of the article is, in fact, based on emails exchanged with an Assistant Attorney General from Washington State.

<sup>71</sup> See generally, COHEN'S HANDBOOK *supra* note 8.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> A 1958 version is considered renegade, "revised by the Department of the Interior for openly political purposes: to advance the efforts to terminate the federal government's relationship with Indian tribes." *Id.* at viii.

<sup>75</sup> See generally COHEN'S HANDBOOK *supra* note 23.

Another longstanding authority on the subject is *American Indian Law in a Nutshell*.<sup>76</sup> Although works in the *Nutshell* series are often viewed skeptically, this one is authored by a Senior Judge of the Ninth Circuit Court of Appeals who wrote his first edition of the book in 1981.<sup>77</sup> Although certainly not as detailed as *Cohen*, Judge Canby's analysis stands on its own, and the *Nutshell* offers a concise primer on Indian law as an entirety that a major treatise does not. One can probably cheaply purchase a copy of an older edition for quick reference on basic issues. Obviously, the information in such a work would need to be verified and updated.

The *American Indian Law Deskbook*<sup>78</sup> also has chapters on a variety of topics in Indian law. The *Deskbook* is written by the Conference of Western Attorneys General. As representatives of state government, their perspective may not always align with that of tribes, but it is well-written and foot-noted. The expansive chapter on "State-Tribal Cooperative Agreements" offers a practical discussion about a unique subject area not covered in other works.

Finally, the American Bar Association publishes a small, but useful book for practitioners dealing with tribes called *Tribal Contracting: Understanding and Drafting Business Contracts with American Indian Tribes*.<sup>79</sup> It merits attention because its focus is on private transactional activity, while most other works concern governmental relations and court procedure. One particularly important part of contracting with an Indian tribe is anticipating and resolving potential issues of sovereign immunity.<sup>80</sup> Additionally, tribes play a unique role in corporate law. Tribes may form corporations (and presumably other entities) under their state law, their own tribal laws, or possibly under a unique federal law.<sup>81</sup> Thus, tribal corporations may have a unique existence. At least one law review article

---

<sup>76</sup> See generally WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* (1981).

<sup>77</sup> *Id.*

<sup>78</sup> CONFERENCE OF WESTERN ATTORNEYS GENERAL, *AMERICAN INDIAN LAW DESKBOOK* (2008).

<sup>79</sup> M. BRENT LEONHARD, *TRIBAL CONTRACTING: UNDERSTANDING AND DRAFTING BUSINESS CONTRACTS WITH AMERICAN INDIAN TRIBES*, § 2.01 16-34 (2009).

<sup>80</sup> See *id.* § 2.01 at 16-34.

<sup>81</sup> See 25 U.S.C. § 477 (2012).

briefly describes the types of tribal corporations and their governing principles.<sup>82</sup>

In addition to these works that discuss the vast array of issues in Indian law, there are numerous works focused on specific areas of law. Some of these were mentioned in the statutory section (those touching on issues like the Indian Child Welfare Act and environmental law as relating to Indians).<sup>83</sup> To see what is available, most law library catalogs are freely searchable via the internet. A keyword search using the word “Indians”<sup>84</sup> and a word or words describing the topic (e.g., “fishing”) should suffice. Even a Google search can be used to get an idea of the available resources.<sup>85</sup>

Supplementing the commentary in treatises, there is coverage of Indian law issues published in law review articles. There are currently only two law reviews devoted exclusively to Indian law: *Indian Law Review* and *The American Indian Law Journal*. However, articles on Indian law topics appear in other law reviews. The best way to search for law review articles is to look at one (or both) of the major law review indexes. The *Index to Legal Periodicals* and *Current Law Index* are both published in hard copy and available online on a subscription basis. The latter’s online version is called *LegalTrac* or *Legal Resources Index* (*Index to Legal Periodicals’* online version goes by the same title as its print one). These subscription-based publications may be available from major law libraries or occasionally from a public library. An attorney might even call such a library’s reference service and ask to have a search done. The more specific the inquiry, the more likely the librarian will do the search and the results will be fruitful. “Can you run a search using the words “Indian” and “corporation”” does not require the analysis that some librarians may

---

<sup>82</sup> Graham Safty, *Federal Diversity Jurisdiction and American Indian Tribal Corporations*, 79 U. CHI. L. REV. 1593, 1595-1601 (2012).

<sup>83</sup> Graham, *supra* note 82, at § B.

<sup>84</sup> “Indians” works better than “Native Americans” (or other similar terms) because the subject heading assigned by the Library of Congress has long been “Indians of North America.”

<sup>85</sup> This might be a general Google search or a search in Google Books or Google Scholar.

interpret as “the practice of law.” “What types of business entities can tribes use and can non-tribal members participate?” is likely to be answered with an invitation to come to the library to do your own research. A search in the law review indexes will provide the most comprehensive coverage of articles, but it may not provide the full-text of the articles themselves. If access to the indexes proves difficult, a search in Google Scholar might suffice as a substitute. Google Scholar<sup>86</sup> has been previously mentioned as a subcomponent of Google. The “Articles” radio button includes references to scholarly literature including law review articles. The links to most law review articles leads to Hein Online, a subscription based service at many law libraries. However, an increasing number of articles are available full-text for free—even if there is not a direct link from Google Scholar.

Additionally, Social Science Research Network (SSRN)<sup>87</sup> is an online repository where authors make their own works available. A portion of SSRN is the Legal Scholarship Network where law review articles and other works on law reside. Many of these are previously published works, but SSRN also includes *unpublished* works, as well as works in progress. The search function of SSRN is not very sophisticated so the more one knows about what is needed, the better. Most articles can be downloaded for free; although, users need to register with SSRN to download.

Berkeley Electronic Press (BePress)<sup>88</sup> is another online repository providing open access to law review commentary. Finally, searching a general search engine like Google or Bing may also provide citations to resources on a topic or free access to a known publication from a surprising source. If the exact title of an article is known, use quotation marks to make the search more precise: for example, “tribal bonds: Indian sovereignty and the tax legislative process.”

---

<sup>86</sup> GOOGLE SCHOLAR, GOOGLE, [www.scholar.google.com](http://www.scholar.google.com) (last visited Feb. 26, 2014).

<sup>87</sup> SOC. SCI. RESEARCH NETWORK, [www.ssrn.com](http://www.ssrn.com) (last visited Feb. 26, 2014).

<sup>88</sup> BERKELEY ELEC. PRESS, [www.bepress.com](http://www.bepress.com) (last visited Feb. 26, 2014).

### G. *Researching the Law of Alaska Natives*

Before proceeding to researching tribal law, one group within the broad category of “Indian” (or more accurately, Native American) deserves particular comment. Although several tribes or groups’ relationships with the federal government vary from what might be considered typical,<sup>89</sup> one group’s relationship is especially different. Alaska Natives have a different history and are governed by different legislation<sup>90</sup> than other tribes. State-chartered Native corporations are a unique core component of this model. Anyone unfamiliar with the law in this area should consult a secondary source to get familiar with the structures and their rules. A book like *Alaska Natives and American Laws*<sup>91</sup> or even a chapter from *Cohen*<sup>92</sup> or the *Nutshell*<sup>93</sup> can provide the framework necessary to allow more effective research strategies on an issue concerning Alaska Natives. A good secondary source will also provide references to the primary sources (code sections and cases) basic to the relationship.

## II. TRIBAL LAW

Most of the scholarship related to Indian law deals with the federal-tribal relationship. However, another area that practitioners need to research is tribal law, or the law of any particular tribe. Since there is little secondary material, the article will not include a separate section following the discussion of primary sources. Instead, one noteworthy work will be used to provide an introduction to the topic. *Navigating Tribal Law* is an important entry into the scholarship on tribal law and is written by several practitioners of Indian law.<sup>94</sup> There is much overlap and redundancy in what they say, but the multiple perspectives generally reinforce their points, and shows, not only the uncertainty within tribal law in general, but

---

<sup>89</sup> Cohen lists Oklahoma Tribes, Pueblo Indians and Native Hawaiians along with Alaska Natives. COHEN’S HANDBOOK, *supra* note 8, § 4.07, at 288.

<sup>90</sup> Alaska Native Claims Settlement Act of 1971, 43 U.S.C. § 1601.

<sup>91</sup> DAVID S. CASE & DAVID A. VOLUCK, ALASKA NATIVES AND AMERICAN LAWS (2012).

<sup>92</sup> COHEN’S HANDBOOK, *supra* note 8, § 4.07(3), at 326-56.

<sup>93</sup> CANBY, *supra* note 76, at 438-72.

<sup>94</sup> See *generally* FRANK R. LAWRENCE, ET AL., NAVIGATING TRIBAL LAW, LEADING LAWYERS ON UNDERSTANDING THE UNIQUE PROCEDURES, INTRICACIES, AND CHALLENGES INVOLVED WITH TRIBAL CASES (2012).

also the possible uncertainty of the law of any particular tribe. As one author aptly notes:

[Tribes] are more akin to a foreign government than a state or municipality. And, like foreign governments, they may be similar to some tribes while radically different than others. One would not assume when dealing with Cambodia that it would be similar to dealing with Canada. Likewise, one should not expect that dealing with the Navajo Nation is similar to dealing with the Quinault Nation.<sup>95</sup>

The authors of *Navigating Tribal Law* offer contrasting observations at times. One author states: “There is no way to generalize how tribes enforce their laws, because each tribe takes a different approach.”<sup>96</sup> Another generalizes and says that each tribe’s unique law is derived from at least three sources: the tribe’s historical organization, federal Indian laws and policies, and modern lawmaking institutions adopted by the tribe.<sup>97</sup>

*Navigating Tribal Law* also makes apparent the differences in available resources. One author mentions that “Some tribes have created and published annotated trial codes similar to state codes.”<sup>98</sup> But the same author also notes that “[m]any tribes are still developing comprehensive document retention and credentialing policies for tribal codes, ordinances, resolutions, and regulations. . . .”<sup>99</sup> And while “[w]ritten laws and court procedures, always available from the tribal courts themselves, are now available online for an ever-increasing number of tribes,”<sup>100</sup> “tribal websites are often slow to keep pace with the ever-evolving resolutions and ordinances the different government bodies pass.”<sup>101</sup> Ultimately, he suggests, “[t]he best practice for any attorney conducting due diligence on

---

<sup>95</sup> LEONHARD, *supra* note 79, at 15.

<sup>96</sup> LAWRENCE, ET AL., *supra* note 94, at 95.

<sup>97</sup> *Id.* at 37.

<sup>98</sup> *Id.* at 41.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 59.

<sup>101</sup> *Id.* at 46.

the tribal laws that may affect a client is to obtain a copy of the relevant laws the tribal attorney general or business committee has certified.”<sup>102</sup> He also recommends obtaining a resolution certifying the law from the tribe’s governing body. Keeping these principles in mind, below is a discussion of tribal primary resources.

### **A. The Nature of Tribal Laws**

As sovereigns, the laws of a particular tribe encompass subjects similar to other sovereigns. What constitutes a crime on tribal land is typically what one would expect to find in other sovereigns, although the penalties may be outside of those generally found in Anglo-American jurisprudence.<sup>103</sup> Tribes will also have civil procedural laws and substantive civil law such as torts. There are some issues of tribal law that are relatively unique, such as membership. It is a basic principle of Indian law that each tribe prescribes its own rules for membership.<sup>104</sup> Provisions governing membership are usually found in the tribe’s constitution, but may also be in the tribal code. Tribal membership establishes not only rights and liabilities of individuals, but can also impact relationships between members. For example, the law of a marriage between two tribal members may be under the jurisdiction of tribal law rather than the state.<sup>105</sup>

### **B. Constitutions and Codes**

One author of *Navigating Tribal Law* advises: “The first place to research a specific tribe’s laws and code is on that particular tribe’s website.”<sup>106</sup> If not available there, the author suggests contacting the tribe (tribal secretary).<sup>107</sup> Rather than trying to navigate through multiple

---

<sup>102</sup> *Id.* at 42.

<sup>103</sup> See, e.g., Patrice H. Kunsesh, *Banishment as Cultural Justice in Contemporary Tribal Legal Systems*, 37 N.M. L. REV. 85 (2007).

<sup>104</sup> COHEN’S HANDBOOK, *supra* note 8, § 30.0[3], at 175.

<sup>105</sup> The Confederated Tribes of the Colville Reservation have as part of their tribal code, a domestic relations code (Title 5): *Current Code*, CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, <http://www.colvilletribes.com/updatedcode.php>. (last visited May 8, 2014).

<sup>106</sup> LAWRENCE, ET AL., *supra* note 94, at 97.

<sup>107</sup> *Id.*

sources to find a code, first try the National Indian Law Library's (NILL) website. NILL has a substantial collection of tribal codes and constitutions. However, an attorney would definitely want to verify the accuracy and currency of the provisions before relying on them.

The NILL's *Tribal Law Gateway* lists hundreds of tribes with references to their legal publications. NILL contains links to available online versions of tribal constitutions and codes and references to print versions. Some of the online versions are hosted on NILL's website while others are links to remote sites (often the tribe's own). NILL also provides references for tribal constitutions, case law, and other sources of Indian and tribal law. Some of the codes are several years old and there may not be any availability for particular tribes, but the *Tribal Law Gateway* is the most comprehensive source for tribal law materials, particularly for tribal codes.

Published print copies of tribal codes have long been rarities. Probably the best-known compilation was edited by University of Washington Law Professor Ralph W. Johnson and published in microfiche in 1981 and updated in 1988.<sup>108</sup> Its current value is purely historical.

In addition to existing tribal codes, some tribal representatives may be interested in resources for drafting tribal codes. The Tribal Law and Policy Institute sponsors the Tribal Legal Code Project.<sup>109</sup> Its model codes are not meant to be adopted verbatim, but rather create representative examples with explanatory resource materials. Tribes can alter the provisions based on their needs and the lands they possess.

Finally, the concepts used in federal statutory research can be applied on a limited scale with tribal code provisions. An annotated tribal code is rare, but if the tribe's court decisions are searchable online, the code citation or heading can be used to find cases interpreting the

---

<sup>108</sup> RALPH W. JOHNSON, INDIAN TRIBAL CODES: A MICROFICHE COLLECTION (1981 & Supp. 1988).

<sup>109</sup> *Tribal Legal Code Project* TRIBAL COURT CLEARINGHOUSE, [www.tribal-institute.org/codes/overview.htm](http://www.tribal-institute.org/codes/overview.htm) (last visited Feb. 27, 2014).

language. As more tribes make decisions available, this practice may become more common and useful than it currently is.

### C. Cases

According to one of *Navigating Tribal Law's* authors: “[T]here are three comprehensive databases of tribal court opinions available through the national Tribal Justice Resource Center the Tribal Court Clearinghouse and a commercial site, VersusLaw.”<sup>110</sup> The author is probably using the word “comprehensive” in the sense of relating to more than one tribe. None of these databases is comprehensive in the sense of having the decisions of every tribal court.

VersusLaw<sup>111</sup> has been a long-time publisher of tribal court decisions. VersusLaw is a low-cost legal research service whose “Standard Plan”<sup>112</sup> includes tribal court decisions along with federal and state court decisions. There are twenty two tribal courts represented in VersusLaw.<sup>113</sup> One interesting feature of the decisions is that VersusLaw is one of the few publishers to have adopted a vendor-neutral citation format. Each paragraph in a decision is numbered allowing for pinpoint citation by those paragraph numbers (rather than any form of pagination).

---

<sup>110</sup> LAWRENCE, ET AL., *supra* note 94, at 59. The decisions the author mentions that were available from the Tribal Justice Resource Center ([www.naicja.org](http://www.naicja.org)) were discontinued due to lack of funding. See Carol Berry, *Tribal Judges Revive National Tribal Justice Resource Center*, INDIAN COUNTRY TODAY (Feb. 15, 2012), <http://indiancountrytodaymedianetwork.com/article/tribal-judges-revive-national-tribal-justice-resource-center-97699> (last visited Feb. 27, 2014).

<sup>111</sup> VERSUSLAW, [www.versuslaw.com](http://www.versuslaw.com) (last visited Feb. 27, 2014).

<sup>112</sup> As of October 2013, the Standard Plan cost \$13.95 per month. *Products and Services*, VERSUSLAW, <http://www.versuslaw.com/products/all.aspx> (last visited Feb. 27, 2014).

<sup>113</sup> Chitimacha, Colville, Grand Ronde, Coquille, Coughatta, Crow, Eastern Band of Cherokee, Fort McDowell Yavapai, For Peck (Assinioboine and Sioux), Hopi, Hualapai, Makah, Mashantucket Pequot, Mohegan (Gaming Dispute and Tribal Courts are separate files), Navajo, Oneida, Passamaquoddy, Puyallup, Saint Regis Mohawk, Tunica-Biloxi and Turtle Mountain. The decisions for any particular tribe may be limited. For example, the Oneida decisions are from the Oneida Appeals Commission. *Native American Tribal Courts*, VERSUSLAW, <http://www.versuslaw.com/help/library/LibCatProfessional.aspx#tribal> (last visited Feb. 27, 2014).

VersusLaw does not have natural language searching capability so knowledge of Boolean connectors is essential to its use.

The Tribal Court Clearinghouse<sup>114</sup> is a website developed and maintained by the Tribal Law and Policy Institute. Its tribal court decisions<sup>115</sup> are the same as those in VersusLaw. However, unlike VersusLaw, there is no charge for accessing the decisions at this website. The drawback with the Clearinghouse access is that its search engine is not as sophisticated as that of VersusLaw. For an attorney who regularly searches tribal court decisions, the slight cost of VersusLaw might be worth paying. The Tribal Court Clearinghouse also has a directory of tribal courts on the website.<sup>116</sup> This can be useful for getting contact information in order to find out about decisions from courts whose decisions are not available in the compilations discussed in this article. The prudent attorney would also contact a court even if the courts decisions are in the compilations. There might be additional decisions and possibly protocols that would be important to know about before appearing in the tribal court.

West Publishing has added tribal court decisions to its array of reported decisions. *American Tribal Law Reporter* is available in hard copy—although with law libraries increasingly cancelling print reporters, there are probably few that own the volumes.<sup>117</sup> The decisions from the reporter are also available on Westlaw. There are about the same number of tribes represented in West's collection, although some of them are different than those in VersusLaw. A major advantage of Westlaw's

---

<sup>114</sup>TRIBAL COURT CLEARINGHOUSE, [www.tribal-institute.org](http://www.tribal-institute.org) (last visited Feb. 27, 2014).

<sup>115</sup> *Tribal Court Decisions*, TRIBAL COURT CLEARINGHOUSE, [www.tribal-institute.org](http://www.tribal-institute.org) (last visited Feb. 27, 2014).

<sup>116</sup> *Tribal Courts*, TRIBAL COURT CLEARINGHOUSE, [www.tribal-institute.org/lists/justice.htm](http://www.tribal-institute.org/lists/justice.htm) (last visited Feb. 27, 2014).

<sup>117</sup> A search of WorldCat shows about 80 libraries worldwide listing the title in their holdings (search done Feb. 28, 2014). That number is probably high because some libraries make a catalog entry to certain items that they have access to via Westlaw even though they don't have it in print. Also, if a library cancelled its print subscription without withdrawing the title, it would appear as a holding in WorldCat even though it is not kept current. For those unfamiliar with the database, WorldCat is by its own terms "the world's largest network of library content and services." WORLD CAT, <http://www.worldcat.org/whatis/default.jsp> (last visited Feb. 28, 2014).

decisions is the enhanced searching capacity that a major vendor offers. Of course, the price is *enhanced* as well.

Although very few tribes host their court decisions on their own websites, that possibility should not be overlooked. The Navajo Nation, for example, makes its Supreme Court Opinions available via its own portal.<sup>118</sup> The Navajo Nation is also unique in operating a two-level court system that has both trial courts and an appellate court.<sup>119</sup> There are some other regional tribal appellate courts such as the Northwest Intertribal Court System (discussed below).

#### ***D. Judicial Interpretation in Tribal Courts***

There are several rules and principles of Anglo-American jurisprudence that apply in varying degrees to tribal law. They include the nature of appellate review of tribal court decisions, the value of appellate precedent, and the rules of evidence in tribal court. Following is a brief discussion of them.

Appellate review itself is an anomaly of Indian law.<sup>120</sup> Many tribes do not have an appellate court and some of those that do, utilize a regional system that encompasses more than one tribe. As previously mentioned, Western Washington tribes, through the Northwest Intertribal Court System, administer a court of appeals for each of its member tribes.<sup>121</sup> Its appellate opinions are published.<sup>122</sup> However, the precedential value of any decision on a particular tribe is not settled. Even if one assumes the doctrine of *stare decisis* applies (see discussion below), a case appealed from one tribe would not normally be considered

---

<sup>118</sup> *Supreme Court Opinions*, NAVAJO COURTS, [www.navajocourts.org/main.htm](http://www.navajocourts.org/main.htm) (last visited Feb. 28, 2014).

<sup>119</sup> *See Courts & Peacemaking in the Navajo Nation: A Public Guide*, NAVAJO COURTS, [www.navajocourts.org/publicguide.htm](http://www.navajocourts.org/publicguide.htm) (last visited Feb. 28, 2014).

<sup>120</sup> *See, e.g.,* Frederic Brandfon, *Tradition and Judicial Review in the American Indian Tribal Court System*, 38 UCLA L. REV. 991 (1991).

<sup>121</sup> *Appellate Reporters*, NORTHWEST INTERTRIBAL COURT SYS., [http://www.nics.ws/appellate/appellate.htm#NICS\\_Appellate\\_Reporters](http://www.nics.ws/appellate/appellate.htm#NICS_Appellate_Reporters) (last visited Feb. 28, 2014).

<sup>122</sup> *Appellate Opinions*, NORTHWEST INTERTRIBAL COURT SYS., <http://www.nics.ws/opinions/opinions.htm> (last visited Feb. 28, 2014).

binding on a trial court of a different tribe. Of course, the general principles applied by the appellate tribunal would probably be accorded deference by most tribal courts.

*Stare decisis* is a principle of Anglo-American jurisprudence. It may not, however, be applied by a particular Indian tribe. One nuance in tribal law is that there may be no appellate court (for “vertical” *stare decisis*); leaving the trial court with only the need to determine whether or not to follow its own previous decisions (“horizontal” *stare decisis*). In such instances, the facts will almost certainly vary enough that the court could distinguish the earlier case without feeling compelled to follow it or overrule it. For example, in *Grady v. Mohegan Tribal Gaming Authority*,<sup>123</sup> the court (citing secondary sources)<sup>124</sup> stated that *stare decisis* “is not a rule of law, but a matter of judicial policy.”<sup>125</sup> It then noted that “decisions of one trial court are not binding upon another,”<sup>126</sup> and concluded that a commissioner was under “no legal constraint to rule in a manner identical to his [previous] ruling.”<sup>127</sup> Contrast that to a decision of the Mashantucket Pequot Tribal Court explicitly stating “[t]his Court operates under the principle of *stare decisis*.”<sup>128</sup> On the related issue of dealing with citation of opinions as persuasive authority, one of the authors of *Navigating Tribal Law* recommends citing to other tribal court decisions rather than federal or state case law.<sup>129</sup>

Another issue that can arise in tribal law is proving the existence of a custom or tradition. This is probably more common in international and foreign law than in United States Courts. However, custom is one of the foundations of tribal law. In proving custom, there may actually be

---

<sup>123</sup> *Grady v. Mohegan Tribal Gaming Authority*, 10 Am. Tribal Law 181, GDTC-WC-09-125-FAM (2010) available at [www.versuslaw.com](http://www.versuslaw.com) (last visited Feb, 28, 2014).

<sup>124</sup> 20 AmJur 2d 520, *Courts*, Sec. 184 (1964).

<sup>125</sup> *Grady*, 10 Am. Tribal Law 181, at 15 (references are to paragraph numbers available in VersusLaw).

<sup>126</sup> *Id.* at 16.

<sup>127</sup> *Id.* at 17. The court also found sufficient factual differences to make the earlier case distinguishable.

<sup>128</sup> *Wilson v. Mashantucket Pequot Gaming Enterprise*, 3 Mash.Rep 440, No. MPTC-CV-2001-129, 14 (2002), available at [www.versuslaw.com](http://www.versuslaw.com) (last visited Feb, 28, 2014).

<sup>129</sup> LAWRENCE, ET AL., *supra* note 94, at 60.

preliminary procedural issues. The Hopi appellate court has observed that “customs, traditions and culture are often unwritten, and this fact can make them more difficult to define or apply.”<sup>130</sup> The court added that use of such evidence presents problems of notice and proof and analogized the situation to that of pleading foreign law in other courts. Because of this, that court held that “where a party intends to raise an issue of unwritten custom, tradition or culture, it must plead and present proof of [its] existence and relevance.”<sup>131</sup> As for actually proving custom, the Supreme Court of the Navajo Nation has held “a party can prove custom through previous case law, learned treatises, or expert testimony.”<sup>132</sup> It follows that an attorney may need to research from scholarly journals in the areas of history or archaeology. Most major research universities have databases that index such research. Footnotes in articles may lead to additional authorities. Google Scholar (radio button “Articles”) is a free alternative to the university databases which may have license limitations on users or locations of use. One would also want to look in a research library’s catalogs for treatises on the tribe or topic. While doing this research, a wise practitioner will note who the authors are because those might be potential experts that can testify on the existence of an unwritten custom or tradition.

Tribes may also use alternative forms of conflict resolution. The Navajo tribe’s process of *peace-making* is a prominent example.<sup>133</sup> An attorney scheduled to appear before a tribal tribunal should explore that possibility before assuming that the upcoming procedure will follow a

---

<sup>130</sup> Hopi Indian Credit Assn. v. Thomas, 1 Am. Tribal Law 353, Case No. 98AC000005 (Appellate Court of the Hopi Tribe) at 32 (Nov. 23, 1998), *available at* [www.versuslaw.com](http://www.versuslaw.com) (last visited Feb, 28, 2014).

<sup>131</sup> *Id.*

<sup>132</sup> In re the Estate of: Mae D. Benally v. Denetclaw, No. A-CV-21-85 at 25 (July 31, 1987) (Supreme Court of the Navajo Nation).

<sup>133</sup> LAWRENCE, ET AL., *supra* note 94, at 97. See also Raymond Austin, *ADR and the Navajo Peacemaker Court: Freedom, Responsibility, and Duty*, 32 JUDGES J. 8 (1993); Robert Yazzie, “Life Comes From It”: *Navajo Justice Concepts*, 24 N.M. L. REV. 175 (1994); James W. Zion, *The Navajo Peacemaker Court: Deference to the Old and Accommodation to the New*, 11 AM. INDIAN L. REV. 89 (1983).

United States court model. Other procedures for dispute resolution are not as well-known as the Navajo's, but are relatively common.<sup>134</sup>

Finally, *Navigating Tribal Law* has effective strategies for handling tribal law cases, such as how to address cultural differences.<sup>135</sup> These are differences that a practitioner would not find in most non-tribal jurisdictions. For example, English might not be the primary language for certain tribal members, including its leaders. Tribes might also be involved in inter-tribal disputes that may be on issues as significant as who has the authority to bind the tribe or adjudicate disputes. Working with such tribes requires, at the least, an awareness of these potential situations.

#### **E. Other Resources for Tribal Law Research**

The National Indian Law Library<sup>136</sup> has already been mentioned, and is a comprehensive resource for tribal law research. Its "Tribal Law Gateway" is the most encompassing site for finding tribal constitutions and codes. Additionally, NILL merits mention for a variety of other services. Its "News Bulletins" offer a legal current awareness service to help practitioners stay abreast of developments in Indian law. Interested persons can have the bulletins emailed by registering with NILL. NILL also publishes topical research guidance and offers Indian law-related research assistance. By focusing on one type of research, NILL's reference staff has a unique knowledge and expertise in such research. The services can all be reached by clicking on the appropriate link on NILL's navigation bar. The library is, without question, the preeminent source for tribal law research in the United States.

Besides NILL, there are sources of current awareness with articles on happenings and issues of interest to Native Americans. Practitioners should know about them because they contain legal as well as non-legal

---

<sup>134</sup> LAWRENCE, ET AL., *supra* note 94, at 60("Tribal courts also frequently have mediation programs involving tribal elders or community leaders for restorative justice. This may prove particularly appealing to a tribal member client who must live and work in the small reservation community in which the dispute arises.").

<sup>135</sup> *Id.* at 42-48 and 60-67.

<sup>136</sup> NAT'L INDIAN LAW LIBRARY, <http://www.narf.org/nill/> (last visited Mar. 1, 2014).

material. They can be useful in understanding the context and Indian perspective on matters. *Indian Country Today*<sup>137</sup> is the leading news source on American Indians. The section devoted to “Politics” is probably most relevant to lawyers. Its sections on “Business” and “Environment” may be of interest to lawyers with specific issues related to Indians. Its content is available online. *Indianz.com*<sup>138</sup> is another online source for news related to Native Americans.

Finally, tribal websites can be used for more than finding a tribe’s primary resources. They can contain important practice information. For example, some tribes require passage of a bar exam prior to acting as counsel in their court. The exam’s purpose is typically to make sure attorneys are aware of the differences in the tribal court, rather than a barrier to practice. For example, the Tulalip Tribal Bar Exam is two hours, twenty-six questions and open book.<sup>139</sup>

#### ***F. Personal contact***

The typical reference on legal research consists of listing useful books, articles and websites. There is a more amorphous resource that should not be overlooked and in fact, should be emphasized: people. Law review articles are usually not the most appropriate fora for anecdotes, but here it seems relevant. This part of the discussion concerns a less formal vehicle of research: personal contact, as opposed to books or computers. Tribal law itself often has less rigidity to it. For this reason, doing *research* may be less formal, but equally as valuable. The following is a typical example of researching Indian or tribal law. I was asked to find out the congressional district and members of Congress for every tribe in the United States. Anyone familiar with our country’s makeup will realize how daunting this task would be. There are more than 550 tribes with borders

---

<sup>137</sup> INDIAN COUNTRY TODAY, <http://indiancountrytodaymedianetwork.com/> (last visited Mar. 1, 2014).

<sup>138</sup> INDIANZ.COM, [www.indianz.com](http://www.indianz.com) (last visited Mar. 1, 2014).

<sup>139</sup> *Tulalip Tribal Bar Exam*, TULALIP TRIBES, <http://www.tulaliptribes-nsn.gov/Home/Government/Departments/TribalCourt/TribalBarExam.aspx> (last visited Mar. 1, 2014). The tribal ordinance book can be purchased when registering for the examination.

that have no relation to congressional districting (not much is). Therefore, tribes could potentially be in multiple districts and one would probably have to resort to map gazing in order to make determinations. Having found no record of anyone having previously done the exercise, I contacted David Selden at the National Indian Law Library. Miraculously, he actually had a document that did just what I needed. It was not on the NILL website so I could not have found it that way. The only way to have saved myself the work was by contacting Seldon. Even if he did not already have access to such a document, his opinion on the most efficient way to go about the task would have been important to me. Similarly, I have used directories to determine a tribe's legal counsel and contacted them at times when I could not find documentation about the tribe's legal system. The BIA publishes the *Tribal Leaders Directory* on its website.<sup>140</sup> It provides a tribes' name, address, phone, and fax number for each of the Federally-recognized Tribes.

There are a few things to keep in mind when contacting tribal governments. First, a tribal government is unlikely to have a sizeable full-time administrative staff to implement its initiatives, much less to respond to inquiries. Second, there is no Freedom of Information Act (or its equivalent) that compels the sovereign to supply information to people who request it. And certainly if the tribe believes information might be used against its interest, it is less likely to provide that information. Therefore, cordiality and patience are especially important when interacting with such governments.

### III. CONCLUSION

The law of relations between the United States and Indian tribes runs longer than the existence of the United States as a sovereign. The law of most tribes runs far longer than that. Yet study of *American Indian Law* was long dormant and tribal law was unknown to non-Indians for the first two centuries of this country's existence. However, the reach of Indian

---

<sup>140</sup> *Tribal Directory*, U.S. DEP'T OF THE INTERIOR BUREAU OF INDIAN AFFAIRS, <http://bia.gov/WhoWeAre/BIA/OIS/TribalGovernmentServices/TribalDirectory/> (last visited Mar. 1, 2014).

tribes is growing. Economic growth has brought business and political clout to many tribes and to Indians generally. Individual citizens and businesses are interacting more often with tribes and realizing different standards in legal relations. Related to this awakening, sources of Indian law have become more available. And legal scholars and practitioners have created more resources about Indian and tribal law. Concurrent with this, technology has provided publication platforms that allow more participation in, and access to, the discussion and analysis of law.

This article has attempted to survey the field of Indian and tribal law and identify the legal research needs of those practicing in the area. It has attempted to identify the existing sources of law such as books, articles, search engines, databases, and even blogs, and evaluated them for their uses with an eye toward cost. The desire has been to weave these separate strands of information into a cohesive design for resolving questions of law when dealing with tribes of American Indians.