II

Definitions

Indian, Indian Tribe, Indian Country, and *Indian Title*

A. INDIAN

Who is an Indian?

There is no universally accepted definition of the word *Indian.* People who have, for example, seven-eighths Caucasian blood and one-eighth Indian blood are free to call themselves Indians rather than Caucasians, but other people may disagree with that characterization.

The word *Indian* can be defined in either an ethnological (racial) or in a legal sense.[1] Indians are a distinct race of people, as are Caucasians, Negroes, and Mongoloids. However, neither in an ethnological nor legal sense is there just one method of determining who is an Indian.

Each government—tribal, state, and federal—determines who is an Indian for purposes of that government's laws. This can result in someone being determined to be an Indian under tribal but not under federal law,[2] under federal but not tribal law,[3] under tribal but not state law,[4] and so forth.[5] In other words, the same person can be considered an Indian in some situations and not in others, depending on how "Indian" is defined in that situation.[6]

Congress has created many programs for Indians, using varying definitions of the word *Indian.* Some programs base Indian status on being an enrolled member of a federally recognized Indian tribe, while others base Indian status on other factors, such as the person's blood quantum (the amount of Indian blood the person has).[7] The U.S. Supreme Court recently held that a program created by Congress in 1934 to benefit "Indians" was available only to those Indians whose tribes were under federal jurisdiction in 1934; all other Indians were not

eligible to participate in that program because that is how Congress, the Supreme Court said, had designed this particular program.[8] Congress has created some programs for Indians without defining the term, thus leaving it to the federal agencies implementing those programs to determine who is eligible. Some of these agencies have been accused of being too stringent in their definitions.[9] The Census Bureau takes a simple approach to these definitional problems by listing as an Indian every person on the census who claims to be one.

As explained in Chapter VIII, certain federal criminal laws apply to "Indians" without defining that term. As a result, courts (and sometimes juries) must determine from the available evidence whether the defendant is, in fact, an Indian. In these situations, courts generally use a two-part test. First, the government must prove that the defendant has some Indian blood, some identifiable Indian ancestry. Second, the government must prove that the Indian community recognizes this person as an Indian, and the best way to meet that burden of proof is by showing tribal enrollment.[10] Proof that the defendant has Indian blood and is enrolled in a tribe establishes Indian status in virtually every situation.[11] Indian status in criminal prosecutions, however, may be proven without tribal enrollment. Proof that the defendant has some Indian blood, has held him- or herself out to be an Indian, has received some type of tribal recognition, or has applied for and participated in programs available only to Indians has been sufficient evidence to allow the government to prosecute the person under federal laws applicable to Indians.[12]

Indian tribes have the authority to determine who is an Indian for tribal purposes[13] but not for federal purposes.[14] Thus, when the federal government distributes federal money to, or creates programs for, Indians, it determines who is eligible, and it may ignore a tribe's membership list and adopt a different standard.[15] To be considered an Indian for federal purposes, an individual must have some Indian blood; consequently, a non-Indian adopted into an Indian tribe cannot be considered an Indian under federal law.[16]

Are the Native people of Alaska, Including the Eskimos and Aleuts, Considered Indians?

The Native people of Alaska are comprised of three groups: Eskimos, Aleuts, and American Indians. Eskimos and Aleuts are ethnologically distinct from, but related to, the American Indian. Eskimos and Aleuts constitute the majority of Alaska's Native population. When Congress passes a law regarding Indians, or creates a program for them, Congress usually states that the law or program has equal application to Eskimos and Aleuts. There are a number of laws, however, that apply only to Alaska Natives, the most important of which are discussed in Chapter XV, Section C.

Can an Indian be a citizen of both the United States and an Indian tribe?
Yes. In 1924, Congress passed a law that grants citizenship to all Indians born in the United States.[17] Many Indians had become citizens before this time by treaty or federal statute. In 1905, the Supreme Court held that Indians granted U.S. citizenship could not participate in federal Indian programs, which were intended, the Court said, for noncitizens.[18] Eleven years later, the Court reversed that decision.[19] It is now settled that an Indian can be both a citizen of the United States and a member of an Indian tribe and have all the benefits and obligations that arise out of that dual status.

B. INDIAN TRIBE

What is an Indian Tribe?

As with the term *Indian*, there is no universally accepted definition of the term *Indian tribe*. Each government—tribal, state, and federal—is permitted to create its own definition of *Indian tribe* for its own purposes. A group of Indians, for instance, may call itself a tribe and be recognized as such by other tribes, even if the state and federal governments do not recognize the group as a tribe for their purposes. Indeed, a number of Indian tribes are not recognized by the state or federal governments. Some tribes are recognized by state governments but not by the federal government, and several of these tribes have reservations that were set aside for them more than a century ago by the state. The state of Connecticut, for instance, has extended formal recognition to five Indian tribes, all of which have reservations, but only two of them are recognized as tribes by the federal government.[20]

The primary method of obtaining federal recognition is by meeting the seven requirements established by the Department of the Interior. Currently, 565 Indian tribes are federally recognized. The process of obtaining federal recognition as an Indian tribe is explained in Chapter XV, Section F.

Federal recognition guarantees that an Indian tribe will qualify to participate in virtually all federal Indian programs. A denial of federal recognition, however, does not automatically disqualify a tribe from all of these programs. Tribal members, for example, can still enforce a treaty that their ancestors made with the United States even though the federal government refuses to recognize the continued existence of the tribe.[21] Also, tribes not officially recognized by the Department of the Interior may participate in federal programs that Congress has not limited to federally recognized tribes.[22] In other words, just as the same person may be considered an Indian in one situation and not in another, the same group may be considered an Indian tribe in one

situation and not in another, depending on how *Indian tribe* is defined in that situation.

Tribes may be defined by their political, rather than by their historical or cultural, identity. For instance, some of the larger tribes, such as the Sioux, Chippewa, Seneca, and Shoshone, were divided by the federal government, and portions of these tribes were placed on different reservations. Although they remain one tribe culturally and historically, each reservation has acquired its own political identity. South Dakota, for example, contains nine federally recognized tribes, and although these tribes are politically distinct, all of them are Sioux. In addition to dividing a single tribe into separate tribes politically, on occasion Congress has taken two culturally distinct tribes and placed them on the same reservation, and these two tribes have become one tribe politically. An example is the Fort Belknap Indian Community in Montana, which is one tribe politically but is composed of two distinct tribes, the Gros Ventre and Assiniboine.[23]

Some tribes have thousands of members, while others have only a few. The Cherokee Nation has the largest membership: more than 330,000.[24] At least 120 tribes have more than one thousand members.[25] In contrast, the California Valley Miwok Tribe, a federally recognized tribe, reported in 2010 that it had only five members.[26]

Is there a Difference Between an Indian Nation and an Indian Tribe?

Each Indian tribe has the right to choose its own name. Some tribes prefer to call themselves nations, while others call themselves tribes, communities, rancherias, or bands. The terms *nation, tribe, community, rancheria* and *band* have been used interchangeably in Indian treaties and statutes, and are used interchangeably in this book.[27]

C. INDIAN COUNTRY

What is Indian Country?

Broadly speaking, *Indian country* is all land under the supervision of the U.S. government that has been set aside primarily for the use of Indians. This includes all land *within* an Indian reservation and all land *outside* a reservation that has been placed under federal superintendence and designated primarily for Indian use.

As a general rule, state laws do not apply to Indians in Indian country; tribal and federal laws apply instead. If someone says, "The crime took place in Indian country," this indicates that the state has no authority to prosecute the

crime if it was committed by an Indian. Thus, one of the first inquiries that must be undertaken in determining which government may exercise its authority in any given situation is determining whether the land in question is Indian country.[28]

"Indian country" is defined in a federal criminal statute, Title 18 of the U.S. Code, section 1151 (18 U.S.C. section 1151), which states:

> "Indian country" . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Although the definition of Indian country is contained in a criminal statute, courts have applied the same definition in civil contexts. Thus, just as most crimes by Indians in Indian country are governed by tribal and federal law rather than state law, so are most civil matters involving Indians, such as taxation, marriage, divorce, inheritance, child custody, and contract disputes.[29] As one court stated in 2010, "as a general rule Indian country falls under the primary civil, criminal, and regulatory jurisdiction of the federal government and the resident Tribe rather than the states."[30] The decision whether a territory is Indian country is an issue of law rather than of fact; therefore, a judge makes this determination, not a jury.[31]

Section 1151 contains three subsections—(a), (b), and (c)—and each subsection identifies a different territory as being Indian country. Under subsection (a), Indian country includes *all* land within the boundaries of an Indian reservation, including land not in trust status that is privately owned by a non-Indian,[32] by an Indian, or by the tribe.[33] Rights-of-way through an Indian reservation, such as railroad tracks, utility power lines, and state and federal highways, remain a part of Indian country.[34] Thus, it does not matter who owns the land; if the land is located within the boundaries of an Indian reservation, it is Indian country.

Normally, a reservation remains Indian country unless Congress eliminates the reservation.[35] However, in 2005 in *City of Sherrill v. Oneida Indian Nation of New York*,[36] the Supreme Court created a narrow exception to this rule. The Court held in *Sherrill* that because a tract of land within the Oneida Indian Reservation had been sold to non-Indians nearly two hundred years earlier and, since then, the state—not the tribe—had been regulating the territory, the land

would not be considered as Indian country even after it was repurchased by the tribe. This ruling, however, is limited to those few situations in which a tribe waited decades before seeking to reestablish control of an area within its reservation that had been owned by non-Indians and regulated by the state. Moreover, as the Supreme Court explained in *Sherrill*, there is a simple method by which a tribe in this situation may have this land restored to the status of Indian country: the tribe may ask the Secretary of the Interior to convert the repurchased land into trust status (through a process discussed in Chapter V), and if the Secretary agrees to the conversion, the land becomes Indian country once again.[37]

Under subsection (b) of section 1151, Indian country includes "all dependent Indian communities" within the United States. Thus, land located *outside* a reservation is Indian country if it has been set aside by the federal government for the use, occupancy, or benefit of Indians and is under the superintendence of the federal government.[38] The nineteen Pueblos of New Mexico, for instance, own their own lands and are not Indian reservations. However, because these lands have been set aside by the federal government for the Pueblos and are under federal supervision, they qualify as Indian country under section 1151(b).[39] Other examples include tribal housing projects,[40] federal and tribal schools for Indian children,[41] and tribal government buildings[42] when located on federal trust land outside of an Indian reservation.

Thus, section 1151(b) expands Indian country to include areas of land outside of Indian reservations. Indian tribes, however, are not able to create additional areas of Indian country merely by purchasing off-reservation land.[43] If the tribe wants this land to be considered Indian county, it must follow the procedure (just discussed) of having the Secretary of the Interior accept the land into trust status and assign that land to the tribe for its use.[44]

Moreover, off-reservation land is not Indian country merely because it is occupied by, or primarily used by, Indians. The Supreme Court made this clear in *Alaska v. Native Village of Venetie Tribal Government* (1998).[45] The Court held in *Venetie* that the nearly 40 million acres of land set aside by Congress for the Native peoples of Alaska was not a dependent Indian community, despite the fact that this land is occupied by Natives, is used primarily by them, and is exempt by federal law from state real estate taxation. Only two factors, the Court said, are relevant in determining if land is a dependent Indian community: whether the federal government intended to set the area apart primarily for Indians, and whether the federal government substantially supervises its use.[46] In *Venetie*, the Court held that the lands in Alaska did not satisfy the "intended primarily for Indian use" requirement because the federal law creating this territory transferred the land to state-chartered corporations that could sell the

land to non-Indians at any time. The Court also held that the lands did not satisfy the "substantial supervision" test because Congress had not placed this land under comprehensive federal control.[47] In reaching this decision, the Court used a more restrictive definition of "dependent Indian community" than lower federal courts had been using for many years.[48]

Subsection (c) of section 1151 includes as Indian country all *trust* and all *restricted* allotments of land located outside an Indian reservation.[49] (Both trust and restricted allotments are parcels of land that have been assigned by the federal government to an individual Indian and cannot be sold or leased by that person without the consent of the federal government. The difference between the two is that a trust allotment is owned by the federal government, whereas a restricted allotment is owned by the Indian.) Hundreds of these individual allotments exist today, often as the result of Congress's having eliminated the reservation in which these allotments once existed without extinguishing the status of land that had been assigned by the federal government to tribal members. These allotments remain Indian country.[50]

Are non-Indians Permitted to Live in Indian Country?

Yes. Many non-Indians live in Indian country. (As explained in Chapter I, the federal government sold millions of acres of reservation land to non-Indians in the years between 1887 and 1934.) On some reservations, more land is owned by non-Indians than Indians, yet by virtue of subsection (a) of section 1151, the entire reservation remains Indian country.

What is an Indian Reservation?

An *Indian reservation* is land that has been set aside by the federal government for the use and benefit of one or more Indian tribes. Most reservations were created by some formal means, such as a federal treaty or statute, or an executive order from the president. Some were created by implication, as when Congress took action that implied the creation of a reservation for a particular tribe.[51]

The terms *Indian reservation* and *Indian country* are often used interchangeably, but they are not the same. Indian country is a larger concept because it includes not only all Indian reservations, but all dependent Indian communities and trust and restricted allotments located outside a reservation.

D. INDIAN TITLE

What is Indian Title?

Not long after the United States gained its independence from Great Britain, the Supreme Court was asked to determine who owned the vast landholdings

still occupied by the Indians: Was it the Indians, who had lived on those lands for centuries, or the new U.S. government, which had yet to even explore most of these areas? The Court answered this question in *Johnson v. McIntosh* (1823).[52] The specific issue in that case was whether a non-Indian who had purchased land from an Indian tribe had obtained valid title to that land, that is, the right of ownership. The Supreme Court held that the non-Indian had not acquired valid title because the land was no longer the tribe's to sell. The U.S. government had become the owner of all the land within the United States by virtue of the "discovery" of the North American continent by Europeans (who were then replaced by the United States) and the "conquest" of its inhabitants. This view, often called the Doctrine of Discovery, was based on the European concept, as the Supreme Court described it in *Johnson v. McIntosh*, that Indians were "heathens" and their land could be taken from them and given to "Christian people."[53]

It did not matter to the Court that Europeans had not discovered North America—on which some five hundred independent nations already lived—and certainly had not conquered all the Indians living there, the vast majority of whom were not even known to those who "discovered" the continent. The Doctrine of Discovery, which the Supreme Court accepted in *Johnson v. McIntosh*, was very popular in the white community because it resulted in the confiscation from the Indians of all the land in the United States.[54]

Many critics of the Discovery Doctrine believe, as one recently stated, that it is "premised on a principle of religious racism."[55] During the fifteenth and sixteenth centuries, the Christian nations of Europe espoused the view that non-Christian lands throughout the world could be claimed by Christians as a matter of divine right, and they used the Doctrine of Discovery "to dominate indigenous peoples and to dispossess them of their lands and assets."[56] The Doctrine of Discovery is "the legacy of 1,000 years of European racism and colonialism directed against non-Western peoples."[57] Indigenous peoples around the world, including those in the United States, Canada, New Zealand, and Australia, had their lands confiscated based on this theory.[58]

The Court went on to hold in *Johnson v. McIntosh*, however, that as the original inhabitants of the United States, Indian tribes have a right to continue to *occupy and use* their ancestral ("aboriginal") land until the federal government decides to use it for another purpose. The federal government could extinguish this interest at its pleasure, the Court said, but until it did so, the Indians had the right to remain on their original territory. This possessory interest has been called *Indian title, Indian right of occupancy,* and *aboriginal title.*

As explained in *Johnson v. McIntosh* and in later cases, the principles of Indian title are the following: (1) the federal government acquired ownership of all the land within the United States by discovery and conquest, and the

Indians lost all rights of ownership; (2) however, Indians retain a perpetual right to remain on their aboriginal territory until such time as Congress decides to take this land for another purpose; (3) Indian title is a possessory and not an ownership interest (that is, Indians have a right to possess their ancestral land but not to own it) unless Congress gives them ownership rights; and (4) Indian title may not be sold by the Indians without authorization from the federal government or lost or removed except by an express act of Congress.[59]

In order to prove the existence of Indian title, the tribe must show by historical evidence that the territory in question was part of its ancestral land and was occupied and controlled exclusively by it.[60] (A tribe can permit other tribes to share its land without losing aboriginal title, but lands continuously wandered over by adverse tribes cannot be claimed by any of these tribes as aboriginal lands.)[61] A tribe need not show that the federal government recognized the tribe's right of occupancy through a treaty, statute, or other formal act, but only that the tribe lived on certain lands continuously and that the federal government has never taken any formal action to terminate the tribe's right of occupancy.[62]

The Supreme Court recognized decades ago that Indian title is a significant and valuable property interest, the loss of which "cannot be lightly implied."[63] However, the Supreme Court recently diluted this protection. In the *Sherrill* case, discussed earlier, the Supreme Court held that the Oneida Indian Nation had forfeited aboriginal title because the Nation had waited nearly two hundred years before seeking to enforce its possessory interest and, during that time, almost all the land in question had been acquired by non-Indians and regulated by the state.[64] Thus, despite the lack of a formal act of Congress removing Indian title, the Court held that the tribe had lost its claim. According to a dissenting justice in *Sherrill*, the majority's decision "is at war" with the Court's prior decisions regarding Indian title.[65]

However, unless an Indian tribe has failed for decades to protect its aboriginal interests (as in *Sherrill*) or has relocated to a new reservation and abandoned its ancestral home,[66] a tribe will be presumed to retain its aboriginal claims absent some formal act of Congress showing an intent to terminate Indian title.[67] For example, even if the United States allows a railroad to use certain reservation land, the railroad takes that land subject to Indian title unless Congress clearly indicates otherwise.[68] Similarly, when new states were allowed to enter into the Union, they were required to respect any Indian title that existed within their borders.[69]

The tribe's interest in continued occupancy is so important that the tribe is entitled to bring a court action to eject trespassers.[70] Indian title includes the right to occupy the property as well as to use its natural resources, such as water