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Thank you for the opportunity to testify on the impact of recent Supreme Court decisions on Indian tribal sovereignty. For most of my professional life I have been involved in Indian law as an attorney, public official, and scholar. For the past several years I have been studying the Supreme Court's jurisprudence in Indian law. My biographical information is attached as Appendix A.

For most people, Indian law is an arcane curiosity. But for Indians, it is vitally important to everyday life. The law includes the tools of cultural preservation – and destruction. It makes tribes sovereigns and guarantees insulation of reservation Indians from intrusions by state governments and laws. It also empowers Congress to revise and even extinguish Indian rights and property interests. Indian law defines a body of law that is both cherished and feared by Indians.

Congress has enunciated a policy of Indian self-determination and has repudiated past policies that stripped tribal powers and rights. But today, the Supreme Court is abandoning its enshrined principle of deferring to Congress and is itself re-shaping and diminishing tribal rights and undermining Indian policy. The Court is ignoring the basic principles of Indian law and it appears that only Congress can set Indian law right.

The Foundational Principles in Indian Law Favor Tribal Self-Government Except as Altered by Congress

Indian law is fraught with heady complexity, but the law concerning tribal governments is founded on a few, very basic principles. They were well-articulated by the late Felix S. Cohen:

> The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles:
>
> 1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state.
> 2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, e.g., its powers of local self government.
> 3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.[1]

Embedded in these principles is a continuing, inherent right of tribal self-government. But this right is subject to express limitation by Congress. Sometimes

judicial deference to Congress worked to the disadvantage of tribes, such as when policies destructive of tribal rights and self-government were announced by Congress. In fact, Congress at times has been extreme in divesting Indian rights. Ill-conceived policies such as Allotment and Assimilation in the late 1800s and Termination in the mid-1900s began dismantling tribal governments and land holdings. These two policies were each repudiated by Congress after they proved disastrous for Indian people. But before Congress reversed itself, Indian people challenged the laws implementing these policies. The courts, however, led by the United States Supreme Court refused to alter policy, deferring to Congress.

Likewise, when unique rights of Indian tribes – treaties that afford special fishing rights, immunity from state taxes, governance of hunting by non-Indians on the reservation – have been challenged by others, the Court has said that if these laws result in inequities or represent outmoded policy it is up to Congress to change them. More often than not, though, the decisions affirmed the rights of tribes to the extent they had not been explicitly curtailed by Congress. Relying on foundational principles, the Court typically upheld tribal treaty rights, powers of self-government, and prevented states from imposing their legislation and taxes on Indian reservations.

From the Nation's Founding Until Recently, the Supreme Court Has Deferred to Congress to Make Indian Policy

The Court has repeatedly said that in absence of a clear statement by Congress, Indian rights cannot be diminished. The tradition of judicial deference to Congress in Indian affairs has been solidly maintained by the Supreme Court, at least until the last fifteen years. The earliest decisions of the Court found the governmental status of Indian tribes to be grounded firmly in the Commerce Clause of the United States Constitution. From the days of Chief Justice John Marshall until the mid-1980s, Indian decisions left to Congress the decision whether to alter venerable principles. A trilogy of cases decided by the Marshall Court recognized the independence of tribes and the political relationship between tribes and the United States. These cases were cited in nearly every Indian decision for 150 years and remain as the foundation of Indian law.[2]

From the 1960s until the mid-1980s, a period known as the "Modern Era" in Indian law, the Court decided a large number of Indian cases and reiterated the principles that tribes retain all their aboriginal powers, except as diminished by Congress.[3] The Court looked at "the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence."[4] In case after case, consistent with the foundational principles in Indian law, the Supreme Court sustained tribal rights and powers unless there was a clear indication from Congress that those rights and powers were extinguished. See Appendix B. For instance, in the Modern Era, the Supreme Court:

- Upheld tribal taxes on non-Indian oil development on the Jicarilla Apache reservation[5]
- Allowed the Mescalero Apache Tribe to regulate and license non-Indian hunting and fishing on its reservation[6]
- Denied state jurisdiction to impose income taxes on an Indian employee of a bank on the Navajo Reservation[7]

- Rejected a double jeopardy claim when the federal government prosecuted a defendant for a sex offense that had been prosecuted by a tribe, because the tribe is separate sovereign[8]

Today, however, there has been a sea change in Indian law. The Supreme Court now will deny or diminish tribal powers and rights whenever it does not find explicit congressional *affirmation* of tribal power. This turns on its head the usual presumption that tribal powers and rights continue in absence of a clear *extinguishment* by Congress. The Court appears to be resolving the cases consistent with its own subjective policy preferences.[9]

Supreme Court Decisions are Undermining Congressional Policy Favoring Indian Self-Determination

For the Court to interpose its own policy judgments is especially surprising since Congress has adhered to a strong and constant policy of Indian self-determination and economic self-sufficiency for over thirty years. In that period Congress has passed dozens of laws bolstering the authority of tribal governments in Indian country and implementing the prevailing self-determination policy with an impressive body of laws and programs strongly supporting the sovereignty of tribes.[10] These laws provide for Indian control of education and health care,[11] tribal regulation of environmental quality on reservations,[12] and the restoration and consolidation of the tribal land and resource base.[13] Congress has even tried to roll back some of the Supreme Court's ventures into policymaking that were in conflict with tribal political and cultural autonomy.[14]

Indian Rights and Sovereignty are Being Destroyed

The abrupt shift in Indian law jurisprudence since the mid-1980s has resulted in a dramatic record of damaging results for Indian tribes. The record is revealing in terms of wins and losses. In the last ten terms, Indian tribal interests have lost 77% of all their cases in the Supreme Court.[15] It is difficult to find another class of cases or type of litigant that has fared worse in the Supreme Court. Indeed, even criminals seeking reversals of their convictions succeeded 36% of the time in the Rehnquist Court compared to the tribes' 23% success rate!

The consequences of the tribes' dismal record before the Court are serious. Since 1986 tribes have lost 70% of all jurisdiction cases. The Court has rejected nearly all attempts to extend tribal law over non-Indians on Indian reservations. Its decisions have prevented tribes from trying and punishing non-Indian criminal defendants,[16] from regulating nonmembers' fishing and hunting on non-Indian land,[17] from zoning nonmember land in communities on the reservation populated by large numbers of whites,[18] from taxing non-Indian hotel guests on the reservation when the hotel is on non-Indian land,[19] from hearing personal injury lawsuits between non-Indians for accidents on non-Indian land within the reservation,[20] and from hearing suits brought by tribal members for torts committed against them on tribal land by non-Indian state officials.[21] Even in cases concerning state jurisdiction over Indians on the reservation, tribes have lost a majority of the time and the Court has allowed state tax collection and regulation of Indians on their own reservations.[22]

These decisions create practical problems. The Court's increasingly complicated jurisdictional rules depend on multiple factors such as the race and tribal membership of parties and ownership of individual parcels of land. This seriously complicates the work of police, courts, and administrators, whether they are employed by tribes or by non-Indian local or state governments.

Consider the result in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*.[23] The Court divided zoning authority over nonmembers' land within different parts of the Yakima Reservation between the tribe and the county based on whether non-Indians owned an unspecified percentage of land in a portion of the reservation. Besides the grave implications for tribal sovereignty, it is nearly impossible for tribal and county officials—not to mention property owners—to apply the decision rationally on the Yakima and other reservations. Zoning jurisdiction based on property ownership not only creates practical problems but also can undermine land use planning objectives because the success of zoning laws depends on comprehensive planning over a substantial area.

The Court created a similarly impractical jurisdictional rule when it said tribal courts did not have jurisdiction over a lawsuit for personal injuries caused by non-Indians on the reservation if they occurred on many (but not all) roads on reservations.[24] The recent *Hicks* case left reservation Indians at the mercy of non-Indian law enforcement officers when it held that state game wardens were immune from tribal jurisdiction even when they invaded an Indian home on tribal land and allegedly damaged property of the Indian resident.[25] And the *Venetie* decision declared that tribal governments lacked jurisdiction over hundreds of remote Alaska Native villages, leaving the residents with little available law enforcement or government regulation.[26]

The Rehnquist Court's decisions, meanderings from the settled principles and approaches embraced by all its predecessors, have created a judicial atmosphere that threatens economic development efforts as well as the political and cultural survival of Indian tribes. This inevitably causes confusion among state, local, and tribal governments, heightens tensions among Indians and their non-Indian neighbors, undermines reservation economic development efforts, and frustrates lower federal and state courts. Investors and businesses seek certainty and the jurisdictional situation created by the present Court has made the provision of government services and the regulatory situation unacceptably ambiguous. Thus, the recent decisions have begun to dismantle Indian policy.

It is ironic that, in an era when many tribes have gained the greater respect and competence needed to deal effectively in the political arena, and when Congress has made clear a strong policy of Indian self-determination, that the Court should, for the first time in the nation's history, assume the prerogative of altering Indian policy instead of deferring to Congress.

Congress Should Provide Guidance to the Court and Rectify its Misadventures in Indian Law

Indian policy-making belongs in Congress, not in the courts. Nothing the Court has said has questioned the continuing existence of Congress's plenary power in Indian affairs. Not only is it consistent with the constitutional separation of powers for Congress to articulate Indian policy regarding tribal powers, but the legislative process also has an

advantage over adjudication. Congress can frame policy that looks beyond a single fact situation. Unlike a judge, who must decide an issue based on whatever record was assembled below, Congress can focus broadly on the issues it addresses and base its ultimate decision on a full consideration of all the implications of the policies and programs it develops.

Although Indians have not always fared well in Congress, American Indian policy, based on a commitment to promoting tribal self-determination, has been rather constant for many years. In part this is because tribes now participate fully in the legislative process.

My research has concluded that, rather than having a specific "Indian agenda," the Rehnquist Court is pursuing certain strongly held values that underlie its larger agenda. That agenda seeks to strengthen states' rights, to insist on color-blind justice, and to advance mainstream values. These three themes dominate virtually all of the Court's work in every field. The Court seems to view Indian law cases as being at odds with these values – involving attacks on state rights, claims of racial preferences, and practices or rights that depart from or disrupt mainstream values. Moreover, it appears that some of the recent Indian cases were selected by the Court because they presented a fact situation in which it could tackle an issue like state sovereign immunity or limits on the free exercise of religion, and the cases just happened to involve Indians.

The Justices' values concerning broader issues in society have informed their views on the merits of Indian cases that, in another era, would be seen as uniquely Indian law matters. When Indian rights and tribal sovereignty are cast as separatist battles that undermine state jurisdiction for the sake of smoke shops and gambling enterprises, they are not viewed favorably by this Court. More appropriately, Indian rights should be seen for what they are, and historically have been: the fulfillment of a political relationship between the United States and self-governing tribes.

The Rehnquist Court has shown that it does not view tribal sovereignty either in a historical context—as part of the arrangements a superior power has made with indigenous sovereigns to secure peace and access to most of the land on the continent—or as an instrument to achieve the current Indian policy goals of economic and political independence set by Congress.

Congress could legislate to reaffirm the self-determination policies and longstanding principles of Indian law that support tribal sovereignty. This would provide guidance to the courts for their decision of Indian law cases. Doing so might return the Court to a more thoughtful consideration of Indian law as a distinct field with its own doctrines and traditions rooted in the nation's history and Constitution.

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1. Felix S. Cohen, Handbook of Federal Indian Law 123 (1941).
2. Worcester v. Georgia, 31 U. S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S, (5 Pet.) 1 (1831); Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823).
3. The term "modern era" for that period was coined by Charles F. Wilkinson, American Indians, Time and the Law (1987). All Indian law cases decided by the Supreme Court from the modern era through the 2000-2001 Term of the Court are cited and described in Appendix B.
4. White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).
5. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).
6. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983).
7. McClanahan v. Ariz. Tax Commission, 411 U.S. 164 (1973).

8. United States v. Wheeler, 435 U.S. 313 (1977).

9. See David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 Calif. L. Rev. 1573 (1996).

10. *E.g.*, Indian Self-Determination & Education Assistance Act, 25 U.S.C. § 450a-450n (1994) (allowing contracting by tribes to perform services formerly performed by the BIA); Indian Self-Determination Contract Reform Act, 25 U.S.C. § 450b, 450c, 450e, 450f, 450j, 450j-1, 450k-450m-1, 450n (1994) (strengthening the contracting authority of tribes); Tribal Self-Governance Act, 25 U.S.C. § 450a, 450aa note, 450aa-450gg (1994) (allowing tribes to participate in a "self-governance" project with funds administered under a program akin to block grants); *see also* Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963 (1994) (establishing a comprehensive scheme for adjudication of child custody cases, giving primacy to tribal courts); Indian Law Enforcement Reform Act, 25 U.S.C. §§ 2801-2809 (1994) (strengthening reservation administration of justice).

11. *See* Indian Health Care Improvement Act, 25 U.S.C. §§ 1613-1682 (1994); Tribally Controlled Community College Assistance Act, 25 U.S.C. §§ 1801-1852 (1994); Indian Alcoholism and Substance Abuse Prevention Act, 25 U.S.C. §§ 2040-2478 (1994); Tribally Controlled School Grants Act, 25 U.S.C. §§ 2501-2511 (1994); Indian Education Act, 25 U.S.C. §§ 2601-2651 (1994); Indian Child Protection and Family Violence Protection Act, 25 U.S.C. §§ 3201-3211 (1994); *cf.* Native American Languages Act, 25 U.S.C. §§ 2901-2906 (1994) (encouraging teaching of indigenous languages). Legislation has also supported tribal economic development. *E.g.*, Indian Financing Act, Pub. L. No. 90-499, 98 Stat. 1725 (1984) (codified as amended in scattered sections of 25 U.S.C.); *cf.* Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (1994) (establishing a regime for tribal gambling businesses that modified but did not substantially undermine tribal immunity from state law).

12. Amendments to federal environmental statutes gave tribes the option of being treated as states for the purpose of carrying out programs on their reservations. *See* Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136u (1994); Clean Water Act, 33 U.S.C. §§ 1370-1377 (1994); Safe Drinking Water Act, 42 U.S.C. § 300j-11, 300h-1 (1994); Clean Air Act, 42 U.S.C. §§ 7474, 7601(d) (1994); Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9604(c) (1994); *cf.* Surface Mining Control Reclamation Act, 30 U.S.C. § 1300 (1994) (affording special treatment to Indian lands).

13. See Indian Land Consolidation Act, 25 U.S.C. §§ 2201-2211 (1994), and amendments to deal with fractionated ownership of allotments, 25 U.S.C. §§ 372, 373-373b (1994). Congress also passed at least ten major land claims acts, DAVID H. GETCHES, ET AL., FEDERAL INDIAN LAW 231 (4th ed. 1998), and sixteen water rights settlement bills since 1982, *id.* at 849-50. In addition, tribal control and management of natural resources has been enhanced. *See* Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101-2108 (1994); National Indian Forest Resources Management Act, 25 U.S.C. §§ 3101-3120 (1994).

14. *E.g.*, 25 U.S.C. § 1301(4) (1994) (amendment affirmed tribal criminal jurisdiction over nonmember Indians, effectively overriding the Supreme Court decision in *Duro v. Reina*, 495 U.S. 676 (1990)); 42 U.S.C. §1996(a) (1994) (enacted to deal with the effects of the *Smith* decision on members of the Native American Church); Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-2000bb-4 (1994) (attempting to override the Supreme Court's rejection of the compelling interest test in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990)); Public Law No. 101-612, 104 Stat. 3209 (1990) (designating as part of a wilderness area the sacred lands denied protection in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1980), thereby assuring that the challenged road would not be built).

16. My study of Indian law in the Supreme Court showed that from 1986-2001, the Court decided forty Indian law cases of which tribal interests won only nine, or 23%. This covers the fifteen terms of the Court since William Rehnquist became Chief Justice and can be compared to the seventeen terms of the predecessor Burger Court when tribal interests prevailed in 58% of the cases. See David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 Minn. L. Rev. 267, 280-81 (2001).

16. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 211-12 (1978).

17. *See* Montana v. United States, 450 U.S. 544, 565-67 (1981); *see also* South Dakota v. Bourland, 508 U.S. 679, 697 (1993) (holding that Congress's authorization of a water project had

"abrogated the Tribe's 'absolute and undisturbed use and occupation' [of certain lands] and thereby deprived the Tribe of the power to license non-Indian use of the lands").

18. *See* Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408, 421-33 (1989).

19. *See* Atkinson Trading Co. v. Shirley, 121 S. Ct. 1825, 1835 (2001).

20. *See* Strate v. A-1 Contractors, 520 U.S. 438, 456-59 (1997).

21. *See* Nevada v. Hicks, 121 S. Ct. 2304, 2318 (2001).

22. *See, e.g.*, Dep't of Taxation & Finance v. Milhelm Attea & Bros., 512 U.S. 61, 78 (1994) (holding valid a New York law requiring tribal record keeping of cigarette sales to non-Indians); Hagen v. Utah, 510 U.S. 399, 421-22 (1994) (holding that the tribe's criminal jurisdiction over non-Indians had been diminished by Congress); cf. Duro v. Reina, 495 U.S. 676, 698 (1990) (holding that Indian tribes lack criminal jurisdiction over nonmembers).

23. 492 U.S. 408 (1989).

24. Strate v. A-1 Contractors, 520 U.S. 438, 442 (1997).

25. Nevada v. Hicks, 121 S. Ct. 2304 (2001).

26. Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520 (1998).

Appendix A

David H. Getches
Biographical Information

David Getches is the Raphael J. Moses Professor of Natural Resources Law at the University of Colorado School of Law. He teaches and writes on Indian law, water law, public land law, and environmental law. Professor Getches has published several books on Indian law and water law including *Federal Indian Law*, with Wilkinson and Williams (1998). He has written many articles and book chapters that appear in diverse scholarly and popular sources, including recent articles analyzing the Supreme Court's departures from traditional principles in Indian law.

Mr. Getches was the first attorney in the Southern California office of California Indian Legal Services, which he opened in 1969. He was the founding Executive Director of the Native American Rights Fund (NARF) where he developed the staff, funding, and program of this national, nonprofit Indian-interest law firm. Major cases he litigated include a Northwest Indian fishing rights case (*United States v. Washington*, known locally as "the Boldt decision") and a case on behalf of Eskimos to establish the North Slope Borough, the largest municipality in the world, which includes the Prudhoe Bay oil fields. His other cases dealt with water rights, land claims, federal trust responsibilities, environmental issues, education, and civil rights on behalf of Native American clients throughout the West.

In 1983, David Getches was appointed Executive Director of the Colorado Department of Natural Resources by Governor Richard D. Lamm. The department includes ten divisions of state government that deal with parks, wildlife, land, water, and minerals. During his three and one-half years in that post he strongly advocated water conservation, pressed for groundwater law reform, advanced ideas for better cooperative management and control of the Colorado River, urged expansion of the state's wilderness areas, and spoke out on the importance of recreation and wildlife to the state's economy.

Professor Getches has consulted widely with governmental agencies, Indian tribes, and non-governmental organizations throughout the United States and in several foreign countries. He is a graduate of Occidental College and the University of Southern California Law School.

Appendix B

Supreme Court Cases in Indian Law: 1958-2000
(decided on the merits with opinion)

David H. Getches*

1958 Term

1. Williams v. Lee, 358 U.S. 217 (1959), upholding exclusive tribal judicial jurisdiction over actions involving contracts entered into on an Indian reservation between a non-Indian plaintiff and an Indian defendant.

1959 Term

2. Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99 (1960), construing the Federal Power Act, 16 U.S. C. §§ 796(2) and 797(e) (1982), as authorizing a licensee of the Federal Power Commission to take lands owned in fee simple by an Indian tribe upon the payment of just compensation.

1960 Term

3. Seymour v. Superintendent, 368 U.S. 351 (1962), upholding exclusive federal judicial jurisdiction over prosecutions for offenses covered by the Major Crimes Act that are committed by an Indian on lands held in fee patent by a non-Indian within the exterior boundaries of an Indian reservation.
4. Metlakatla Indian Community v. Egan, 369 U.S. 45 (1962), upholding the secretary of the interior's authority to license the manner in which the Metlakatla Indians fish on lands reserved for the use of the tribe by the Act of March 3, 1891.
5. Organized Village of Kake v. Egan, 369 U.S. 60 (1962), striking down the authority of the secretary of the interior to authorize fishing by Thlinget Indians, for whom no reservation had been set aside, in a manner contrary to state law.

1962 Term

6. Arizona v. California, 373 U.S. 546 (1963), upholding the authority of the United States to reserve water rights for Indian reservations originally established by executive order; defining the quantity of water reserved for Indian reservations as being enough water to satisfy the future, as well as present, needs of the reservations, including enough water to irrigate all of the practicably irrigable acreage on the reservations.

1964 Term

7. Warren Trading Post v. Arizona State Tax Comm'n, 380 U.S. 685 (1965), striking down the imposition of a state gross receipts tax on income earned by a federally licensed trader on sales to Indians on a reservation.

1965 Term

8. Arizona v. California, 383 U.S. 269 (1965), ordering the secretary of the interior and states of Arizona, California, and Nevada to furnish the Court with a list of their present perfected

* Through the 1985 Term of the Court is based on the virtually identical compilation in Charles F. Wilkinson, American Indians, Time and the Law 123-132 (1987). The rest of the list was compiled by David H. Getches.

rights (including Indian reserved rights) and claimed priority dates to waters in the Colorado River.

1967 Term

9. Poafpybitty v. Skelly Oil Co., 390 U.S. 365 (1968), upholding an Indian landowner's standing to sue to enforce an oil and gas lease, approved by the secretary of the interior, for use on land held by the Indian under a trust patent.
10. Peoria Tribe of Indians v. United States, 390 U.S. 468 (1968), holding the United States liable for the investment that would have been earned on the proceeds from the sale of lands ceded by the tribe had those lands been sold at their public auction value, as required by the Treaty of May 30, 1854.
11. Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968), upholding the Menominee Tribe's retention of its treaty hunting and fishing rights despite the Termination Act of 1954.
12. Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968), upholding the state's authority to regulate the manner in which a tribe exercises its off-reservation treaty fishing rights where such regulations are reasonable and necessary to conserve fish and wildlife resources and are nondiscriminatory.

1968 Term

13. Makah Indian Tribe v. Tax Comm'n, 393 U.S. 8 (1968) (per curiam), dismissing, for lack of a substantial federal question, the tribe's appeal of the Washington Supreme Court's holding that application of a state cigarette tax to wholesalers who distribute cigarettes to retailers doing business on the reservation did not violate the Indian Commerce Clause, U.S. Const., art. III, § 8, cl. 3.

1969 Term

14. Tooahnippah v. Hickel, 397 U.S. 598 (1970), striking down the secretary of' the interior's authority to disapprove an Indian's testamentary disposition of trust property on the secretary's subjective belief that the disposition is not "just and equitable."
15. Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970), upholding the Cherokee, Chickasaw, and Choctaw Nations' title to lands underlying a ninety-six mile navigable stretch of the Arkansas River.

1970 Term

16. Kennerly v. District Court, 400 U.S. 423 (1971), striking down asserted state judicial jurisdiction over civil contract actions brought by a non-Indian against an Indian concerning a transaction occurring on the reservation.
17. United States v. Southern Ute Tribe, 402 U.S. 159 (1971), barring, as res judicata, the tribe's claim for compensation for lands ceded pursuant to the Act of June 15, 1880.

1971 Term

18. Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972), upholding the termination of the federal government's supervision of trust property held by individual mixed-blood Utes after the secretary of the interior's issuance of' a termination proclamation.

1972 Term

19. United States v. Jim, 409 U.S. 80 (1972), upholding Congress's authority to redistribute mineral royalties generated by tribal lands to a larger class of Indian beneficiaries without incurring a Fifth Amendment obligation to compensate the original, smaller class of Indian beneficiaries.
20. Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973), upholding the imposition of a state gross receipts tax on income earned from a tribal business conducted on off-reservation lands where the tax does not discriminate against Indians.
21. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973), striking down the imposition of a state tax on income earned on a reservation by a tribal member who resides on the reservation.
22. Keeble v. United States, 412 U.S. 205 (1973), construing the Major Crimes Act as entitling Indian criminal defendants to a jury instruction on a lesser-included offense that is not an offense enumerated in the act.
23. United States v. Mason, 412 U.S. 391 (1973), upholding a federal administrator's authority to rely on prior Supreme Court cases that the Court has not later overruled or questioned in discharging the government's fiduciary obligations to Indians.
24. Mattz v. Arnett, 412 U.S. 481 (1973), upholding the continued existence of the Klamath River Reservation despite the Act of June 17, 1892, which opened the lands within the reservation to settlement under the homestead laws.

1973 Term

25. Department of Game v. Puyallup Tribe, 414 U.S. 44 (1973), striking down, as discriminatory against Indians, a state regulation that completely banned net fishing for steelhead trout.
26. Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974), upholding federal judicial jurisdiction over an action brought by a tribe claiming that political subdivisions of the state were interfering with the tribe's possessory rights to aboriginal lands.
27. Morton v. Ruiz, 415 U.S. 199 (1974), striking down a regulation of the Bureau of Indian Affairs (BIA) that denied general assistance to unassimilated Indians living in an Indian community near their native reservation.
28. Morton v. Mancari, 417 U.S. 535 (1974), upholding a BIA regulation providing for Indian preference in promotional opportunities within the agency.

1974 Term

29. United States v. Mazurie, 419 U.S. 544 (1975), upholding Congress's authority to delegate to tribal governments the authority to regulate the distribution of alcoholic beverages on a reservation.
30. Antoine v. Washington, 420 U.S. 194 (1975), upholding Congress's authority to enact legislation limiting a state's power to regulate tribal hunting and fishing rights on lands ceded by the tribe.
31. DeCoteau v. District County Court, 420 U.S. 425 (1975), construing the Act of March 3, 1891, as having disestablished the Lake Traverse Indian Reservation.
32. Chemehuevi Tribe of Indians v. Federal Power Comm'n, 420 U.S. 395 (1975), construing § 4(e) of the Federal Power Act (16 U.S.C. §§ 791a-823 (1982)) as not authorizing the

Federal Power Commission to issue licenses for the construction of thermal-electric power plants.

1975 Term

33. Fisher v. District Court, 424 U.S. 382 (1976) (per curiam), upholding exclusive tribal jurisdiction over an adoption proceeding where all of the parties to the proceeding were members of the tribe and resided on the reservation.
34. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976), upholding the dismissal of an action brought by the United States in federal court to adjudicate federal and Indian reserved water rights when there is a concurrent adjudication of the same issues in state court.
35. Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976), striking down the imposition of a state cigarette tax on on-reservation sales by Indians to Indians; upholding the imposition of a state cigarette tax on on-reservation sales by Indians to non-Indians.
36. Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649 (1976), upholding the authority of Congress to transfer mineral rights from individual Indian allottees to their tribe without compensation where the act authorizing allotment of tribal lands severed the mineral and surface estates.
37. Bryan v. Itasca County, 426 U.S. 373 (1976), striking down the imposition of a state tax levied on personal property located on a Public Law 280 reservation.

1976 Term

38. Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73 (1977), upholding the exclusion of the Kansas Delawares from an act distributing judgment funds to the Delaware Tribe.
39. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977), construing the acts of April 23, 1904, March 2, 1907, and May 30, 1910, as having disestablished a portion of the Rosebud Sioux Reservation.
40. United States v. Antelope, 430 U.S. 641 (1977), upholding the first degree murder conviction of an Indian under the Major Crimes Act where the conviction of a non-Indian for the same offense in state court would have placed a higher burden of proof upon the state.
41. Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165 (1977), upholding the state's authority to regulate the tribe's on-reservation treaty fishing rights when such regulations are reasonable and necessary for the conservation of fish.

1977 Term

42. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), striking down tribal jurisdiction over crimes committed by non-Indians on a reservation.
43. United States v. Wheeler, 435 U.S. 313 (1978), upholding successive tribal and federal prosecutions of an Indian for crimes arising out of the same offense committed on a reservation.
44. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), holding the writ of habeas corpus to be the exclusive remedy available for alleged violations of the Indian Civil Rights Act.
45. United States v. John, 437 U.S. 634 (1978), striking down state jurisdiction over the prosecution of an Indian for an offense included in the Major Crimes Act and committed on lands purchased for the Mississippi Choctaws, a remnant band of the Choctaw Tribe.

1978 Term

46. Washington v. Confederated Bands of the Yakima Indian Nation, 439 U.S. 463 (1979), upholding the authority of an optional Public Law 280 state to assert partial jurisdiction over an Indian reservation.
47. Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979), construing 25 U.S.C. § 194 (1982) as shifting the burden of persuasion to non-Indian parties, except states, involved in land ownership disputes against an individual Indian or tribe.
48. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979), upholding the Pacific Northwest tribes' treaty right to take up to 50 percent of the harvestable fish passing through the tribes' usual and accustomed fishing places.

1979 Term

49. United States v. Clarke, 445 U.S. 253 (1980), striking down the authority of Alaska municipalities to acquire individual Indian allotments by inverse condemnation.
50. United States v. Mitchell, 445 U.S. 535 (1980), construing the General Allotment Act as creating only a limited trust relationship that does not impose a fiduciary obligation on the United States to manage the allottees' timber resources properly.
51. Andrus v. Glover Construction Co., 446 U.S. 608 (1980), construing the Buy Indian Act (25 U.S.C. § 47 (1982)) as requiring the department of the interior to advertise for bids pursuant to the Federal Property and Administrative Services Act (41 U.S.C. §§ 251-60 (1982)) before entering into road construction contracts.
52. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980), upholding the imposition of state cigarette and sales taxes on on-reservation sales by a tribe to nonmembers of the tribe.
53. White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980), striking down the imposition of state motor carrier license and fuel use taxes on a non-Indian corporation engaged in logging activities on a reservation pursuant to a contract with the tribe.
54. Central Machinery Co. v. Arizona State Tax Comm'n, 448 U.S. 160 (1980), striking down the imposition of a state gross receipts tax on on-reservation sales by a non-Indian to a tribe, where the non-Indian seller is not licensed to trade with Indians and has no permanent place of business on the reservation.
55. United States v. Sioux Nation of Indians, 448 U.S. 371 (1980), upholding the United States' obligation to compensate the tribe for taking the Black Hills in 1877.

1980 Term

56. Montana v. United States, 450 U.S. 544 (1981), striking down the tribe's authority to regulate non-Indians' hunting and fishing on a state-owned navigable watercourse traversing the reservation.

1981 Term

57. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982), upholding the tribe's authority to impose a severance tax on oil and gas production on reservation land.
58. Ramah Navajo School Bd. v. Bureau of Revenue, 458 U.S. 832 (1982), striking down the imposition of a state gross receipts tax on a non-Indian corporation constructing school facilities on reservation land.

1982 Term

59. Arizona v. California, 460 U.S. 605 (1983), barring, on the basis of finality, an increase in tribes' water rights based on additions to the tribes' practicably irrigable acreage, except as to lands judicially determined to have extended the reservation boundaries.
60. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983), upholding exclusive tribal regulatory jurisdiction over hunting and fishing by members and nonmembers within the reservation.
61. Nevada v. United States, 463 U.S. 110 (1983), barring, on the basis of res judicata, the tribe's assertion of a reserved water right to maintain Pyramid Lake.
62. United States v. Mitchell, 463 U.S. 206 (1983), construing various timber management statutes as imposing a fiduciary duty on the United States to manage individual Indian allottees' timber resources properly.
63. Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983), upholding the dismissal of an action brought in federal court by an Indian tribe to adjudicate its reserved water rights when there is a concurrent adjudication of the same issue in state court.
64. Rice v. Rehner, 463 U.S. 713 (1983), upholding concurrent tribal and state regulation of on-reservation sales of alcoholic beverages.

1983 Term

65. Solem v. Bartlett, 465 U.S. 463 (1984), construing the Cheyenne River Act as having opened a portion of the Cheyenne River Sioux Reservation to settlement by non-Indians, but as not having disestablished the opened lands from the reservation.
66. Escondido Mutual Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765 (1984), upholding the authority of the secretary of interior to impose mandatory conditions on Federal Energy Regulatory Commission licenses for construction, operation, and maintenance of hydroelectric project works located on Indian reservations; finding that Indian reserved water rights are not protected reservations within the meaning of the Federal Power Act.
67. Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, 467 U.S. 138 (1984), upholding concurrent tribal and state judicial jurisdiction over actions brought by an Indian tribe against a non-Indian defendant for claims arising in Indian country.

1984 Term

68. United States v. Dann, 470 U.S. 39 (1985), holding that the Shoshone Tribe's aboriginal title to lands in several western states was extinguished when, pursuant to a judgment awarded the tribe by the Indian Claims Commission, the United States placed $26 million in an interest-bearing trust account for the tribe.
69. County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985), upholding the tribe's federal common law right of action for a violation of its possessory rights to aboriginal lands that occurred in 1795.
70. Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195 (1985), upholding the authority of a non-IRA tribe to impose possessory interest and business activity taxes on mineral production within the reservation without the approval of the secretary of interior.
71. Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985), striking down the imposition of a state tax on tribal royalty interests in mineral leases on reservation land.

72. National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985), construing 28 U.S.C. § 1331 (1982) as conferring jurisdiction on federal, district courts to hear actions alleging that a tribal court has exceeded its jurisdiction after the appellant has exhausted tribal court remedies.
73. Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237 (1985), construing § 17 of the Pueblo Lands Act of 1924 as authorizing the conveyance of the nineteen New Mexico Pueblos' land upon the approval of the secretary of the interior.
74. Oregon Dept. of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753 (1985), upholding the authority of the state to regulate tribal members' hunting and fishing on former tribal lands ceded by the tribe in 1901.

1985 Term

75. California State Bd. of Equalization v. Chemehuevi Indian Tribe, 474 U.S. 9 (1985) (per curiam), upholding the authority of the state to require the tribe to collect an excise tax on tribal cigarette sales to non-Indians where the incidence of the tax falls upon the purchasers.
76. South Carolina v. Catawba Indian Tribe, 476 U.S. 498 (1986), holding that the Catawba Indian Tribe Division of Assets Act of 1959 requires the application of the state statute of limitations to the tribe's land claim.
77. Bowen v. Roy, 476 U.S. 693 (1986), holding that the right of Indian parents to exercise their religion under the Free Exercise Clause was not violated by the government's use of their child's Social Security number.
78. United States v. Dion, 476 U.S. 734 (1986), holding that Congress, in the Eagle Protection Act, set out a clear and plain intent to abrogate the treaty rights of Indians to hunt eagles.
79. United States v. Mottaz, 476 U.S. 834 (1986), holding that a suit against the United States by an Indian, claiming that the sale of her allotment interests was void, was barred by the 12-year statute of limitations period of the Quiet Title Act, 28 U.S.C.A. § 2409a (1982).
80. Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, 476 U.S. 877 (1986), holding that Public Law 280 preempted state's disclaimer of jurisdiction over suits brought by Indian tribes against non-Indians in state court.

1986 Term

81. Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9(1987), holding that tribal courts have jurisdiction over nonmember activities in Indian country unless jurisdiction is limited by explicit treaty or statutory language.
82. California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987), holding that a tribe in a Public Law 280 state is not subject to state laws that regulate specific types of gambling.

1987 Term

83. Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988), holding that the federal government was not prohibited by the Free Exercise Clause from logging and construction on National Forest lands used by tribes for religious purposes, even though the activities could have devastating effects on Indian religious practices.

1988 Term

84. Employment Division, Dept. of Human Resources of Oregon v. Smith, 485 U.S. 660 (1988), holding that tribal members who used peyote for religious purposes could be denied

state unemployment compensation benefits if the state prohibited peyote use and this prohibition was not unconstitutional.

85. Oklahoma Tax Commission v. Graham, 489 U.S. 838 (1989), holding that the possible existence of a tribal sovereign immunity defense did not convert state tax claims into federal question.
86. Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989), holding that exclusive jurisdiction over custody proceedings where the child is domiciled on a reservation is given to the tribe under the Indian Child Welfare Act (ICWA).
87. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989), holding that a state severance tax on a non-Indian minerals company, that was operating on reservation lands, was not preempted by federal law or the imposition of a tribal tax.
88. Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. 408 (1989), holding that the tribe had jurisdiction to zone nonmember fee lands on the reservation that were not open to the public, but the county had jurisdiction to zone nonmember lands in the open portion of the reservation.

1989 Term

89. Employment Division, Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990), holding that a tribal member was not excused under the Free Exercise clause for violation of state peyote laws that represented generally applicable prohibitions of socially harmful conduct.
90. Duro v. Reina, 495 U.S. 676 (1990), holding that the tribe could not assert jurisdiction over non-member Indians for crimes committed on the reservation.

1990 Term

91. Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505 (1991), holding that the tribe had not waived its sovereign immunity to suit by the state, when it sought an injunction to prevent state taxation of cigarette sales to tribal members, but that sovereign immunity did not prevent the state from taxing sales to nonmembers on allotted lands.
92. Blatchford v. Native Village of Noatak and Circle Village, 501 U.S. 775 (1991), holding that the Eleventh Amendment state sovereign immunity doctrine protected states from suits by tribes.

1991 Term

93. County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation, 502 U.S. 251 (1992), holding that the county could impose an ad valorem property tax on Indian-owned lands within the reservation that had been patented in fee under the General Allotment Act.

1992 Term

94. Negonsott v. Samuels, 507 U.S. 99 (1993), holding that federal jurisdiction over crimes covered by the Major Crimes Act was not exclusive and did not prevent the state from prosecuting the same conduct, if it also violated state law.

95. Oklahoma Tax Comm'n v. Sac and Fox Nation, 508 U.S. 114 (1993), holding that the state was preempted from imposing income or motor vehicle taxes on tribal members who lived within Indian Country.
96. Lincoln v. Vigil, 508 U.S. 182 (1993), holding that the Indian Health Services did not need to conduct notice and comment rulemaking procedures under the Administrative Procedure Act before discontinuing mental health services to handicapped Indian children.
97. South Dakota v. Bourland, 508 U.S. 679 (1993), holding that Congress abrogated tribal treaty rights to regulate non-Indian fishing and hunting on reservation land when it took the land for construction of a dam and reservoir for public use.

1993 Term

98. Hagen v. Utah, 510 U.S. 399 (1994), holding that Congress intended that surplus land acts would diminish the reservation, based on the circumstances surrounding passage of the acts and current demographics showing a high population of non-Indians on the land.
99. Dept. of Taxation and Finance of New York v. Milhelm Attea & Brothers, Inc., 512 U.S. 61 (1994), holding that federal Indian Trader Statutes did not preempt the state's interest in taxing non-Indian purchases of cigarettes on reservation lands, thus allowing state to regulate sales to Indians as means of enforcement.

1994 Term

100. Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995), holding that the state may impose income tax on tribal members who live outside of the reservation but who are employed by the tribe on the reservation.

1995 Term

101. Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), holding that Congress cannot abrogate state sovereign immunity to suit by enacting legislation under the Indian Commerce Clause that allowed tribes to sue states for failure to negotiate gaming complaints in good faith.

1996 Term

102. Babbitt v. Youpee, 519 U.S. 234 (1997), holding that the escheat provision of the Indian Land Consolidation Act of 1982, held unconstitutional and subsequently amended by Congress, still constituted an unconstitutional taking without just compensation.
103. Strate v. A-1 Contractors, 520 U.S. 438 (1997), holding that the tribe lacked jurisdiction over a civil case between tribal nonmembers, which was based on a traffic accident that occurred on a state highway over a reservation right-of-way.
104. Idaho v. Coeur d' Alene Tribe of Idaho, 521 U.S. 261 (1997), holding that the tribe was barred from suing state of officials under the Ex Parte Young doctrine because their suit was the equivalent of a quiet title action and could extinguish state control over the land.

1997 Term

105. South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998), holding that the statutory language of the surplus land act combined with the commitment by the U.S. to pay for ceded lands, served to diminish the reservation, and thus the tribe lacked jurisdiction over non-Indian land.

106. Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520 (1998), holding that the tribe lacked jurisdiction to tax non-Indian property in native villages, which was not a "dependent Indian community" defined by 18 U.S.C. § 1151, because lands were not set aside for the use of Indians under the superintendence of the federal government.
107. Montana v. Crow Tribe, 523 U.S. 696 (1998), holding that the tribe was not entitled to the proceeds of state taxes that were collected in violation of federal law, because that state could have lawfully collected some of the taxes and it was unfair to allow the tribe to have them all.
108. Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751 (1998), holding that a tribe is protected from suit under the soverign immunity doctrine, even for off-reservation activities, unless Congress authorized the suit or the tribe waived its immunity.
109. Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103 (1998), holding that alienable lands that had been repurchased by the tribe were subject to state and local taxation unless they were restored to federal trust protection under the Indian Reorganization Act.

1998 Term

110. Arizona Dept. of Revenue v. Blaze Construction Co., 526 U.S. 32 (1999), holding that a state may tax a private company for on-reservation work based on its contract with the BIA, if the legal incidence of the tax falls on the private company, and Congress does not expressly preempt the contract from taxation.
111. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999), affirming fishing and hunting rights on ceded land in present-day Wisconsin and Minnesota under 1837 treaty.
112. El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473 (1999), holding that the doctrine of tribal court exhaustion does not apply in a case under the Price-Anderson Act, which if brought in a state court would be subject to removal.
113. Amoco Production Co. v. Southern Ute Indian Tribe, 526 U.S. 865 (1999), rejecting tribe's claim that coal owned by tribe under former reservation lands the surface of which patented to settlers, but subject to a reservation of the "coal," included valuable coalbed methane gas.

1999 Term

114. Rice v. Cayetano, 528 U.S. 495 (2000), rejecting Hawaii's voting scheme that limits the election of trustees who administer funds for Native Hawaiians to ancestral descendents of Native Hawaiians, as a violation of the Fifteenth Amendment.
115. Arizona v. Californina, 530 U.S. 392 (2000), allowing the tribe to assert claim to water rights.

2000 Term

116. C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 532 U.S. 411 (2001), ruling that arbitration clause in commercial contract constituted tribe's waiver of sovereign immunity.
117. Department of the Interior v. Klamath Water Users Protective Association, 532 U.S. 1 (2001), holding that communications between tribe and Bureau of Indian Affairs officials

and attorneys were subject to disclosure under a Freedom of Information Act request by adverse party in water rights litigation whether or not they were discoverable because the communications were not intra- or inter-agency.

118. Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 645 (2001), holding that nonmembers of tribe were not subject to tribe's hotel occupancy tax where hotel was located on parcel of non-Indian land within reservation because there were no consensual relations between the hotel owners or guests and the tribe and hotel operations did not affect political integrity, economic security, or health and welfare of tribe.
119. Idaho v. United States, 533 U.S. 262 (2001), affirming finding that tribe retained title to bed of lake within reservation where evidence showed Congress intended that submerged land not pass to state on statehood without tribal consent, based on continuous pre-statehood understanding that the lands and related water rights were important to tribe.
120. Nevada v. Hicks, 533 U.S. 353 (2001) holding that tribal court did not have jurisdiction to adjudicate tort and civil rights claims by tribal member against state game warden sued in his individual capacity for allegedly exceeding the scope of a state warrant to search the Indian's home on tribal land within a reservation that had been validated by the tribal court, because of state's interest in asserting its jurisdiction over Indians.