



**Recognizing the Importance
of Indian Law on
State Bar Examinations**

**by Angelique Townsend EagleWoman, Sheri Freemont,
Gloria Valencia-Weber, and Joseph Williams**

Indian law is one of the most complicated areas of law in the United States due to the jurisdictional and substantive issues present. Overlapping governmental interests commonly involve federal jurisdiction, tribal jurisdiction, and at times, state jurisdictional components. There is also the possibility of multiple tribal jurisdictions being involved on any number of mutual situations. In many areas of federal Indian law, practitioners must understand substantive principles coupled with the unique relationship between tribal nations and the United States at the federal and state level of government.

Indian law is an umbrella term that includes both tribal law and federal Indian law. Tribal law is formed from the tribal statutes, tribal judicial decisions, and tribal regulations of any one tribe. Federal Indian law is the law created through federal statutes, federal judicial opinions, and federal regulations that have American Indians as the subject matter. Federal Indian law statutes are codified primarily in volume 25 of the U.S. Code, but specific statutes may also be found in other sections such as volume 18, which addresses criminal laws. Competency in handling Indian law matters requires a solid understanding of tribal, federal, and state law.

Recognizing the level of competency necessary to resolve issues across jurisdictions, several state bar associations have taken the lead in responding to the challenge by including Indian law as a testable subject on the state bar exam. With over 560 federally recognized tribal nations¹ within the boundaries of the United States, legal practitioners are becoming more aware of the need for Indian law courses in the law school curriculum and as part of the state bar exams.

This article will begin with a history on the inclusion of Indian law on state bar exams. The New Mexico bar examination was the first to include Indian law and the history of that effort will be detailed by Professor Gloria Valencia-Weber. Moving to efforts in Oklahoma, the Oklahoma Indian Bar Association has actively worked on a similar effort which will be shared by Indian law practitioner Joseph Williams. Recently, a trend has developed to adopt the Uniform Bar Exam (UBE) by a number of jurisdictions to standardize test scores across multiple state bar exams, provide cost effective bar examination processes, and create greater uniformity in bar examination delivery. Sheri Freemont, chair of the Indian law section of the Arizona state bar, will explain the ongoing work in Arizona to include Indian law on the state bar exam and the likely impact that the move to the UBE will have on that undertaking. Finally, Professor Angelique Townsend EagleWoman will provide information on a recent proposal to the Idaho State Bar Commissioners to include Indian law as a topic for the mandatory Practical Skills Seminar following the Idaho administration of the UBE.

New Mexico: The Pioneer in Placing Indian Law in the State Bar Exam

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In 2002, New Mexico became the first state to include questions about Indian law on the state bar exam, thus advancing the formal recognition of the role Indian law has within national and international law. Two other states (Washington and South Dakota) followed in making knowledge of Indian law a competency requirement for all attorneys in state practice.²

The Rationale

Including Indian law on the New Mexico state bar examination formally recognized and legitimized Indian law, reducing the disrespect that has been directed toward tribal sovereigns and their laws. In its approval the New Mexico Supreme Court recognized that Indian law is more than just the federal external law to control the lives of tribes and their members. Twenty-three pueblos and tribes govern within the state's boundaries. The tribes' laws for self-governance affect the relationships with non-Indians in personal relationships or as customers, employees, contractors, and partners in tribal ventures.

Twenty-first century life involves compelling interests for Indians and non-Indians to justify mandating that those who practice or enforce law must have some knowledge of Indian law. Critical interests, such as safety on the roadways, are not restricted by jurisdictional boundaries as many are affected within a geographical area. Thus, knowledge and cooperation among tribal, local, and state governments underlay the cross-deputizing and sharing of offender databases to reduce vehicular offenses involving intoxication. Federal pre-emption prevails over state power in the daily lives of American Indians as individuals. Land tenure, probate law, and children are among the many areas where American Indians cannot exercise the autonomy of non-Indians. Federal laws, such as the Indian Child Welfare Act (ICWA),³ have removed jurisdiction from states. In applying ICWA, the best interest of an Indian child in a non-divorce custodial proceeding mandates that the state defer to the tribal law and courts.⁴ This displacement of state law operates with important tribal matters such as the development of natural resources and environmental regulation where federal law applies.

The Process to Incorporate Indian Law Into the Bar Exam

In New Mexico the process to bring Indian law into the exam took seven months, the shortest period among the three states, who currently test Indian law on the bar exam, from initial effort to the approval by the New Mexico Supreme Court. The process began with the New Mexico Native American Bar Association (NABA) requesting assistance from the Southwest Indian Law Clinic at the University of New Mexico School of Law.⁵ The NABA's initial request was for research on past or potential placement of Indian law on the state bar exam. NABA then submitted a formal proposal to the New Mexico State Board of Bar Examiners in December 2001. On Feb. 28, 2002, the New Mexico Supreme Court approved the inclusion of Indian law on the exam as of February 2003. The collaborative support of "affinity" practitioners was helpful as there

were common concerns among family law and natural resources practitioners as well as some state judges. The concern was focused on the handicap when an attorney or judge lacks the comprehensive knowledge needed to resolve matters.

The Results

An immediate result was the increased enrollment in Indian law at the University of New Mexico School of Law. Consequently, the school now offers the course each semester. The New Mexico bar also instituted a process for qualifying for a formalized Indian law specialization for the attorney's credentials.

After New Mexico adopted Indian law as a testable subject on the bar examination, the National Congress of American Indians in 2004 recognized the important act in New Mexico and passed a resolution urging similar actions in state bars in Indian country.⁶ Concurrently, the Indian law section of the Federal Bar Association appointed a committee to promote the inclusion of Indian law in state bar exams. The committee's members obtained from different states the advocates' proposals submitted to state bar entities, the affirmative and negative responses of the bar examiner authorities and judicial bodies involved, and press releases and statements by parties who were engaged in the adoption process.⁷

Within New Mexico, the impact has been a new cohort of attorneys who are practitioners, prosecutors, public defenders, and judges with a basic knowledge of Indian law. It is especially significant when one considers the reaction of New Mexico Supreme Court Justice Gene E. Franchini, now deceased, who described the action by the state supreme court as "long overdue." He commented: "I am just real happy that we're the first in the nation to get off the dime on this issue. This is really an important area of law and applicants for the New Mexico Bar should be aware of significant questions of law which arise in this area."⁸ When he was a practicing attorney, Justice Franchini represented the plaintiffs at the U.S. Supreme Court in the critical case, *Morton v. Mancari*.⁹ He expressed some concerns in the past about Indian law's impact on non-Indians. His support for this important area of law and expansion of the generic attorneys' knowledge is historic as a marker of Indian law entering the comprehensive legal system of the United States.

Indian Law and the Oklahoma Bar Exam

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Like New Mexico, numerous Indian tribes are located in Oklahoma. Oklahoma is home to 39 Indian nations with thousands of Indian people located in various parts of the state, both on and off Indian country lands. Like other parts of the country, tribes in

Oklahoma are continuing to be a part of the business infrastructure in the state and have a major impact in the growth and development of the local economy. Inevitably, because of this increased growth, there will be legal issues that arise and involve Indian law principles and that will have to be adjudicated in a legal forum.

Legal issues involving Indian affairs and Indian people in Oklahoma are commonly adjudicated in the various Oklahoma tribal courts or Courts of Indian Offenses, as well as the Oklahoma state courts. Some claims are heard in federal courts. There are, however, many legal practitioners who fail to apply (intentionally or not) the basic principles of federal Indian law to address legal problems that arise in Indian country or that involve Indian affairs for such common issues like tort or prize claims at tribal casinos, business disputes with tribal governments, or the ICWA.¹⁰

The Oklahoma Bar Association-Indian Law Section and the Oklahoma Indian Bar Association¹¹ have worked together for many years to make great strides in the effort to have federal Indian law tested as one of the subjects in the Oklahoma bar exam. Unfortunately, that goal has not yet been achieved.

Some of the on-going actions by those in support of this effort are:

- Communications with the deans and certain faculty of the three Oklahoma law schools to obtain their support and to voice their support with the Oklahoma Supreme Court;
- Encourage discussions of the issue at local conferences and bar association meetings;



- Garner support from the other sections of the Oklahoma bar association and other nonlegal (but influential) organizations and associations;
- Write articles and make presentations regarding notable cases or issues in Oklahoma involving Indian law and how it impacts many people, and;
- Establish connections and communications with members of the Oklahoma Board of Bar Examiners about the importance of this issue.

There is no magic formula that can be used to accomplish this important task. Like other great successes in the growth and development of Indian law, a great deal of work and tenacity is required to break through the barriers of political and legal resistance. Such resistance may be the result of unfamiliarity with Indian law. Those in Oklahoma who continue to see a need for the law schools to teach Indian law, and for the Oklahoma bar exam to test on the subject of Indian law, will continue the effort so that the future attorneys, judges, lawmakers, and government officials in Oklahoma will (hopefully) begin their careers with a firm understanding of the impact of Indian law in Oklahoma.

Indian Law and the Uniform Bar Exam in Arizona

Sheri Freemont, Chair, Indian Law Section of the State Bar of Arizona

Similarly, within Arizona, a significant number of tribes exist and Indians reside. In Arizona, the Supreme Court administers bar admissions with the bar exam being determined by a Committee on Examinations. There are three law schools in the state with at least two of them offering certificates or special legal degrees in Indian law, and all three offering basic courses covering Indian law. Arizona's land base is almost one-third Indian land¹² and is home to 22 federally recognized tribes.

Arizona began using the UBE¹³ in 2011, essentially sealing the fate of Indian law on the bar exam. Prior to the decision to use the UBE, the Indian Law Section of the state bar, Gov. Janet Napolitano and Gov. Janice Brewer and other advocates including the Arizona NABA filed petitions with the Arizona Supreme Court to support a rule change that would include Indian law on the bar exam. The issue, however, became moot as the bar admissions committee decided to move to administering the UBE. With the UBE, the state bar examiners deliver pre-written questions composed by the National Conference of Bar Examiners¹⁴ and thus, the issue of including Indian law on the state bar examination was no longer active.

The Committee on Examinations elected not to support the inclusion of Indian law on the bar exam in prior years, referring to Indian law as a specialty and not one of the basic competencies that the exam is designed to cover. The committee noted that other specialty areas such as bankruptcy, administrative law, and taxation are not tested and to test such specialty areas was overly burdensome for applicants.

In the 2008 petition to amend the rule governing bar exam topics, and in corresponding letters of support, advocates noted such critical issues as the ICWA's provisions and the authorization of federal prosecution in tribal lands due to the Major Crimes Act.¹⁵ Both of these are areas that all legal practitioners in Arizona should have a general knowledge of in their practice of family law or

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criminal law. The 2008 proposed language for the rule would have permitted including the topics of tribal jurisdiction and tribal governmental sovereign immunity.

Once the bar admissions committee moved the exam to the UBE, the Indian Law Section of the state bar attempted to include Indian law on the course materials for those persons seeking admission by motion through reciprocity bar admission. Attorney members of the section drafted suggested points of law that could have been included in the materials for the mandatory on-line course that all persons admitted by motion must view. Those materials have not been incorporated as of December 2012. The undertaking continues in Arizona to include Indian law in the bar examination process.



Idaho: Recent Proposal to Include Indian Law in the Mandatory State-Specific Course

Professor Angelique Townsend EagleWoman, University of Idaho College of Law

The Idaho State Bar adopted the UBE in March 2011. The first UBE was administered in Idaho during the February 2012 bar

examination.¹⁶ Indian law had not been a topic on the Idaho bar examination prior to adoption of the UBE. The need for greater legal competency in Indian law has been building in Idaho in recent years. In August 2012, the Idaho Supreme Court reinvigorated the Idaho Tribal State Court Forum which had been dormant for several years.¹⁷

For over a decade, the University of Idaho College of Law has offered courses in the areas of Indian law and tribal resource management law. Beginning in fall 2009, the Native American Law Emphasis program¹⁸ was launched under the direction of Associate Professor Angelique EagleWoman, who serves as the coordinator for all aspects of the native law program and advisor to the Idaho chapter of the Native American Law Student Association (NALSA). Within the state boundaries of Idaho are six federally recognized tribal nations: (1) the Coeur d'Alene Tribe; (2) the Kootenai Tribe of Idaho; (3) the Nez Perce Tribe; (4) the Northwestern Band of the Shoshone Nation; (5) the Shoshone-Bannock Tribes; and (6) the Shoshone-Paiute Tribes.

On Nov. 30, 2012, a formal proposal was sent to the State Bar Commission to include Indian law as a topic in the mandatory course following administration of the UBE. The mandatory course is currently referred to as the "Practical Skills Seminar." Twice per year in the capital city of Boise the Practical Skills Seminar is held. Upon admission to the state bar, an attorney is required to attend the seminar within his/her first 12 months of being admitted. The proposal identified four core areas of Indian law that would provide a foundation for newly admitted practitioners in the state. First, the overarching topic of tribal civil and criminal jurisdiction should be provided to frame the training on the jurisdictional issues involving federal, state, and tribal governmental entities, citizens, and interests. Second, Idaho as an "optional" Public Law Number 280 state has accepted specific areas of criminal jurisdiction within Indian Country resulting in great complexity for overlapping law enforcement agencies.¹⁹ Third, the provisions of the ICWA require ongoing training for attorneys in the field of family law. Fourth, tribal hunting and fishing rights on and off reservation require a learned bar to understand and communicate to private citizenry as well as to represent public interests on the laws and various federal and state court decisions involving these rights.

With the proposal under review in Idaho, the inclusion of Indian law may be realized in the near future for the mandatory state-specific skills course. As more law schools and attorneys communicate the need for competency in this area of law to be supported by state bar examinations and accompanying mandatory courses, the future is bright for greater understanding and legal efficiency in working in coordination with tribal, state, and federal laws.

Conclusion: Current Practitioners Make a Difference in Expanding Indian Law Competency

As these various reports from New Mexico, Oklahoma, Arizona, and Idaho indicate, current practitioners in Indian law have an important role to play in expanding the competency in the field by supporting efforts to include Indian law on state bar examinations. The efforts described in this article required the concerted work of law professors, attorneys, and judges to bring the significance of the field of Indian law to the attention of those administering state bar examinations. With three state bar examinations currently including Indian law as a testable topic, there is still much work to do to

increase the level of competency in the practice of Indian law in the United States. ☉

Endnotes

¹See The Indian Tribal Entities Within the Contiguous 48 States Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs and Native Entities Within the State of Alaska Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 77 Fed. Reg. 47868 (Aug. 10, 2012), available at federalregister.gov/a/2012-19588.

²Gloria Valencia-Weber, *Indian Law on State Bar Exams: A Situational Report*, FED. LAW. , Mar./Apr. 2007, at 26.

³25 U.S.C. § 1901 et seq. (Pub. L. No. 95-608, Nov. 8, 1978).

⁴*Id.* § 1911.

⁵Gloria Valencia-Weber & Sherri Nicole Thomas, *When the State Bar Exam Embraces Indian Law: Teaching Experiences and Observations*, 82 N.D. L. REV. 741 (2006).

⁶NATIONAL CONGRESS OF AMERICAN INDIANS, RESOLUTION NO. MOH-04-001, THE EXAMINATION OF INDIAN LAW ON STATE BAR EXAMINATIONS (June 23, 2004), available at turtletalk.files.wordpress.com/2009/04/barexammaterials-ncai-04-001.pdf. Indian law in this context refers to geographical areas that intersect the boundaries of local, state, and tribal governments with common interests that overlap jurisdictional lines. Included within such mixed larger landscapes are the formally defined areas in the Indian Country statute, 18 U.S.C. § 1151 (defining reservation, dependent Indian communities, and Indian allotments).

⁷In April 2006, the committee members were Patty A. Ferguson, Gabriel S. Galanda, William Bluehouse Johnson, Justin Ruggieri, Sherri Thomas, Cheryl Williams, and the author, who served as chair. Thomas and the author organized and copied the materials as they were received.

⁸New Mexico State Board of Bar Examiners, News Release (Mar. 19, 2002) (on file with author).

⁹See page 52 of this issue for an in-depth look at the case: *Apocalypse Now: The Unrelenting Assault on Morton v. Mancari*.

¹⁰The ICWA is a significant federal law intended to preserve American Indian families by placing procedural safeguards into any state court proceedings involving an Indian child being placed in foster care or in an adoptive placement. 25 U.S.C. § 1912-1916. For example, the ICWA provides that the Indian child's tribe may request transfer of a pending placement case to the tribal court or intervene in the state court placement proceeding. *Id.* § 1911(b), § 1911(c).

¹¹See Oklahoma Indian Bar Association website, www.oiba.net (last visited Jan. 4, 2013).

¹²See note 4 for the definition of Indian Country, codified at 18 U.S.C. § 1151.

¹³For information about the sections of the UBE, the Multistate Performance Test (MPT), the Multistate Essay Examination (MEE), and the Multistate Bar Examination (MBE), see the National Conference of Bar Examiners website, www.ncbex.org.

¹⁴See The UBE, National Conference of Bar Examiners website, www.ncbex.org/multistate-tests/ube. "The Uniform Bar Examination (UBE) is prepared and coordinated by the National Conference of Bar Examiners to test knowledge and skills that every lawyer

of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

(2) **Joinder by Court Order.** If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.

(3) **Venue.** If a joined party objects to venue and the joinder would make venue improper, the court must dismiss that party.

(b) **When Joinder Is Not Feasible.** If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

(2) the extent to which any prejudice could be lessened or avoided by:

(A) protective provisions in the judgment;

(B) shaping the relief; or

(C) other measures;

(3) whether a judgment rendered in the person's absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

(c) **Pleading the Reasons for Nonjoinder.** When asserting a claim for relief, a party must state:

(1) the name, if known, of any person who is required to be joined if feasible but is not joined; and

(2) the reasons for not joining that person.

(d) **Exception for Class Actions.** This rule is subject to Rule 23.

⁸436 U.S. 49, 59 (1978).

⁹520 F.2d 1324 (9th Cir. 1975).

¹⁰547 F.3d 962 (9th Cir. 2008).

¹¹337 U.S. 682 (1949).

¹²788 F.2d 765 (D.C. Cir. 1986).

¹³480 F.3d 1318 (Fed. Cir. 2007).

¹⁴928 F.2d 1496 (9th Cir. 1991).

¹⁵672 F.3d 1176 (9th Cir. 2012).

¹⁶No. 11-5322, ___ F.3d ___ (D.C. Cir. Dec. 14, 2012).

¹⁷*Manygoats v. Kleppe*, 558 F.2d 556 (10th Cir. 1977).

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should be able to demonstrate prior to becoming licensed to practice law." *Id.*

¹⁵18 U.S.C. § 1153.

¹⁶See UBE Score Transfer, Idaho State Bar website, isb.idaho.gov/admissions/ube/ube_transfer.html.

¹⁷See Tribal State Court Forum, State of Idaho Judicial Branch website, www.isc.idaho.gov/tribal-state/tribal-benchbook. The Idaho Tribal State Court Forum is co-chaired by an Idaho state court judge and an Idaho tribal court judge who set an agenda on the pressing topics impacting both state and tribal court jurisdiction. For example, the next Idaho Tribal State Court Forum is set for March 20, 2013, with agenda topics including the enforcement of protection orders in state and tribal courts, the current issues involving the ICWA, and a review of the Tribal Law and Order Act of 2010. Attendees to the forums include tribal and state court judges, practitioners, academics, and citizens interested in fostering better relations across tribal and state judicial systems.

¹⁸See The University of Idaho College of Law's Native Law Program website at www.uidaho.edu/law/academics/areas_of_study/nativelaw.

¹⁹The Idaho statute accepting the federal delegation of authority under Public Law Number 280 is codified at I.C. 67-5101—State jurisdiction for civil and criminal enforcement

concerning certain matters arising in Indian country. In 1953, the U.S. Congress passed legislation, commonly known as Public Law Number 280, to provide a process for delegating federal criminal authority in Indian Country to consenting states. Under 18 U.S.C. § 1162(a), six states immediately assumed federal criminal jurisdiction over all tribes and tribal lands within the state, unless a tribe was expressly exempted by the law. These six states were: Alaska, California, Minnesota, Oregon, and Wisconsin. Other states could pass legislation and accept the federal delegation as "optional states." Idaho is an optional Public Law Number 280 state passing legislation in 1963 to accept the federal delegation of authority. Public Law Number 280 also included a civil provision allowing access to state courts when a suit involved an Indian in Indian Country, 28 U.S.C. § 1360. The split of criminal authority in Indian Country between tribal, federal, and state governments has become increasingly complex with the addition of Public Law Number 280.