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Native American Natural Resources Law

Cases and Materials

Second Edition

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We dedicate this book to Indian Law students concerned about the environment and Indian country.
# Contents

Table of Cases xv  
Preface to the Second Edition xxi  
Introduction xxiii  

## Chapter I  Land, Religion, and Culture  
A. Indians and the Land 3  
   Frank Pommersheim, *The Reservation As Place: A South Dakota Essay* 3  
   Navajo Nation Code, Tit. I, § 205 7  
   Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge* 8  
B. Legal Protection of Religion and Cultural Resources 9  
   *Lyng v. Northwest Indian Cemetery Protective Association* 9  
   Notes 17  
   *Navajo Nation v. United States Forest Service* 18  
   Notes 32  
   *Bear Lodge Multiple Use Association v. Babbitt [Bear Lodge I]* 32  
   *Bear Lodge Multiple Use Association v. Babbitt [Bear Lodge II]* 33  
   Executive Order 13007 — Indian Sacred Sites 38  
   Notes 39  
   Note on Federal Protection of Cultural Property 40  
   USDA Forest Service Lake Tahoe Basin Management Unit Record of Decision for Cave Rock Management Direction Final Environmental Impact Statement 44  
   Notes 49  
   Note on the Native American Graves Protection and Repatriation Act 49  

## Chapter II  Some Basics of Federal Indian Law  
A. History of Federal Indian Policy 53  
B. The Cherokee Cases 59  
   *Cherokee Nation v. Georgia* 60  
   *Worcester v. Georgia* 63  
   Notes 67  
C. Tribal Sovereignty 69  
   Felix S. Cohen, *Handbook of Federal Indian Law* 69  
   Cohen’s Handbook of Federal Indian Law § 4.01[1][a] 70  
   Notes 71
D. Federal Role in Indian Country
   *Lone Wolf v. Hitchcock*
   Notes
   Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations* 77
   Notes

E. Indian Country
   1. Scope and Extent of Indian Country
      Note on Indian Country 81
      *Oklahoma Tax Com'n v. Sac and Fox Nation* 82
      Note on the Definition of Reservation 85
      *Alaska v. Native Village of Venetie Tribal Government* 85
      Notes 89
      Note on Alaskan Subsistence 91
      *Mustang Production Co. v. Harrison* 93
      Note on Indian Country in Oklahoma 95
   2. Expanding Indian Country 96
      *Buzzard v. Oklahoma Tax Commission* 96
      Notes 97
   3. Contracting Indian Country: Reservation Diminishment 101
      *Solem v. Bartlett* 102
      *South Dakota v. Yankton Sioux Tribe* 109
      Notes 115

Chapter III Land: The Fundamental Resource
A. Aboriginal Title 117
   *Johnson and Graham's Lessee v. M'Intosh* 117
   Notes 120
   *City of Sherrill v. Oneida Indian Nation* 124
   Notes 128
   *United States ex rel. Hualpai Indians v. Santa Fe Pacific Railroad Co.* 129
   Notes 134
   *Tee-Hi-Ton Indians v. United States* 136
   Notes 141
B. Recognized Title 144
   *United States v. Shoshone Tribe of Indians* 145
   Notes 147
   *United States v. Sioux Nation of Indians* 148
   Notes 159
C. Executive Order Reservations 163
   *Sioux Tribe of Indians v. United States* 163
   Notes 166
D. Submerged Lands 167
   *Montana v. United States* 168
   Notes 171
   *United States v. Cherokee Nation of Oklahoma* 175
   Notes 177
E. Allotted Lands 181
   *Northern Cheyenne Tribe v. Hollowbreast* 182
Note on Fractionation 185
*Babbitt v. Youpee* 187
  Notes 191

Chapter IV  Land Use and Environmental Protection 193
A. Authority to Control Land Use
*Worcester v. Georgia* 193
  Notes 194
*Montana v. United States* 195
  Notes 199
*New Mexico v. Mescalero Apache Tribe* 201
  Notes 206
*Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation* 208
  Notes 219
*South Dakota v. Bourland* 220
  Notes 220
*Strate v. A-1 Contractors* 221
  Notes 223
*Nevada v. Hicks* 224
  Notes 227
B. Environmental Protection 227
  1. Environmental Authority in Indian Country
    *Phillips Petroleum Co. v. U.S. Environmental Protection Agency* 228
    Notes 229
    EPA Policy for the Administration of Environmental Programs on Indian Reservations 229
    Notes 230
    *State of Washington, Department of Ecology v. United States Environmental Protection Agency* 231
    Notes 235
    *City of Albuquerque v. Browner* 239
    Notes 243
    *Montana v. U.S. Environmental Protection Agency* 245
    Notes 249
    *Arizona Public Service Co. v. Environmental Protection Agency* 250
    Notes 257
    *Backcountry against Dumps v. Environmental Protection Agency* 258
    Notes 261
  2. Application of Environmental Laws to Tribes 264
    Notes 264
    *Blue Legs v. United States Bureau of Indian Affairs* 265
    Notes 268
    *Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community* 269
    Notes 272
  3. Environmental Impacts of Development
    *Davis v. Morton* 274
    Notes 277
CONTENTS

Sangre De Cristo Development Co., Inc. v. United States 278
Notes 280
Pamela A. D’Angelo, Waste Management Industry Turns to Indian Reservations As States Close Landfills 281
Scott Morrison & Leanne Howe, The Sewage of Foreigners 285
Kevin Gover, Letter to the Editor 289
Notes 289
Metcalf v. Daley 289
Notes 296

Chapter V Natural Resource Development 299
A. The Federal Role in Resource Management 299
Reid Peyton Chambers & Monroe E. Price, Regulating Sovereignty: Discretion and the Leasing of Indian Lands 299
Mary Christina Wood, Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources 301
Notes 301
Nell Jessup Newton, Enforcing the Federal-Indian Trust Relationship after Mitchell 302
Notes 310
United States v. Navajo Nation 312
United States v. White Mountain Apache Tribe 322
Navajo Nation v. United States 329
Notes 330
Jicarilla Apache Tribe v. Supron Energy Corp. 336
Notes 337
B. The Tribal Role in Resource Management 342
Jicarilla Apache Tribe v. Andrus 342
Note on the Environmental Effects of Mining 346
United Nuclear Corp. v. United States 347
Notes 352
Quantum Exploration, Inc. v. Clark 354
Notes 358

Chapter VI Taxation of Natural Resources 359
A. Federal Taxation 359
Squire v. Capoeman 359
Notes 361
B. Tribal Taxation 363
Merrion v. Jicarilla Apache Tribe 364
Notes 369
Kerr-McGee Corp. v. Navajo Tribe of Indians 369
Notes 371
Atkinson Trading Company Inc. v. Shirley 373
Notes 375
C. State Taxation 376
Note on State Taxation of Tribal Interests 376
Chapter VII  Water Rights

A. Introduction to Reserved Rights

United States v. Winans

Winters v. United States

Notes

Note on State Water Law Systems

B. Extending the Winters Doctrine

Arizona v. California

Notes

C. Scope and Extent of Water Rights

1. Reservation Purposes, Priority Dates, and Quantification

Note on Reservation Purposes

Note on Measurement of Water Rights

United States v. Adair [Adair I]

Notes

In re General Adjudication of All Rights to Use Water in the Big Horn River System [Big Horn I]

In re General Adjudication of All Rights to Use Water in the Gila River System and Source

Notes

2. Rights to Groundwater

In re General Adjudication of All Rights to Use Water in the Big Horn River System [Big Horn I]

In re the General Adjudication of All Rights to Use Water in the Gila River System and Source [Gila River-Groundwater]

Notes

3. Use of Water Rights

In re General Adjudication of All Rights to Use Water in the Big Horn River System [Big Horn III]

Notes

Note on Water Marketing

4. Rights of Allottees and Subsequent Purchasers

Colville Confederated Tribes v. Walton

Notes

5. Right to Water Quality

United States v. Gila Valley Irrigation District

D. Determination of Water Rights

Notes

Pyramid Lake Paiute Tribe of Indians v. Morton
Chapter VIII Usufructuary Rights: Hunting, Fishing, and Gathering

A. Off-Reservation Rights

1. Modern Survival of the Rights
   - Minnesota v. Mille Lacs Band of Chippewa Indians
   - Notes
   - Public Access Shoreline Hawaii (PASH) v. Hawai’i County Planning Commission
   - Notes

2. Defeasible Usufructuary Rights
   - State of Washington v. Buchanan
   - Notes

3. Scope and Extent
   - United States v. Winans
   - Notes
   - Notes
   - Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin [LCO-Timber]
   - Note on the Non-Indian Backlash

4. Regulation of the Rights
   - Puyallup Tribe v. Department of Game of Washington [Puyallup I]
   - Notes
   - Department of Game of the State of Washington v. Puyallup Tribe [Puyallup II]
   - Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin [LCO IV]
   - Note on On-Reservation versus Off-Reservation Rights

5. Habitat Protection
   - United States v. Washington
   - Kittitas Reclamation Dist. v. Sunnyside Valley Irrig. Dist.
   - Notes
   - United States v. Washington
   - Notes
   - Klamath Tribes v. United States Forest Service
   - Nez Perce Tribe v. Idaho Power Company
   - Notes

B. Loss and Diminishment of the Rights
   - Menominee Tribe of Indians v. United States
   - Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe
   - Note on Restoration of Menominee and Klamath Tribes
   - United States v. Dion
   - Notes
CONTENTS

Anderson v. Evans 589
Note: Abrogation versus Regulation 595

Chapter IX  International Approaches to Indigenous Lands and Resources 597
A. International Instruments for the Protection of Indigenous Rights 597
Note: ILO Convention No. 169 597
The Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 1989 598
Note: U.N. Declaration 600
U.N. Declaration on the Rights of Indigenous Peoples 601
Note: Inter-American Draft Declaration 604
Draft of the Inter-American Declaration on the Rights of Indigenous Peoples 604

B. Tribal Claims before International Forums 607
Inter-American Commission on Human Rights, Report No. 75/02, Case 11.140, Mary and Carrie Dann 608
Note: The Inter-American Human Rights System 612
Committee on the Elimination of Racial Discrimination: Early Warning and Urgent Action Procedure, Decision 1 (68): United States of America 613
Notes 614

Index 617
# Table of Cases

Access Fund v. U.S. Dept. of Agriculture, 49  
Alabama-Coushatta Tribe v. United States, 122  
Alaska v. Babbitt, 92  
Alaska v. Native Village of Venetie Tribal Gov’t, 82, 85, 95, 142  
Alaska ex rel. Yukon Flats School Dist. v. Native Village of Venetie Tribal Gov’t, 91  
Alcea Band of Tillamook’s v. United States, 167  
Amoco Production Co. v. Southern Ute Tribe, 147  
Amoco Production Co. v. Village of Gambell, 92  
Anderson v. Evans, 297, 589  
Arizona v. California, 167, 409, 413, 481  
Arizona v. California II, 451  
Arizona v. California III, 481  
Arizona v. California (decree entered), 481  
Arizona v. California (Quechan Tribe claim), 412  
Arizona v. San Carlos Apache Tribe, 485  
Arizona Dep’t of Revenue v. Blaze Construction Co., Inc., 399  
Arizona Public Service Co. v. Environmental Protection Agency, 250  
Arviso v. Commissioner of Internal Revenue, 362  
Ashley v. U.S. Dept. of Interior, 331  
Atkinson Trading Co. v. Shirley, 219, 227, 373  
Atlantic States Legal Foundation v. Salt River Pima-Maricopa Indian Community, 272  
Attorney-General v. Ngati Apa, 136  

Babbit v. Youpee, 187, 192  
Backcountry Against Dumps v. Environmental Protection Agency, 236, 258, 280  
Bangor Hydro-Electric Co. v. U.S. Dep’t of the Interior, 40  

Bear Lodge Multiple Use Ass’n v. Babbitt (Bear Lodge I), 32, 39, 43  
Bear Lodge Multiple Use Ass’n v. Babbitt (Bear Lodge II), 33  
Big Eagle v. United States, 362  
Big Horn County Electric Coop. v. Adams, 223, 372  
Black Hills Institute of Geological Research v. South Dakota School of Mines & Technology, 148  
Blatchford v. Native Village of Noatak, 172  
Blaze Construction Co. v. Taxation and Revenue Dep’t, 398  
Blue Legs v. U.S. Bureau of Indian Affairs, 265, 272, 273  
Boarhead Corp. v. Erickson, 43  
Bobby v. Alaska, 92  
Bonnichsen v. United States, 51, 52  
Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 208, 245, 249, 369, 375  
Brewer-Elliott Oil & Gas Co. v. United States, 174  
Brown v. United States, 334, 335  
Bullcreek v. U.S. Dept. of the Interior, 335  
Burlington Northern Railroad Co. v. Blackfeet Tribe, 371  
Burlington Northern Santa Fe Railroad Co. v. Assiniboine and Sioux Tribes of the Fort Peck Reservation, 372  
Buzzard v. Oklahoma Tax Comm’n, 96, 289  

Cabazon Band of Mission Indians v. Wilson, 398  
Calder v. Attorney General for British Columbia, 134  
Cappaert v. United States, 439  
Carcieri v. Norton, 99
TABLE OF CASES

Cardin v. De La Cruz, 207
Cass County v. Leech Lake Band of Chippewa Indians, 380, 387
Cayuga Indian Nation of New York v. Pataki, 128
Cherokee Nation v. Georgia, 55, 60, 79, 121, 200, 310
Cherokee Nation v. State of Oklahoma, 179
Cherokee Nation of Oklahoma v. United States (Claims Court), 180
Cherokee Nation of Oklahoma v. United States (Federal Circuit), 181
Cherokee Nation of Oklahoma v. United States (10th Circuit), 178
Cherokee Tobacco, The, 361
Cheyenne-Arapaho Tribes of Oklahoma v. Oklahoma, 96
Cheyenne-Arapaho Tribes of Oklahoma v. United States (Ct. Fed Claims), 338
Cheyenne-Arapaho Tribes of Oklahoma v. United States (10th Circuit), 338
Chippewa Cree Tribe of the Rocky Boy's Reservation v. United States, 331
Choctaw Nation v Oklahoma, 171, 174, 176, 178
Cholla Ready Mix, Inc. v. Civish, 42
Churchill County v. Norton, 482
City of Albuquerque v. Browner, 239, 249
City of Boerne v. Flores, 588
City of Roseville v. Norton, 101
City of Sherrill v. Oneida Indian Nation, 124
Cobell v. Babbitt, 338–340
Cobell v. Kempthorne, 338
Cobell v. Norton, 339–341
Coeur d’Alene Tribe v. Asarco, Inc., 264
Colorado River Water Conservation Dist. v. United States, 484, 493
Colville Confederated Tribes v. Cavenham Forest Industries, 208
Confederated Salish and Kootenai Tribes v. Clinch, 436
Confederated Salish and Kootenai Tribes v. Namen, 207
Confederated Salish and Kootenai Tribes of the Flathead Reservation v. Stults, 436, 439
Confederated Tribes v. Bonneville Power Administration, 562
Confederated Tribes of Siletz Indians of Oregon v. United States, 101
Confederated Tribes of the Colville Reservation v. Hoover, 223
Cotton Petroleum Corp. v. New Mexico, 391
County of Oneida v. Oneida Indian Nation, 123
County of San Diego v. Babbitt, 280
County of Yakima v. Confederated Tribes and Bands of the Yakama Indian Nation, 377, 387
Critic v. United States, 362
Cross v. United States, 361
Crow Creek Sioux Tribe v. Brownlee, 41
Crow Tribe of Indians v. Repsis, 527
Cutter v. Wilkerson, 32
Davis v. Morton, 274, 278–279, 345
DeCouteau v. District County Court, 82
Delgamuukw v. British Columbia, 135
Dept. of Game of the State of Washington v. Puyallup Tribe (Puyallup II), 528, 538, 539, 540, 553
Dept. of the Interior v. Klamath Water Users Protective Ass'n, 39, 40, 483
Dept. of the Interior v. South Dakota, 99
Dillon v. United States, 361, 362
Duro v. Reina, 200, 375
Earl v. Commissioner, 362
El Paso Natural Gas v. Neztsosie, 354
Ellis v. Page, 95
Ellis v. State, 95
Ex Parte Crow Dog, 56
Ex Parte Young, 172
Fisher v. United States, 331
Flathead Joint Board of Control v. U.S. Dept. of the Interior, 483
Florida Dept. of Business Regulation v. U.S. Dept. of the Interior, 100
Fort Mojave Indian Tribe v. United States, 481
Gila River Indian Community v. Waddell, 398
Gila River Pima-Maricopa Indian Community v. United States, 439
Gobin v. Snohomish County, 219
Governing Council of Pineville Indian Community v. Mendocino County, 208
<table>
<thead>
<tr>
<th>Case Title</th>
<th>Page(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gros Ventre Tribe v. United States</td>
<td>332</td>
</tr>
<tr>
<td>Guerin v. The Queen</td>
<td>134</td>
</tr>
<tr>
<td>Hodel v. Irving</td>
<td>185, 191</td>
</tr>
<tr>
<td>Holt v. Commissioner</td>
<td>362</td>
</tr>
<tr>
<td>Hoopa Valley Tribe v. Nevins</td>
<td>397</td>
</tr>
<tr>
<td>Housing Authority v. Harjo</td>
<td>95</td>
</tr>
<tr>
<td>Idaho v. Coeur d’Alene Tribe</td>
<td>172, 173</td>
</tr>
<tr>
<td>Idaho v. United States</td>
<td>174</td>
</tr>
<tr>
<td>In re General Adjudication of All Rights to Use Water in the Big Horn River System (Big Horn I)</td>
<td>413, 414, 424, 436, 437, 440, 452, 459, 519</td>
</tr>
<tr>
<td>In re General Adjudication of All Rights to Use Water in the Big Horn River System (Big Horn III)</td>
<td>440, 460</td>
</tr>
<tr>
<td>In re General Adjudication of All Rights to Use Water in the Big Horn River System (non-Indian water rights)</td>
<td>459</td>
</tr>
<tr>
<td>In re General Adjudication of All Rights to Use Water in the Big Horn River System (Big Horn IV)</td>
<td>459</td>
</tr>
<tr>
<td>In re General Adjudication of All Rights to Use Water in the Gila River System</td>
<td>413, 430</td>
</tr>
<tr>
<td>In re General Adjudication of All Rights to Use Water in the Gila River System (Gila River-Groundwater)</td>
<td>438</td>
</tr>
<tr>
<td>In re General Adjudication of All Rights to Use Water in the Gila River System and Source (tributary streams)</td>
<td>482</td>
</tr>
<tr>
<td>In re Ninety Mile Beach</td>
<td>36</td>
</tr>
<tr>
<td>In re SRBA</td>
<td>423</td>
</tr>
<tr>
<td>In the Matter of the Application of Beneficial Water Use Permit No.s 66459-76L, Ciotti</td>
<td>436</td>
</tr>
<tr>
<td>In the Matter of Water Use Permit Applications</td>
<td>519</td>
</tr>
<tr>
<td>Iowa Mutual Insurance Co. v. LaPlante</td>
<td>264</td>
</tr>
<tr>
<td>Jango v. Northern Territory</td>
<td>135</td>
</tr>
<tr>
<td>Jicarilla Apache Tribe v. Andrus</td>
<td>342</td>
</tr>
<tr>
<td>Jicarilla Apache Tribe v. Supron Energy Corp.</td>
<td>331, 332, 336</td>
</tr>
<tr>
<td>Johnson v. M’Intosh</td>
<td>53, 54, 55, 59, 117, 141</td>
</tr>
<tr>
<td>Joint Board of Control of the Flathead, Mission, and Jocko Irrigation Dists. v. United States</td>
<td>421</td>
</tr>
<tr>
<td>Ka Pa’Akai O Ka’Aina v. Land Use Comm’n</td>
<td>518</td>
</tr>
<tr>
<td>Kansas Indians, The</td>
<td>376</td>
</tr>
<tr>
<td>Karuk Tribe of California v. Ammon</td>
<td>167</td>
</tr>
<tr>
<td>Kenaitze Indian Tribe v. Alaska</td>
<td>92</td>
</tr>
<tr>
<td>Kerr-McGee Corp. v. Navajo Tribe of Indians</td>
<td>369</td>
</tr>
<tr>
<td>Keweenaw Bay Indian Community v. Naftaly</td>
<td>383</td>
</tr>
<tr>
<td>Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.</td>
<td>81, 264</td>
</tr>
<tr>
<td>Kittitas Reclamation Dist. v. Sunnyside Valley Irrig. Dist.</td>
<td>421, 493, 560</td>
</tr>
<tr>
<td>Klamath Tribes v. United States Forest Service</td>
<td>565</td>
</tr>
<tr>
<td>Knight v. Shoshone &amp; Arapaho Indian Tribes</td>
<td>208</td>
</tr>
<tr>
<td>Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt</td>
<td>511, 519</td>
</tr>
<tr>
<td>Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (LCO II)</td>
<td>527</td>
</tr>
<tr>
<td>Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (LCO III)</td>
<td>539, 542</td>
</tr>
<tr>
<td>Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (LCO IV)</td>
<td>554</td>
</tr>
<tr>
<td>Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (LCO V)</td>
<td>540</td>
</tr>
<tr>
<td>Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (LCO VII)</td>
<td>540</td>
</tr>
<tr>
<td>Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (LCO-Timber)</td>
<td>542</td>
</tr>
<tr>
<td>Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wisconsin</td>
<td>549</td>
</tr>
<tr>
<td>Lone Wolf v. Hitchcock</td>
<td>57, 73, 77, 80, 192</td>
</tr>
<tr>
<td>Lucas v. South Carolina Coastal Council</td>
<td>518</td>
</tr>
<tr>
<td>Lummi Indian Tribe v. Hallauer</td>
<td>207</td>
</tr>
<tr>
<td>Lyng v. Northwest Indian Cemetery Protective Ass’n</td>
<td>9, 39</td>
</tr>
<tr>
<td>Mabo v. Queensland</td>
<td>135</td>
</tr>
<tr>
<td>Madison v. Alaska Dept. of Fish and Game</td>
<td>91</td>
</tr>
</tbody>
</table>
### TABLE OF CASES

<table>
<thead>
<tr>
<th>Case</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>McClanahan v. State Tax Commission of Arizona,</td>
<td>376</td>
</tr>
<tr>
<td>McDonald v. Means,</td>
<td>223</td>
</tr>
<tr>
<td>McDowell v. Alaska,</td>
<td>92</td>
</tr>
<tr>
<td>Menominee Tribe of Indians v. United States,</td>
<td>570,  571</td>
</tr>
<tr>
<td>Merrion v. Jicarilla Apache Tribe,</td>
<td>364, 396</td>
</tr>
<tr>
<td>Mervyn (on behalf of the peoples of the Ngaanyatjarra Lands) v. Western Australia,</td>
<td>135</td>
</tr>
<tr>
<td>Mescalero Apache Tribe v. Jones,</td>
<td>81, 98, 549</td>
</tr>
<tr>
<td>Metcalf v. Daley,</td>
<td>289</td>
</tr>
<tr>
<td>Michigan v. Environmental Protection Agency,</td>
<td>257</td>
</tr>
<tr>
<td>Michgan Dept. of Environmental Quality v. EPA,</td>
<td>235</td>
</tr>
<tr>
<td>Mid States Coalition for Progress v. Surface Transportation Board,</td>
<td>161</td>
</tr>
<tr>
<td>Midwater Trawlers Co-operative v. Dept. of Commerce,</td>
<td>297</td>
</tr>
<tr>
<td>Milirrpum v. Nabalco,</td>
<td>135</td>
</tr>
<tr>
<td>Minnesota v. Mille Lacs Band of Chippewa Indians,</td>
<td>496, 518, 587</td>
</tr>
<tr>
<td>Montana v. Blackfeet Tribe of Indians,</td>
<td>383, 396</td>
</tr>
<tr>
<td>Montana v. Crow Tribe of Indians,</td>
<td>396</td>
</tr>
<tr>
<td>Montana v. U.S. Environmental Protection Agency,</td>
<td>245</td>
</tr>
<tr>
<td>Muckleshoot v. Hall,</td>
<td>561</td>
</tr>
<tr>
<td>Muckleshoot Indian Tribe v. Lummi Indian Nation,</td>
<td>541</td>
</tr>
<tr>
<td>Mustang Production Co. v. Harrison,</td>
<td>93, 373</td>
</tr>
<tr>
<td>Nance v. EPA,</td>
<td>236</td>
</tr>
<tr>
<td>Narragansett Indian Tribe v. Warwick Sewer Authority,</td>
<td>43</td>
</tr>
<tr>
<td>National Farmers Union Insurance Cos. of Crow Tribe,</td>
<td>264</td>
</tr>
<tr>
<td>National Mining Ass’n v. Slater,</td>
<td>43</td>
</tr>
<tr>
<td>Navajo Nation v. Peabody Holding Co., Inc.,</td>
<td>330</td>
</tr>
<tr>
<td>Navajo Nation v. United States,</td>
<td>329</td>
</tr>
<tr>
<td>Navajo Nation v. United States Forest Service,</td>
<td>18, 588</td>
</tr>
<tr>
<td>Neighbors for Rational Development v. Norton,</td>
<td>100</td>
</tr>
<tr>
<td>Nevada v. Hicks,</td>
<td>59, 224, 265, 372, 375</td>
</tr>
<tr>
<td>Nevada v. United States,</td>
<td>472, 565</td>
</tr>
<tr>
<td>New Mexico v. Mescalero Apache Tribe,</td>
<td>201, 558, 559</td>
</tr>
<tr>
<td>New Mexico ex rel. Reynolds v. Aamodt,</td>
<td>439</td>
</tr>
<tr>
<td>New York Indians, The,</td>
<td>376</td>
</tr>
<tr>
<td>Nez Perce Tribe v. Idaho Power Company,</td>
<td>560, 566</td>
</tr>
<tr>
<td>Ninilchik Traditional Council v. United States,</td>
<td>92</td>
</tr>
<tr>
<td>No Oilport! v. Carter,</td>
<td>561</td>
</tr>
<tr>
<td>Northern Cheyenne Tribe v. Hollowbreast,</td>
<td>182</td>
</tr>
<tr>
<td>Northern Cheyenne Tribe v. U.S. Bureau of Land Management,</td>
<td>43</td>
</tr>
<tr>
<td>Northern States Power Co. Prairie Island Mde-wakanton Sioux Indian Community,</td>
<td>269</td>
</tr>
<tr>
<td>Northwest Indian Cemetery Protective Ass’n v. Peterson,</td>
<td>18</td>
</tr>
<tr>
<td>Northwest Sea Farms v. U.S. Army Corps of Engineers,</td>
<td>561</td>
</tr>
<tr>
<td>Oglala Sioux Tribe v. United States,</td>
<td>161</td>
</tr>
<tr>
<td>Oklahoma Tax Comm’n v. Chickasaw Nation,</td>
<td>376, 377</td>
</tr>
<tr>
<td>Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Oklahoma,</td>
<td>85, 238</td>
</tr>
<tr>
<td>Oklahoma Tax Comm’n v. Sac and Fox Nation,</td>
<td>82, 89, 95, 376, 377</td>
</tr>
<tr>
<td>Oliphant v. Suquamish Indian Tribe,</td>
<td>59, 162, 200</td>
</tr>
<tr>
<td>Oneida Indian Nation v. County of Oneida,</td>
<td>123</td>
</tr>
<tr>
<td>Oneida Indian Nation v. New York (2d Cir.),</td>
<td>128, 129</td>
</tr>
<tr>
<td>Oneida Indian Nation v. New York (N.D. N.Y),</td>
<td>128</td>
</tr>
<tr>
<td>Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe,</td>
<td>575</td>
</tr>
<tr>
<td>Osage Tribal Council v. Dep’t of Labor,</td>
<td>273</td>
</tr>
<tr>
<td>Osage Tribe of Indians of Oklahoma v. United States,</td>
<td>331</td>
</tr>
<tr>
<td>Parravano v. Babitt,</td>
<td>166</td>
</tr>
<tr>
<td>Peabody Coal Co. v. Navajo Nation,</td>
<td>330</td>
</tr>
<tr>
<td>Phillips Petroleum Co. v. U.S. Environmental Protection Agency,</td>
<td>228</td>
</tr>
<tr>
<td>Pittsburg &amp; Midway Coal Mining Co. v. Watchman,</td>
<td>373</td>
</tr>
<tr>
<td>Public Access Shoreline Hawaii (PASH) v. Hawai’i County Planning Comm’n,</td>
<td>512, 565</td>
</tr>
<tr>
<td>Public Service Co. v. Shoshone-Bannock Tribes,</td>
<td>273</td>
</tr>
<tr>
<td>Case</td>
<td>Volume</td>
</tr>
<tr>
<td>----------------------------------------------------------------------</td>
<td>--------</td>
</tr>
<tr>
<td>Pueblo of Sandia v. United States, 40, 42</td>
<td></td>
</tr>
<tr>
<td>Puget Sound Gillnetters v. U.S. District Court, 530</td>
<td></td>
</tr>
<tr>
<td>Puget Sound Gillnetters Ass’n v. Moos, 529</td>
<td></td>
</tr>
<tr>
<td>Purse Seine Vessel Owners Ass’n v. Tollefson, 529</td>
<td></td>
</tr>
<tr>
<td>Puyallup Indian Tribe v. Port of Tacoma, 172</td>
<td></td>
</tr>
<tr>
<td>Puyallup Tribe v. Dep’t of Game of Washington (Puyallup I), 528, 549</td>
<td></td>
</tr>
<tr>
<td>Puyallup Tribe v. Dep’t of Game of State of Washington (Puyallup III), 528, 558, 559</td>
<td></td>
</tr>
<tr>
<td>Pyramid Lake Paiute Tribe of Indians v. Morton, 468, 518, 565</td>
<td></td>
</tr>
<tr>
<td>Quantum Exploration, Inc. v. Clark, 354</td>
<td></td>
</tr>
<tr>
<td>Quinault Indian Nation v. Grays Harbor County, 383, 398</td>
<td></td>
</tr>
<tr>
<td>R. v. Marshall, 135</td>
<td></td>
</tr>
<tr>
<td>Red Lake Band of Chippewa Indians v. United States, 362</td>
<td></td>
</tr>
<tr>
<td>Reno-Sparks Indian Colony v. EPA, 257</td>
<td></td>
</tr>
<tr>
<td>Reppun v. Board of Water Supply, 518</td>
<td></td>
</tr>
<tr>
<td>Rice v. Rehner, 201</td>
<td></td>
</tr>
<tr>
<td>Rosebud Sioux Tribe v. Gover, 280</td>
<td></td>
</tr>
<tr>
<td>Rosebud Sioux Tribe v. McDivitt, 280</td>
<td></td>
</tr>
<tr>
<td>San Carlos Apache Tribe v. United States (9th Cir.), 43</td>
<td></td>
</tr>
<tr>
<td>Sangre de Cristo Development Co., Inc. v. United States, 278</td>
<td></td>
</tr>
<tr>
<td>Santa Clara Pueblo v. Martinez, 264</td>
<td></td>
</tr>
<tr>
<td>Santa Rosa Band of Indians v. Kings County, 98</td>
<td></td>
</tr>
<tr>
<td>Satiacum, 362</td>
<td></td>
</tr>
<tr>
<td>Seufert Bros. v. United States, 526, 528, 538</td>
<td></td>
</tr>
<tr>
<td>Shiwits Band of Paiute Indians v. Utah, 207</td>
<td></td>
</tr>
<tr>
<td>Shoshone Indian Tribe of the Wind River Reservation v. United States, 332</td>
<td></td>
</tr>
<tr>
<td>Simon v. The Queen, 134, 135</td>
<td></td>
</tr>
<tr>
<td>Sioux Tribe of Indians v. United States, 163</td>
<td></td>
</tr>
<tr>
<td>Skeem v. United States, 453</td>
<td></td>
</tr>
<tr>
<td>Skokomish Indian Tribe v. United States, 420, 570</td>
<td></td>
</tr>
<tr>
<td>Sohappy v. Smith, 529</td>
<td></td>
</tr>
<tr>
<td>Solem v. Bartlett, 102, 376</td>
<td></td>
</tr>
<tr>
<td>South Dakota v. Bourland, 220, 369, 558</td>
<td></td>
</tr>
<tr>
<td>South Dakota v. Bourland (8th Circuit), 221</td>
<td></td>
</tr>
<tr>
<td>South Dakota v. U.S. Dept. of the Interior, 98, 100</td>
<td></td>
</tr>
<tr>
<td>South Dakota v. Yankton Sioux Tribe, 109, 376, 511</td>
<td></td>
</tr>
<tr>
<td>Sparrow v. R., 135</td>
<td></td>
</tr>
<tr>
<td>Squire v. Capoeman, 359</td>
<td></td>
</tr>
<tr>
<td>State v. Elliott, 129</td>
<td></td>
</tr>
<tr>
<td>State v. Hanapi, 518</td>
<td></td>
</tr>
<tr>
<td>State v. Klindt, 96</td>
<td></td>
</tr>
<tr>
<td>State v. Littlechief, 96</td>
<td></td>
</tr>
<tr>
<td>State Dept. of Ecology v. Acquavella, 423</td>
<td></td>
</tr>
<tr>
<td>State Engineer v. South Fork Band of the Te-Moak Tribe, 493</td>
<td></td>
</tr>
<tr>
<td>State ex rel. Greely v. Confederated Salish &amp; Kootenai Tribes, 459</td>
<td></td>
</tr>
<tr>
<td>State ex rel. Martinez v. Kerr-McGee, 423</td>
<td></td>
</tr>
<tr>
<td>State ex rel. Martinez v. Lewis, 414</td>
<td></td>
</tr>
<tr>
<td>State ex rel. May v. Seneca-Cayuga Tribe, 96</td>
<td></td>
</tr>
<tr>
<td>State of Washington v. Buchanan, 520</td>
<td></td>
</tr>
<tr>
<td>State of Washington, Dept. of Ecology v. U.S. Environmental Protection Agency, 231, 244, 258, 261</td>
<td></td>
</tr>
<tr>
<td>Strate v. A-1 Contractors, 221, 265, 372</td>
<td></td>
</tr>
<tr>
<td>Strom v. Commissioner of Internal Revenue, 362</td>
<td></td>
</tr>
<tr>
<td>Superintendent of Five Civilized Tribes v. Commissioner of Internal Revenue, 362</td>
<td></td>
</tr>
<tr>
<td>Tee-Hit-Ton Indians v. United States, 136</td>
<td></td>
</tr>
<tr>
<td>Temoak Band of Western Shoshone Indians v. United States, 607</td>
<td></td>
</tr>
<tr>
<td>Thompson v. County of Franklin, 383</td>
<td></td>
</tr>
<tr>
<td>Tooisgah v. United States, 95</td>
<td></td>
</tr>
<tr>
<td>Tulee v. Washington, 528, 538</td>
<td></td>
</tr>
<tr>
<td>Tweedy v. Texas Co., 439</td>
<td></td>
</tr>
<tr>
<td>United Nuclear Corp. v. United States, 347</td>
<td></td>
</tr>
<tr>
<td>United States v. Abousleman, 406</td>
<td></td>
</tr>
<tr>
<td>United States v. Adair (Adair I), 406, 413, 414, 452, 493, 519, 561</td>
<td></td>
</tr>
<tr>
<td>United States v. Adair (Adair II), 421</td>
<td></td>
</tr>
<tr>
<td>United States v. Alaska, 174</td>
<td></td>
</tr>
<tr>
<td>United States v. Anderson (taxation), 363</td>
<td></td>
</tr>
<tr>
<td>United States v. Anderson (water rights-district court), 421, 561</td>
<td></td>
</tr>
<tr>
<td>United States v. Anderson (water rights-9th Cir.), 459, 460, 561</td>
<td></td>
</tr>
<tr>
<td>United States v. Antoine, 589</td>
<td></td>
</tr>
<tr>
<td>United States v. Billie, 587</td>
<td></td>
</tr>
<tr>
<td>United States v. Braren, 422</td>
<td></td>
</tr>
<tr>
<td>United States v. Bresette, 587</td>
<td></td>
</tr>
</tbody>
</table>

**TABLE OF CASES**

**xix**
United States v. Cherokee Nation of Oklahoma, 175
United States v. Clapox, 56
United States v. Dann, 129, 608
United States v. Daney, 362
United States v. Dion, 80, 166, 423, 582, 595
United States v. District Court in and for Eagle County, 484
United States v. 43 Gallons of Whiskey, 361
United States v. Gerber, 41
United States v. Gila Valley Irrigation District, 460
United States v. Hardman, 589
United States v. Hicks, 527
United States v. Hugs, 589
United States v. Idaho, 424
United States v. Jim, 589
United States v. Kagama, 56, 57, 79, 80
United States v. Lara, 200
United States v. Lummi Tribe, 541
United States v. Lundquist, 589
United States v. McBratney, 194
United States v. Midwest Oil Co., 166
United States v. Mitchell (Mitchell I), 304, 310
United States v. Mitchell (Mitchell II), 304, 331, 338
United States v. Muckleshoot Tribe, 541
United States v. Navajo Nation, 312
United States v. New Mexico, 413
United States v. Newmont USA, Ltd., 268
United States v. Oklahoma Gas & Electric Co., 95
United States v. Oliver, 588
United States v. Oregon, 492
United States v. Orr Water Ditch Co., 452, 483
United States v. Ramsey, 96
United States v. Roberts, 99
United States v. Sandoval, 89
United States v. Shoshone Tribe of Indians, 145, 427
United States v. Sioux Nation of Indians, 80, 148
United States v. Tawahongva, 589
United States v. Truckee-Carson Irrigation Dist., 483
United States v. Washington (Boldt Decision) (district court), 529, 542
United States v. Washington (Cehalas Tribe), 541
United States v. Washington (culvert case), 562, 570
United States v. Washington (Puyallup reservation), 558
United States v. Washington (habitat protection), 539, 559, 570
United States v. Washington (hatchery fish), 538, 539, 540
United States v. Washington (Lummi groundwater), 435
United States v. Washington (shellfish), 571
United States v. Webb, 116
United States v. White Mountain Apache Tribe, 322
United States v. Winans, 57, 171, 401, 519, 527, 570
United States ex rel. Hualpai Indians v. Santa Fe Pacific Railroad Co., 129, 511
Vieux Carre Prop. Owners, Residents & Assoc., Inc. v. Brown, 43
Wagnon v. Prairie Band of Potawatomi Nation, 398
Ward v. Race Horse, 510
Washington v. Confederated Tribes of the Colville Indian Reservation, 162, 206, 363
Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n, 421, 530, 560
Washington Dept. of Ecology v. Yakima Reservation Irrig. Dist., 422, 423
Wheeler v. United States, 200
White Mountain Apache Tribe v. Bracker, 201, 387, 398
Wik Peoples v. Queensland, 135
Williams v. Lee, 194, 195, 200, 201
Winters v. United States, 57, 403
Wisconsin v. Environmental Protection Agency, 244
Wisconsin v. Yoder, 17
Worcester v. Georgia, 55, 63, 68, 79, 80, 116, 194, 200
Wyoming v. United States, 414, 424, 436, 437
Wyoming v. United States (district court), 493
Yankton Sioux Tribe v. Gaffey, 115
Youngbull v. United States, 144
Preface to the Second Edition

We have been quite pleased with the reception the first edition of Native American Natural Resources Law received. It has been especially gratifying to see our efforts encourage the establishment of a new course in the law school curriculum, one which bridges Indian law and natural resources and environmental law. Some of our colleagues have been uncommonly enthusiastic about both the casebook and the subject matter. See, e.g., Debra Donahue, A Call For Native American Natural Resources in the Law School Curriculum, 24 Journal of Land, Resources, and Environmental Law 211 (2004).

In the six years since the first edition, the field of Native American natural resources law has proceeded apace, and this edition reflects those developments: in legislatures, in the courts, and in the legal commentary. Particularly notable among the latter was the publication a new edition of Cohen's Handbook of Federal Indian law in 2005. On the federal level, the tension between Congress and the Supreme Court continues: while the Supreme Court has continued its apparent hostility toward tribal sovereignty, tribal governments continue to gain important regulatory roles under federal statutes. And although some state courts have read tribal water rights extremely narrowly, for the most part tribal property rights continue to gain judicial recognition and protection.

We continue to believe that this book is adaptable to either an advanced course in Indian law for students whose principal interest is Indian law, or an advanced natural resources law course for students whose principal interest is in natural resources law, or for students whose interest lies in the intersection between the two fields. We’ve tried to design this book so that students need not have taken either the basic Indian law course or the basic natural resources law course in order to take this course.

A word about editing in this edition: to increase the book’s readability, we have generally eliminated ellipses in our edits of cases and commentary, retaining ellipses only to indicate material that has been edited out within a paragraph.

We look forward to continuing to follow developments in this dynamic field for years to come. Professor Blumm thanks Miles Kowalski and Alex Vinson, now both graduates of Lewis and Clark Law School, for help on this edition. Their research assistance was funded by a timely grant from the Rocky Mountain Mineral Law Institute.

JVR

MCB
Introduction

Native American Natural Resources Law is a growing, dynamic, exciting area of the law, involving important economic resources. Yet it has deep historical roots which are inextricably linked to the nation's ethical and legal obligations to the continent's first peoples. The field includes transcendent issues, such as compensation for or restoration of lost resources, as well as pragmatic concerns, such as the ability to site or maintain major facilities, the allocation of water supplies, and pollution control. In a larger sense, the study of Native American Natural Resource Law is a worthy endeavor because, as Felix Cohen noted, it serves as a reflection of the dominant society’s tolerance for diversity. Moreover, by providing new laboratories to test novel management approaches, the dominant society may learn valuable natural resources lessons for the future.

Themes of Native American Natural Resources Law

There are several enduring themes in this text. We believe the material is better understood if the following points are introduced at the outset:

1) Most of the core conflicts in this field are jurisdictional: conflicts over which government has sovereign control over which resources;

2) What you learned in high school civics class—that the United States has a federal system of government with dual sovereigns, the states and the federal government—is not true. Tribal governments are an important third source of sovereignty that play an increasingly important role in natural resources allocation.

3) A critical distinction, one not always recognized in the case law, concerns the difference between questions of sovereignty—which government has authority to control natural resource allocation—and questions of property: that is, ownership of resources.

4) Large variations in the history of Native American policy continue to influence natural resources allocation today. In particular, the legacy of the allotment era (1887–1934), when tribes lost more than sixty percent of their land base in a purported effort to “assimilate” the tribes into the mainstream of American life, looms large.

5) The historical record reveals that, although both the federal Congress and Executive have trust responsibilities to protect tribal lands and resources, they
have not always been able to fulfill those responsibilities without assistance from the federal courts.

6) Ironically, however, some of the most innovative aspects of Native American Natural Resources Law in recent years have come from the U.S. Environmental Protection Agency, when Congress has authorized treatment of tribes as states for pollution control purposes. These initiatives come at a time when the United States Supreme Court has frequently treated tribal claims of inherent sovereignty with hostility.

7) Perhaps the chief characteristic of this field of law is its relative lack of universal principles that apply to all situations. The great diversity in Indian Country because of distinct treaties, statutes, executive orders, and histories—what Charles Wilkinson has called the “scattering forces” in Indian Country—makes case by case adjudication the norm and generic statements hazardous.