

# **Native American Natural Resources Law**

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# Native American Natural Resources Law

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## Cases and Materials

*Second Edition*

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



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# Preface to the Second Edition

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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.

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# Introduction

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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.