

Native American Natural Resources Law

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Cases and Materials

FIFTH EDITION

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We dedicate this book to Indian Law students everywhere who are concerned about Indigenous sovereignty and the wise use of the environment of Indian country and beyond.

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Preface to the Fifth Edition

The fifth edition of the casebook is the first since Judith Royster's retirement. Judith, our leader in many respects, first reorganized Michael Blumm's teaching materials into the first edition in 2003. We will miss Judith's inspiration. In this edition, we welcome a new Indian law scholar as co-author, Monte Mills, now at the University of Washington. Professor Mills, like Dean Kronk Warner, is a leader in a new generation of Indian law scholars, which will take this casebook into the second quarter of the twenty-first century.

The reception of the first four editions of the casebook has encouraged the establishment of a new course in the law school curriculum, one that 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 five years since the fourth edition, the field of Native American natural resources law has continued to expand, and this edition reflects those developments: in legislatures, in administrative agencies, in the courts, and in the legal commentary. In addition to recent legislation in the energy law field, there are important proposals of the Biden administration to promote co-management among federal land managers and tribal governments.

On the federal judicial level, tension between Congress and the Supreme Court continues. The Court, in its historic *McGirt* decision, refused to find reservation disestablishment due to time and custom, ruling that disestablishment required express congressional action. But the Court also seemed prepared to look beyond settled principles of federal Indian law by proclaiming that state sovereignty over criminal law extended to reservations. At the same time that the Court created this judicial confusion, tribal governments continue to gain important regulatory roles under federal statutes. Although some state courts have interpreted tribal water rights extremely narrowly, not all have, and 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 have 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 to understand the material in this coursebook.

A word about editing in this edition: in order 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 and assess the implications of developments in this dynamic field for years to come. We produce annual teacher's updates and a teacher's manual that are available from the publisher, and we welcome comments on a planned sixth edition.

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January 2023

Introduction

Native American Natural Resources Law is a growing, dynamic, exciting area of the law, involving important environmental and 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 scarce 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 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) A developing theme, as this edition goes to press, is the Biden administration's commitment to enhance prospects for co-management of federal lands with tribal governments which possess cultural ties to the lands and their resources. Ensuing years have the promise of fertile working relationships between federal land managers and tribes.

8) 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 in terms 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.