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NATIVE AMERICAN NATURAL RESOURCES LAW

Carolina Academic Press (2d ed., 2008)
Judith Royster & Michael Blumm

Teacher's Update for 2010-11

August 2010

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Phone: (919) 489-7486
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www.cap-press.com

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I. Land, Religion, and Culture

B. Legal Protection of Religion and Cultural Resources

Pages 18-32: The case of *Navajo Nation v. U.S. Forest Service* was reversed, 8-3, en banc. Substitute the following two cases for the excerpt in the book:

Navajo Nation v. United States Forest Service

535 F.3d 1058 (9th Cir. 2008) (en banc), *cert. denied*, 129 S.Ct. 2763 (2009)

BEA, Circuit Judge:

In this case, American Indians ask us to prohibit the federal government from allowing the use of artificial snow for skiing on a portion of a public mountain sacred in their religion. At the heart of their claim is the planned use of recycled wastewater, which contains 0.0001% human waste, to make artificial snow. The Plaintiffs claim the use of such snow on a sacred mountain desecrates the entire mountain, deprecates their religious ceremonies, and injures their religious sensibilities. We are called upon to decide whether this government-approved use of artificial snow on government-owned park land violates the Religious Freedom Restoration Act of 1993 ("RFRA") [and other statutes]. We hold that it does not, and affirm the district court's denial of relief on all grounds.

* * *

Plaintiff Indian tribes and their members consider the San Francisco Peaks in Northern Arizona to be sacred in their religion.[2] They contend that the use of recycled wastewater to make artificial snow for skiing on the Snowbowl, a ski area that covers approximately one percent of the

[2] The Plaintiffs-Appellants in this case are the Navajo Nation, the Hopi Tribe, the Havasupai Tribe, the Hualapai Tribe, the Yavapai-Apache Nation, the White Mountain Apache Nation, Bill Bucky Preston (a member of the Hopi Tribe), Norris Nez (a member of the Navajo Nation), Rex Tilousi (a member of the Havasupai Tribe), Dianna Uqualla (a member of the Havasupai Tribe), the Sierra Club, the Center for Biological Diversity, and the Flagstaff Activist Network.

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San Francisco Peaks, will spiritually contaminate the entire mountain and devalue their religious exercises. The district court found the Plaintiffs' beliefs to be sincere; there is no basis to challenge that finding. The district court also found, however, that there are no plants, springs, natural resources, shrines with religious significance, or religious ceremonies that would be physically affected by the use of such artificial snow. No plants would be destroyed or stunted; no springs polluted; no places of worship made inaccessible, or liturgy modified. The Plaintiffs continue to have virtually unlimited access to the mountain, including the ski area, for religious and cultural purposes. On the mountain, they continue to pray, conduct their religious ceremonies, and collect plants for religious use.

Thus, the sole effect of the artificial snow is on the Plaintiffs' subjective spiritual experience. That is, the presence of the artificial snow on the Peaks is offensive to the Plaintiffs' feelings about their religion and will decrease the spiritual fulfillment Plaintiffs get from practicing their religion on the mountain. Nevertheless, a government action that decreases the spirituality, the fervor, or the satisfaction with which a believer practices his religion is not what Congress has labeled a "substantial burden"– a term of art chosen by Congress to be defined by reference to Supreme Court precedent – on the free exercise of religion. Where, as here, there is no showing the government has coerced the Plaintiffs to act contrary to their religious beliefs under the threat of sanctions, or conditioned a governmental benefit upon conduct that would violate the Plaintiffs' religious beliefs, there is no "substantial burden" on the exercise of their religion.

Were it otherwise, any action the federal government were to take, including action on its own land, would be subject to the personalized oversight of millions of citizens. Each citizen would hold an individual veto to prohibit the government action solely because it offends his religious beliefs, sensibilities, or tastes, or fails to satisfy his religious desires. Further, giving one religious sect a veto over the use of public park land would deprive others of the right to use what is, by definition, land that belongs to everyone.

"[W]e are a cosmopolitan nation made up of people of almost every conceivable religious preference." Our nation recognizes and protects the expression of a great range of religious beliefs. Nevertheless, respecting religious credos is one thing; requiring the government to change its conduct to avoid any perceived slight to them is quite another. No matter how much we might wish the government to conform its conduct to our religious preferences, act in ways that do not offend our religious sensibilities, and take no action that decreases our spiritual fulfillment, no government – let alone a government that presides over a nation with as many religions as the United States of America – could function were it required to do so. *Lyng v. Nw. Indian Cemetery Protective Ass'n,* 485 U.S. 439, 452 (1988).

I. Factual and Procedural Background

The Snowbowl ski area ("the Snowbowl") is located on federally owned public land and operates under a special use permit issued by the United States Forest Service ("the Forest Service"). Specifically, the Snowbowl is situated on Humphrey's Peak, the highest of the San Francisco Peaks

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("the Peaks"), located within the Coconino National Forest in Northern Arizona. The Peaks cover about 74,000 acres. The Snowbowl sits on 777 acres, or approximately one percent of the Peaks.

The Forest Service designated the Snowbowl as a public recreation facility after finding the Snowbowl "represented an opportunity for the general public to access and enjoy public lands in a manner that the Forest Service could not otherwise offer in the form of a major facility anywhere in Arizona." The Snowbowl has been in operation since the 1930s and is the only downhill ski area within the Coconino National Forest.

The Peaks have long-standing religious and cultural significance to Indian tribes. The tribes believe the Peaks are a living entity. They conduct religious ceremonies, such as the Navajo Blessingway Ceremony, on the Peaks. The tribes also collect plants, water, and other materials from the Peaks for medicinal bundles and tribal healing ceremonies. According to the tribes, the presence of the Snowbowl desecrates for them the spirituality of the Peaks. Certain Indian religious practitioners believe the desecration of the Peaks has caused many disasters, including the September 11, 2001 terrorist attacks, the Columbia Space Shuttle accident, and increases in natural disasters.

* * * In 2002, the Snowbowl submitted a proposal to the Forest Service to upgrade its operations. The proposal included a request for artificial snowmaking from recycled wastewater for use on the Snowbowl. The Snowbowl had suffered highly variable snowfall for several years; this resulted in operating losses that threatened its ski operation. Indeed, the district court found that artificial snowmaking is "needed to maintain the viability of the Snowbowl as a public recreational resource."

The recycled wastewater to be used for snowmaking is classified as "A+" by the Arizona Department of Environmental Quality ("ADEQ"). A+ recycled wastewater is the highest quality of recycled wastewater recognized by Arizona law and may be safely and beneficially used for many purposes, including irrigating school ground landscapes and food crops. Further, the ADEQ has specifically approved the use of recycled wastewater for snowmaking.

The Forest Service conducted an extensive review of the Snowbowl's proposal. As part of its review, the Forest Service made more than 500 contacts with Indian tribes, including between 40 and 50 meetings, to determine the potential impact of the proposal on the tribes. In a December 2004 Memorandum of Agreement, the Forest Service committed to, among other things: (1) continue to allow the tribes access to the Peaks, including the Snowbowl, for cultural and religious purposes; and (2) work with the tribes periodically to inspect the conditions of the religious and cultural sites on the Peaks and ensure the tribes' religious activities on the Peaks are uninterrupted.

Following the review process, the Forest Supervisor approved the Snowbowl's proposal, including the use of recycled wastewater to make artificial snow, and issued a Final Environmental Impact Statement and a Record of Decision in February 2005. [The Plaintiffs unsuccessfully pursued an administrative appeal. In their federal court action, the district court granted summary judgment on all claims to the Defendants. A panel of the Ninth Circuit reversed, holding that the use of

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recycled wastewater violated RFRA.] We took the case en banc to revisit the panel's decision and to clarify our circuit's interpretation of "substantial burden" under RFRA.

III. Religious Freedom Restoration Act of 1993

Plaintiffs contend the use of artificial snow, made from recycled wastewater, on the Snowbowl imposes a substantial burden on the free exercise of their religion, in violation of the Religious Freedom Restoration Act of 1993 ("RFRA"). We hold that the Plaintiffs have failed to establish a RFRA violation. The presence of recycled wastewater on the Peaks does not coerce the Plaintiffs to act contrary to their religious beliefs under the threat of sanctions, nor does it condition a governmental benefit upon conduct that would violate their religious beliefs, as required to establish a "substantial burden" on religious exercise under RFRA.

RFRA was enacted in response to the Supreme Court's decision in *Employment Division v. Smith,* 494 U.S. 872 (1990). In *Smith,* the Supreme Court held that the Free Exercise Clause does not bar the government from burdening the free exercise of religion with a "valid and neutral law of general applicability." Applying that standard, the *Smith* Court rejected the Free Exercise Clause claims of the plaintiffs, who were denied state unemployment compensation after being discharged from their jobs for ingesting peyote for religious purposes.

* * * With the enactment of RFRA, Congress created a cause of action for persons whose exercise of religion is substantially burdened by a government action, regardless of whether the burden results from a neutral law of general applicability.

To establish a prima facie RFRA claim, a plaintiff must present evidence sufficient to allow a trier of fact rationally to find the existence of two elements. First, the activities the plaintiff claims are burdened by the government action must be an "exercise of religion." Second, the government action must "substantially burden" the plaintiff's exercise of religion. If the plaintiff cannot prove either element, his RFRA claim fails. Conversely, should the plaintiff establish a substantial burden on his exercise of religion, the burden of persuasion shifts to the government to prove that the challenged government action is in furtherance of a "compelling governmental interest" and is implemented by "the least restrictive means." If the government cannot so prove, the court must find a RFRA violation.

We now turn to the application of these principles to the facts of this case. The first question is whether the activities Plaintiffs claim are burdened by the use of recycled wastewater on the Snowbowl constitute an "exercise of religion." RFRA defines "exercise of religion" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." The Defendants do not contest the district court's holding that the Plaintiffs' religious beliefs are sincere and the Plaintiffs' religious activities on the Peaks constitute an "exercise of religion" within the meaning of RFRA.

The crux of this case, then, is whether the use of recycled wastewater on the Snowbowl

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imposes a "substantial burden" on the exercise of the Plaintiffs' religion. RFRA does not specifically define "substantial burden." Fortunately, we are not required to interpret the term by our own lights. Rather, we are guided by the express language of RFRA and decades of Supreme Court precedent.

A.

Our interpretation begins, as it must, with the statutory language. RFRA's stated purpose is to "restore the compelling interest test as set forth in *Sherbert v. Verner,* 374 U.S. 398(1963) and *Wisconsin v. Yoder,* 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." RFRA further states "the compelling interest test as set forth in ... Federal court rulings [prior to *Smith*] is a workable test for striking sensible balances between religious liberty and competing prior governmental interests."

Of course, the "compelling interest test" cited in the above-quoted RFRA provisions applies only if there is a substantial burden on the free exercise of religion. That is, the government is not required to prove a compelling interest for its action or that its action involves the least restrictive means to achieve its purpose, unless the plaintiff first proves the government action substantially burdens his exercise of religion. The same cases that set forth the compelling interest test also define what kind or level of burden on the exercise of religion is sufficient to invoke the compelling interest test. Therefore, the cases that RFRA expressly adopted and restored – *Sherbert, Yoder*, and federal court rulings prior to *Smith* – also control the "substantial burden" inquiry.

B.

In *Sherbert,* a Seventh-day Adventist was fired by her South Carolina employer because she refused to work on Saturdays, her faith's day of rest. Sherbert filed a claim for unemployment compensation benefits with the South Carolina Employment Security Commission, which denied her claim, finding she had failed to accept work without good cause. The Supreme Court held South Carolina could not, under the Free Exercise Clause, condition unemployment compensation so as to deny benefits to Sherbert because of the exercise of her faith. Such a condition unconstitutionally forced Sherbert "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."

In *Yoder,* defendants, who were members of the Amish religion, were convicted of violating a Wisconsin law that required their children to attend school until the children reached the age of sixteen, under the threat of criminal sanctions for the parents. The defendants sincerely believed their children's attendance in high school was "contrary to the Amish religion and way of life." The Supreme Court reversed the defendants' convictions, holding the application of the compulsory school-attendance law to the defendants "unduly burden[ed]" the exercise of their religion, in violation of the Free Exercise Clause. According to the Court, the Wisconsin law "affirmatively compel[led the defendants], under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs."

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The Supreme Court's decisions in *Sherbert* and *Yoder,* relied upon and incorporated by Congress into RFRA, lead to the following conclusion: Under RFRA, a "substantial burden" is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*). Any burden imposed on the exercise of religion short of that described by *Sherbert* and *Yoder* is not a "substantial burden" within the meaning of RFRA, and does not require the application of the compelling interest test set forth in those two cases.

Applying *Sherbert* and *Yoder,* there is no "substantial burden" on the Plaintiffs' exercise of religion in this case. The use of recycled wastewater on a ski area that covers one percent of the Peaks does not force the Plaintiffs to choose between following the tenets of their religion and receiving a governmental benefit, as in *Sherbert.* The use of recycled wastewater to make artificial snow also does not coerce the Plaintiffs to act contrary to their religion under the threat of civil or criminal sanctions, as in *Yoder.* The Plaintiffs are not fined or penalized in any way for practicing their religion on the Peaks or on the Snowbowl. Quite the contrary: the Forest Service "has guaranteed that religious practitioners would still have access to the Snowbowl" and the rest of the Peaks for religious purposes.

The only effect of the proposed upgrades is on the Plaintiffs' subjective, emotional religious experience. That is, the presence of recycled wastewater on the Peaks is offensive to the Plaintiffs' religious sensibilities. To plaintiffs, it will spiritually desecrate a sacred mountain and will decrease the spiritual fulfillment they get from practicing their religion on the mountain. Nevertheless, under Supreme Court precedent, the diminishment of spiritual fulfillment – serious though it may be – is not a "substantial burden" on the free exercise of religion.[12]

The Supreme Court's decision in *Lyng v. Northwest Indian Cemetery Protective Ass'n* is on point. * * * The Supreme Court rejected the Indian tribes' Free Exercise Clause challenge.[13] * * * [T]here is nothing to distinguish the road-building project in *Lyng* from the use of recycled wastewater on the Peaks. We simply cannot uphold the Plaintiffs' claims of interference with their faith and, at the same time, remain faithful to *Lyng*'s dictates.

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[12] * * * the sole question is whether a government action that affects only subjective spiritual fulfillment "substantially burdens" the exercise of religion. For all of the rich complexity that describes the profound integration of man and mountain into one, the burden of the recycled wastewater can only be expressed by the Plaintiffs as damaged spiritual feelings. Under Supreme Court precedent, government action that diminishes subjective spiritual fulfillment does not "substantially burden" religion.

[13] That *Lyng* was a Free Exercise Clause, not RFRA, challenge is of no material consequence. Congress expressly instructed the courts to look to pre-*Smith* Free Exercise Clause cases, which include *Lyng,* to interpret RFRA.

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D.

In support of their RFRA claims, the Plaintiffs rely on two of our RLUIPA decisions. For two reasons, RLUIPA is inapplicable to this case. First, RLUIPA, by its terms, prohibits only state and local governments from applying regulations that govern land use or institutionalized persons to impose a "substantial burden" on the exercise of religion. RLUIPA does not apply to a federal government action, which is the only issue in this case. Second, even for state and local governments, RLUIPA applies only to government land-use regulations of private land-such as zoning laws-not to the government's management of its own land.

VI. Conclusion

We affirm the district court's entry of judgment in favor of the Defendants on the RFRA claim* * *.

WILLIAM A. FLETCHER, Circuit Judge, dissenting, joined by Judge PREGERSON and Judge FISHER:

The en banc majority today holds that using treated sewage effluent to make artificial snow on the most sacred mountain of southwestern Indian tribes does not violate the Religious Freedom Restoration Act ("RFRA").

I. Religious Freedom Restoration Act

A. Background

The Forest Service has acknowledged that the Peaks are sacred to at least thirteen formally recognized Indian tribes, and that this religious significance is of centuries' duration. There are differences among these tribes' religious beliefs and practices associated with the Peaks, but there are important commonalities. As the Service has noted, many of the tribes share beliefs that water, soil, plants, and animals from the Peaks have spiritual and medicinal properties; that the Peaks and everything on them form an indivisible living entity; that the Peaks are home to deities and other spirit beings; that tribal members can communicate with higher powers through prayers and songs focused on the Peaks; and that the tribes have a duty to protect the Peaks.

The Arizona Snowbowl is a ski area on Humphrey's Peak, the most sacred of the San Francisco Peaks.

Until now, the Snowbowl has always depended on natural snowfall. In dry years, the operating season is short, with few skiable days and few skiers. * * * ASR, the current owner, purchased the Snowbowl in 1992 for $4 million, with full knowledge of weather conditions in northern Arizona.

Under the [approved snowmaking plan], the City of Flagstaff would provide the Snowbowl

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with up to 1.5 million gallons per day of its treated sewage effluent – euphemistically called "reclaimed water" – from November through February. A 14.8-mile pipeline would be built between Flagstaff and the Snowbowl to carry the treated effluent. The Snowbowl would be the first ski resort in the nation to make artificial snow entirely from undiluted treated sewage effluent.

The effluent that emerges after treatment by Flagstaff satisfies the requirements of Arizona law for "reclaimed water." However, as the FEIS explains, the treatment does not produce pure water. * * * Under Arizona law, the treated sewage effluent must be free of "detectable fecal coliform organisms" in only "four of the last seven daily reclaimed water samples." The FEIS acknowledges that the treated sewage effluent also contains "many unidentified and unregulated residual organic contaminants." Treated sewage effluent may be used for many things, including irrigation and flushing toilets, but the Arizona Department of Environmental Quality ("ADEQ") requires that precautions be taken to avoid ingestion by humans.

Under the [approved plan], treated sewage effluent would be sprayed on 205.3 acres of Humphrey's Peak during the ski season. In November and December, the Snowbowl would use the effluent to build a base layer of artificial snow. The Snowbowl would then make more snow from the effluent depending on the amount of natural snowfall. The Snowbowl would also construct a reservoir on the mountain with a surface area of 1.9 acres to hold treated sewage effluent. The stored effluent would allow snowmaking to continue after Flagstaff cuts off the supply at the end of February.

B. Religious Freedom Restoration Act

The majority contends that the phrase "substantial burden" refers only to burdens that are created by two mechanisms – the imposition of a penalty, or the denial of a government benefit. But the phrase "substantial burden" has a plain and ordinary meaning that does not depend on the presence of a penalty or deprivation of benefit. A "burden" is "[s]omething that hinders or oppresses." Black's Law Dictionary (8th ed.2004). A burden is "substantial" if it is "[c]onsiderable in importance, value, degree, amount, or extent." American Heritage Dictionary (4th ed.2000). In RFRA, the phrase "substantial burden" modifies the phrase "exercise of religion." Thus, RFRA prohibits government action that "hinders or oppresses" the exercise of religion "to a considerable degree."

The text of RFRA does not describe a particular *mechanism* by which religion cannot be burdened. Rather, RFRA prohibits government action with a particular *effect* on religious exercise.

* * * *Sherbert* and *Yoder* held that certain interferences with religious exercise trigger the compelling interest test. But neither case suggested that religious exercise can be "burdened," or "substantially burdened," *only* by the two types of interference considered in those cases.

Lyng did not hold that the road at issue would cause no "substantial burden" on religious exercise. The Court in *Lyng* never used the phrase "substantial burden." Rather, *Lyng* held that

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government action that did not coerce religious practices or attach a penalty to religious belief was insufficient to trigger the compelling interest test *despite* the presence of a significant burden on religion. The Court explicitly recognized this in *Smith* when it wrote, "In [*Lyng*], we declined to apply *Sherbert* analysis to the Government's logging and road construction activities on lands used for religious purposes by several Native American Tribes, even though it was undisputed that the activities '*could have devastating effects on traditional Indian religious practices.*'"

The majority's attempt to read *Lyng* into RFRA is not just flawed. It is perverse. In refusing to apply the compelling interest test to the "severe adverse effects on the practice of [plaintiffs'] religion" in *Lyng,* the Court reasoned that the protections of the First Amendment "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." The Court directly incorporated this reasoning into *Smith.* Congress then rejected this very reasoning when it restored the application of strict scrutiny "in all cases where free exercise of religion is substantially burdened."

The express purpose of RFRA was to reject the restrictive approach to the Free Exercise Clause that culminated in *Smith* and to restore the application of strict judicial scrutiny "in all cases where free exercise of religion is substantially burdened." The majority's approach is fundamentally at odds with this purpose.

As should be clear, RFRA creates a legally protected interest in *the exercise of religion.* The protected interest in *Sherbert* was the right to take religious rest on Saturday, not the right to receive unemployment insurance. The protected interest in *Yoder* was the right to avoid secular indoctrination, not, as the majority contends, the right to avoid criminal punishment.

Such interests in religious exercise can be severely burdened by government actions that do not deny a benefit or impose a penalty. For example, a court would surely hold that the government had imposed a "substantial burden" on the "exercise of religion" if it purchased by eminent domain every Catholic church in the country. Similarly, a court would surely hold that the Forest Service had imposed a "substantial burden" on the Indians' "exercise of religion" if it paved over the entirety of the San Francisco Peaks.

D. Misunderstanding of Religious Belief and Practice

In addition to misstating the law under RFRA, the majority misunderstands the nature of religious belief and practice. The majority concludes that spraying up to 1.5 million gallons of treated sewage effluent per day on Humphrey's Peak, the most sacred of the San Francisco Peaks, does not impose a "substantial burden" on the Indians' "exercise of religion." In so concluding, the majority emphasizes the lack of physical harm. According to the majority, "[T]here are no plants, springs, natural resources, shrines with religious significance, nor any religious ceremonies that would be physically affected" by using treated sewage effluent to make artificial snow. In the majority's view, the "sole effect" of using treated sewage effluent on Humphrey's Peak is on the Indians' "subjective spiritual experience."

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The majority's emphasis on physical harm ignores the nature of religious belief and exercise, as well as the nature of the inquiry mandated by RFRA. The majority characterizes the Indians' religious belief and exercise as merely a "subjective spiritual experience." Though I would not choose precisely those words, they come close to describing what the majority thinks it is *not* describing – a genuine religious belief and exercise. Contrary to what the majority writes, and appears to think, religious exercise invariably, and centrally, involves a "subjective spiritual experience."

Religious belief concerns the human spirit and religious faith, not physical harm and scientific fact. Religious exercise sometimes involves physical things, but the physical or scientific character of these things is secondary to their spiritual and religious meaning. The centerpiece of religious belief and exercise is the "subjective" and the "spiritual." As William James wrote, religion may be defined as "the feelings, acts, and experiences of individual men [and women] in their solitude, so far as they apprehend themselves to stand in relation to whatever they may consider the divine."

The majority's misunderstanding of the nature of religious belief and exercise as merely "subjective" is an excuse for refusing to accept the Indians' religion as worthy of protection under RFRA. According to undisputed evidence in the record, and the finding of the district court, the Indians in this case are sincere in their religious beliefs. The record makes clear that their religious beliefs and practice do not merely require the continued existence of certain plants and shrines. They require that these plants and shrines be spiritually pure, undesecrated by treated sewage effluent.

Perhaps the strength of the Indians' argument in this case could be seen more easily by the majority if another religion were at issue. For example, I do not think that the majority would accept that the burden on a Christian's exercise of religion would be insubstantial if the government permitted only treated sewage effluent for use as baptismal water, based on an argument that no physical harm would result and any adverse effect would merely be on the Christian's "subjective spiritual experience." Nor do I think the majority would accept such an argument for an orthodox Jew if the government permitted only non-Kosher food.

E. Proper Application of RFRA

b. Substantial Burden on the Indians' Exercise of Religion

[Descriptions of Hopi and Navajo religious practices have been omitted. Much of the information is contained in the panel decision, reprinted in the casebook at pages 22-24, for those who are interested.]

* * * Because the Indians' religious beliefs and practices are not uniform, the precise burdens on religious exercise vary among the Appellants. Nevertheless, the burdens fall roughly into two categories: (1) the inability to perform a particular religious ceremony, because the ceremony requires collecting natural resources from the Peaks that would be too contaminated – physically,

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spiritually, or both – for sacramental use; and (2) the inability to maintain daily and annual religious practices comprising an entire way of life, because the practices require belief in the mountain's purity or a spiritual connection to the mountain that would be undermined by the contamination.

The first burden – the inability to perform religious ceremonies because of contaminated resources – has been acknowledged and described at length by the Forest Service. The FEIS summarizes: "Snowmaking and expansion of facilities, especially the use of reclaimed water, would contaminate the natural resources needed to perform the required ceremonies that have been, and continue to be, the basis for the cultural identity for many of these tribes." Further, "the use of reclaimed water is believed by the tribes to be impure and would have an irretrievable impact on the use of the soil, plants, and animals for medicinal and ceremonial purposes throughout the entire Peaks, as the whole mountain is regarded as a single, living entity."

Three Navajo practitioners' testimony at trial echoed the Forest Service's assessment in describing how the proposed action would prevent them from performing various ceremonies. [The testimony emphasized the threat that using sewage effluent to produce snow posed to the tribes' religious ceremonies, medicine practices, and cultural ceremonies.] * * * Larry Foster, a Navajo practitioner who is training to become a medicine man * * * testified that if treated sewage effluent were used on the Peaks he would no longer be able to go on the pilgrimages to the Peaks that are necessary to rejuvenate the medicine bundles, which are, in turn, a part of every Navajo healing ceremony.

Appellant Navajo medicine man Norris Nez testified that the proposed action would prevent him from practicing as a medicine man. He told the district court that the presence of treated sewage effluent would "ruin" his medicine, which he makes from plants collected from the Peaks. He also testified that he would be unable to perform the fundamental Blessingway ceremony, because "all [medicine] bundles will be affected and we will have nothing to use eventually."

The second burden the proposed action would impose – undermining the Indians' religious faith, practices, and way of life by desecrating the Peaks' purity – is also shown in the record. The Hopi presented evidence that the presence of treated sewage effluent on the Peaks would fundamentally undermine all of their religious practices because their way of life, or "beliefway," is largely based on the idea that the Peaks are a pure source of their rains and the home of the Katsinam.

Antone Honanie, a Hopi practitioner, testified that he would have difficulty preparing for religious ceremonies, because treated sewage effluent is "something you can't get out of your mind when you're sitting there praying" to the mountain, "a place where everything is supposed to be pure." Emory Sekaquaptewa, a Hopi tribal member and research anthropologist, testified that the desecration of the mountain would cause Katsinam dance ceremonies to lose their religious value. They would "simply be a performance for performance['s] sake" rather than "a religious effort."

Summarizing the Hopi's testimony, the district court wrote:

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> The individual Hopi's practice of the Hopi way permeates every part and every day of the individual's life from birth to death.... The Hopi Plaintiffs testified that the proposed upgrades to the Snowbowl have affected and will continue to negatively affect the way they think about the Peaks, the Kachina and themselves when preparing for any religious activity involving the Peaks and the Kachina – from daily morning prayers to the regular calendar of religious dances that occur throughout the year.... The Hopi Plaintiffs also testified that this negative effect on the practitioners' frames of mind due to the continued and increased desecration of the home of the Kachinas will undermine the Hopi faith and the Hopi way. According to the Hopi, the Snowbowl upgrades will undermine the Hopi faith in daily ceremonies and undermine the Hopi faith in their Kachina ceremonies as well as their faith in the blessings of life that they depend on the Kachina to bring.

The record supports the conclusion that the proposed use of treated sewage effluent on the San Francisco Peaks would impose a burden on the religious exercise of all four tribes discussed above – the Navajo, the Hopi, the Hualapai, and the Havasupai. However, on the record before us, that burden falls most heavily on the Navajo and the Hopi. The Forest Service itself wrote in the FEIS that the Peaks are the most sacred place of both the Navajo and the Hopi; that those tribes' religions have revolved around the Peaks for centuries; that their religious practices require pure natural resources from the Peaks; and that, because their religious beliefs dictate that the mountain be viewed as a whole living being, the treated sewage effluent would in their view contaminate the natural resources throughout the Peaks. Navajo Appellants presented evidence in the district court that, were the proposed action to go forward, contamination by the treated sewage effluent would prevent practitioners from making or rejuvenating medicine bundles, from making medicine, and from performing the Blessingway and healing ceremonies. Hopi Appellants presented evidence that, were the proposed action to go forward, contamination by the effluent would fundamentally undermine their entire system of belief and the associated practices of song, worship, and prayer, that depend on the purity of the Peaks, which is the source of rain and their livelihoods and the home of the *Katsinam* spirits.

In light of this showing, it is self-evident that the Snowbowl expansion prevents the Navajo and Hopi "from engaging in [religious] conduct or having a religious experience" and that this interference is "more than an inconvenience."

III. Conclusion

The San Francisco Peaks have been at the center of religious beliefs and practices of Indian tribes of the Southwest since time out of mind. Humphrey's Peak, the holiest of the San Francisco Peaks, will from this time forward be desecrated and spiritually impure. In part, the majority justifies its holding on the ground that what it calls "public park land" is land that "belongs to everyone." There is a tragic irony in this justification. The United States government took this land from the Indians by force. The majority now uses that forcible deprivation as a justification for spraying treated sewage effluent on the holiest of the Indians' holy mountains, and for refusing to recognize

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that this action constitutes a substantial burden on the Indians' exercise of their religion.

RFRA was passed to protect the exercise of all religions, including the religions of American Indians. If Indians' land-based exercise of religion is not protected by RFRA in this case, I cannot imagine a case in which it will be. I am truly sorry that the majority has effectively read American Indians out of RFRA.

COMANCHE NATION v. UNITED STATES

2008 WL 4426621 (W.D. Okla. Sept. 23, 2008) (unreported)

TIMOTHY D. DeGIUSTI, District Judge.

II. Summary of Claims and Defenses:

Plaintiffs' claims in this action are based on the site selected for the construction of a 43,000 square foot building, known as the Training Support Center ("TSC"), at Fort Sill, Oklahoma ("Ft. Sill"). The building site is directly south of Medicine Bluffs (sometimes referred to herein as the "Bluffs"), a natural landform which has been listed on the National Register of Historic Sites since 1974 because of its historical importance, its role in the founding of Fort Sill, and its religious and cultural significance to Native Americans.

Plaintiffs assert two claims for relief: 1) a violation of the Religious Freedom and Restoration Act ("RFRA"), based on the allegation that construction of the TSC at its current site substantially interferes with the exercise of Plaintiffs' religious beliefs; and 2) a violation of the National Historic Preservation Act of 1966 ("NHPA"), based on the contention that Defendants failed to make a reasonable and good faith effort to consult with the Comanche Nation to identify and resolve any adverse effects on Medicine Bluffs resulting from construction of the TSC. Plaintiffs seek a permanent injunction prohibiting the construction of the TSC at its current site and an order directing the Defendants to initiate and engage in a good faith consultation with Plaintiffs and other interested parties to select a new location at a site having no adverse impact on their culture or religious practices.

In their request for a preliminary injunction, Plaintiffs seek to enjoin the Defendants from continuing construction of the TSC until this case can be heard on the merits. Defendants ask the Court to dissolve the temporary restraining order and deny the preliminary injunction, arguing that Plaintiffs cannot satisfy the requirements for a preliminary injunction on either claim. Defendants also contend that the proposed TSC is essential to Fort Sill's ability to satisfy its obligations under the directives of the Base Realignment and Closure ("BRAC") Commission. They argue that continued delay of the construction increases contract costs and risks the loss of funding for the TSC.

III. Preliminary Injunction Standards:

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"A preliminary injunction serves to preserve the status quo pending a final determination of the case on the merits." "In issuing a preliminary injunction, a court is primarily attempting to preserve the power to render a meaningful decision on the merits."

To obtain a preliminary injunction, the movant must show: 1) a substantial likelihood of success on the merits; 2) irreparable harm to the movant if the injunction is denied; 3) the threatened harm to the movant outweighs any harm to the opposing party if the injunction issues; and 4) issuance of the injunction would not be adverse to the public interest. * * * The Tenth Circuit has held that the irreparable harm element is satisfied where a plaintiff alleges a violation of RFRA.

Because Plaintiffs in this case assert two claims for relief, the Court must determine whether Plaintiffs can satisfy these requirements as to either claim. That determination requires consideration of the elements of the claims asserted and the applicable burden of proof.

a. The RFRA claims:

The RFRA claims are asserted both by Plaintiff Arterberry individually and by the Comanche Nation on behalf of its members. Plaintiff Arterberry alleges that the location of the TSC warehouse would substantially interfere with the exercise of his personal religious beliefs as a Comanche; likewise, the Nation alleges that the construction would substantially interfere with its members' exercise of their religious beliefs.

RFRA provides that the government "shall not substantially burden a person's exercise of religion."

* * * The exercise of Native American traditional religious practices has been recognized as constituting an "exercise of religion" for purposes of RFRA.

RFRA does not define "substantial burden." The Tenth Circuit has defined the term by stating that a governmental action which substantially burdens a religious exercise is one which must "significantly inhibit or constrain conduct or expression" or "deny reasonable opportunities to engage in" religious activities. *Thiry v. Carlson,* 78 F.3d 1491, 1495 (10th Cir.1996) (quoting *Werner,* 49 F.3d at 1480).[14]

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[14] Both *Thiry* and *Werner* were decided prior to the 2000 amendment changing RFRA's definition of a religious exercise, and both applied the definition of a "substantial burden" in the context of the former more restrictive definition of a religious exercise. Defendants urge the Court to adopt a definition applied by the Ninth Circuit Court of Appeals, which has concluded that a "substantial burden" is imposed only when individuals are "forced to choose between following the tenets of their religion and receiving a governmental benefit ... or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions." *Navajo Nation v. United States Forest Service,* 535 F.3d 1058, 1070 (9th Cir.2008). The Tenth Circuit has not adopted that definition, and the Court declines to do so in this case. The Tenth Circuit's consideration of RFRA subsequent to

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Plaintiffs' RFRA allegations emphasize that Medicine Bluffs has historically been the focus of sacred Comanche traditional religious practices, and it continues to have religious significance at the present time. More specifically, Plaintiffs contend that the area on the south side of the Bluffs, extending at least to Randolph Road, has traditionally been an area in which religious practitioners gather to pray, to contemplate the Bluffs, to gather plants for use in healing and religious ceremonies, and to engage in sacred observances. In addition, the southern approach is the only access point from which tribal members may ascend to the peaks of the Bluffs, a traditional practice of known cultural and religious significance to Comanches. Conceding that there are existing buildings on Randolph Road south of the Bluffs, Plaintiffs contend the proposed TSC construction would further encroach on the last remaining open viewscape on the southern approach to the Bluffs.

Defendants argue that construction at the proposed TSC site does not substantially burden Plaintiffs' ability to exercise their religious beliefs. Defendants note that no construction will take place on the Bluffs themselves, and the proposed TSC building is located approximately 1,600 feet south of the base of the Bluffs. According to Defendants, they were not aware that Comanches or other Native Americans regard the area on the south side of the Bluffs north of Randolph Road as having religious significance. Instead, they believed that only the actual Bluffs and the area on the north side of the Bluffs, where a historical marker is located, had such significance. Defendants suggest that, in any event, locating the warehouse at the selected site will not substantially interfere with Plaintiffs' exercise of their religious beliefs because the area between the north boundary of the TSC site and extending to the base of Medicine Bluffs will be unoccupied and can continue to be used for religious purposes. Defendants also argue that the Bluffs are visible and accessible from areas other than the south side of the Bluffs. Defendants emphasize that Ft. Sill regards the TSC project as essential to the fulfillment of its obligations pursuant to the directives of BRAC. As more fully explained in the factual findings herein, the BRAC directives substantially increase the number of military personnel to be trained at Ft. Sill, thus requiring additional training facilities and materials. Finally, Defendants argue that, if the TSC construction does not commence immediately, there is a significant risk that BRAC funds will no longer be available.

IV. Findings of Fact

1. The Medicine Bluffs National Historic Feature is located on the Ft. Sill military installation near Lawton, Oklahoma. Medicine Bluffs was entered on the National Register of Historic Places in 1974.

2. Medicine Bluffs consists of four contiguous porphyry bluffs forming a crescent a mile in length on the south side of Medicine Bluff Creek. From the south, the terrain rises gradually to the top of the Bluffs; from the north, beginning immediately on the south side of Medicine Bluff Creek, the Bluffs rise abruptly – on the north side Bluff No. 3 consists of a sheer cliff, 310 feet high.

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the 2000 amendment does not appear to signal a restrictive application of RFRA. *See, e.g., Grace United Methodist Church,* 451 F.3d at 662.

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3. Ft. Sill was established in 1869 and was known to Native Americans in the area as "The Soldier House at Medicine Bluffs." Indeed, the significance of Medicine Bluffs to Native Americans, and particularly the Comanche Tribe, far predates the first U.S. military expedition in the area which camped near the Bluffs in 1852. Reports made in preparation of the establishment of Ft. Sill reflect that Native American guides informed military officials in 1868 of the sacred nature of the Bluffs by stating "there the great spirit sometimes dwells – there the Comanche goes to drive out the bad spirit."

4. The Bluffs and surroundings are of great cultural and religious significance to Native Americans in the area, and particularly to the Comanche people. The status of the Bluffs as a sacred site has been widely known outside of the Native American community since before the establishment of Ft. Sill. Indeed, an historical plaque present today on the north side of the Bluffs states that the Medicine Bluffs area has been "held in deep reverence by the Indian Tribes of the area from time immemorial."

5. Testimony from several members of the Comanche Nation established that the Bluffs remain a sacred site for the Comanche people, and are still the situs of significant aspects of traditional Comanche religious practices for hundreds of Comanches. Testimony including that of Wallace Coffey, Chairman of the Comanche Nation, and co-plaintiff Jimmy Arterberry, Jr., a member of the Comanche Tribe and traditional religious practitioner, explained the importance of the southern approach to the Bluffs: the southern approach is the traditional route to ascend the Bluffs for Comanches making the trek to the peaks for spiritual purposes; camps were made there to support those who desired to ascend the Bluffs; sweat lodges were established along the southern approach; plants used for religious and healing practices were historically – and are today – gathered among the trees and vegetation below and on the southern slopes of the Bluffs; and the unobstructed view of all four Bluffs is central to a spiritual experience of the Bluffs, as the number four has particular spiritual significance.

6. Testimony from members of the Comanche Nation, as well as expert testimony from Dr. Joe Watkins, University of Oklahoma Director of Native American Studies, described the traditional religious practice of the Comanche people as an intensely private spiritual experience that is inextricably intertwined with the natural environment. Traditional practitioners resist disclosing the location of their sacred sites, and generally treat such information as confidential. Such practices rarely involve disturbance of the natural environment. Together with the oral history tradition of many Native American tribes, these factors make it difficult to tie down Native American religious practices to a specific site or location. Nevertheless, the testimony during the hearing made clear that the area of the Medicine Bluffs Historic Feature, *as well as* the southern approach which is particularly significant to this case, is considered sacred by the Comanche people and continues to be used for traditional religious purposes. Plaintiff Arterberry testified that his traditional religious practice as it relates to the Bluffs involves a physical and spiritual "centering" on the gap between Bluffs 2 and 3, with a visual focus on the area called "Sweet Medicine" by the Comanche people. This "centering" requires Mr. Arterberry to stand in the precise location of the TSC site.

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[Under BRAC, Ft. Sill received over $7 million for construction of the TSC warehouse, which is needed to replace aging facilities and provide additional storage space. Ft. Sill currently conducts training for approximately 14,000 soldiers a day; as a result of BRAC, this will increase to about 18,500. Military officials testified that the new TSC warehouse was a "critical BRAC project," essential for the support of the increased training mission at Ft. Sill.]

12. The site selected [for the TSC warehouse] by Mr. LePine [the military planner] is within the area of the southern approach to the Bluffs, 1,662 feet southwest of the southern boundary of the Medicine Bluffs National Historic Feature. The remaining, open southern approach to the Bluffs is generally bounded by Randolph Road to the south, the Ft. Sill Regional Confinement Facility on the west, and Currie Road and a motorpool on the east. From Randolph Road north to the Bluffs the area is open, bisected by a gravel tank trail and a small road leading to an old firing range known as "MB3." * * * The TSC construction site is roughly centered on the Bluffs; directly forward from the site is the gap between Bluffs 2 and 3, referred to by the Comanche people as "Sweet Medicine." The TSC construction site naturally slopes up toward the Bluffs. From the location of the TSC construction site, looking north-northeast, all four Bluffs are clearly visible. Approximately 750 feet north on the tank trail the view is significantly restricted, with none of the peaks clearly visible. Only with substantial clearing of native trees would the Bluffs be visible from the tank trail.

14. Although Mr. LePine did not consider any alternative sites for the TSC on the basis of cultural and religious impact to Native Americans in the area, he did consider at least one alternative location when applying his site selection criteria. Mr. LePine considered a site about 2,500 feet west of the selected site along Randolph Road. The alternative site is just west of the Regional Confinement Facility, and thus is outside of the area of the remaining open southern approach to the Bluffs. The site apparently meets all three of Mr. LePine's criteria, but was considered by him to be somewhat inferior to the selected site on the basis of availability of utilities. However, some evidence suggests that the alternative site is in fact superior to the selected site in terms of expense of construction. Further, although as a matter of policy use of existing facilities must be considered before deciding on new construction, Mr. LePine did not seriously consider using the nearby Regional Confinement Facility as additional warehouse space, even though it will be vacated in 2010 as a result of the BRAC realignment. Mr. LePine stated that he did not believe the confinement facility structures would be suitable, but also acknowledged that he is not aware of the specific configuration of its several buildings.

V. Conclusions of Law

Plaintiffs have made a clear and unequivocal showing of their entitlement to preliminary injunctive relief, and have established each element necessary for the issuance of such relief, as set forth below.

a) Substantial likelihood of success on the merits.

Plaintiffs have demonstrated a substantial likelihood of success on the merits of their

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Religious Freedom and Restoration Act claim. The evidence clearly shows that the southern approach to Medicine Bluffs – the land area north of Randolph Road up to the base of the Bluffs – has historically been, and is today, a sacred site of the Comanche people. Further, this area is the situs of traditional religious practices of numerous Comanches – perhaps hundreds. The practices engaged in by the Comanche people in this land area constitute the sincere exercise of religion as defined under the RFRA. Construction of the TSC warehouse at its current location will impose a substantial burden on the traditional religious practices of the Comanche people in the area of the southern approach to the Bluffs.

The traditional religious practices of the Comanche people are inextricably intertwined with the natural environment. Their sacred ceremonies are intensely private. As these practices relate to the Bluffs, an unobstructed view of all four Bluffs is central to the spiritual experience of the Comanche people. The southern approach to the Bluffs – now restricted to the open terrain north of Randolph Road between Currie Road on the east and the Ft. Sill Regional Confinement Facility on the west – is the last remaining open, unobstructed viewscape from the south. Moreover, the southernmost portion of this area, nearest to Randolph Road, is the only available vantage point which affords a view of all four Bluffs. It is this precise area where the TSC warehouse is to be built. While it is true that the TSC facility will not occupy the entire area along the north side of Randolph Road, it will occupy the area which represents the central sight-line to the Bluffs-the area where Mr. Arterberry stands to center himself on the prominent gap between Bluffs 2 and 3 which is referenced to by the Comanches as "Sweet Medicine." The obstruction by the TSC facility in this area, along with the assumed added disruption of increased vehicular traffic, will constitute a substantial burden on the traditional religious practices of Plaintiffs. Thus, the evidence amply demonstrates the substantial likelihood that Plaintiffs can satisfy the first three elements of a claim under the RFRA, and accordingly, make out a *prima facie* case under the Act.

Once a *prima facie* case is established, the RFRA burden of proof shifts to the government to demonstrate that the substantial burden imposed upon Plaintiffs is in furtherance of a compelling governmental interest, and that the government's action is the least restrictive means of furthering that compelling governmental interest.

Although the evidence is somewhat conflicting regarding the necessity of the new TSC warehouse to the implementation of the BRAC obligations at Ft. Sill, the Court accepts the testimony of the military officials – and primarily that of COL Bridgford – that the new TSC facility is essential to the training mission at Ft. Sill. Thus, Defendants have substantially demonstrated that the construction of the TSC warehouse is in furtherance of a compelling governmental interest.

The record is utterly devoid, however, of facts tending to demonstrate that the construction of the TSC in its current location is the least restrictive means of furthering the compelling governmental interest. In fact, the evidence presented establishes that a much less restrictive alternative – constructing the TSC at the alternate location identified by Mr. LePine just west of the Regional Confinement Facility – was not seriously considered by Defendants. Moreover, it is clear Defendants failed to consider means of fulfilling their compelling interest which would have been

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less restrictive of the religious practices of Plaintiffs because Defendants did not consider Plaintiffs' religious practices at all when selecting the site of the TSC. Thus, since it is unlikely that Defendants can meet their burden under the RFRA, there is a substantial likelihood that Plaintiffs will prevail on the merits of their RFRA claim.

The conclusion regarding the likelihood of success on the RFRA claim satisfies the first element of the standard for preliminary injunctive relief, however, the Court also concludes that Plaintiffs have demonstrated a substantial likelihood of success on their claim that Defendants have not complied with the National Historic Preservation Act. [The NHPA analysis is omitted.]

b) Irreparable harm to the movant if the injunction is denied.

Absent preliminary injunctive relief, the construction of the TSC warehouse will proceed. The construction of a permanent structure on a site considered sacred by the Comanche people, and the substantial burden the presence of the structure would impose on their traditional religious practices as detailed *supra,* would constitute irreparable harm.

c) The threatened harm to the movant must outweigh any harm to the opposing party if the injunction is granted.

The Court is not insensitive to the economic harm Defendants estimate will occur in the event of further delay, or termination, of the TSC project. However, the monetary damages Defendants may incur if an injunction issues pale in comparison to the prospect of irreparable harm to sacred lands and centuries-old religious traditions which would occur absent injunctive relief.

d) Issuance of the injunction would not be adverse to the public interest.

The protection and preservation of historic landmarks and traditional cultural and religious practices tied to such lands, consistent with expressions of public policy such as the RFRA and the NHPA, is not contrary to the public interest.

ORDER

Defendants are hereby preliminarily enjoined from commencing or continuing construction, including earthwork, foundation preparation or related activities, of the Training Support Center at the current planned site location on the north side of Randolph Road and south of Medicine Bluffs at the Fort Sill, Oklahoma military installation. This injunction applies to Defendants and their agents and employees and those otherwise acting on behalf of Defendants. This injunction shall remain in full force and effect until this action can be determined on the merits or until further order of the Court.

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Page 32. Add new notes 1a, 1b & 1c:

1a. Criticism of *Navajo Nation*. Professors Kristen A. Carpenter, Sonia K. Katyal, and Angela R. Riley, in *In Defense of Property,* 118 Yale L. J. 1022 (2009), criticize the en banc opinion for elevating the dominance of federal property rights over tribal religious and cultural interests. They propose instead a "stewardship model" of property that can protect cultural property in the absence of title.

1b. Post-*Navajo Nation* cases. In *Snoqualmie Indian Tribe v. Federal Energy Regulatory Comm'n,* 545 F.3d 1207 (9th Cir. 2008), the court upheld a FERC hydropower relicensing decision, concluding that the relicensing did not substantially burden the Snoqualmie Tribe's free exercise of religion. In *South Fork Band Council v. U.S. Dep't of Interior,* 588 F.3d 718 (9th Cir. 2009), the court rejected the band's argument that approval of a gold-mining project on Mount Tenabo in central Nevada violated religious rights protected by RFRA, ruling that the agency had adequately protected access to and use of religious and cultural sites on the mountain.

1c. Subsequent development in the Medicine Bluffs case. In October 2008, the commander at Fort Sill filed a declaration with the district court that the contract to construct the TSC at the proposed site had been cancelled. He stated: "Fort Sill will not now, or in the future, construct a TSC warehouse at the current site and will not revive the TSC warehouse project at a later date at that location." The government moved to dismiss the lawsuit as moot, but the Comanche Nation would prefer a permanent injunction to ensure its rights.

Page 39. Add at the end of note 3, on page 40:

For a discussion of sacred sites, FOIA, and disclosure under the National Environmental Policy Act, see Ethan Plaut, Comment, *Tribal-Agency Confidentiality: A Catch-22 for Sacred Site Management?*, 36 Ecol. L.Q. 137 (2009).

Page 41, note 2. Add at the end of note 2a, on page 42:

Over a dissent, the D.C. Circuit held that the NHPA does not require the Army Corps of Engineers to evaluate Indian sites within a former reservation for inclusion on the National Register of Historic Places. *Oglala Sioux Tribe of Pine Ridge Indian Reservation v. U.S. Army Corps of Engineers,* 570 F.3d 327 (D.C. Cir. 2009).

Add at the end of note 2b, on page 43:

The Ninth Circuit ruled that the Federal Energy Regulatory Commission was not obligated to consult with the Snoqualmie Tribe concerning a hydropower relicensing decision because the tribe was not a federally recognized tribe. *Snoqualmie Indian Tribe v. Federal Energy Regulatory Comm'n,* 545 F.3d 1207, 1216 (9th Cir. 2009).

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Page 55. Add a footnote * to the end of the fourth sentence of the first full paragraph:

* *But see* Professor Blumm's critique of *M'Intosh* in the article cited, *infra* at page 120, note 1.

Page 59. Add at the end of section A:

On December 19, 2009, President Obama signed into law the Department of Defense Appropriations Act of 2009 which included an "Apology to Native Peoples of the United States." The apology recognized the "special legal and political relationship" between Indian tribes and the United States, which expressed regret over its "official depredations, ill-conceived policies, and the breaking of covenants" and urged state governments to "work toward reconciling relationships with Indian tribes with their boundaries. The apology did not authorize any legal action against the United States, however. Public Law No. 111-118, § 8113, 123 Stat. 3409, 3453-54 (2009).

II. Some Basics of Federal Indian Law

C. Tribal Sovereignty

Page 72. Note 2, second paragraph, replace final sentence with the following:

For a recent list of the 564 "Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs," see 74 Fed. Reg. 40218 (2009).

D. Federal Role in Indian Country

Page 79, note 3. Add to the end of the note, on page 80:

Professor Lincoln Davis suggests that tribal sovereignty and the federal trust are not reconcilable, that the former is "morally, historically, and politically" superior, and that a better model to promote native sovereignty would be to allow tribes to be treated as states. Lincoln L. Davis, *Skull Valley Crossroads: Reconciling Native Sovereignty and the Federal Trust,* 68 Md. L. Rev. 290 (2009) (concerning a proposal to store high-level nuclear waste on tribal land).

E. Indian Country

1. Scope and Extent of Indian Country

Page 89, add at end of note 1:

The Eighth Circuit holds that it does. That court found that lands acquired for a tribe in trust, but acquired under authority other than 25 U.S.C. § 465 (the Indian Reorganization Act), qualified not as "reservation" lands, but as dependent Indian communities. *Yankton Sioux Tribe v. Podhradsky*,

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606 F.3d 994 (8th Cir. 2010).

The difficulties involved in determining what constitutes a dependent Indian community are illustrated by *Hydro Resources, Inc. v. U.S. Environmental Protection Agency*, 608 F.3d 1131 (10th Cir., 2010). On rehearing en banc, a deeply divided Tenth Circuit reversed, 6-5, a 2009 panel decision concerning the Indian country status of a checkerboarded area near the Navajo Reservation. HRI proposed a uranium mining operation on fee lands within the checkerboarded area. The EPA determined that the mine site was a dependent Indian community and thus subject to federal rather than state regulation. The panel agreed, concluding that the proper "community of reference," or geographical area to be considered, was the Church Rock Chapter of the Navajo Nation, where 78% of the Chapter land was set aside for the use of Navajos, and where the federal government exercised superintendence over the land.

The en banc court reversed, rejecting the community of reference test. Relying on *Venetie*, the majority concluded that it must look only at the specific land in question, and that such land would be a dependent Indian community only if that specific land had been explicitly set aside by Congress or the executive for the use of Indians. Because HRI's mine site was on fee land, the court held, it could not be a dependent Indian community. The dissenting judges argued that the community of reference test was not inconsistent with *Venetie*; rather, the community of reference test was used to determine the "land in question" to which the *Venetie* test should be applied.

Page 95. Note 1, add at the end of the first paragraph:

The presumption against the survival of Oklahoma reservations has been applied in eastern Oklahoma (the former Indian Territory) as well. Relying in large part on that presumption, statements from historians, and a single statement in the legislative history of the Oklahoma Indian Welfare Act of 1936, federal courts have recently concluded that both the Muscogee (Creek) Nation and the Osage Nation reservations have been disestablished. Murphy v. Sirmons, 497 F.Supp.2d 1257 (E.D. Okla. 2007) (Muscogee (Creek) Nation); Osage Nation v. Irby, 597 F.3d. 1117 (10th Cir. 2010).

2. Expanding Indian Country

Page 97. Note 1, add at end of first paragraph on page 98:

The Eighth Circuit recently distinguished between lands added to existing reservations and lands comprising new reservations under § 465. While the latter require a proclamation under § 467 that they are reservation land, the former do not. *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir. 2010). The lands at issue in the case had been taken into trust within the borders of the Yankton Sioux's original 1858 reservation; although the reservation has been diminished – see *South Dakota v. Yankton Sioux Tribe*, casebook at page 109 – it has never been disestablished. When the lands were reacquired in trust, they automatically became reservation land within the meaning of the Indian country statute, 28 U.S.C. § 1151(a). The court further held that lands acquired for the tribe

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in trust other than under § 465 constituted dependent Indian communities.

Page 99, note 3. Add to the end of the note, page 100:

In 2008, the BIA issued a handbook describing the agency's procedure for the transfer of land in fee to land in trust or restricted status. *See* Dep't of Interior, Bureau of Indian Affairs, *Acquisition of Title to Land Held in Fee or Restricted Fee* (May 20, 2008).

Page 100. Add new note 4a:

4a. Land into trust and federal recognition of tribes. In 2009, the Supreme Court held that the Secretary of Interior may take lands into trust under § 465 only for tribes that were federally recognized as such in 1934. *Carcieri v. Salazar*, 129 S.Ct. 1058 (2009). The IRA defines Indians to "include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 479. Overturning decades of prior practice, the Court focused on the word "now," finding the statute to unambiguously refer to those tribes that were under federal supervision as of the date the IRA was enacted. As a result, the Secretary had no authority to take a 31-acre parcel into trust for the Narragansett Tribe of Rhode Island. In 1934, the Narragansett Tribe was a state-recognized tribe; it did not become federally-recognized until 1983.

3. Contracting Indian Country: Reservation Diminishment

Page 115, note 4. Add at end of first paragraph, page 116:

On remand, the Eighth Circuit affirmed the district court's ruling that lands taken into trust under the Indian Reorganization Act were part of the Yankton Sioux Reservation, and that other trust lands within the original reservation boundaries were dependent Indian communities. However, the court reversed the ruling that former allotments continuously held in fee by Indian owners were reservation lands, concluding that the lack of a fully developed record on those parcels rendered the issue not yet ripe. *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir. 2010).

III. Land: The Fundamental Resource

A. Aboriginal Title

Page 120, note 1. Add at the end of paragraph 2, at page 121:

(suggesting that the result in *M'Intosh* should have been interpreted to leave the tribes with fee title subject to a partial restraint on alienation and to the federal government's right of preemptive purchase).

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Add at the end, at page 121:

For a recent case using the temporary nature of "the right of occupancy" to deny tribal fishing rights in Lake Erie, see *Ottawa Tribe of Oklahoma v. Logan,* 577 F.3d 634 (6th Cir. 2009) (discussed in chap. VII.A.1, below).

Page 128, note 1. Add a new second paragraph:

In May 2008, the Secretary of the Interior published notice of the agency's final determination to take approximately 13,003.89 acres in Oneida and Madison counties into trust for the Oneida Indian Nation. 73 Fed. Reg. 27,816 (2008).

Page 128, note 3. Add a new second paragraph on page 129:

Professor Matthew L.M. Fletcher, in *Preconstitutional Federal Power,* 82 Tulane L. Rev. 509 (2007), argues that the congressional plenary power in Indian affairs derives from pre-constitutional authority, based on dicta in *United States v. Lara*, 541 U.S. 193, 201 (2004), analogizing from the Foreign Affairs power enunciated in *United States v. Curtiss-Wright Export Corp.,* 209 U.S. 304, 318 (1936).

Page 134. Add a new note 2a:

2a. The background of the *Hualapai* case. Christian McMillen's book, MAKING INDIAN LAW: THE HUALAPAI LAND CASE AND THE BIRTH OF ETHNOHISTORY (Yale, 2007), explains the near dispossession of the tribe at the hands of the government and the railroad during the late nineteenth and early twentieth centuries, the government lawyers' erroneous claim that the Hualapai had abandoned the reservation, and the influence of Fred Mahone, a Hualapai historian, on John Collier, Commissioner of Indian Affairs, who eventually opposed diminishing the reservation in favor of the railroad. Collier's legal team, which included Felix Cohen, unsuccessfully argued in the lower courts that the railroad's occupation of the reservation was illegal, but they convinced the Supreme Court to reverse, based largely on Cohen's brief that, under *Johnson v. M'Intosh*, the tribe retained an inherent property right to the land, even without an affirmative grant from the government. *See* Matthew L.M. Fletcher, *Book Review*, 31 Am. Indian Culture & Research J. 225 (2007).

D. Submerged Lands

Page 172, note 4. Add a new note 4c on page 174:

4c. Trespass on tribal tidelands. The Ninth Circuit ruled that shoreland owners whose lands eroded over the years and are now submerged beneath the Gulf of Georgia in northwest Washington had to remove shore defense structures originally constructed on uplands. The court concluded that lands were held by the United States in trust for the Lummi Tribe under an 1873

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executive order that extended the tribe's reservation's boundaries to "the low water mark on shore of the Gulf of Georgia." Even though the structures were legal when constructed, they now are below the mean high water line and affect the capacity of navigable waters. The structures therefore violate the Rivers and Harbors Act and may be removed under that statute. *United States v. Milner,* 583 F.3d 1174 (9th Cir. 2009).

Page 192, note 2. Add at the end:

An alternative proposal is for tribes to create tribal land corporations, which would acquire fractionated interests in land in exchange for shares in the corporation. *See* Brian Sawers, *Tribal Land Corporations: Using Incorporation to Combat Fractionation*, 88 Neb. L. Rev. 385 (2009).

IV. Land Use and Environmental Protection

A. Authority to Control Land Use

Page 200. Add new note 3a.

3a. Narrowing *Montana*'s consensual relations exception. In *Plains Commerce Bank v. Long Family Land and Cattle Co.,* 128 S.Ct. 2709 (2008), a 5-4 Supreme Court refused to apply the first *Montana* exception, concerning consensual relations, to an anti-discrimination claim brought in tribal court against a bank that had extensive on-reservation dealings with tribal members. The majority characterized the *Montana* rule as prohibiting the exercise of tribal jurisdiction over nonmembers, and the consensual relation exception as extending only to activities on-reservation. However, the majority explained that a land sale of a mortgage in default was not related to the bank's commercial dealings with the tribe, and therefore the tribal court lacked jurisdiction to either grant a tribal family an option to repurchase or award damages. The four-member dissent (per Justice Ginsberg) would have found tribal court jurisdiction to award damages for discrimination, rejecting the majority's distinction between on-reservation land sales and activities on the land.

B. Environmental Protection

1. Environmental Authority in Indian Country

Page 230, note 1. Add at the end of the first paragraph:

Barack Obama's EPA Administrator, Lisa Jackson, reaffirmed the 1984 policy on July 22, 2009, available at www.epa.gov/tribalportal/basicinfo/epa-policies.htm. In March 2010, Jackson created the Office of International and Tribal Affairs. Tribal issues, formerly handled by the American Indian Environmental Office within the Office of Water, are now part of the combined OITA.

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Page 238, note 5. Add at the end of the first paragraph:

See generally Marren Sanders, *Clean Water in Indian Country: The Risks (and Rewards) of Being Treated in the Same Manner as a State*, 36 W. Mitchell L. Rev. 533 (2010).

Page 243, note 1: Add to end of note on page 244:

EPA maintains a list of approved tribal water quality standards. As of June 29, 2010, the agency had approved water quality standards for 46 tribes. *See* U.S. Environmental Protection Agency, *Tribes: Water Quality Standards & Criteria*, available at www.epa.gov/waterscience/tribes/approvtable.htm (last visited July 6, 2010).

Page 249, note 2. Add to end of note:

Michigan lacked standing to challenge a reclassification of the Forest County Potawatomi Community's lands from Class II to Class I under EPA's prevention of significant deterioration program, according to the Seventh Circuit. The court ruled that the state lacked constitutional injury-in-fact; instead, the potentially injured parties were emitting sources within the state. *Michigan v. U.S. Environmental Protection Agency,* 581 F.3d 524 (7th Cir. 2009). In *Arizona Public Serv. Co. v. EPA,* 562 F.2d 116, 1124-26 (10th Cir. 2009), involving a Four Corners Plant on the Navajo Reservation, the court held that an EPA rule providing a lower standard for the reservation than state standards was permissible because the CAA requires that standards require that air quality be maintained, not improved.

Page 250, note 3. Add at end of third paragraph:

In late 2007, the Saint Regis Mohawk Tribe and the Mohegan Tribe of Connecticut became the first tribes to receive EPA approval of their TIPs. In approving the Saint Regis Mohawk TIP, however, the EPA approved only those portions that did not conflict with or supplement federal standards, and rejected proposed tribal standards that were more stringent than federal standards. *See* 72 Fed. Reg. 45397 (2007).

Page 261, note 2. Add at the end of note 2a, on page 262:

The EPA published a rule authorizing the inclusion of state and tribal programs under CERCLA. 74 Fed. Reg. 28,443 (2009) (codified at 40 C.F.R. § 35). Matthew Duchesne claims that courts should interpret CERCLA to impose the same limits on the uses to which tribal trustees may put recovered natural resources damages they do on federal and state trustees, even though the statute does not make such limitations explicit. Matthew Duchesne, *Tribal Trustees and the Use of Recovered Natural Resource Damages under CERCLA,* 48 Nat. Res. J. 353 (2008).

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Page 264. Add new note 4:

4. Common law natural resource damages. In the early twentieth century, northeastern Oklahoma experienced large-scale lead and zinc mining; in 1983, the area was designated the Tar Creek Superfund Site, and remedial operations have been conducted in the area since then. In 2003, the Quapaw Tribe, whose lands are within the Superfund site, filed suit against various mining companies and railroads to recover natural resource damages under Oklahoma common law. The federal district court held that the tribe had *parens patriae* standing to protect its quasi-sovereign interests in natural resources "within the Tribe's authority," specifically including resources on tribal lands. *Quapaw Tribe of Oklahoma v. Blue Tee Corp.*, 653 F.Supp.2d 1166 (N.D. Okla. 2009).

2. Application of Environmental Laws to Tribes

Page 273, note 2. Add new paragraph at the end of the note:

In contrast, a district court held that Indian tribes are not subject to counterclaims for contribution under CERCLA because they are not included within the meaning of "person" under that statute. *Pakootas v. Teck Cominco Metals, Ltd.*, 632 F.Supp.2d 1029 (E.D. Wash. 2009). The court held that: "CERCLA's definition of 'person' is plain. It does not include 'Indian tribes.' . . . Whereas CERCLA specifically provides for liability *to* an Indian tribe, it contains no specific provision for the liability *of* an Indian tribe. Furthermore, sovereigns will not be read into the term 'person' unless there is affirmative evidence that Congress intended to include sovereigns." *Id.* at 1032. The court noted that although CERCLA defines "person" to include "municipality," it does not define municipality. Thus, unlike RCRA, the CWA, and the SDWA, there is no definitional chain connecting Indian tribes to statutory "persons."

3. Environmental Impacts of Development

Page 280. Add new note 1a:

1a. NEPA, gold mining, and ancestral lands. A band of Western Shoshone successfully invoked NEPA against a proposed expansion of gold mining on Mount Tenabo in central Nevada, federal public which the band considered to be an ancestral sacred site. The project (the Cortez Hills Expansion Project) involved 10 more years of mining by Barrick Cortez, Inc. and construction of a 70-mile long ore conveyance system to an off-site processing facility. The Ninth Circuit concluded that the Bureau Land Management's environmental impact statement on the expansion was inadequate because it failed to sufficiently analyze the air quality effects of transporting the gold ore and of dewatering local springs due to groundwater pumping. The court also ruled that the EIS used the wrong method to analyze the emissions of small particulates. *South Fork Band Council of Western Shoshone of Nevada v. U.S. Dep't of Interior,* 588 F.3d 718 (9th Cir. 2009). Another band of Western Shoshone was also able to employ NEPA against a plan to expand gold mining operations (the Horse Canyon/Cortez Unified Exploration Project) on other ancestral lands near Mount Tenabo. Although the court upheld most of the Bureau of Land Management's environmental

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assessment (EA), it ruled that the EA's conclusory discussion of cumulative impacts of the expansion and planned nearby mining operations was defective for failing to take a hard look at, among other things, water resources potentially affected by the projects. *Te-Moak Tribe of Western Shoshone of Nevada v. U.S. Dep't of Interior*, 2010 WL 2431001 (9th Cir. June 18, 2010).

Page 297. Add new note 4a:

4a. NEPA, offshore oil, and subsistence whaling in Alaska. In *Alaska Wilderness League v. Kempthorne*, 548 F.3d 815 (9th Cir. 2008), a divided Ninth Circuit agreed with a coalition of native and environmental groups and rejected an environmental assessment (EA) by the Mineral Management Service on an exploration plan in the Beaufort Sea by an outer continental shelf lessee. The court concluded that the EA failed to take the requisite "hard look" demanded by NEPA, faulting the EA for its lack of specificity concerning drilling sites and the potential effect of drilling on bowhead whales and native subsistence practices. The majority of the court refused to accept a "conflict avoidance" process for affected Inupiat communities as a post-lease mitigation measure reducing the significance of the environmental impacts of the drilling, and viewed the controversy surrounding the project as a reason to require an EIS. The dissent complained that the majority was engaging in "fine-grained judgments" on the evidence the agency assembled and should defer to the agency absent systematic failures in its analysis.

V. Natural Resource Development

A. Federal Role in Resource Development

Page 302, note 3. Add at the end of the note:

In November 2009, President Obama directed the head of every federal agency to submit, after consultations with tribes and tribal officials, "a detailed plan of actions the agency will take to implement the policies and directives of Executive Order 13175." Progress and implementation reports are also required. *See* 74 Fed. Reg. 57881 (2009).

Pages 329-330. Delete the note case of Navajo Nation v. United States (Fed. Cir. 2007). Insert the following note before note 1 on page 330:

0.5. Subsequent developments. On remand from the Supreme Court's decision, the Court of Federal Claims found no trust duties in other sources of law asserted by the Navajo Nation. The Federal Circuit reversed, finding that a "network of statutes and regulations" established trust duties, and that "the government exercised blanket control over the Nation's coal resources." In *United States v. Navajo Nation*, 129 S.Ct. 1547 (2009), the Supreme Court reversed. It concentrated its opinion on three statutory provisions, finding that two provisions of the Navajo-Hopi Rehabilitation Act did not impose money-mandating duties on the government, and that provisions of the Surface Mining Control and Reclamation Act (SMCRA) applicable to leases issued after SMCRA was

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enacted were not applicable to the Navajo Nation's lease, which was issued years before SMCRA became law.

With respect to the suggestion of the Federal Circuit that the government's comprehensive control over the Navajo Nation's coal resources could give rise to trust duties, the Court stated:

> The Federal Government's liability cannot be premised on control alone. The text of the Indian Tucker Act makes clear that only claims arising under "the Constitution, laws or treaties of the United States, or Executive orders of the President" are cognizable (unless the claim could be brought by a non-Indian plaintiff under the ordinary Tucker Act). 28 U.S.C. § 1505. In *Navajo I* we reiterated that the analysis must begin with "specific rights-creating or duty-imposing statutory or regulatory prescriptions." *If* a plaintiff identifies such a prescription, and *if* that prescription bears the hallmarks of a "conventional fiduciary relationship," *White Mountain,* 537 U.S., at 473, *then* trust principles (including any such principles premised on "control") could play a role in "inferring that the trust obligation [is] enforceable by damages," *id.,* at 477. But that must be the second step of the analysis, not (as the Federal Circuit made it) the starting point.

129 S.Ct. at 1558. Can this be reconciled with *White Mountain Apache*? What "specific rights-creating or duty-imposing" provision was there in the 1960 statute placing the former Fort Apache into trust for the tribe?

Page 333, note 5c. Add at the end of the note on page 334:

For discussion and critique of ITEDSA, see Judith V. Royster, *Practical Sovereignty, Political Sovereignty, and the Indian Tribal Energy Development and Self-Determination Act*, 12 Lewis & Clark L. Rev. 1065 (2008).

Page 334. Add new note 5e:

5e. Alternative energy sources. Alternative sources of energy, such as solar, wind, and geothermal, may be developed under the various minerals statutes, which include "other energy" mineral resources in their definitions. (ITEDSA specifically mentions geothermal as well.) Alternatively, energy resources that involve surface use only – such as wind or solar – might be developed using the surface leasing authority of 25 U.S.C. § 415 (see note 6 in the casebook, page 334). For a review of alternative energy projects and obstacles, see Elizabeth Ann Kronk, *Alternative Energy Development in Indian Country: Lighting the Way for the Seventh Generation*, 46 Idaho L. Rev. 449 (2010).

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Page 337, note 2. Add at the end of the note, on page 338:

A federal statute enacted at the end of the Civil War prohibits the Court of Federal Claims from exercising jurisdiction "of any claim" then pending before any other court. 28 U.S.C. § 1500. As interpreted by the Federal Circuit, this statute does not bar a plaintiff from filing first in the claims court and then in the district court. In addition, a lawsuit filed first in federal district court raises the same "claim" only if the claim both arises from the same operative facts and seeks the same relief. In *Tohono O'odham Nation v. United States*, 559 F.3d 1284 (Fed. Cir. 2009), the court determined that a tribe's federal district court claims for declaratory and equitable relief, including an accounting for breach of trust, were not the same claims as those subsequently filed in the Court of Federal Claims for money damages for breach of trust. The equitable relief claim for an accounting, the court ruled, is a claim for restitution of money in the government's possession but not properly credited to the tribe's account. A claim for money damages, by contrast, seeks consequential damages for money the tribe would have made but for the government's mismanagement. Moreover, the court noted that there is no risk of double recovery: the Court of Federal Claims has no power to award equitable relief, and the district court has no power to award money damages. The Supreme Court has granted certiorari in the case, 130 S.Ct. 2097 (Apr. 19, 2010).

Page 338, note 4. Replace the final paragraph of the note, on page 341, with:

After Judge Lamberth's removal, the litigation continued. In January 2008, following a 10-day bench trial, the district court concluded that "it is now clear that completion of the required accounting is an impossible task." *Cobell v. Kempthorne*, 532 F.Supp.2d 37, 39 (D.D.C. 2008). Based on that holding, the beneficiaries moved for restitution, and the district court granted the motion for equitable relief. *Cobell v. Kempthorne*, 569 F.Supp.2d 223 (D.D.C. 2008). On appeal, however, the Federal Circuit vacated the order for restitution, holding that the beneficiaries were statutorily entitled to an accounting. *Cobell v. Salazar*, 573 F.3d 808 (Fed. Cir. 2009).

On December 7, 2009, the parties reached a Class Action Settlement Agreement, contingent on congressional authorization. The settlement agreement set December 31, 2009 as a deadline for legislative action. The parties have since agreed to extend the deadline five times; the current deadline is July 9, 2010. The House approved the settlement on May 28, 2010 (as part of H.R. 4213, the American Jobs and Closing Tax Loopholes Act of 2010), but the Senate has yet to act.

The settlement agreement would create a $1.4 billion Trust Accounting and Administration Fund and a $2 billion Trust Land Consolidation Fund, and create two groups of IIM account holders eligible to receive settlement payments. As of August 2010, the House had twice passed the settlement as part of broader funding bills, but the settlement has not passed in the Senate. One aspect in the Senate is a proposed amendment by Sen. John Barrasso of Wyoming, Vice Chairman of the Senate Committee on Indian Affairs, to cap lawyers' fees at $50 million and incentive awards for the lead plaintiffs at expenses up to $15 million. Both the settlement itself and Senator Barrasso's proposed amendment have engendered considerable controversy within Indian country

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The new website address for the *Cobell* litigation and settlement is www.cobellsettlement.com/.

Page 341. Add new note 5.

5. Government disclosure of trust management communications to tribes. The Federal Circuit has adopted the fiduciary exception to attorney-client privilege in tribal trust cases. *In re United States*, 590 F.3d 1305 (Fed. Cir. 2009). In the litigation, the Jicarilla Apache Tribe sought to compel discovery of documents relating to the government's management of tribal trust funds; the United States contended that the documents were protected by attorney-client privilege. The court held: "the United States cannot deny an Indian tribe's request to discover communications between the United States and its attorneys based on the attorney-client privilege when those communications concern management of an Indian trust and the United States has not claimed that the government or its attorneys considered a specific competing interest in those communications." *Id.* at 1313. The court concluded that the fiduciary exception applied in the case before it because the Department of the Interior was seeking advice on trust management for the benefit of the tribe and because the case involved trust funds, not trust assets such as land or minerals that might implicate competing interests.

VII: Water Rights

C. Scope and Extent of Water Rights

2. Rights to Groundwater

Page 440. Add new note 4:

4. Right to non-interference from groundwater use. In *United States v. Orr Water Ditch Co.*, 600 F.3d 1152 (9th Cir. 2010), the Pyramid Lake Paiute Tribe challenged a groundwater allocation by the Nevada State Engineer on the ground that it would adversely affect the tribe's senior rights in the Truckee River under the federal Orr Ditch decree. The Ninth Circuit acknowledged that the decree did not explicitly protect the tribe's water rights from groundwater diminution, but held that allowing such diminution would be inconsistent with the intent of the decree to assure "a reasonable amount of water" for the tribe. Moreover, the court cited *Winters* for the proposition that ambiguities should be resolved in favor of the tribes.

4. Rights of Allottees and Subsequent Purchasers

Page 459, note 3. Add at end of note:

See generally Nicole C. Salamander, *A Half Full Circle: The Reserved Rights Doctrine and Tribal Reacquired Lands*, 12 U. Denver Water L. Rev. 333 (2009).

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D. Determination of Water Rights

Page 482, note 3. Add at the end of note 3a, page 483:

Among other provisions, the Settlement Act directed the Secretary of the Interior to pursue recoupment of water diverted in excess of the amounts permitted by federal operating criteria, including the 1973 criteria implementing the *Pyramid Lake* decision. In 1995, the United States sued the Truckee-Carson Irrigation District and all water users in the Newlands Reclamation Project, seeking recoupment of one million acre-feet of water. In 2005, the district court awarded slightly less than 200,000 acre feet, along with post-judgment water interest but no pre-judgment water interest. In *United States v. Bell*, 602 F.3d 1074 (9th Cir. 2010), the Ninth Circuit affirmed in part, ruling that the district court's order did not conflict with the federal decrees and was not impossible to implement, and that the district court did not err in finding TCID liable for its violations of federal criteria. But the court vacated the award of post-judgment water interest (i.e., interest to be paid in water rather than money) and remanded for the district court to explain the basis of the award, stating that if post-judgment interest was appropriate, pre-judgment interest should be awarded as well. In addition, while the Ninth Circuit largely upheld the amount of the award, it remanded for recalculation of diversion amounts based on gauge error and determined that the United States was entitled to recoup the amount of spills during certain years.

In September 2008, the Pyramid Lake Paiute Tribe, the United States, the states of California and Nevada, and several water agencies concluded the Truckee River Operating Agreement (TROA). The TROA, authorized by the 1990 Settlement Act, took eighteen years of negotiations. *Truckee River Operating Agreement Settles Decades of Water Rights Dispute*, 13 Western Water Law 3 (Nov. 2008). One of the purposes of the TROA is to provide for enhanced spawning flows for the Pyramid Lake fisheries. 43 C.F.R. § 419.1(b)(4). To that end, the TROA allows signatory parties, and non-signatories who agree to be bound by the terms of the TROA, to receive credit for storing in Truckee River reservoirs water that they would otherwise be entitled to divert. One category of credit water is Fish Credit Water, which the U.S. and the Pyramid Lake Paiute Tribe will establish to benefit the tribal fisheries. The U.S. Bureau of Reclamation adopted the TROA by rule, see 73 Fed. Reg. 74031 (Dec. 5, 2008), but the TROA still awaits approval by the federal courts.

Add new note 3c, on page 483:

c. State groundwater allocations affecting tribal rights. The Pyramid Lake Paiute Tribe challenged an allocation of groundwater by the State Engineer, alleging that the withdrawals would adversely affect the tribe's water rights under the Orr Ditch decree. In *United States v. Orr Water Ditch Co.*, 600 F.3d 1152 (9th Cir. 2010), the court held that the tribe's decreed water rights could not be diminished by state groundwater allocations. In addition, the court ruled that the federal district court had jurisdiction to review the State Engineer's decision as part of its equitable power to enforce and administer the Orr Ditch decree. The opinion also addressed a 1998 State Engineer's ruling that the tribe was entitled to all water in the Truckee River remaining after all decreed and other rights had been satisfied. The Ninth Circuit held that the federal court had no jurisdiction over

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the tribe's challenge that groundwater allocations would affect those rights, because they were state-law rights rather than rights awarded by the federal decree.

Page 493, note 4. Add at the end of the note, on page 494:

Five water settlement acts, affecting eight tribes and pueblos, were introduced in the 111th Congress. The settlement acts include Crow Tribe, H.R. 845; Pechanga Band of Luiseno Mission Indians, H.R. 4285; White Mountain Apache Tribe, S. 313; Taos Pueblo, S. 965; and Pueblos of Nambe, Pojoaque, San Ildefonso, and Teseque, S. 1105.

VIII: Usufructuary Rights

A. Off-Reservation Rights

1. Modern Survival of the Rights

Page 510, note 3. Add at the end of the note:

The Sixth Circuit ruled that the Ottawa Tribe of Oklahoma had no treaty rights to establish a commercial fishery on Lake Erie, ancestral waters of the tribe. A district court had rejected the tribe's argument base on its interpretation of an 1831 removal treaty, which terminated "the privileges of every description" held under a series of earlier treaties. The Sixth Circuit affirmed, but based on an earlier, 1795 treaty and an interpretation of that treaty by the U.S. Supreme Court in *Williams v. City of Chicago*, 242 U.S. 434 (1917), which involved a tribal claim to the filled lakebed of Lake Michigan. The appeals court interpreted *Williams* to hold that the treaty gave the tribes only a "right of continued occupancy" which ended when the tribe "abandoned" its territory under congressional removal statutes. A concurrence suggested that the result could have been different had the tribe been able to show, based on the historical record, that it understood its fishing rights to be "a separate bundle of rights from its right to occupy land associated with those rights," noting that under the Supreme Court's *Mille Lacs* decision, usufructuary rights may exist apart from occupancy rights. *Ottawa Tribe of Oklahoma v. Logan,* 577 F.3d 634 (6th Cir. 2009).

2. Scope and Extent

Page 529, 2d full paragraph. The correct citation to the *Boldt decision* should be 384 F.Supp. 312 (W.D. Wash. 1974).

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5. Habitat Protection

Page 565, note 3. Add at the end of the note:

For a discussion of the culverts case, see Michael C. Blumm & Jane G. Steadman, *Indian Treaty Fishing Rights and Habitat Protection: The Martinez Decision Supplies a Resounding Judicial Reaffirmation,* 49 Nat. Res. J. – (forthcoming 2009), available at http://ssrn.com/abstract=1356223.

B. Loss and Diminishment of the Rights

Page 588, note 5a. Insert the following after the citation to *Hugs* on page 589, and delete the remainder of the note:

United States v. Friday, 535 F.3d 938 (10th Cir. 2008) (Eagle Protection Act permit requirement does not impose a substantial burden, and statute is least restrictive means to achieve compelling government interest). *See also United States v. Tawahongva*, 456 F.Supp.2d 1120 (D. Ariz. 2006) (Migratory Bird Treaty Act does not impose substantial burden, but even if it did, is the least restrictive means to achieve compelling interest).

Page 589, note 5b. Add at the end of the note:

See also United States v. Vasquez-Ramos, 531 F.3d 987 (9th Cir. 2008) (reaffirming *Antoine* and rejecting defendants' argument that because eagles were removed from the Endangered Species List, the government no longer had a compelling interest).

VIII: International Approaches to Indigenous Lands and Resources

A. International Instruments for the Protection of Indigenous Rights

Page 600. Note on U.N. Declaration, add to end of first paragraph:

Of the four countries opposed, Australia and New Zealand have since announced their support for the U.N. Declaration. *See* Statement on the United Nations Declaration on the Rights of Indigenous Peoples (Australia, Apr. 3, 2009), available at <www.jennymacklin.fahcsia.gov.au/statements/Pages/un_declaration_03apr09.aspx>; National Govt to support UN rights declaration (New Zealand, Apr. 20, 2010), available at <www.beehive.govt.nz/release/national+govt+support+un+rights+declaration>. The Governor General of Canada announced that that country would "take steps to endorse" the Declaration. *See* Speech from the Throne (Mar. 3, 2010), available at <www.speech.gc.ca/grfx/docs/sft-ddt-2010_e.pdf>. And in the United States, the Obama Administration announced that it "has decided to review our position" on the Declaration as well. *See* Remarks by Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations,

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at the UN Permanent Forum on Indigenous Issues (April 20, 2010), available at <http://usun.state.gov/briefing/statements/2010/140600.htm>.

B. Tribal Claims before International Forums

Page 612. Note on the Inter-American Human Rights System, add at end of first paragraph:

Professor Pasqualucci has analyzed the Inter-American Court of Human Rights' approach to indigenous land rights in light of the U.N. Declaration on the Rights of Indigenous Peoples. She concludes that the court's decisions "generally conform" to the UN Declaration, "except in the area of state expropriation of natural resources on indigenous ancestral lands," where the court permits some government development rights "to the detriment of the indigenous peoples." Jo. M. Pasqualucci, *International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in Light of the United Nations Declaration on the Rights of Indigenous Peoples*, 27 Wis. Int'l L.J. 51, 54 (2009).

— END —