Native American Natural Resources Law
Cases and Materials
Third Edition
2015-16 Teacher’s Update

Judith V. Royster
Professor of Law
Co-Director, Native American Law Center
University of Tulsa College of Law

Michael C. Blumm
Professor of Law
Lewis and Clark Law School

Elizabeth Kronk Warner
Associate Professor of Law and
Director of the Tribal Law and Government Center
The University of Kansas

CAROLINA ACADEMIC PRESS
Durham, North Carolina
I. Land, Religion, and Culture

A. Legal Protection of Religion and Cultural Resources

Page 49. Add a new paragraph at the end of the chapter:

In 2015, a study by University of Copenhagen (Denmark) geneticists concluded that, based on DNA testing, Kennewick Man’s closest contemporary relatives were Native Americans, not Asian Americans, as earlier studies based on craniometric studies that did not incorporate DNA analysis had suggested. But since the DNA study did not indicate to which current tribe the skeleton was most closely related, it is not clear whether it will lead to repatriation of the remains, which are currently housed at the University of Washington’s Burke Museum. See Carl Zimmer, New DNA Results Show Kennewick Man Was Native American, N.Y. Times, June 18, 2015, http://www.nytimes.com/2015/06/19/science/new-dna-results-show-kennewick-man-was-native-american.html?_r=0.

II. Some Basics of Federal Indian Law

C. Tribal Sovereignty


E. Indian Country
   2. Expanding Indian Country

Page 96, note 3. Add to the first paragraph before the citation to Sheppard:


At the end of the first paragraph, replace the citation to the Fee-to-Trust Handbook with:

III. Land: The Fundamental Resource

A. Aboriginal Title

Page 126, note 1. Add to the end of the note:

The Second Circuit reaffirmed its ruling in Madison County that an Indian tribe has sovereign immunity from suit by a county to foreclose on tribally-owned fee land for nonpayment of ad valorem property taxes. Cayuga Indian Nation v. Seneca County, 761 F.3d 218 (2d Cir. 2014). The court declined to “attempt to discern the implied message” in the Court’s vacatur of Madison County in light of subsequent Supreme Court opinions upholding tribal sovereign immunity. It also stated that “we read no implied abrogation of tribal sovereign immunity from suit” into Sherrill.

Page 133. Add following second full paragraph:

In 2014, Tsilhot’in Nation v. British Columbia, 2014 S.C.C. 44, the Supreme of Canada handed down a highly significant aboriginal rights decision concerning the claims of a semi-nomadic grouping of six bands sharing common culture and history, which have lived in a remote valley bounded by rivers and mountains in central British Columbia. The bands are among hundreds of indigenous groups in British Columbia with unresolved land claims. In 1983, B.C. granted commercial logging licenses on land considered by the Tsilhqot’in to be part of their traditional territory. The bands objected and sought a declaration prohibiting commercial logging on the land. After negotiations failed, the bands filed suit. Their aboriginal rights claim was opposed by both the federal and provincial governments. A trial court upheld the claim, but the British Columbia Court of Appeal largely reversed, indicating that aboriginal title was limited to small intensively used tracts.

The Canadian Supreme Court disagreed, ruling that aboriginal title requires only evidence of regular and exclusive use and occupation of land. The use and occupation must sufficient, continuous, and exclusive. In determining what constitutes sufficient occupation, which was the heart of the Tsilhot’in appeal, the Court determined that aboriginal title is not confined to specific sites of settlement but instead extends to tracts of land regularly used for hunting, fishing, or otherwise exploiting resources and over which the group exercised effective control at the time of assertion of European sovereignty. The court consequently upheld the trial judge’s determination, even though the Tsilhot’in population was small, because there was sufficient evidence that the parts of the land were regularly used by the Tsilhqot’in. The evidence also showed that historically the Tsilhqot’in repelled other people from their land and demanded permission from outsiders who wished to pass over it.

The Court stated that the nature of aboriginal title is that it confers on the group that holds it the exclusive right to decide how the land is used and the right to benefit from those uses, subject to the restriction that the uses must be consistent with the group nature of the interest and the enjoyment of the land by future generations. Moreover, prior to establishment of title, the Crown must consult in good faith with any aboriginal groups asserting title to the land about proposed uses of the land and, if appropriate, accommodate the interests of such groups. The
level of consultation and accommodation required varies with the strength of the aboriginal
group’s claim to the land and the seriousness of the potentially adverse effect upon the interest
claimed.

And where aboriginal title has been established, the Crown must not only comply with its
procedural duties, but must also justify any incursions on aboriginal title lands by ensuring that
the proposed government action is substantively consistent with the requirements of section 35
of the Canadian Constitution Act of 1982, which requires a demonstration of both a compelling
and substantial governmental objective, and that the government action is consistent with the
fiduciary duty owed by the Crown to the aboriginal group. According to the Court, the
government must act in a way that respects the fact that aboriginal title is a group interest that
inheres in present and future generations. Fulfilling that duty requires consultation with and
consent by with the group. The Court concluded that the province breached its duty by issuing
the 1983 licenses, since the honor of the Crown required consultation with the Tsilhqot’in and
accommodation of their interests.

Page 141. Add note 7. The Tejon Ranch Claim. In 2015, the Ninth Circuit affirmed a district
court’s rejection of the non-recognized Kawaiisu Tribe’s aboriginal claim to Tejon Ranch, some
270,000 acres of private lands in southern California, because of the tribe’s failure to present the
claim to a board of commissioners established by the California Land Claims Act of 1851. The
court also ruled that a subsequent treaty did not recognize the tribe’s aboriginal claim, nor did an
unratified treaty. *Robinson v. Jewell*, 790 F.3d 910 (9th Cir. 2015) (also rejecting claims of
forgery and deception in Mexican land grants that occurred before the land claims process
established by the 1851 statute).

E. Allotted Lands

Page 186, note 2. Add to the end of the note:

The Claims Resolution Act of 2010 that ended the *Cobell* trust litigation – see note 4,
pages 308-309 – included a $2 billion Trust Land Consolidation Fund. Over $1.5 billion of that
is set aside for the purchase of fractionated interests in allotments. The Land Buy-Back Program
for Tribal Nations allows individuals to voluntarily sell their interests, with the land placed
immediately in trust for the tribe with jurisdiction. The initial implementation plan in 2012
reported over 10 and a half million fractionated acres, with close to 3 million fractionated
interests in them, and over 90,000 tracts that are fractionated.

The program, just getting underway in 2013, will concentrate on the 40 reservations that
the government believes will experience the most benefit from the consolidation of land
administration. The first reservation on which allotment owners received offers to sell was the
Pine Ridge Reservation in South Dakota, considered the most fractionated of all reservations.
Pine Ridge had nearly 6000 fractionated tracts, with close to 1.2 million acres and over 194,000
interests eligible for purchase.

In June 2015, the Department of the Interior reported that: “more than $500 million has
been paid to more than 24,000 individual landowners to restore the equivalent of nearly 850,000

IV. Land Use and Environmental Protection

B. Environmental Protection

Page 221, note 1. Add to the end of the note:

On January 9, 2014, EPA Administrator Gina McCarthy reaffirmed the EPA’s Indian Policy first adopted in 1984. In her statement, Administrator McCarthy stated:

the EPA reiterates its recognition that the United States has a unique legal relationship with tribal governments based on the Constitution, treaties, statutes, executive orders and court decisions. The EPA recognizes the right of the tribes as sovereign governments to self-determination and acknowledges the federal government’s trust responsibility to tribes. The EPA works with tribes on a government-to-government basis to protect the land, air and water in Indian Country.


Page 227, note 3(a). Add to the end of the note:

On August 7, 2015, the EPA released notice in the Federal Register of its proposed revised interpretation of the CWA TAS provision. 80 Fed. Reg. 47430 (Aug. 7, 2015). The purpose of reinterpreting the CWA TAS provision is to help streamline how tribes apply for TAS status under the CWA. The “EPA proposes to conclude definitively that section 518 includes an express delegation of authority by Congress to eligible Indian tribes to administer regulatory programs over their entire reservations.” Id. at 47431. The proposed reinterpretation would be consistent with EPA’s interpretation of tribal regulation under the CAA. The proposed reinterpretation “would eliminate the need for applicant tribes to demonstrate inherent authority to regulate…..” Id. The proposed reinterpretation would not change any regulatory text. Any comments on the proposed reinterpretation are due to EPA by October 6, 2015.

Page 247, note 2. Add to the end of the note:

The District of Columbia Circuit struck down a similar argument in Oklahoma v. Environmental Protection Agency, 740 F.3d 185 (D.C. Cir. 2014). EPA attempted to establish a federal rule for attainment of national ambient air quality standards in Indian County not located within reservations. 76 Fed. Reg. 38,748 (July 1, 2011). According to the CAA, tribes may manage and protect resources within “the exterior boundaries of the reservation or other areas
within the tribe’s jurisdiction.” 42 U.S.C. §7601(d)(2)(B). Under the EPA’s tribal authority rule (TAR), upheld in Arizona Public Service Co. v. EPA, a tribe may implement the CAA within its reservation without proving jurisdiction, but must demonstrate jurisdiction over non-reservation areas. Under the TAR, a federal implementation plan applied to all of Indian country nationwide except where EPA had already approved a tribal program. Oklahoma challenged the rule, alleging that a state’s plan applied to pollution sources outside reservations until EPA demonstrates the existence of tribal regulatory authority. The court agreed with the state, finding that the newly promulgated rule was arbitrary and capricious under the Administrative Procedure Act for two reasons. First, no regulatory gap (a justification for the new rule) exists as the State Implementation Plan applies unless a tribe demonstrates regulatory authority. Second, EPA cannot institute a Federal Implementation Plan until it has determined that the jurisdiction’s plan is inadequate. The court did not reach the second issue, as it found in Oklahoma’s favor on the first issue. Until a tribe demonstrates jurisdiction over non-reservation Indian country, the court found that jurisdiction resides in the state. Accordingly, the court determined that EPA’s interpretation under the newly promulgated rule was not entitled deference because its interpretation violates the CAA and was therefore arbitrary and capricious.

Page 247, add a new note 3.

In December 2008, the Eastern Shoshone and Northern Arapaho Tribes applied to the EPA for treatment as a state under the CAA. The Tribes asserted jurisdiction over Riverton, Wyoming in their application. On December 19, 2013, EPA approved the Tribes’ application, and the approved jurisdictional area included Riverton, Wyoming. In February 2014, Wyoming petitioned the U.S. Court of Appeals for the Tenth Circuit to review EPA’s decision, and it filed its opening brief with the court in December 2014. The issue before the Tenth Circuit is whether EPA was correct to include Riverton, Wyoming within the boundaries of the Tribes’ reservation for purposes of a tribal air monitoring program under the CAA. Wyoming argues that EPA’s decision was erroneous because several acts of Congress diminished the Tribes’ reservation, and, as a result, the Tribes no longer have jurisdiction over the town. For copies of the briefs filed in this case, see https://turtletalk.wordpress.com/2014/10/23/tenth-circuit-briefs-in-state-of-wyoming-v-epa-challenge-tas-status-to-wind-river-reservation/. For a discussion of reservation diminishment, see Chapter 2, pages 99-114.

Pages 253-254, Note on Tribal Environmental Law. Add to the end of the note:

A recent study looked at the tribal environmental codes of 74 federally recognized tribes located within Arizona, Montana, New York and Oklahoma. The study determined that approximately half of the tribal codes reviewed, or the tribal codes of 36 tribes, included code provisions related to air pollution, water pollution, solid waste disposal or environmental quality generally. Elizabeth Ann Kronk Warner, Examining Tribal Environmental Law, 39 Colum. J. Envt'l L. 42 (2014). Examining the environmental tribal laws of the same 74 federally recognized tribes, a second article considered how tribes have adopted and adapted federal environmental laws within the tribal context. Elizabeth Ann Kronk Warner, Tribes as Innovative Environmental “Laboratories,” 86 Colo. L. Rev. 789 (2015).
Page 264, note 2. Add to the end of the note.

As a recent example of how tribes attempted to use NEPA as a “shield,” see Center for Biological Diversity, et al. v. Salazar, et al., 706 F.3d 1065 (9th Cir. 2013). Environmental organizations, the Kaibab Band of Paiute Indians, and the Havasupai Tribe alleged the Secretary of the Interior and Bureau of Land Management (BLM) violated NEPA, in addition to the Federal Land Policy and Management Act and BLM regulations, when the agencies permitted a mining company to restart uranium mining after a 17-year hiatus without a new mine plan or a new environmental impact statement. The 9th Circuit upheld the district court’s decision to allow the restart because the court deferred both to BLM’s interpretation of its mine plan regulations and its interpretation of its NEPA responsibilities, including its determination that a required gravel permit qualified for a categorical exclusion.

Pages 274, Note on Environmental Justice. Add to the end of the note:

On July 24, 2014, the EPA released the EPA Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous Peoples, which is available at: http://www.epa.gov/oecaerth/environmentaljustice/resources/policy/indigenous/ej-indigenous-policy.pdf. The EPA defines “environmental justice” as the “fair and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.” The new policy is designed to integrate environmental justice principles into the Agency’s work with federally recognized tribes and indigenous peoples. The Policy is based on three key documents: 1) Executive Order 12898 (page 275); 2) the EPA Policy for the Administration of Environmental Programs on Indian Reservations (page 220); and 3) Plan EJ 2014, which is the EPA’s overarching strategy for advancing environmental justice, available at: http://www.epa.gov/environmentaljustice/plan-ej/. The policy divides 17 principles into four categories: 1) promoting environmental justice principles in EPA direct implementation of programs, policies, and activities; 2) promoting environmental justice principles in tribal environmental protection programs; 3) promoting environmental justice principles in EPA’s engagement with indigenous peoples; and, 4) promoting environmental justice principles in intergovernmental coordination and collaboration.

V. Natural Resource Development

A. The Federal-Tribal Relationship in Resource Management

Page 284, note 4. Add to the end of the note on page 286:

The HEARTH Act has proved more popular with tribes than the TERA provision of ITEDSA on which it was modeled. By August 2015, no tribe had yet submitted a TERA application. By that same time, 18 tribes in twelve states had already received approval of their HEARTH Act applications. Of the 18 tribes with approved regulations, the vast majority are for residential and business leases. See News Release (Feb. 12, 2015), available at www.bia.gov/News/index.htm
On January 21, 2015, Senator John Barrasso (R-Wyo.) introduced a bill, S. 209, designed to streamline the TERA process so that it is easier for tribes to enter into TERAs. Senator John Tester (D-Mont.) co-sponsored the bill. The bill is also designed to help ensure tribal access to long-term supplies of woody biomass materials. See S. 209 – Indian Tribal Energy Development and Self-Determination Act Amendments of 2015, available at https://www.congress.gov/bill/114th-congress/senate-bill/209.

B. The Breach of Trust Action for Federal Resource Mismanagement

Page 303, note 1. Add to the end of the note on page 304:

The Supreme Court’s direction in Navajo II that “liability cannot be premised on control alone” led the Court of Federal Claims to dismiss an action brought by the Hopi Tribe regarding its water resources, on the ground that the claims court lacked subject matter jurisdiction. In Hopi Tribe v. United States, 113 Fed. Cl. 43 (2013), the tribe sought damages for breach of trust for the federal government’s failure to ensure that reservation drinking water contained safe levels of arsenic. Public water systems on the eastern part of the reservation contained arsenic at levels exceeding EPA standards. The tribe argued that the executive order and statute establishing the reservation, along with a slew of statutes relating to tribal and Hopi water supplies, gave the federal government sufficient control over the water supply to give rise to fiduciary obligations. The court found no specific duties with respect to Hopi water supplies, and distinguished White Mountain Apache. In that case, the court said, “the specific statutory provision at issue simultaneously used the word ‘trust’ in connection with imparting to the federal government a right to ‘use’ the land.” The statute for the Hopi Reservation, by contrast, “does not confer on the federal government comparable authority or, indeed, any kind of authority to use or manage the land.” Has the Court of Federal Claims effectively limited White Mountain Apache to situations where the federal government is in actual physical control of trust property?

Page 308, note 3. Add to the end of the note:

The Court of Federal Claims has addressed these questions. In Otoe-Missouria Tribe of Indians v. United States, 105 Fed. Cl. 136 (2012), the court held that the order of filing was crucial. The tribe had filed in the morning in the Court of Federal Claims, and that same afternoon in federal district court. The claims court held that “pending” in the statute “refers to cases that are filed.” At the time the tribe filed in the claims court, no other lawsuit had been filed. “It is from the moment of the filing, not necessarily the date of filing,” that the court determines which lawsuit was filed first. Because no case was therefore pending when the tribe filed in the claims court, that court had proper subject matter jurisdiction.

The Court of Federal Claims ruled that it lacked jurisdiction, however, in a case filed in federal district court and transferred in part to the claims court. Jackson v. United States, 107 Fed. Cl. 495 (2012). Individual members of the Shoshone-Bannock Tribe filed claims for negligence and breach of fiduciary duty in federal district court. The court granted summary judgment against the tribal members on the negligence claims, and transferred the breach of trust
claims to the claims court. Under the transfer statute, 28 U.S.C. § 1631, the transferred claim is to be treated as if it were filed in the claims court on the date it was actually filed in district court. As a result, the claims in the district court and in the claims court were considered to be filed simultaneously. Under a 1999 case not involving Indian claims, the claims court had held that in that situation, the district court claims are “pending” for purposes of § 1500. The Court of Federal Claims appeared sympathetic to the plaintiffs, but held itself bound by precedent to dismiss the case.

**Page 308, note 4. Add to the end of the note:**

In September 2014, the United States entered into the largest settlement ever with a single tribe, the Navajo Nation. The federal government agreed to pay $554 million for its historical mismanagement of funds and natural resources on the Nation’s reservation. Some of the claims that were settled dated back 50 years. In exchange for the settlement monies, the Nation agreed to drop its existing claims and forego future litigation involving this historical mismanagement. The settlement, however, does not preclude the Nation from bringing claims related to federal mismanagement in the future. See Sari Horwitz, *U.S. to pay Navajo Nation $554 million in Largest Settlement with Single Indian Tribe*, The Washington Post, Sept. 24, 2014, available at https://www.washingtonpost.com/world/national-security/us-to-pay-navajo-nation-554-million-in-largest-settlement-with-single-indian-tribe/2014/09/24/4dc02cc6-434e-11e4-9a15-137aa0153527_story.html.

**Page 320, add a new note following note 4.**

On April 16, 2015, the Mandan, Hidatsa, and Arikara Tribes of the Fort Berthold Reservation pursuant to tribal resolution 15-059 asserted authority to “regulate, monitor and register all companies … providing work and business within the boundaries of the West Segment [of the Reservation].” Because tribal leaders are concerned that not enough is being done to protect the land during oil and gas development, the Tribes created the West Segment Regulatory Commission through which the Tribes intend to impose their own oil and gas regulations. The Tribes’ Reservation is located within the Bakken oil shale area. See James MacPherson, *Tribal panel aims to regulate oil on part of North Dakota reservation; jurisdiction questioned*, Associated Press, June 24, 2015, available at http://indiancountrytodaymedianetwork.com/2015/08/11/toxic-river-spill-flowing-across-navajo-nation-3-million-gallons-not-one-epa-161348.

**VI. Taxation of Natural Resources**

**C. State Taxation**

**Page 365, note 6. Add to the end of the note.**

Recently, the United States Court of Appeals for the Ninth Circuit decided that a treaty provision did not exempt a business owned by a tribal member and partially located within the tribe’s reservation from a state escrow tax. *King Mountain Tobacco Comp. Inc. v. McKenna*,
768 F.3d 989 (9th Cir. 2014). The court upheld Washington’s application of its escrow tax on the King Mountain Tobacco Company Inc., which is owned by a citizen of the Yakama Nation and the company grows and processes some of its tobacco within the Nation’s reservation. The escrow tax requires that money be put into an escrow account to reimburse Washington for health care costs related to the use of tobacco products. The company argued that a provision of the Nation’s 1855 treaty precluded application of the tax. However, the court disagreed explaining that because the escrow statute is a nondiscriminatory law and the company’s activities and sales occurred largely off of the reservation the escrow tax applied. Further, the court held that the plain text of the Nation’s treaty did not create a federal exemption from the escrow statute.

VII. Water Rights

C. Scope and Effect of Water Rights

2. Rights to Groundwater

Page 404, note 2. Add after the citation to U.S. v. Washington Dep’t of Ecology (2005) on page 405:

See also Agua Caliente Band v. Coachella Valley Water Dist., 2015 WL 1600065 (C.D. Cal. Mar. 20, 2015) (holding that "the federal government impliedly reserved groundwater, as well as surface water, for the Agua Caliente when it created the reservation," but noting that the court was reserving the question of whether groundwater sources were necessary to fulfill the purposes of the reservation).

Page 405. Add to the end of the note:


D. Determination of Water Rights

Page 439, note 1. Add to the end of the note on page 440:

In Hopi Tribe v. United States, 113 Fed. Cl. 43 (2013), the United States “concedes that it holds plaintiff’s water rights in trust, but argues that this general trust relationship does not suffice to establish a specific trust duty to maintain water quality.” In the case, summarized above as an addition to Chapter V, page 303, the Court of Federal Claims agreed with the federal government and dismissed (for lack of subject matter jurisdiction) the tribe’s claim that the United States had an enforceable duty to ensure safe levels of arsenic in reservation drinking water supplies.
Page 440, note 2. Add to the end of the note on page 441:

By contrast, the Washington Supreme Court held that federal proceedings in *United States v. Ahtanum Irrigation District*, 330 F.2d 897 (9th Cir. 1964), adjudicated the non-tribal rights in Ahtanum Creek (a tributary of the Yakima River that forms the northern boundary of the Yakama Reservation), but did not quantify the practicably irrigable acreage on the Yakama Reservation. *In re Yakima River Drainage Basin*, 177 Wash. 2d 299 (2013). The state trial court determined the PIA based on a 1957 pretrial order in the federal lawsuit, but the state supreme court ruled that the pretrial order only referred to the PIA claimed by the United States. At no time did the federal court make a finding of fact as to PIA, and consequently the state supreme court remanded to the trial court for a determination. (In the federal litigation, the United States claimed 5,100 PIA; the state trial court determined PIA to be 4,107 acres; the United States and the Yakama Nation argue in the current litigation that the correct figure is 6,381 acres.)

VIII.Usufructuary Rights: Hunting, Fishing, and Gathering

Page 508. Add a new note 4a. In-Lieu Fishing Sites. In 1945, to compensate tribes for the devastation of many tribal “usual and accustomed fishing grounds” caused by federal dams, Congress authorized the creation of several “in-lieu” fishing sites and added to them in 1988 “for the permanent use and enjoyment of Indian tribes,” One such site was Maryhill, where Lester Ray Jim, a Yakama tribal member was cited by the state of Washington for unlawfully harvesting an undersized sturgeon. In *State v. Jim*, 273 P.3d 434 (Wash. 2012), the Washington Supreme Court affirmed an appeals court dismissal of the charge and held that the state lacked criminal jurisdiction over the in-lieu fishing site because federal regulations made clear that the fishing right at such sites was reserved exclusively for the tribes.

Page 510. Add to the end of note 8:

A split Ninth Circuit reversed a district court and ruled that the eastern boundary of the Lummi Nation’s usual and accustomed fishing ground had not been established by “law of the case.” The court therefore decided that the boundary dispute between the Lummi and the Klallam Tribes would have to be resolved at trial before the district court. *United States v. Lummi Nation*, 763 F.3d 1180 (9th Cir. 2014).

Page 519. Update note 1 to include the following: When several years of settlement negotiations failed, in 2013, Judge Martinez issued an injunction requiring the state to begin repairing more than 600 state-owned road culverts blocking salmon migration, giving the state 17 years to complete the task. The court ruled that an injunction was necessary because the state had reduced repair efforts in recent years, resulting in a net increase of fish blocking culverts, meaning that at the current rate repairs would never be completed. The decision found that the state’s duty to fix the culverts did not arise from a “broad environmental servitude” but instead from a “narrow and specific treaty-based duty that attaches when the state elects to block rather than bridge a salmon-bearing stream . . .” *United States v. Washington*, No. C70-9213, 2013 WL 1334391 (W.D.Wash. March 29, 2013) (finding that the tribes had been irreparably harmed “economically, socially, educationally, and culturally by the generally reduced salmon harvest
that have resulted from State-issued or State-maintained fish passage barriers.”). The state has appealed the case to the Ninth Circuit.

Page 519. Add a new paragraph at the end of note 3:

In August 2014, the state of Oregon rejected a permit from Ambre Energy, an Australian company which sought to construct a terminal on the Columbia River to export 8.8 million tons of coal annually to Asia. Although environmental groups opposed the terminal on grounds that it would unwisely expand the use of coal and accompanying greenhouse gas emissions, the state based its denial large on the disruption the terminal would cause to tribal fisheries. Governor John Kitzhaber stated, “Columbia River tribes have fundamental rights to these fisheries,” and any project that threatens those rights should be held to high standards. See http://thehill.com/policy/energy-environment/215463-oregon-blocks-major-coal-export-terminal.

Page 541. Add note 2a. Lacey Act:

The Lacey Act makes violation of tribal fishing laws a federal offense, 16 U.S.C. s. 3372(a)(1). In United States v. Brown, No. 13-3800 (8th Cir. Feb. 10, 2015), the Eighth Circuit affirmed the dismissal of federal criminal charges against members of the Minnesota Chippewa Tribe under the Lacey Act for violating the Leech Lake Conservation Code by fishing on-reservation with gillnets for commercial purposes and subsequently selling the fish to non-Indians. The tribal code prohibited commercial fishing without a permit and banned gillnetting for other than personal use. The appeals court agreed with the lower court that the Chippewa Tribe reserved exclusive on-reservation fishing rights under its 1837 treaty and an 1855 Executive Order, and that these rights included commercial fishing with no specifications as to how to fish. The Eighth Circuit decided that although the tribe might be able to enforce its code against the defendants, “[t]ribal fishing laws enforceable in tribal court do not change the scope of treaty protections which tribal members may assert as a defense to prosecution by the United States.” The court also found no treaty abrogation under the standards set by the Supreme Court’s Dion decision because Congress never abrogated the treaty rights by actually considering and choosing to abrogate them in clear and plain legislation.

IX. International Approaches to Indigenous Lands and Resources

A. International Instruments for the Protection of Indigenous Rights

Pages 549-550. Add to the end of the Note on the U.N. Declaration on the Rights of Indigenous Peoples:

Since the original vote of the U.N. General Assembly, the United States, Australia, Canada and New Zealand have all endorsed the U.N. Declaration on the Rights of Indigenous Peoples. In 2009, Australia endorsed the Declaration. In April 2010, New Zealand endorsed the Declaration. In November 2010, Canada endorsed the Declaration, but maintains that the document is merely aspirational. And, in December 2010, President Obama announced that the United States supported the Declaration. For more information on the United States’ position on