

Native American Natural Resources Law

FOURTH EDITION

2019 SUPPLEMENT

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I. Land, Religion, and Culture

A. Indians and the Land

Page 3. Add a new paragraph at the end of the introductory material:

The Columbia River Gorge Commission, an interstate compact agency with land use authority over the Columbia River Gorge National Scenic Area, determined that a proposed second railroad track through the Gorge would impermissibly adversely affect tribal fishing rights, employing what the commission termed “an Indian world view.” *See* Michael C. Blumm & Jeffrey B. Litwak, *Democratizing Treaty Fishing Rights: Denying Fossil-Fuel Exports in the Pacific Northwest*, 30 Colo. Nat’l Res., Energy & Env’tl. L. Rev. 1, 28-29 (2019) (discussing an evidentiary standard the commission employed to determine the existence of tribal fishing sites that would be adversely affected by the project).

B. Legal Protection of Religion and Cultural Resources

Page 43. Add a new paragraph following the first complete paragraph:

The tribes with treaty fishing rights on the Columbia River were unwilling to disclose the nature and extent of their fishing sites allegedly adversely affected by an additional Union Pacific Railroad track through the Columbia River Gorge due to concerns over loss of proprietary information. In 2017, the Columbia River Gorge Commission upheld a county government’s denial of a permit on the ground that evidentiary standards should be relaxed to accommodate such reasonable tribal concerns over protecting tribal access to their fishing sites and harvesting practices. The issue is now before the Oregon Court of Appeals. *See* Michael C. Blumm & Jeffrey B. Litwak, *Democratizing Treaty Fishing Rights: Denying Fossil-Fuel Exports in the Pacific Northwest*, 30 Colo. Nat’l Res., Energy & Env’tl. L. Rev. 1, 28-29 (2019).

Page 44. In the first full paragraph:

The number of public comments favoring maintaining the 2016 boundaries of the Bears Ears National Monument should be 685,000.

II. Some Basics of Federal Indian Law

C. Tribal Sovereignty

Page 93. Add to the end of the second paragraph of note 3:

The number of recognized tribes was 573 as of 2018. 83 Fed. Reg. 34,863 (2018).

Page 100. First full paragraph, line 7:

Errata: should be “nurtured,” not nurture.

E. Indian Country

Page 121. Add to the end of note 1:

The decision cited in the text was amended slightly by the Tenth Circuit in denying rehearing at 875 F.3d 896 (10th Cir. 2017). After accepting certiorari, 138 S.Ct. 2026 (2018), and hearing argument in *Murphy*, the Supreme Court held the case over for re-hearing during the 2019 Term, so it appears that the Court is divided on the merits, although Justice Gorsuch has recused himself. The case is now captioned *Carpenter v. Murphy*.

Page 127. Note 4, paragraph 2, line 4:

Errata: eliminate “and of”.

Page 128. Add to the end of note 5:

In Bethany C. Sullivan & Jennifer L. Turner, *Enough Is Enough: Ten Years of Carcieri v. Salazar*, 40 Public Lands & Resources L. Rev. 1 (2019), the authors review *Carcieri*’s progeny, concluding that the decision has enabled states, local governments, and others—including other tribes—to often successfully challenge the exercise of tribal sovereignty through the land-into-trust process. They make suggestions for tribes who must navigate the post-*Carcieri* landscape.

Page 151. Add to the end of note 2:

The disestablishment issue in eastern Oklahoma remains before the Supreme Court concerning the Muskogee (Creek) Nation Reservation in Oklahoma, held over from the 2018 Term. *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), *cert. granted*, 138 S.Ct. 2026 (2018), now captioned *Carpenter v. Murphy*. The Tenth Circuit held that the Muskogee (Creek) Nation Reservation was intact (see note 1, page 121). Professor Royster described the large stakes involved in the case, noting that if the Tenth Circuit decision is upheld, the state could not prosecute any crime by or against an Indian on those reservations. Quoted in the Tulsa World (Aug. 8, 2017).

III. Land: The Fundamental Resource

A. Aboriginal Title

Page 159. Add to the end of note 1:

and Joseph William Singer, *Indian Title: Unraveling the Racial Context of Property Rights, or How to Stop Engaging in Conquest*, 10 Alb. Gov't L. Rev. 1, 48 (2017) (reconsidering *Johnson v. M'Intosh* to recognize Indian title as a property right and to help “move beyond our past sins of conquest and racial oppression”).

Page 169. Add a new note 1a.

a. Tribal immunity and quiet title suits. In *Upper Skagit Tribe v. Lundgren*, 138 S.Ct. 1649 (2018), the Supreme Court reversed a Washington Supreme Court ruling deciding that tribal sovereign immunity did not apply to the tribe's 40-acre purchase of off-reservation land that was challenged by neighbors who claimed they had adversely possessed a portion of the purchased land. A seven-member Court, in which Justice Gorsuch authored the majority decision, thought that the state court misconstrued *County of Yakima v. Confederated Tribes and Bands of the Yakama Indian Nation*, 502 U.S. 251 (1992) (excerpted below at p. 441 of the casebook) as foreclosing tribal immunity in *in rem* proceedings. Instead, the Court concluded that the 1992 decision did not conflate the issue of jurisdiction to tax with the question of sovereign immunity. The Court therefore remanded the case to the state court to consider whether a so-called “immovable objects exception” to sovereign immunity (which prevents one sovereign from invoking immunity to lands purchased within the territory of another sovereign) should apply. The tribe subsequently mooted the issue by purchasing the disputed tract. For a perceptive analysis of the case, including a deconstruction of Justice Thomas' dissent, see Gregory Ablavsky, *Upper Skagit v. Lundgren: Deceptively Straightforward Case Raises Fundamental Questions About Native Nations, History, and Sovereignty*, <https://law.stanford.edu/2018/05/23/upper-skagit-v-lundgren-deceptively-straightforward-case-raises-fundamental-questions-about-native-nations-history-and-sovereignty/>.

Page 178. Add to the end of note 4a:

Since that decision, the Tsilhqot'in Nation and British Columbia have negotiated agreements to provide additional clarity regarding the Nation's rights in their treaty lands. See Monica Lamb-Yorski, *Province and Tsilhqot'in nation sign accord*, The Williams Lake Tribune, <https://www.wltribune.com/news/province-and-tsilhqotin-nation-sign-accord/amp/> (last visited August 2, 2019); Monica Lamb-Yorski, *New agreements reached on Tsilhqot'in title lands*, The Williams Lake Tribune (June 22, 2018), <https://www.wltribune.com/news/new-agreements-reached-use-on-tsilhqotin-title-lands/>.

For an historical examination of the tension in Canadian Supreme Court decisions between a nation-to-nation vision of reconciling pre-existing aboriginal societies and Crown sovereignty, see Ryan Beaton, *The Crown Sovereignty at the Supreme Court of Canada: Reaching Across*

Nations, or Held within the Grip of the Crown, in *Canada in International Law at 150 and Beyond* (Centre for International Governance Innovation, 2018), <https://ssrn.com/abstract=3396112>.

Page 185. Add to the end of note 1:

See Joseph William Singer, *Indian Title: Unraveling the Racial Context of Property Rights, or How to Stop Engaging in Conquest*, 10 Alb. Gov't L. Rev. 1 (2017).

D. Submerged Lands

Page 222. Add to the end of note 5:

The Court considers the navigability of rivers on a “segment-by-segment basis to assess whether the segment of the river, under which the riverbed in dispute lies, is navigable or not.” *PPL Montana, LLC v. Montana*, 565 U.S. 576, 593 (2012).

E. Allotted Lands

Page 245. Add to the end of the last paragraph:

As of July 2019, over 70,000 buy-back offers had been accepted, resulting in the purchase of the equivalent of more than 2.5 million acres. *Land Buy-Back Program for Tribal Nations Cumulative Sales through July 26, 2019*, U.S. Dep't of the Interior, https://www.doi.gov/sites/doi.gov/files/uploads/table_lbbtn_transactions_through_july_26_2019.pdf (last visited Aug. 2, 2019).

In recent years, however, the Department of the Interior substantially narrowed the program. After the 2016 election of President Donald J. Trump and his appointment of Secretary of Interior Ryan Zinke, the Department's Acting Deputy Secretary criticized the program's operations during the prior eight years, suggesting that it was “not very successful at managing the fractionation problem” but had been a “very good deal for tribal leaders” because they could get “free money.” *The Status and Future of the Cobell Land Consolidation Program: Oversight Hearing Before the Subcomm. on Indian, Insular and Alaska Native Affairs of the H. Comm. on Natural Resources*, 115th Cong. 13 (2017). As a result of the new administration's concerns, the Department announced a revised strategy in July 2017 that reduced to 20 the number of tribes where the program would be implemented and prioritized the purchase of only certain property interests. See *Interior Announces Revised Strategy, Policies to More Effectively Reduce Fractionation of Tribal Lands*, Press Release, U.S. Dep't of the Interior (July 31, 2017), <https://www.doi.gov/pressreleases/interior-announces-revised-strategy-policies-more-effectively-reduce-fractionation>.

IV. Land Use and Environmental Protection

B. Environmental Protection

Page 285. Add to end of note 1.

On April 5, 2019, the EPA affirmed the 1984 Policy in a memorandum from Andrew Wheeler. See https://www.epa.gov/sites/production/files/2019-04/documents/10apr19memo_reaffirming_epas_1984_indian_policy.pdf.

V. Natural Resource Development

- A. The Federal-Tribal Relationship in Resource Management
- 2. Tribal Resource Development Statutes

Page 361. Replace the last paragraph of note 4a with:

The Indian Tribal Energy Development and Self-Determination Act Amendments (ITEDSA Amendments), Pub. L. 115-325, became law on December 18, 2018. The law's enactment culminated years of effort on the part of tribes interested in pursuing TERAs to address the barriers, such as those identified by Professor Kronk, to entering such agreements. The ITEDSA Amendments add pooling, unitization, and communitization agreements to the types of agreements that tribes could approve pursuant to a TERA, expand the types of rights-of-way that could be tribally-approved, and require that a proposed TERA be deemed approved after 270 days unless the Secretary of the Interior disapproves the proposal before that date. The ITEDSA Amendments also remove the requirement that an Indian tribe demonstrate sufficient capacity to enter a TERA and, instead, require that an interested tribe provide assurance that it has successfully managed 638 contracts or otherwise has substantial administrative experience in energy-related matters. The amendments also address the liability of the United States, making clear that, although the liability of the United States is limited for losses arising from agreement terms negotiated by tribes, nothing in the law absolves the federal government from any liability that may otherwise arise from energy related agreements or as a result of the Secretary's actions or inactions.

Page 362. Replace the last sentence of the carry-over paragraph with:

Although the HEARTH Act does not apply to mineral leases, the ITEDSA Amendments, Pub. L. 115-325, discussed *supra*, amended a separate section of the Indian Long Term Leasing Act to authorize the Navajo Nation to approve mineral leases pursuant to tribal regulations and without Secretarial approval; a model consistent with the HEARTH Act's approach. *See* Pub. L. 115-325, §205 (amending 25 U.S.C. § 415(3)(1) to add "leases for the exploration, development, or extraction of any mineral resource (including geothermal resources)," the terms of which do not exceed 25 years with one option to renew for an additional term of 25 years, to the surface leases that that Navajo Nation could approve without Secretarial authority under the HEARTH Act's Navajo-specific predecessor).

Page 362. Note on Renewable Energy Resources, add to the end of the second paragraph:

The ITEDSA Amendments, Pub. L. 115-325, discussed *supra*, promoted the development of tribal biomass projects, using tribal forest resources of tribes in both the lower-48 states and in Alaska. *Id.* at §202 (amending The Tribal Forest Protection Act of 2004, 25 U.S.C. §3115a, et seq.).

3. Energy Rights-of-Way

Page 370. Replace the last sentence of note 3 with:

On appeal, the Tenth Circuit affirmed the District Court’s grant of summary judgment but reversed and remanded the injunction, directing the lower court to consider the federal standards for granting an injunction, rather than the state trespass laws that it had applied. *Davilla v. Enable Midstream Partners L.P.*, 913 F.3d 959 (10th Cir. 2019).

B. The Breach of Trust Action for Federal Resource Mismanagement

Page 395. Replace the last sentence of the third paragraph of note 5 with:

Nonetheless, also like the IMDA, ITEDSA asserts that the federal government “shall not be liable” for any loss resulting from any term or provision of a lease, agreement, or right-of-way negotiated by a tribe and entered into pursuant to a tribal energy resource agreement. The ITEDSA Amendments, Pub. L. 115-325, enacted in 2018 and discussed *supra*, clarified that the law did not affect any liability of the United States arising outside of the “negotiated terms” of such agreements.

VI. Taxation of Natural Resources

A. Federal Taxation

Page 422. Add to the end of note 2:

As further evidence of the strict federal interpretation of the “directly derived” test, the United States Tax Court recently decided that tribal members who received revenues from a tribal casino were liable for federal income taxes owed on the gaming revenue, as the revenues were not directly derived from tribal lands. The court explained that “[w]e have limited our definition of income derive directly from the land to income earned through ‘exploitation of the land itself.’” The court noted that “[w]e also have held that per capita payments of casino revenue are not directly derived from the land merely by virtue of the casino’s location on tribal land.” *Clay v. Commissioner of Internal Revenue*, 152 T.C. No. 13 (April 24, 2019).

Page 424. Add to the end of note 5:

Federal taxes may also be applicable to some tribally-owned businesses. For example, the Ninth Circuit held that federal excise taxes applied to the King Mountain Tobacco Company, Inc.,

a tribal manufacturer of tobacco products located on land held in trust by the United States. The court found that neither the General Allotment Act nor the Treaty with the Yakamas of 1855 exempted the company from the federal tax. *United States v. King Mountain Tobacco Company, Inc.*, 899 F.3d 954 (9th Cir. 2018).

C. State Taxation

Page 466. Add at the end of note 6:

As a recent example of the federal courts allowing state taxes on non-Indian entities within an Indian reservation, the District Court for the Western District of Washington found that a municipality within the Tulalip Tribe's territory was subject to retail sales and use tax, business and occupation tax, and personal property tax, as these taxes were not preempted by federal law and the collection of these taxes did not infringe on tribal sovereignty. *Tulip Tribes v. Washington*, 349 F.Supp.3d 1046 (W.D. Wash. Oct. 4, 2018).

Page 468. Replace the first full paragraph with:

In *Washington State Department of Licensing v. Cougar Den, Inc.*, 139 S.Ct. 1000 (2019), the U.S. Supreme Court considered the same treaty provision, the right to travel, of the Treaty with the Yakamas, 12 Stat. 951, 952-53 (1855). Cougar Den, a wholesale fuel importer owned by a citizen of the Yakama Nation and incorporated under Yakama law, challenged the application of taxes by the Washington State Department of Licensing. The State of Washington assessed Cougar Den a total of \$3.6 million in taxes, penalties, and licensing fees for failure to pay taxes on fuel it imported into the State of Washington on its way for sale on the Yakama Nation. The Court ultimately determined that application of the State's taxes and fees was not appropriate given the Yakama Nation's treaty right to travel upon all public highways in common with citizens of the United States.

In an opinion by Justice Breyer, joined by Justices Sotomayor and Kagan, the Court determined that the 1855 treaty between the Yakama Nation and the federal government preempted that application of the State of Washington's fuel tax to Cougar Den. In reaching this decision, the Court explained that it had previously interpreted language similar to that at issue in this treaty, and, in every instance, "has stressed that the language of the treaty should be understood as bearing the meaning that the Yakamas understood it to have." *Id.* at 1011 (citations omitted). Further, the Court explained that treaty terms should be read in the terms that the Tribe would have understood them, that the right to travel included the right to travel with goods for sale, and that taxes would burden this right to travel.

Justice Gorsuch wrote a concurring opinion, in which Justice Ginsburg joined. In agreeing that the taxes did not apply, Justice Gorsuch explained that a treaty should be interpreted as the tribe would have understood it at the time. Here, there was evidence in the record to support that the Yakama Nation would have understood the treaty provision as the right to travel far distances for the purpose of trade. The State of Washington argued that the provision meant that the Nation could use highways the same as other citizens of the State, but Justice Gorsuch explained that "the consideration the Yakamas supplied – millions of acres desperately wanted by the United States

to settle the Washington territory – was worth far more than an abject promise they would not be made prisoners on their reservation.” Finally, in a paragraph that has already been readily quoted by those working in Indian country, Justice Gorsuch explained:

Really, this case just tells an old and familiar story. The State of Washington includes millions of acres that the Yakamas ceded to the United States under significant pressure. In return, the government supplied a handful of modest promises. The state is now dissatisfied with the consequences of one of those promises. It is a new day, and now it wants more. But today and to its credit, the Court holds the parties to the terms of their deal. It is the least we can do.

Id. at 1021.

VII. Water Rights

C. Scope and Extent of Water Rights

1. Reservation Purposes, Priority Dates, and Quantification

Page 487. Add to the end of the note:

A pair of forthcoming articles looks at the thorny issue of quantifying instream flow rights. See Dylan Hedden-Nicely, *The Contemporary Methodology for Claiming Reserved Instream Flow Water Rights to Support Aquatic Habitat* (Envtl. L., forthcoming 2019); Dylan Hedden-Nicely, *The Historical Evolution of the Methodology for Quantifying Federal Reserved Instream Water Rights for American Indian Tribes* (Envtl. L., forthcoming 2019).

2. Rights to Groundwater

Page 519. Add new note 0.5:

0.5. Phase II of the *Agua Caliente* litigation. Phase II of the litigation addresses three questions: “(1) whether the Tribe owns the pore space underlying its reservation; (2) whether there is a water quality component to the Tribe’s federal reserved water right; and (3) the appropriate legal standard to quantify the Tribe’s reserved water right.” *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*, Case No. EDCV 13-00883 JGB (SPx), 2019 WL 2610965 at *1 (C.D. Cal. Apr. 19, 2019). The district court held that the tribe lacked constitutional standing to seek quantification of its reserved right to groundwater or to assert a right to water quality. The tribe, the court determined, could not satisfy the injury-in-fact requirement because it provided no evidence of injury to its ability to use water sufficient to fulfill the purposes of the reservation. *Id.* at *9. In addition, the court held that the tribe could not show actual or imminent harm to its ability to use water of sufficient quality; the tribe only alleged injury to the water and not injury to the tribe. *Id.* at *13-14. The court also determined that the tribe showed no evidence of injury to its ability to store its water in the pore space, but deferred to Phase III the question of whether the tribe owns sufficient pore space to store its reserved water. *Id.* at *15. Finally, the

court ruled that the United States, as trustee for the tribe, also lacked standing for the same reasons that the tribe did. *Id.*

If neither a tribe nor the United States as the tribal trustee has standing to assert the parameters of the tribe's property rights, who does? If the tribe is denied the right to quantify its reserved right, how may it protect that right?

D. Determination of Water Rights

Page 583. Add to the end of the first full paragraph of note 2:

For a recent listing of all enacted water rights settlements with the public law numbers of the original acts and any amendments, see *Indian Water Rights Settlements: An Update from the Congressional Research Service*, The Water Report, issue #184 (June 15, 2019), 14, 16. The most recent information (2017) on water rights settlements negotiations appears *id.* at 17. A number of settlement acts have been introduced in the 116th Congress, although none has yet made it out of committee. See S. 1977 (Kickapoo Tribe in Kansas); S. 1875 (Aamodt Litigation Settlement Completion Act); S. 1277 (Hualapai Tribe); S. 1207 (Navajo Utah); S. 886 (Indian Water Rights Settlement Extension Act).

VIII. Usufructuary Rights: Hunting, Fishing, and Gathering

A. Off-Reservation Rights

1. Modern Survival of the Rights

Page 601. Replace note 1 with:

1. Treaty rights and the equal footing doctrine. In *Ward v. Race Horse*, 163 U.S. 504 (1896), the Court held that the admission of Wyoming into the Union terminated the off-reservation hunting rights of the Eastern Shoshone and Bannock Tribes because of the equal footing doctrine, which guarantees new states sovereignty equal to the original states. The *Race Horse* Court thought that survival of the tribes' off-reservation hunting right after statehood would conflict with Wyoming's sovereignty. Justice O'Connor's opinion in *Mille Lacs*, however, made clear that *Race Horse*'s assumption of this conflict was based on false premises because off-reservation treaty rights and state regulation can and do in fact co-exist. Thus, the *Mille Lacs*' off-reservation rights survived Minnesota statehood. But did the Court in *Mille Lacs* overrule *Race Horse*?

Twenty years after *Mille Lacs*, the Court again considered the modern survival of off-reservation hunting rights in Wyoming and analyzed the continuing viability of *Race Horse*. In *Herrera v. Wyoming*, 139 S.Ct. 1686 (2019), a Crow tribal member appealed his state law conviction for hunting in Wyoming's Bighorn National Forest. The Crow Treaty of 1868 includes language nearly identical to the treaty language analyzed by the Court in *Race Horse*. But, despite Wyoming's argument that the Court in *Herrera* should defer to *Race Horse*, the Court instead

determined that *Mille Lacs*, not *Race Horse*, controlled. As Justice Sotomayor, writing for the five justice majority, explained:

... *Mille Lacs* upended both lines of reasoning in *Race Horse*. The case established that the crucial inquiry for treaty termination analysis is whether Congress has expressly abrogated an Indian treaty right or whether a termination point identified in the treaty itself has been satisfied. Statehood is irrelevant to this analysis unless a statehood Act otherwise demonstrates Congress' clear intent to abrogate a treaty, or statehood appears as a termination point in the treaty. ...

We thus formalize what is evident in *Mille Lacs* itself. While *Race Horse* 'was not expressly overruled' in *Mille Lacs*, 'it must be regarded as retaining no vitality' after that decision. ... To avoid any future confusion, we make clear today that *Race Horse* is repudiated to the extent it held that treaty rights can be impliedly extinguished at statehood. *Herrera*, 139 S.Ct. at 1696-97 (citations omitted).

"Applying *Mille Lacs*," the majority wrote, "[*Herrera*] is not a hard case," and the rights reserved by the Crow Tribe in the 1868 Treaty were not abrogated by Wyoming's statehood. *Id.* at 1700.

Page 611. Add to the end of note 3:

In 2018, the Hawai'i Supreme Court considered whether the State Board of Land and Natural Resources (BLNR) properly applied the three step *Ka Pa 'Akai O Ka 'Aina* test before approving a development permit for a controversial telescope, known as the Thirty Meter Telescope or TMT, near the summit of Mauna Kea, a sacred area for many Native Hawaiians. *Matter of Conservation District Use Application HA-3568*, 431 P.3d 752 (Haw. 2018). A majority of the court upheld the BLNR's findings that no traditional or customary practices took place in the TMT site area and that, as a result, the TMT would not adversely affect any such practices, findings that rendered the third step of the *Ka Pa 'Akai O Ka 'Aina* test unnecessary. *Id.* at 769-70. As a result of that decision, the state's Department of Natural Resources issued a permit in June 2019 authorizing construction of the TMT. Protests ensued, protesters were arrested, and the Governor declared a state of emergency. See *OHA Statement on Yesterday's Arrest of Kupuna and others on Mauna Kea*, TURTLETALK, July 18, 2019, <https://turtletalk.blog/2019/07/18/oha-statement-on-yesterdays-arrest-of-kupuna-and-others-on-maunakea/>.

2. Defeasible Usufructuary Rights

Page 620. Replace the second paragraph of note 4 with:

In *Herrera v. Wyoming*, 139 S.Ct. 1686 (2019), the United States Supreme Court considered whether the Bighorn National Forest in Wyoming is "unoccupied" for purposes of the Crow Treaty of 1868, in which the Crow Tribe reserved the right "to hunt on the unoccupied lands of the United States so long as game may be found thereon." Relying on the text of the treaty and the canons of treaty interpretation, the Court's majority concluded

that the establishment of the Bighorn National Forest “did not remove the forest lands, in their entirety, from the scope of the treaty.” *Id.* at 1699-1703. Despite holding that the forest was “not categorically occupied,” the majority allowed that certain, specific sites within the forest could be “‘occupied’ within the meaning of the 1868 Treaty,” which Wyoming could argue on remand. *Id.* at 1703 (citation omitted).

4. Scope and Extent of “the Right of Taking Fish”

Page 632. Delete “See” at the end of the first paragraph before the citation to Goodman and replace with:

For analysis of the impacts of Judge Belloni’s decision, see Michael C. Blumm and Cari Baermann, *The Belloni Decision and Its Legacy: United States v. Oregon and Its Far-Reaching Effects after a Half-Century*, 49 ENVTL. L., no. 3 (forthcoming 2019).

Page 644. Add at the end of note 5:

On June 27, 2019, the United States Senate passed the “Columbia River In-Lieu and Treaty Fishing Access Sites Improvement Act,” which, if enacted, would authorize \$11 million from 2020-2025 to improve and maintain the facilities at these “in-lieu” fishing sites. S. 50, 116th Cong. (2019).

Page 647. Delete the period at the end of note 9 and add:

(*Lummi II*). After a summary judgment ruling that the evidence did not support the Lummi’s claim and another trip to the Ninth Circuit, *see United States v. Lummi Nation*, 876 F.3d 1104 (9th Cir. 2017) (*Lummi III*), the District Court for the Western District of Washington determined that the Ninth Circuit’s decision foreclosed further litigation in the case and dismissed the matter. *United States v. Washington*, No. C70-9213RSM, 2019 WL 3029465 (W.D. Wash. July 11, 2019). In doing so, however, Chief District Judge Ricardo S. Martinez noted that dismissal was a necessary but “unsatisfactory resolution” and “strongly urge[d] the parties to work together ... to resolve the dispute in a fair and equitable manner.” *Id.* at *8.

5. Habitat Protection for the Treaty Fishing Right

Page 654. Add to the end of note 5:

Although the legislation passed the House, 164 CONG. REC. H3542, H3560 (daily ed. Apr. 25, 2018), it failed to pass the Senate during the 115th Congress.

B. Loss and Diminishment of the Rights

Page 687. Add to the end of note 6:

The Fifth Circuit, citing a less developed record than those before the Tenth or Ninth Circuits, determined that the Department of Interior's decision to restrict eagle feather permits to members of federally recognized Indian tribes was not shown to be "the least restrictive means of achieving any compelling interest in maintaining the trust relationship between the United States and federally recognized Indian tribes." *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 479-80 (5th Cir. 2014). Most recently, pursuant to a settlement agreement in *McAllen*, the case's lead plaintiff and the Becket Fund for Religious Liberty filed a petition for rulemaking asking Interior's Fish and Wildlife Service (FWS) to revise its rules regarding the religious use of federally protected bird feathers. In response, the FWS published a request for public comment and may consider additional rulemaking. *See* Bald and Golden Eagle Protection Act and Migratory Bird Treaty Act; Religious Use of Feathers, 84 Fed. Reg. 18,230 (Apr. 30, 2019).

Page 694. Add new paragraph at the end of the chapter:

On April 5, 2019, NMFS initiated a formal rulemaking process to consider issuing a waiver of the MMPA take moratorium in response to a 2005 request from the Makah to resume hunting gray whales. *See* Announcement of Hearing Regarding Proposed Waiver and Regulations Governing the Taking of Marine Mammals, 84 Fed. Reg. 13,639 (Apr. 5, 2019); Regulations Governing the Taking of Marine Mammals, 84 Fed. Reg. 13,604 (Apr. 5, 2019).