

V. Natural Resource Development

A. The Federal-Tribal Relationship in Resource Management

1. Role of the Department of the Interior

Page 353. Delete the period at the end of note 3 and replace with:

; Colette Routel and Jeffrey Holth, *Toward Genuine Tribal Consultation in the 21st Century*, 46 U. Mich. J. L. Reform 417 (2013) (highlighting the legal bases and practical challenges of tribal consultation and calling for reform).

Page 354. Insert new paragraph immediately following the block quote from Secretarial Order No. 3317:

In the midst of the conflict over the Dakota Access Pipeline, *see infra* pp. 346-48, the Department of the Interior, the Department of Justice, and the Department of the Army convened tribes from across the country to discuss their tribal consultation practices related to infrastructure projects like pipelines and utility corridors. In January 2017, the agencies released a joint report titled *Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions*, which set forth a number of findings and recommendations, including a call for federal agencies to review and update their consultation policies. See *Tribal Input on Infrastructure Decisions*, U.S. Dept. of the Interior, Indian Affairs, <https://www.bia.gov/as-ia/raca/tribal-input-federal-infrastructure-decisions> (last visited July 25, 2020).

2. Tribal Resource Development Statutes

Page 359. Add to the end of the first full paragraph:

Additional legislation in 2018 enabled tribes to enter similar self-governance agreements with the Department of Agriculture to carry out “demonstration projects” involving the administration or management of certain national forest lands pursuant to the Tribal Forest Protection Act (TFPA) of 2004, 25 U.S.C. § 3115a (2018), although this latter authority is limited to protecting tribal lands or forest lands “bordering or adjacent to” lands under tribal jurisdiction.

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.

On December 16, 2019, Secretary of the Interior David Bernhardt issued Secretarial Order 3377, which is “intended to provide policy guidance on contractible Federal functions in support of tribal energy resource agreements (TERAs) relating to energy resource development,” and directed the Interior Solicitor's office and other Interior agencies to identify actions and processes related to oil and gas development on Indian lands that Indian tribes could assume under a TERA. Secretarial Order 3377 (Dec. 16, 2019), *available at* https://www.doi.gov/sites/doi.gov/files/elips/documents/so-3377-508-compliant-1_0.pdf.

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. Add a new subsection c. just before the Note on Renewable Energy Resources:

c. Indian Trust Asset Reform Act (ITARA). In 2016, Congress enacted the Indian Trust Asset Reform Act (ITARA), 25 U.S.C. §§ 5601-5636 (2018), which authorized Indian Trust Asset Demonstration Projects pursuant to which tribes could assume primary responsibility for managing trust assets, including forestry and surface leasing resources. ITARA draws on authorities already granted to tribes by NIFRMA and the HEARTH Act but provides tribes with greater flexibility to design and submit their own trust asset management plans for review and approval by the Secretary. *See* 25 U.S.C. §§ 5613-14 (2018). Upon such approval, which could include authorization to supercede certain federal regulations, the tribe would then be responsible for management of those trust assets in accordance with the plan and could do so according to a “less stringent standard than the Secretary would otherwise require or adhere to.” 25 U.S.C. § 5615(b) (2018); *see also* Monte Mills, *Beyond a Zero-Sum Federal Trust Responsibility: Lessons from Federal Indian Energy Policy*, 6 Am. Ind. L. J. 35, 90-91 (2017) (comparing ITARA to ITEDSDA and the HEARTH Act).

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 pre-empted 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

B. Scope and Extent of Water Rights

1. Reservation Purposes, Priority Dates, and Quantification

Page 487. Add to the end of the note:

For a pair of articles examining the thorny issue of quantifying instream flow rights. See Dylan R. Hedden-Nicely, *The Contemporary Methodology for Claiming Reserved Instream Flow Water Rights to Support Aquatic Habitat*, 50 *Envtl. L.* 205 (2020); Dylan R. Hedden-Nicely, *The Historical Evolution of the Methodology for Quantifying Federal Reserved Instream Water Rights for American Indian Tribes*, 50 *Envtl. L.* 257 (2020).

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 529: Add after note 3:

Baley v. United States

942 F.3d 1312 (Fed. Cir. 2019), cert. denied 2020 WL 3405869

[In 2001, the federal Bureau of Reclamation temporarily halted water deliveries to farmers and irrigation districts northern California and southern Oregon served by the Klamath Basin Project. It took this action in order protect three listed species under the requirements of the Endangered Species Act, as outlined in biological opinions from the United States Fish and Wildlife Service (“the FWS”) and the United States National Marine Fisheries Service (“the NMFS”) and in order to meet its tribal trust obligations to several tribes.

Irrigators filed suit, claiming that the Bureau’s halting of water deliveries amounted to an unconstitutional taking under the Fifth Amendment, seeking \$30 million in compensation. The Court of Federal Claims rejected the irrigators’ claims and the Federal Circuit affirmed, on the basis of the seniority of the tribal rights. Some citations omitted.]

The Klamath Tribes, the Yurok Tribe, and the Hoopa Valley Tribe of Native Americans (collectively, the “Tribes”) each hold rights to take fish from water sources on their reservations. These rights were set aside for them when their reservations were created, as discussed in further detail below. The Tribes’ rights are non-consumptive, meaning that the Tribes are “not entitled to withdraw water from the stream for agricultural, industrial, or other consumptive uses.” *United States v. Adair*, 723 F.2d 1394, 1411 (9th Cir. 1983). Instead, they hold “the right to prevent other appropriators from depleting the streams[’] waters below a protected level in any area where the non-consumptive right applies.” *Id.*

The Klamath Tribes, which include the Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians, constitute a federally-recognized tribe which has hunted, fished, and foraged in the Klamath Basin for over a thousand years. *Id.* at 1397). The basis for the Klamath Tribes’ fishing rights is an 1864 treaty with the United States, in which the Klamath Tribes “relinquished [their] aboriginal claim to some 12 million acres of land in return for a reservation of approximately 800,000 acres” of land that abutted Upper Klamath Lake and included several of its tributaries. *Adair*, 723 F.2d at 1397–98. In addition to other rights, the 1864 Treaty guaranteed the Klamath Tribes “the exclusive right of taking fish in the streams and lakes, included in said reservation.” *Treaty Between the United States of Am. & the Klamath & Moadoc Tribes & Yahooskin Band of Snake Indians*, Art. I, Oct. 14, 1864, 16 Stat. 707 (“the Klamath Treaty” or “the 1864 Treaty”). In *Adair*, the Ninth Circuit determined that “one of the ‘very purposes’ of establishing the Klamath [r]eservation was to secure to the Tribe a continuation of its traditional hunting and fishing lifestyle.” 723 F.2d at 1408–09.11 The Klamath Tribes’ water rights “necessarily carry a priority date of time immemorial. The rights were not created by the 1864 Treaty, rather, the treaty confirmed the continued existence of these rights.” *Adair*, 723 F.2d at 1414 (collecting cases).

Until 1887, the Klamath Tribes lived on their reservation under the terms of the 1864 Treaty, holding the reservation land in communal ownership. *Adair*, 723 F.2d at 1398. In 1887, Congress passed the General Allotment Act, 24 Stat. 388. Under the General Allotment Act, approximately 25% of the reservation passed from tribal to individual Indian ownership. *Id.* In 1954, Congress passed the Klamath Termination Act, 68 Stat. 718 (codified at 25 U.S.C. §§ 564–564w (1976)) (“the Termination Act”), largely terminating the reservation. *Id.* at 1398, 1411–12. This led a large majority of tribal members to give up their interests in tribal property for cash. *Id.* at 1398. However, § 564m(a) of the Termination Act provides that “[n]othing in sections 564–564w of this title shall abrogate any water rights of the tribe and its members,” *id.* at 1412, and § 564m(b) specifies that the Termination Act’s provisions will not “abrogate any fishing rights or privileges of the tribe or the members thereof enjoyed under Federal treaty,” Oregon Department of Fish & Wildlife, 473 U.S. at 761–62. Courts have subsequently held that the Klamath Tribes’ hunting, fishing and implied reserved water rights survived passage of the Termination Act. See, e.g., *Adair*, 723 F.2d at 1412

The United States purchased parts of the former Klamath reservation in 1958 and 1961, in order to establish a migratory bird refuge and in order to provide for part of the Winema National Forest. *Adair*, 723 F.2d at 1398. Thereafter, in 1973, the government condemned most of the remaining tribal land, which essentially extinguished the original reservation. *Id.* The Klamath Tribes were later restored as a federally-recognized tribe under the Klamath Indian Tribe Restoration Act of 1986. Pub. L. No. 99-398, 100 Stat. 849.

The rights of the Yurok and Hoopa Valley Tribes, both located in California, were secured by three presidential Executive Orders, issued in 1855, 1876, and 1891. The rights were confirmed by the 1988 Hoopa-Yurok Settlement Act, 25 U.S.C. § 1300i et seq. See *Baley*, 134 Fed. Cl. at 633–34 & n.4. Like the Klamath Tribes, the Yurok and Hoopa Valley Tribes are federally-recognized tribes. Indian Entities Recognized and Eligible to Receive Services From the Bureau of Indian Affairs, 77 Fed. Reg. 47,868, 47,869, 47,870, 47,872. The Hoopa Valley reservation is a nearly twelve-mile square on the Trinity River at its confluence with the Klamath River. See *Karuk Tribe of California v. Ammon*, 209 F.3d 1366, 1370 (Fed. Cir. 2000). The Yurok reservation runs along the Klamath River, one mile on each side, from the Hoopa Valley reservation downstream to the Pacific Ocean. See *id.*; *Parravano v. Babbitt*, 70 F.3d 539, 542 (9th Cir. 1995). Federal and California state courts have recognized that the right of the Yurok and Hoopa Valley Tribes to take fish from the Klamath River for ceremonial, subsistence, and commercial purposes was reserved when the Hoopa Valley reservation was created. See *Baley*, 134 Fed. Cl. at 634, 671. . . . A January 9, 1997 Memorandum by the Department of the Interior’s Regional Solicitors for the Pacific Southwest and Pacific Northwest Regions recognized that the Yurok and Hoopa Valley Tribes “hold adjudicated water rights which vested at the latest in 1891 and perhaps as early as 1855.” *Baley*, 134 Fed. Cl. at 634.

* * *

As the Court of Federal Claims noted, it is well-established that the creation of a tribal reservation carries an implied right to unappropriated water “to the extent needed to accomplish the purpose of the reservation.” . . . We are not persuaded by appellants’ argument that the Tribes’ entitlement to a “reasonable livelihood” or “moderate living” did not require that the Bureau halt water deliveries to the extent required to comply with the ESA. Beginning with the suckers and

the Klamath Tribes, appellants have not argued that the Court of Federal Claims erred when it found that the “Lost River and short nose suckers are tribal resources of the Klamath Tribes and uncontested evidence presented at trial demonstrated that the fish have played an important role in the Klamath Tribes’ history.” Baley, 134 Fed. Cl. at 671. Given that the standard of the ESA is to avoid jeopardizing the existence of the suckers, we do not see how, in this case, the “reasonable livelihood” or “moderate living” standard constitutes a standard lower than the requirement that the very existence of this important tribal resource not be placed in jeopardy.

We also do not agree with appellants that the Klamath Tribes have no rights to the suckers because they do not fish or use the suckers “for any purpose today.” That the Tribes do not use endangered species cannot be held against them. In fact, as appellants point out, if the Klamath Tribes’ members were to take the endangered suckers, they would be committing a federal offense.

...

Similarly, that the Yurok and Hoopa Valley Tribes catch significantly more chinook salmon than coho salmon does not necessarily mean that they can sustain a “reasonable livelihood” or “moderate living” through the chinook salmon alone. This is particularly true since the NMFS Biological Opinion indicates that the habitat needs of the chinook and coho salmon are similar and that “populations of chinook salmon ... have declined to levels that have warranted their consideration for listing.” Indeed, the NMFS Biological Opinion also indicates that the Bureau’s proposed 2001 operating plan to continue operating the Klamath Project would have reduced the spawning habitat for the chinook salmon. Moreover, appellants do not dispute the importance of salmon, generally, to the Yurok and Hoopa Valley Tribes. Thus, we do not see how the requirement that these tribes maintain a “reasonable livelihood” or a “moderate living” from the fish can possibly be a lesser standard than the requirement that the coho salmon’s very existence not be placed in jeopardy.

It is not necessary for us to determine the amount of fish that would constitute a “reasonable livelihood” or a “moderate living” for the Tribes. At the bare minimum, the Tribes’ rights entitle them to the government’s compliance with the ESA in order to avoid placing the existence of their important tribal resources in jeopardy. We therefore reject appellants’ argument that the Court of Federal Claims erred when it held that the Tribes had rights to an amount of water that was at least equal to what was needed to satisfy the Bureau of Reclamation’s ESA obligations.

We turn now to appellants’ second main argument noted above: that there are geographic limitations on the Tribes’ rights that exclude Upper Klamath Lake, and accordingly Klamath Project water, from the reach of those rights. The record on appeal is not clear as to whether the Klamath Tribes’ fishing rights include the right of tribe members to take fish from Upper Klamath Lake while they stand on former reservation lands. At the same time, appellants are correct that we do not have evidence before us establishing that water from Upper Klamath Lake flows upstream into the Williamson and Sprague rivers. However, there is evidence before us establishing that the Lost River and shortnose suckers do travel upstream from Upper Klamath Lake into its tributaries. For example, in Baley, the Court of Federal Claims relied upon the Determination of Endangered Status for Shortnose Sucker and Lost River Sucker, which states:

The present or threatened destruction, modification, or curtailment of its habitat or range. Initial biological surveys of the Klamath Basin indicated the presence of large populations of fishes, and suckers in particular. Spawning runs of suckers from Upper Klamath Lake were large enough to provide a major food source for Indians and local settlers. The shortnose sucker and Lost River sucker were staples in the diet of the Klamath Indians for thousands of years. ... Even through the 1960's and 1970's, runs of suckers moving from Upper Klamath Lake up into the Williamson and Sprague Rivers were great enough to provide a major sport fishery that annually attracted many people from throughout the West. The primary species was the larger Lost River sucker, locally known as mullet, but significant numbers of shortnose suckers also occurred in the runs. During the past years, however, [t]he Klamath Tribe and local biologists have been so alarmed by the population decline of both suckers that in 1987, the Oregon Fish and Wildlife Commission closed the fishery for both species and place[d] them on the State's list of protected species.

53 Fed. Reg. at 27,130

As noted, the Klamath Tribes have an implied right to water to the extent necessary for them to accomplish hunting, fishing, and gathering on the former reservation, a primary purpose of the Klamath reservation. See *Adair*, 723 F.2d at 1408–09. This entitlement includes the right to prevent appropriators from utilizing water in a way that depletes adjoined water sources below a level that damages the habitat of the fish they have a right to take. *Id.* While the Klamath Project did not exist at the time of the creation of the Klamath Tribes' reservation, Upper Klamath Lake undisputedly did exist at that time, as it was the boundary of the reservation as it was created. See *Klamath Treaty*, Art. I, 16 Stat. 707. The FWS Biological Opinion indicated that maintaining minimum levels in Upper Klamath Lake was “necessary to avoid jeopardy and adverse modification of proposed critical habitat” for the suckers. Appellants do not challenge the findings of the FWS Biological Opinion. Thus, given the facts of record, the Court of Federal Claims did not err in finding that the Klamath Tribes' implied water rights include Upper Klamath Lake.

As seen above, appellants cite *Oregon Department of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. at 768, for the proposition that “[t]he Supreme Court has ruled that the Klamath Tribes' treaty fishing right extends only to lakes and streams within the Tribes' former reservation.” Appellants' Br. 31. Accordingly, and because the Klamath Project and its additional stored water did not exist in 1864, appellants contend that the Court of Federal Claims “lacked any basis, in law or in fact, to declare a water right for the Tribes in Upper Klamath Lake.” *Id.* *Oregon Department of Fish & Wildlife* does not stand for the broad proposition that appellants assert, however. The case did not involve water rights on the Klamath Tribes' former reservation. Rather, the question before the Court was whether the tribes retained hunting and fishing rights on land the tribes had ceded to the United States from the reservation under a 1901 agreement. See 473 U.S. at 764.

Even if the Klamath Tribes' fishing rights extend only to lakes and streams within their former reservation, this does not mean their reserved water right is so limited. See *John v. United States*, 720 F.3d 1214, 1230 (9th Cir. 2013) (“No court has ever held that the waters on which the United States may exercise its reserved water rights are limited to the water within the borders of a given federal reservation.”). *Winters* itself makes this clear. 207 U.S. at 568, 576–77. In addition, in *Cappaert*, the United States had reserved Devil's Hole Monument, which included an

underground pool that was the only habitat for a type of desert pupfish, for the purpose of preserving the pool. 426 U.S. at 131–32, 141. The Supreme Court held that the United States could enjoin the pumping of groundwater at a ranch two and a half miles from Devil’s Hole. *Id.* at 133, 147. In reaching this conclusion, the Court held that the “Reserved-Water-Rights Doctrine” was not limited to surface water and could be extended to groundwater as it is “based on the necessity of water for the purpose of the federal reservation.” *Id.* at 142–43. Likewise, water outside the Klamath Tribes’ former reservation is necessary for the purposes of the tribes’ reservation—to secure to the Tribes a continuation of their traditional hunting and fishing lifestyles.

Relatedly, we do not agree with appellants that the geography of the Klamath Basin and the distance between Upper Klamath Lake and the Yurok and Hoopa Valley Tribes’ reservations mean that Klamath Project water is not subject to those tribes’ reserved water rights. It is true that, downstream from Upper Klamath Lake, between the Iron Gate Dam and the Hoopa Valley reservation (and subsequently, the Yurok reservation) there are other water sources. Specifically, the Trinity River joins the Klamath River at the Hoopa Valley reservation, and there are several other tributaries to the Klamath River along the way. However, appellants’ focus on the distance between the tribes’ reservations, on the one hand, and the Project water in Upper Klamath Lake and Iron Gate Dam, on the other hand, is misplaced. In *Winters*, the Supreme Court held that the 1888 treaty that established the Fort Belknap reservation had also impliedly reserved water that was being diverted upstream from the reservation. 207 U.S. at 576–77. Not only does the Klamath River flow from Upper Klamath Lake through the Yurok and Hoopa Valley Tribes’ reservations, but the river’s very path defines the borders of the Yurok reservation. Moreover, as set forth in the NMFS Biological Opinion, the varying water flows at Iron Gate Dam were designed to provide suitable habitat, and adequate water temperatures and quality, to avoid the likelihood of jeopardizing the existence of the coho salmon. They also were designed to avoid the destruction or adverse modification of the critical habitat of the coho salmon. Thus, while the fish may be taken by members of the Yurok and Hoopa Valley Tribes as they stand on their reservations, the habitat of the coho salmon includes waters both downstream from the reservations and also upstream from the reservations to the Iron Gate Dam. The dam is the stopping point for the salmon’s spawning migration because there is no way for the fish to pass through the dam. In addition, the dam controls the water of the Klamath River that flows to it from Upper Klamath Lake. As it is the habitat for the salmon they fish, and as it flows through their reservations, the Yurok and Hoopa Valley Tribes have an implied water right that includes the Klamath River and the flows therein as controlled by the Iron Gate Dam.

We thus conclude that the Court of Federal Claims did not err when it determined that the Tribes’ reserved water rights encompass Klamath Project water. We turn now to the question of whether the Tribes’ rights were properly exercised.

As noted, appellants contend that it was contrary to Oregon law, specifically, Or. Rev. Stat. § 540.045(4), and thus the Reclamation Act, for Klamath Project water to be “delivered” to anyone other than the Klamath farmers without there first being a final adjudication and quantification. We disagree. [The court concluded that tribal water right arising from federal land reservations are federal water rights not governed by state laws concerning waiver and did not need to be quantified to be enforced. Nor did the Reclamation Bureau lack authority to halt the deliveries.]

For the foregoing reasons, we agree with the Court of Federal Claims that appellants' water rights were subordinate to the Tribes' federal reserved water rights. We therefore see no error in the court's holding that the Bureau of Reclamation's action in temporarily halting deliveries of Klamath Project water in 2001 did not constitute a taking of appellants' property. . . .

Page 562. Add before the last paragraph of note 1:

In 2003, the Navajo Nation sued the United States Department of the Interior over the development of shortage guidelines related to the management of the Colorado River. The Nation alleged that Interior had breached its trust duties to account for and protect the Nation's reserved rights to water in the development of those guidelines. After protracted attempts at settlement, the litigation proceeded and, in 2017, the United States Court of Appeals for the Ninth Circuit reinstated the Nation's breach of trust claim, finding that it fit within the Administrative Procedures Act's waiver of the United States' immunity from suit. *Navajo Nation v. Dept. of the Interior*, 876 F.3d 1144 (9th Cir. 2017). Thereafter, however, the United States District Court for the District of Arizona again dismissed the Nation's claims, reasoning that they required the court to decide whether the Nation has any reserved rights to water; an issue reserved (in the court's view) to the Supreme Court by *Arizona v. California*, presented *supra*, at page 481. *Navajo Nation v. Dept. of the Interior*, 2018 WL 6506957, *2-4 (D. Ariz. Dec. 11, 2018). The Nation has again appealed to the Ninth Circuit, and oral arguments in the case are scheduled for October 16, 2020.

Page 566. Add to the end of the first paragraph of the Note on the McCarran Amendment:

For a thorough reexamination of the legislative history of the McCarran Amendment, concluding that there is no evidence that Congress intended the reach of the waiver of sovereign immunity to extend to tribal water rights not acquired under state law, see Dylan Hedden-Nicely, *The Legislative History of the McCarran Amendment: An Effort to Determine Whether Congress Intended for State Court Jurisdiction to Extend to Indian Reservations*, 46 *Env'tl. L.* 845 (2016).

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. For information on water rights settlements negotiations through 2017, see *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 605. Add to the end of the Note on the Non-Indian Backlash:

In recognition of one historical injustice perpetrated in the context of tribal treaty rights, on July 10, 2020, the Washington Supreme Court issued an order repudiating its 1916 decision in *State v. Towessnute*, 154 P. 805, 89 Wash. 478 (1916). Order No. 13083-3 (July 10, 2020), <http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/130833%20Supreme%20Court%20Order.pdf>. In doing so, the Court noted that, its 1916 opinion upholding Mr. Towessnute’s state law conviction for exercising his treaty reserved rights to fish:

is an example of . . . racial injustice . . . and . . . fundamentally misunderstood the nature of treaties and their guarantees, as well as the concept of tribal sovereignty. For example, that old opinion claimed: “The premise of Indian sovereignty we reject . . . Only that title [to land] was esteemed which came from white men, and the rights of these have always been ascribed by the highest authority to lawful discovery of lands occupied, to be sure, but not owned, by any one before.” [154 P. at 807.] And that old opinion rejected the arguments of Mr. Towessnute and the United States that treaties are the supreme law of the land. It also rejected the Yakama Treaty’s assurance of the tribal members’ right to fish in the usual and accustomed waters, in the usual and accustomed manner, as the tribe had done from time immemorial. This court characterized the Native people of this nation as “a dangerous child,” who “squander[ed] vast areas of fertile land before our eyes.”

State v. Towessnute, Order No. 13083-3 at 3-4 (July 10, 2020).

The court issued its order in response to a request from Mr. Towessnute’s descendants who, with support from the State’s Attorney General, requested the court to review its earlier decision. The court took the opportunity “to repudiate this case, its language, its conclusions, and its mischaracterization of the Yakama people, who continue the customs, traditions, and responsibilities that include the fishing and conservation of the salmon in the Yakima River. . . . We cannot forget our own history, and we cannot change it. We can, however, forge a new path forward, committing to justice as we do so.” Justice Raquel Montoya-Lewis, the first Native American to sit on the Washington Supreme Court, announced and read the court’s order: *Washington State Supreme Court Order 13083-3: Reading by Justice Raquel Montoya-Lewis*, YouTube (July 10, 2020), <https://youtu.be/mDD-zy573Vo>.

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:

At a 2019 symposium celebrating the fiftieth anniversary of Judge Belloni’s decision, Professor Charles Wilkinson summarized these important findings:

Judge Belloni[’s] ... opinion cut[] through the existing confusion and present[ed] the case in the context of traditional Indian law and the demands of an emerging new era in public natural resource and wildlife law. He recognized that the treaties must be read to reflect the intent of the tribes and required strong protection of tribal off-reservation fishing rights. He ruled, which had never been done before, that tribes must have a specific share of the resource. He did not put a number on it, but called it a “fair share.” As for the case as a whole, he knew that his decision would have to be employed in a real and complex world on real rivers, on specific runs in particular areas at designated times, and declared that the court would keep continuing jurisdiction to resolve continuing conflicts, a judicial remedy rarely used at the time. That jurisdiction remains in force today.

Charles Wilkinson, *The Belloni Decision: A Foundation for the Northwest Fisheries Cases, the National Tribal Sovereignty Movement, and an Understanding of the Rule of Law*, 50 *Envtl. L.* 331, 340 (2020). As Professor Wilkinson describes, Judge Belloni’s decision was not only innovative for its time but it has had long lasting influence on judicial treaty interpretation and the balancing of tribal and state interests. See Michael C. Blumm & Cari Baermann, *The Belloni*

Decision and Its Legacy: United States v. Oregon and Its Far-Reaching Effects after a Half-Century, 50 *Envtl. L.* 347, 372-83 (2020) (discussing the decision as a catalyst for long-lasting conservation plans, continuing judicial oversight, and co-management of natural resources); Monte Mills, *Beyond the Belloni Decision: Sohappy v. Smith and the Modern Era of Tribal Treaty Rights*, 50 *Envtl. Law* 387, 397-410 (2020) (analyzing main principles of Judge Belloni’s decision and tracing them through treaty rights cases in the Great Lakes region).

Page 644. Add at the end of note 5:

In December 2019, the “Columbia River In-Lieu and Treaty Fishing Access Sites Improvement Act,” which authorizes \$11 million from 2020-2025 to improve and maintain the facilities at these “in-lieu” fishing sites, became law. Pub. L. 116-99, 33 Stat. 3254 (Dec. 202019).

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. As of the date of this update, the case is on appeal before the Ninth Circuit.

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). In January 2020, the agency proposed such a waiver and sought public input on that proposal. Request for Public Comment Regarding Proposed Waiver and Regulations Governing the Taking of Marine Mammals, 85 Fed. Reg. 5,196 (Jan. 29, 2020).

IX. International Approaches to Indigenous Lands and Resources

Page 696. Add to end of the Note: U.N. Declaration on the Rights of Indigenous Peoples

The decade starting in 2010 was supposed to be Indigenous Decade, shining a light on indigenous rights worldwide. Using the U.N. Declaration of the Rights of Indigenous Peoples as the yardstick by which to evaluate decisions by the United States, Professor Christine Zuni Cruz examines how American indigenous claims fared during the Indigenous Decade. In her review of court decisions, she focuses in part on decisions related to land and the environment. See Christine Zuni Cruz, *The Indigenous Decade in Review*, 73 SMU L. Rev. F. 140 (2020) <https://doi.org/10.25172/slrf.73.1.13>

For additional information on developments related to the U.N. Declaration on Indigenous Peoples, the University of Colorado School of Law and the Native American Rights Fund developed a new website, <https://un-declaration.narf.org/>, which is the online presence for their joint Project to Implement the United Nations Declaration on the Rights of Indigenous Peoples in the United States.

Page 720. Add a Note 5. Other Claims Under International Law.

Other indigenous communities within the United States have looked to international law to protect their natural resources. For example, for a discussion of how the Amah Mutsun community could use international indigenous law to protect their sacred land, *Juristac*, see Zartner, Dana, *Justice for Juristac: Using International and Comparative Law to Protect Indigenous Lands*, 18 Santa Clara J. Int'l L. 175 (2020).