

Native American Natural Resources Law

Cases and Materials

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August 2021

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NATIVE AMERICAN NATURAL RESOURCES LAW

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Teacher's Update for 2021

August 2021

Michael C. Blumm, Elizabeth Ann Kronk Warner & Monte Mills*

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, upheld a county decision 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); see also Jeffrey B. Litwak, *How Much Evidence Should We Need to Protect Cultural Sites and Treaty Rights?*, 50 Env'tl. L. 447 (2020) (suggesting that courts and administrators should reduce the amount of evidence required from tribes to protect their sacred off-reservation rights).

Page 11. Add just before subsection B:

Monte Mills, *Beyond the Belloni Decision: *Sohappy v. Smith* and the Modern Era of Tribal Treaty Rights*

50 Env'tl. L. 387, 388-89 (2020)

Entering the second millennium's third decade, American Indian tribes and their members continue the lifeways, cultures, and traditions that they and their ancestors have practiced since time immemorial. These practices, including activities like hunting, fishing, and gathering, are interwoven with the cultures, ceremonies, and spirituality of many tribal societies, making their ongoing practice an essential aspect of protecting and enhancing tribal existence. Unlike prior decades, however, tribes and their expanding exercise of sovereignty are now two generations into a meteoric rise from the depths of the termination era of the mid-Twentieth Century and leading the way to represent those values and ensure their survival.

B. Legal Protection of Religion and Cultural Resources

* Professor Blumm thanks Hailey Broeker & Ivy-Rose Kramer, 2Ls, Lewis and Clark Law, for research assistance.

Page 22. Add to the end of note 3.

Recently, the question of the ability of tribes and Indians to protect sacred sites has come up in the context of lithium mining. Increasingly, companies are looking to sites near and within Indian country to mine lithium (which is needed to meet the Biden Administration's clean energy targets), but such development threatens sacred sites. Maya L. Kapoor, *Mining for lithium, at a cost to Indigenous religions*, High Country News (June 9, 2021), available at: <https://www.hcn.org/issues/53.7/indigenous-affairs-mining-for-lithium-at-a-cost-to-indigenous-religions> For a recent article discussing legal protections for indigenous sacred sites, see Michalyn Steele & Stephanie Hall Barclay, *Rethinking Protections for Indigenous Sacred Sites*, 134 Harv. L. Rev. 1294 (2021).

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

The tribes with treaty fishing rights on the Columbia River failed to provide details on 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 the 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. Blumm & Litwak, cited above, at 28-29. The issue remains before the Oregon Court of Appeals, although the case is in settlement negotiations.

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.

Page 44. Before the Note on Cultural Protection Under Other Statutes:

The district court in *Hopi Tribe* case has not issued an opinion, despite the fact that the case was filed over three years ago. In the meantime, Secretary of the Interior Deb Haaland, the first Native American ever to hold that position, visited the Bears Ears region in April 2021 to gather information for recommendations to President Joseph R. Biden regarding whether to restore the Bears Ears National Monument as originally proclaimed by President Obama. See Joshua Partlow, *Tourists and looters descend on Bears Ears as Biden mulls protections*, WASH. POST (Apr. 8, 2021), <https://www.washingtonpost.com/nation/2021/04/08/bears-ears-haaland/>. During her visit, Secretary Haaland met with tribal representatives, including representatives from the Bears Ears Inter-Tribal Coalition, and, in June 2021, reportedly submitted recommendations to the White House in support of restoring the Monument's original boundaries. See *BEITC responds to Haaland's monument recommendation; Pushes for expanded boundaries*, BEARS EARS INTER-TRIBAL COALITION (June 16, 2021), <https://bearssearscoalition.org/beitc-responds-to-haalands-monument-recommendation-pushes-for-expanded-boundaries/>.

Page 47. Add new paragraph just before subsection b. Tribal consultation:

In June 2020, the D.C. Circuit upheld the cancellation of a 1980s-era oil and gas lease in the Badger-Two Medicine Area of Montana. *Solenex, LLC v. Bernhardt*, 962 F.3d 520 (D.C. Cir. 2020). That area, taken from the Blackfeet Nation’s reservation by a dubious 1895 “agreement,” holds a special place in the Nation’s history and tradition and, after decades of study, was designated by the U.S. Forest Service as the “‘Badger-Two Medicine Blackfoot Traditional Cultural District’ [and] as eligible for listing in the National Register of Historic Places based on the Blackfeet Tribe’s use of ‘the lands for traditional purposes for generations[.]’” *Id.* at 524. Because the oil and gas lease would authorize drilling within that area and the effects of such drilling on those values could not be mitigated, the Secretary of the Interior ultimately determined that, to comply with the NHPA, the lease would have to be cancelled. *Id.* at 525.

The leaseholder challenged the cancellation, and the D.C. district court invalidated it, ruling that the agency’s long delay in making the decision, and the leaseholder’s reliance on the granting of the lease prohibited its cancellation. *Solenex v. Jewell*, 334 F.Supp. 3d 174 (D.D.C. 2018). But the D.C. Circuit reversed, upholding the lease’s cancellation, ruling that delay did not make cancellation invalid, and that the leasee’s reliance interests were misplaced given the substantial evidence in the record about the multi-step leasing process and the importance of the area to the Blackfeet. *Solenex v. Bernhardt*, 962 F.3d 520, 528-29 (D.C. Cir. 2020) (“In short, from the Lease’s inception, the various leaseholders, including Solenex, were aware that the NEPA and Historic Preservation Act analyses would be necessary prior to any surface-disturbing activity and that drilling permits were not guaranteed.”) On July 22, 2020, Senator John Tester introduced new legislation to designate the Badger-Two Medicine area as a “Cultural Heritage Area,” requiring particular protections, including consultation with the Blackfeet Tribe on its management. See Rob Chaney, *Badger-Two Medicine gets protection bill*, The Missoulian (July 22, 2020), https://missoulian.com/news/local/badger-two-medicine-gets-protection-bill/article_717d5f5c-b7fa-5cde-a687-378515f0849a.html.

Page 55. Add new note 3.

3. Tribal Co-Management on Federal Public Lands. Faced with the challenges posed by federal management of off-reservation sites of tribal importance, many tribes and their allies have advocated for more authority in the actual management of federal public lands. See, e.g., National Congress of American Indians, Resolution No. PDX-20-003, Calling for the Advancement of Meaningful Tribal Co-Management of Federal Lands (Nov. 2020), https://www.ncai.org/attachments/Resolution_FamhBAHVFLnQfgvKBsgXjzIrdYAbDzKIaVtsEdSjWibSZtJdkFR_PDX-20-003%20SIGNED.pdf; David Treuer, *Return the National Parks to the Tribes*, *The Atlantic* (Apr. 12, 2021), <https://www.theatlantic.com/magazine/archive/2021/05/return-the-national-parks-to-the-tribes/618395/>. In many places, however, tribal co-management is already occurring, including Kasha-Katuwe Tent Rocks National Monument and Santa Rosa and San Jacinto Mountains National Monument. See Martin Nie, *The Use of Co-Management and Protected Land-Use Designations to Protect Tribal Cultural Resources and Reserved Treaty Rights on Federal Lands*, 48 Nat. Resources J. 1, 29-30 (2008). The Kasha-Katuwe Tent Rocks co-management program features collaboration between the Bureau of Land Management (BLM) and Cochiti Pueblo to

maintain trails, regulate visitor services, and manage law enforcement on the land. *Id.* at 30. To a lesser extent, Santa Rosa and San Jacinto Mountains National Monument in southern California reflects tribal co-management between the Agua Caliente Band of Cahuilla Indians, the BLM, and the U.S. Forest Service. *Id.* at 30–31. While these and other examples demonstrate the existing legal and policy avenues through which tribes may be able to seek and exercise greater co-management authority, additional executive and legislative actions could be taken to further support and expand such opportunities. See Monte Mills & Martin Nie, *Bridges to a New Era: A Report on the Past, Present, and Potential Future of Tribal Co-Management on Federal Public Lands*, 44 Pub. Land & Res. L. Rev. 49 (2021); see also Michael C. Blumm & Lizzy Penock, *Tribal Consultation: Toward Meaningful Collaboration with the Federal Government*, 33 Colo. Nat. Res., Energy & Env'tl. L. Rev. 1 (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3841809.

On April 20, 2021, the Biden Administration's Acting Assistant Secretary of the Army, Jaime Pickham, issued a memorandum rescinding Trump Administration guidance that the Corps of Engineers need not consult with tribes when making jurisdictional determinations under the Clean Water Act. The Pinkham memorandum instead called for “regular, meaningful, and robust consultation” with tribal nations, https://www.eenews.net/assets/2021/04/21/document_daily_05.pdf.

Page 69. After the Note on the Native American Graves Protection and Repatriation Act *Note on Resource Protection through Personhood*

In order to protect their usufructuary rights, tribes recently began recognizing personhood rights in natural resources. This development among tribes in the United States parallels an international movement to enhance protection of historically and culturally important natural resources, often related to fishing and gathering rights. Advocates of tribes' recognizing personhood rights to natural resources hope that personhood will provide an alternative basis to achieve standing, or the right to defend the resource in court (and perhaps in legislatures). No tribal or federal court has yet addressed whether granting personhood provides standing, however.

The doctrine of standing is a threshold hurdle to obtaining federal court protection of natural resources in the United States. Groups wishing to allege harm to natural resources must meet the standing requirements of Article III of the U.S. Constitution which limits judicial review to “cases and controversies.” *Town of Chester, New York v. Laroe Estates, Inc.*, 137 S.Ct. 1645 (2017); *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972) (Douglas, J. dissenting). The Court majority in *Sierra Club v. Morton* refused standing for an environmental group to represent a mountain against a planned ski resort because “a mere ‘interest in a problem,’ no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization ‘adversely affected’ or ‘aggrieved’” under the Administrative Procedure Act. *Id.* Justice Douglas' dissent argued that unless groups alleging harm to the natural resources had standing harm to the environment and natural resources could never be litigated on the merits. Douglas compared natural resources with corporations and other artificial legal entities, opining that if non-living entities could be legal persons for judicial review, so could ecosystems and natural resources, especially because the environment “sustain[s] and nourish[es]” life. 405 U.S. 727, at 742–43 (Douglas, J., dissenting).

Douglas' dissent anticipated more recent tribal efforts to recognize various natural resources as "persons" for purposes of having legal standing. For example, the White Earth Band of Ojibwe and various other groups of Chippewa passed a resolution in 2018 recognizing the legal rights of wild rice (Manoomin) on ceded lands in Minnesota. The Chippewa claim these rights under inherent sovereignty, treaty harvesting rights on established in the 1855 Chippewa Treaty, and their "one-half undivided interest" in the "ecosystem that supports [their] way of life." The tribes claim authority to protect these rights pursuant to sections 401 and 404 of the Clean Water Act because water quality is integral to growing Manoomin as well as the Tribe's other usufructuary rights. Perhaps anticipating future conflicts, the Chippewa asserted their right to enforce Manoomin's rights on ceded lands against both governments and private parties. The resolution declared Manoomin's inherent rights to "exist, flourish, regenerate, and evolve," as part of the right to a healthy environment free from "human-caused global warming impacts." 1855 Treaty Authority, Resolution Establishing Rights of Manoomin, Resolution Number 2018-05 (Dec. 5, 2018).

Similarly, in 2019, the Yurok Tribe of Northern California passed a resolution granting rights to We-roy (the Klamath River) under Tribal law. According to the resolution, the Klamath River has the rights to "exist, flourish, and naturally evolve; to have a clean and healthy environment free from pollutants; to have a stable climate free from human-caused climate impacts; and to be free from contamination by genetically engineered organisms." The Yurok Tribal Council, Resolution Establishing the Rights of the Klamath River, Resolution 2 (May 9, 2019). The Tribe declared it possessed an inherent right to fish the waters of the Klamath, and that environmental degradation threatens the Tribe's use of the river's ecosystem. The resolution notified both California and the federal government that the Yurok tribe granted personhood status to the Klamath River and claims to possess standing in causes of action against infringement of the river's rights. *Id.*

Christine Ochoa in *Nature's Rights*, 10 Mich. J. Admin. & Env'tl. L. (forthcoming 2021), has explained that at least five tribes have implemented rights of nature, including not only the Yurok and the White Earth Band of the Ojibwe, but also the Navajo Nation, the Ho-Chunk Nation, the Ponca Nation of Oklahoma. The hope is that these rights will be adjudicated in tribal court and upheld in federal court.

II. Some Basics of Federal Indian Law

B. The Cherokee Cases

Page 80. Add to the top of the page before *Cherokee Nation v. Georgia*:

Despite Georgia's efforts to extend its authority and avoid the Supreme Court's authority, there remained the promises made between the United States and the Cherokee Nation in treaties leading up to the Cherokee cases. These agreements were part of a long tradition of government-to-government relations and the Supreme Court's consideration of the United States treaties with the Cherokee Nation would come to define the basic, foundational principles of federal Indian law:

Upon its founding, the United States acceded to a long tradition of “linking arms together” with Indian nations by continuing to engage with those nations through treaties. By the time the Constitution was ratified, tribes were negotiating and entering treaties with European colonial powers for over 175 years. The practice of reaching terms on a government-to-government basis to serve the mutual interests of both sovereigns was already well-accepted and represented an important and ongoing bond rooted in ceremony, especially from the tribal perspective. Given that long history, the critical national interests served by treaty arrangements with native people, and the penchant for colonists and their local interests to interfere with those commitments, it is not surprising that the ratified Constitution included a provision ensuring that the treaties made or yet to be made by the United States would be the supreme law of the land. But, although the Supremacy Clause establishes the primacy of treaties as a legal matter, it was not until Chief Justice John Marshall began interpreting and applying that clause in the context of treaties between the United States and the Cherokee Nation that the true weight of Indian treaties became clear.

Monte Mills, *Beyond the Belloni Decision: Sohappy v. Smith and the Modern Era of Tribal Treaty Rights*, 50 *Envtl. L.* 387, 393 (2020).

C. Tribal Sovereignty

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

The number of federally recognized tribes was 574 as of January 2021, according to the most recent list of federally recognized tribes published by the Bureau of Indian Affairs. Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs, 86 *Fed. Reg.* 7,554 (Jan. 29, 2021); *see also* National Conference of State Legislatures, <https://www.ncsl.org/research/state-tribal-institute/list-of-federal-and-state-recognized-tribes.aspx#federal> (also containing a list of state-recognized tribes).

Page 100. First full paragraph, line 7:

Errata: should be “nurtured,” not nurture.

E. Indian Country

Page 121. Add at the end of the note:

Enactment of the Indian Reorganization Act in 1934 encouraged tribes to enact their own laws and establish their own tribal courts. According to the Bureau of Justice Statistics of the U.S. Department of Justice, “[m]odern tribal courts are under tribal control, and are directly oriented to the needs of tribal members. Some tribes have developed a hybrid or blended judicial system, incorporating the dispute resolution elements of indigenous or Code of Federal Regulations (CFR) courts and a more modern focus to ensure due process. In 2002, about 60% (188) of all the tribes had some form of a tribal justice system. The court systems operating in Indian country vary by

tribe. The Indian country judicial system revolves around a core of four legal institutions—Court of Indian Offenses, tribal courts of appeal, tribal courts of general jurisdiction, and indigenous forums. See <https://www.bjs.gov/index.cfm?ty=tp&tid=29>.

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). The Court ultimately affirmed the Tenth Circuit in a per curiam decision following its historic opinion in *McGirt v. Oklahoma*, discussed below. 591 U.S. ____, 140 S.Ct. 2452 (2020).

Page 127. Add to end of note 3:

On June 23, 2021, the Biden Administration announced the transfer of over 18,000 acres of public land that makes up the National Bison Range into trust for the Confederated Salish and Kootenai Tribes of the Flathead Reservation. 86 Fed. Reg. 33345 (June 24, 2021). This decision was made as part of the Administration’s efforts to restore tribal homelands.

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 & Res. 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.

A recent legacy of *Carcieri* is *Littlefield v. Mashpee Wampanoag Tribe*, 951 F.3d 30 (1st Cir. 2020), in which the First Circuit upheld a district court’s reversal of the Obama Administration’s 2015 decision to take 300-some acres into trust in Massachusetts because the Tribe was not under federal jurisdiction in 1934, even though the Tribe’s ancestry can be traced to the natives that shared a fall harvest dinner with the Pilgrims in 1621. The Trump Administration quickly rescinded the land-into-trust decision. See Philip Marcelo, *Federal Government Revoking Reservation Status for Mashpee Wampanoag Tribe’s 300 Acres*, Time Mag. (March 30, 2020) (also noting that the Trump Administration revoked the trust status of lands owned by the Santa Ynez Band of Chumash Indians. The Santa Ynez Band of Chumash Indians also had some 1400 acres of land that it planned for development lose trust status due a district court decision that ruled that the official who upheld an land-into-trust status decision on the last day of the Obama Administration lacked the authority to do so. *Crawford-Hall v. United States*, Case No. 2:17-cv-01616-SVW-AFM (C.D. Cal, Feb. 19, 2019).

Page 151. Add to the end of note 2:

Like the Osage Nation, the status of other reservations in eastern Oklahoma, including those of the so-called “Five Civilized Tribes” who had been removed to the area during the early 19th century, remained uncertain. In 2017, the United States Court of Appeals for the Tenth Circuit determined that the reservation of the Muscogee (Creek) Nation, which had been reserved via a series of treaties with the United States, had not been diminished. *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017). After accepting the case for review and hearing argument, the United States Supreme Court did not decide the case and, instead, restored it to the calendar for the subsequent term. Justice Neil Gorsuch took no part in that case.

On April 17, 2019, a petition for a writ of certiorari and motion for leave to proceed in forma pauperis was filed with the United States Supreme Court by Jimcy McGirt, a *pro se* defendant. Mr. McGirt had been convicted of three sexual offenses by an Oklahoma State Court but, as in *Murphy*, Mr. McGirt consistently argued that the State of Oklahoma did not have the authority to prosecute him because he is an enrolled citizen of the Seminole Nation and the alleged crimes occurred within the boundaries of the Muscogee (Creek) Reservation as set forth in prior treaties. This is because the Major Crimes Act provides that, within “the Indian country,” “[a]ny Indian who commits” certain enumerated offenses “against the person or property of another Indian or any other person” “shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.” Because state courts generally do not have authority to try cases occurring within Indian country, McGirt argued that the Oklahoma courts should not have authority to hear the charges against him as the crimes occurred within Indian country – the Muscogee (Creek) Reservation. The case raised essentially the same legal question as *Murphy*, but the Court opted to grant certiorari in this case rather than rehear *Murphy* for a second time. Justice Gorsuch was not recused from hearing the *McGirt* case. The Court heard arguments in the case on May 11, 2020 and, on July 9, 2020, issued a 5-4 decision agreeing with Mr. McGirt’s position and confirming the continuing existence of the Muscogee (Creek) Reservation. 591 U.S. ___, 140 S.Ct. 2452 (2020)

Writing for the majority, Justice Gorsuch opened his opinion with prophetic and powerful words recognizing the historical context of the Muscogee Creek’s removal from their original homelands:

On the far end of the Trail of Tears was a promise. Forced to leave their ancestral lands in Georgia and Alabama, the Creek Nation received assurances that their new lands in the West would be secure forever. In exchange for ceding “all their land, East of the Mississippi river,” the U. S. government agreed by treaty that “[t]he Creek country west of the Mississippi shall be solemnly guarantied [sic] to the Creek Indians.” Treaty With the Creeks, Arts. I, XIV, Mar. 24, 1832, 7 Stat. 366, 368 (1832 Treaty). Both parties settled on boundary lines for a new and “permanent home to the whole Creek nation,” located in what is now Oklahoma. Treaty With the Creeks, preamble, Feb. 14, 1833, 7 Stat. 418 (1833 Treaty). The government further promised that “[no] State or Territory [shall] ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves.” 1832 Treaty, Art. XIV, 7 Stat. 368.

Today we are asked whether the land these treaties promised remains an Indian reservation for purposes of federal criminal law. Because Congress has not said otherwise, we hold the government to its word.

The majority opinion went on to rule that disestablishment was a power only Congress could exercise, further emphasizing *Solem*'s direction to start with the relevant congressional text:

Under our Constitution, States have no authority to reduce federal reservations lying within their borders.

* * *

Likewise, courts have no proper role in the adjustment of reservation borders. Mustering the broad social consensus required to pass new legislation is a deliberately hard business under our Constitution. . . . “[O]nly Congress can divest a reservation of its land and diminish its boundaries.” *Solem*, 465 U. S., at 470. So it’s no matter how many other promises to a tribe the federal government has already broken. If Congress wishes to break the promise of a reservation, it must say so. History shows that Congress knows how to withdraw a reservation when it can muster the will. Sometimes, legislation has provided an “[e]xplicit reference to cession” or an “unconditional commitment . . . to compensate the Indian tribe for its opened land.” *Ibid.* Other times, Congress has directed that tribal lands shall be “restored to the public domain.” *Hagen v. Utah*, 510 U. S. 399, 412, 114 S. Ct. 958, 127 L. Ed. 2d 252 (1994) (emphasis deleted). Likewise, Congress might speak of a reservation as being “discontinued,” “abolished,” or “vacated.” *Mattz v. Arnett*, 412 U. S. 481, 504, n. 22, 93 S. Ct. 2245, 37 L. Ed. 2d 92 (1973). Disestablishment has “never required any particular form of words,” *Hagen*, 510 U. S., at 411. But it does require that Congress clearly express its intent to do so, “[c]ommon[ly with an] ‘[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests.’” *Nebraska v. Parker*, 577 U. S. 481, ___ - ___ (2016) (slip op. at 6).

Where, according to the majority, the statutory text is clear and Congress has not clearly disestablished a reservation, the remaining two prongs of *Solem*'s test become unnecessary:

To avoid further confusion, we restate the point. There is no need to consult extratextual sources when the meaning of a statute’s terms is clear. Nor may extratextual sources overcome those terms. The only role such materials can properly play is to help “clear up . . . not create” ambiguity about a statute’s original meaning. *Milner v. Department of Navy*, 562 U. S. 562, 574 (2011). And, as we have said time and again, once a reservation is established, it retains that status “until Congress explicitly indicates otherwise.” *Solem*, 465 U. S., at 470 (citing *Celestine*, 215 U. S., at 285); see also *Yankton Sioux*, 522 U. S., at 343 (“[O]nly Congress can alter the terms of an Indian treaty by diminishing a reservation, and its intent to do so must be clear and plain”) (citation and internal quotation marks omitted). . . .

In analyzing and dismissing Oklahoma’s arguments about the potentially “transform[ative]” impacts of the Court’s decision on the State’s understanding of its authority, the Court made clear that “the ‘rule of law’ must prevail over the ‘rule of the strong,’ and that the promises made to Tribes cannot be diminished by claims of disruption or convenience, or by narratives grounded in a course of illegal action over time.” Justice Gorsuch then closed the majority’s opinion with a recognition that the continuing importance of treaty promises demand clear abrogation from Congress if those guarantees are to be rescinded:

The federal government promised the Creek a reservation in perpetuity. Over time, Congress has diminished that reservation. It has sometimes restricted and other times expanded the Tribe’s authority. But Congress has never withdrawn the promised reservation. As a result, many of the arguments before us today follow a sadly familiar pattern. Yes, promises were made, but the price of keeping them has become too great, so now we should just cast a blind eye. We reject that thinking. If Congress wishes to withdraw its promises, it must say so. Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right.

The Court’s momentous *McGirt* decision affirmed the status of the Muscogee (Creek) Reservation as Indian country for purposes of the Major Crimes Act and likely portends similar results for other reservations and legal purposes across the eastern half of what is now the State of Oklahoma. The decision also reframes the *Solem* test to ensure that the express language used (or not used) by Congress is the paramount factor in determining whether a reservation established by a treaty has been subsequently disestablished. Where Congress’ words are unambiguous and treaty-promised lands have not been expressly withdrawn, the contemporaneous circumstances surrounding the opening of the reservation and subsequent events like demographic history are irrelevant. The dismissal of these “claims of disruption or convenience” in favor of historic treaty guarantees marked an important victory for tribal interests before a Court that had, in recent decades, been unwilling to uphold such promises. See, e.g., David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 Cal. L. Rev. 1573, 1576 (1996) (arguing that the Court “became susceptible to arguments that the impacts on non-Indians were too severe, and began aberrational departures from the presumption that tribal sovereignty survives until curtailed by Congress.”) The outcome prompted one commentator to suggest that, “[i]n the long Indigenous struggle for justice,” *McGirt* could be “one of the most important Supreme Court cases of all time.” Julian Brave NoiseCat, *The McGirt Case Is a Historic Win for Tribes*, *The Atlantic* (July 12, 2020), <https://www.theatlantic.com/ideas/archive/2020/07/mcgirt-case-historic-win-tribes/614071/>.

The first legacy of *McGirt* was *Oneida Nation v. Village of Hobart*, No. 19-1981, 958 F.3d 664 (7th Cir. 2020), in which the court reversed a lower court and ruled that the Nation need not obtain a village permit for its annual Big Apple Fest, held partially on land within the village, because the land remained Indian Country, stating: “We read *McGirt* as adjusting the *Solem* framework to place a greater focus on statutory text, making it even more difficult to establish the

requisite congressional intent to disestablish or diminish a reservation. The Oneida Nation prevails under both the *Solem* framework and the adjustments made in *McGirt*.” *Id.* at 668.

In the wake of *McGirt*, many commentators have offered their initial predictions for the long-term impacts of the decision. See Elizabeth Ann Kronk Warner & Heather Tanana, *Indian Country Post McGirt: Implications for Traditional Energy Development and Beyond*, 45 *Harvard Environmental L. Rev.* 249 (2021) (focusing on the environmental and natural resources impacts of the Court’s decision in *McGirt*, with emphasis on environmental justice); Robert J. Miller & Torey Dolan, *The Indian Law Bombshell: McGirt v. Oklahoma*, 101 *B.U. L. Rev.* ___ (forthcoming 2021) (arguing that *McGirt* clarifies “*Solem* did not create a three ‘step’ test” and, absent express congressional intent in subsequent statutes, the Court will not imply diminishment) (quoting *McGirt*, 140 S.Ct. at 2468)); Matthew L.M. Fletcher, *Muskrat Textualism*, 115 *Northwestern L. Rev.* ___ (forthcoming 2022) (asserting *McGirt* creates a “sea change” in Indian law textual analysis, moving from “Canary textualism,” which treats tribes as passive and powerless in the face of Congressional action, to “Muskrat textualism,” which recognizes tribes as equal and active participants in governing Indian Country); Elizabeth A. Reese, *Welcome to the Maze: Race, Justice, and Jurisdiction in McGirt v. Oklahoma*, 2020 *U. Chi. L. Rev. Online* 1, 3 (2020) (theorizing that *McGirt*’s rejection of the “Indian Character” test may indicate that the Court is prepared to revisit and discard old doctrines that “mistreated Indian tribes”); Dylan R. Hedden-Nicely & Stacy L. Leeds, *A Familiar Crossroads: McGirt v. Oklahoma and the Future of the Federal Indian Law Canon*, 51 *New Mex. L. Rev.* 300 (2021) (claiming that while *McGirt* seemed to solidify a shift toward a consistent approach rooted in foundational principles, the passing of Justice Ginsberg and the consequent shifting make-up of the Supreme Court again thrust Federal Indian Law into a crossroads).

Page 152. Note 4, lines 2 & 6:

Errata: the proper name of the Tribe at issue is the Ute Tribe of the Uintah and Ouray Reservation.

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 to the end of note 1:

Following the Second Circuit’s decision in 2014, the parties cross-moved for summary judgement, and the district court again ruled in favor of the Cayuga Indian Nation, holding that tribal sovereign immunity from suit bars the County from pursuing tax enforcement actions. The County appealed to the Second Circuit, arguing that the immovable property exception to the traditional sovereign immunity exception applied, and also that *City of Sherrill v. Oneida Indian Nation of New York* waived tribal sovereign immunity in these types of cases. The immovable property common law exception to sovereign immunity focuses on the rights an entity possesses within a particular piece of land. Because the Tribe convinced the court that this action essentially dealt with money damages, the court decided that it did not lie within the immovable property common law exception. Additionally, the court held that *Sherrill* does not strip tribes of tribal sovereign immunity from suit in tax foreclosure proceedings. *Cayuga Indian Nation of New York v. Seneca County, New York*, 978 F.3d 829 (2nd Cir. 2020).

The Supreme Court has continued to invoke—but not yet applied—*Sherrill* in the context of cases involving the potential diminishment of reservation boundaries, suggesting that even where no reservation diminishment is found, the Court may rely upon *Sherrill* to limit the assertion of tribal authority in areas where such authority has long been ignored or unasserted. *See, e.g., Nebraska v. Parker*, 136 S.Ct. 1072, 1082 (2016) (“Because petitioners have raised only the single question of diminishment, we express no view about whether equitable considerations of laches and acquiescence may curtail the Tribe's power to tax the retailers of Pender in light of the Tribe's century-long absence from the disputed lands.”) (*citing Sherrill*); *McGirt v. Oklahoma*, No. 18-9526, Oral Arg. Trans. at 41-42 (May 11, 2020).

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/>. See also Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 Yale L.J. 1012 (2015) (suggesting that the federal government’s assertion of jurisdiction over Indian tribes, beginning in the Washington Administration, was narrower than Justice Thomas suggested and that the immovable objects exception was inapplicable to Indian tribes).

Page 176. Add to the end of note 3:

For another excellent account of the context and history surrounding the Hualapai’s efforts to maintain their lands, especially in light of their proximity to what would become Grand Canyon National Park, see Sarah Krakoff, *Not Yet America’s Best Idea: Law, Inequality, and Grand Canyon National Park*, 91 U. Colo. L. Rev. 559, 588-95 (2020).

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/>.

In 2021, in *R. v. Desautel*, 2021 S.C.C. 17, the Supreme Court of Canada again interpreted section 35 of the Canadian Constitution Act of 1982, this time to determine whether its use of the term “aboriginal peoples of Canada” included individuals who may no longer reside within Canada. The case involved a citation issued to Mr. Desautel for shooting an elk without a license in Canada. Mr. Desautel is a member of the Lakes Tribe (one of the Confederated Tribes of the Colville Reservation in Washington State), which is a successor group of the Sinixt people, whose ancestral territory spanned a large portion of what is now southern British Columbia and northern Washington. Mr. Desautel had shot the elk within this territory. After determining that, given its history, the Lakes Tribe qualified as “aboriginal peoples of Canada,” the Court’s majority then determined that the Tribes’ rights to access and hunt within its aboriginal territory had not been abrogated and that, therefore, Mr. Desautel retained an aboriginal right to hunt within that territory for which he could not be legally cited by Canadian authorities. The Court’s opinion distinguished between claims of aboriginal rights and aboriginal title and made clear that the latter were not at issue but also noted that additional duties, such as consultation, may be owed to individuals or

groups like the Lakes Tribe that retain aboriginal rights in Canada even if no longer within Canadian territory.

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).

Page 192. Add to the end of note 4:

See also *Murray v. BEJ Minerals LLC*, 464 P.3d 80, 93 (Mont. 2020) (holding in a case arising outside of Indian Country that, under Montana law, “dinosaur fossils do not constitute ‘minerals’ for the purpose of a mineral reservation.”)

Page 206. Add to the end of note 1:

On July 3, 2020, President Donald J. Trump traveled to and delivered a speech at Mount Rushmore, in the heart of the Black Hills. The President’s visit prompted opposition from Sioux leaders, some of whom called for the removal of Mount Rushmore. In a statement released just before the Presidential visit, for example, Chairman Harold Frazier of the Cheyenne River Sioux Tribe said, “[n]othing stands as a greater reminder to the Great Sioux Nation of a country that cannot keep a promise or a treaty than [sic] the faces carved into our sacred land on what the United States calls Mount Rushmore.” See Mark Russo, *Another South Dakota Tribe Criticizes Mount Rushmore*, KELO.com (June 30, 2020), <https://kelo.com/news/articles/2020/jun/30/another-south-dakota-tribe-criticizes-mount-rushmore/1034858/>.

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 2020, over 70,000 buy-back offers had been accepted, resulting in the purchase of the equivalent of more than 2.7 million acres. *Land Buy-Back Program for Tribal Nations Cumulative Sales through July 17, 2020*, U.S. Dep't of the Interior, <https://www.doi.gov/sites/doi.gov/files/uploads/table-lbbtn-transactions-through-july-17-2020.pdf> (last visited July 25, 2020).

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>; see also David Baxter, *What the Fraction: A Divisive Look into the Necessary Revisions to the Department of Interior's Fractionated Land Buy-Back Program Amongst Diminishing Funding*, 7 U. Balt. J. Land & Devel. 19, 22 (2017) (approving most of the programmatic changes on efficiency grounds but claiming that the amount money in the program is "woefully inadequate" to cure the fractionation problem, noting that while the program had reduced fractionation by 23% in purchasing 40,000 tracts at forty-five different locations out of more than 700,000 fractional interests, the \$1.2 billion it had expended by 2017 was 75% of the funds available under the *Cobell* settlement). The Biden Administration's fiscal 2022 budget proposal would appropriate \$150 million for the buy-back program, which would be the first significant infusion of funds since 2010. See Michael Doyle, *Spending plan would boost land buyback program*, E & E News (June 1, 2021), <https://www.eenews.net/greenwire/2021/06/01/stories/1063733895>.

Although not part of the buy-back program, the Department of the Interior has recently taken steps to further streamline the transfer of fee lands into trust status. In 2021, for example, Secretary of the Interior Deb Haaland issued Secretarial Order 3400, which re-delegated authority to approve fee-to-trust applications to BIA's regional directors and reversed policies of the prior administration. Secretarial Order No. 3400, *Delegation of Authority for Non-Gaming Off-Reservation Fee-to-Trust Acquisitions* (Apr. 27, 2021), <https://www.doi.gov/sites/doi.gov/files/elips/documents/so-3400-non-gaming-off-reservation-fee-to-trust-acquisitions-final.pdf>.

IV. Land Use and Environmental Protection

B. Environmental Protection

Page 281. Add to the end of the last paragraph of note 4.

Other tribal courts follow similar reasoning and apply *Montana* in favor of tribal jurisdiction. The Navajo Supreme Court determined that *Strate* did not restrict its jurisdiction over insurance claims arising out of a car accident that occurred on a highway right-of-way. *Allstate Indemnity Co. v. Blackgoat*, 8 Navajo Rptr. 660, 666 (2005). Because *Strate* prohibits application of *Montana*'s second exception in actions arising from negligent driving on-reservation land, the Navajo court instead retained jurisdiction under *Montana*'s first exception. *Id.* (citing *Atkinson Trading Co. Inc. v. Shirley*, 532 U.S. 645, 656); *cf. Crow v. Parker*, No. CV-07-246 (Cherokee 10/17/2007) (finding that negligent driving on-reservation did not fall within the second *Montana* exception under *Strate*). The court determined that the relationship between Allstate and the insured tribal member had a nexus to a consensual contractual relationship. 8 Navajo Rptr. at 666.

For a recent example of a tribal court applying the *Montana* exceptions to find a company liable for the storage costs of hazardous waste on the tribe's reservation, see *FMC Corp. v. Shoshone-Bannock Tribes*, 2019 WL 6042469 (9th Cir. 2019). In 1990, the U.S. Environmental Protection Agency ("EPA") declared FMC's plant and storage area, together with an adjoining off-reservation plant owned by J.R. Simplot, a superfund site. In 1997, EPA further charged FMC with violating the Resource Conservation and Recovery Act ("RCRA"). Under a consent decree, FMC and the tribes negotiated an agreement in which FMC agreed to pay \$1.5 million per year for a tribal permit to store hazardous waste. FMC, however, refused to pay the fee starting in 2002 after ceasing active plant operations, although it continued to store the hazardous waste on the reservation. The Tribes sued FMC in tribal court, seeking *inter alia* payment of the annual \$1.5 million use permit fee for waste storage. The Tribes argued that both *Montana* exceptions gave the tribal court jurisdiction over the claim. The tribal court of appeals held in 2014 that the Tribes had both regulatory and adjudicatory jurisdiction over FMC under both *Montana* exceptions, and that FMC owed \$19.5 million in unpaid use permit fees for hazardous waste storage from 2002 to 2014, and \$1.5 million in annual fees going forward. After that decision, FMC sued the Tribes in federal district court, arguing that the tribes lacked jurisdiction under either of the *Montana* exceptions. Both the district court and the Ninth Circuit upheld tribal regulatory and adjudicatory jurisdiction under each of *Montana* exceptions.

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.

Page 295. Add to end of note 5. TAS in Oklahoma.

As discussed previously at pages 7-10 of this update, the U.S. Supreme Court held in *McGirt v. Oklahoma* (2020) that the Muscogee (Creek) Nation's reservation had not been diminished.

Within two weeks of the Court's decision in *McGirt*, the State of Oklahoma petitioned EPA to allow it to continue to regulate environmental programs across areas that were Indian Territory prior to Oklahoma becoming a state. Jack Money, *Oklahoma seeks continued authority to oversee environmental programs in state's Indian territories*, THE OKLAHOMAN (July 24, 2020), <https://perma.cc/6HWX-5WSU>. Typically, states do not have the ability to engage in environmental regulation within Indian country, as either EPA or the Tribes, through TAS status, maintain regulatory control. EPA, EPA-160S16001, EPA's Direct Implementation of Federal Environmental Programs in Indian Country (2016), <https://perma.cc/M8QD-A9DW>; Washington Dep't Ecology v. EPA, 752 F.2d 1465 (9th Cir. 1985) (holding that EPA's determination that state environmental regulations do not apply within Indian country was a reasonable interpretation of the statute). Because of the expanded role that Congress granted Oklahoma in the Safe, Accountable, Flexible, Efficient, Transportation Equity Act, Pub. L. 109-59 § 10211, 199 Stat. 1144, 1937 (2005), EPA granted Oklahoma's request. Letter from Andrew Wheeler, EPA Administrator, to Gov. J. Kevin Stitt, Oklahoma Governor, regarding Approval of State of Oklahoma Request Under Section 10211(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005 (Oct. 1, 2020), <https://perma.cc/Z82H-8B6R>. As a result, Oklahoma's environmental regulations continue to govern the affected territory, although tribal environmental laws could still apply where they are not preempted by the federal environmental statutes.

Page 320. Add to the end of Note on Tribal Environmental Law

As this past series of articles found, tribal self-determination in modern environmental law holds the prospect of translating indigenous environmental value judgments into legally enforceable requirements of federal regulatory programs. Congress authorized this approach three decades ago through the TAS structure, but as the preceding research found – relatively few tribes have sought primacy, even for foundational programs like Clean Water Act water quality standards, contributing to potentially serious environmental injustices. Professor Jim Grijalva's recent article analyzes in detail EPA's attempt at reducing tribal barriers — reinterpreting the Act as a congressional delegation of tribal jurisdiction over non-Indians — and the early indications are that the results of this effort have been insignificant in that there has not been a notable increase in tribes taking advantage of this opportunity. *Ending the Interminable Gap in Indian Country Water Quality Protection*, 45 Harv. Env'tl. L. Rev. 1 (2020).

For tribes that have seized the opportunity to implement primacy under the TAS structure, however, it appears they are doing a normatively good job of enforcing the environmental regulations. Recent research looked at Clean Water Act (CWA) enforcement under American Indian tribal primacy compared with tribal facilities regulated directly by the federal government. To date, 62 tribal governments have been approved for implementation primacy under the CWA. The number and diversity of tribes operating regulated facilities provides uncommon leverage on key questions about environmental federalism. Analysis of CWA enforcement across 474 tribal wastewater facilities concluded that, on average, enforcement increases significantly under tribal primacy. Mellie Haider & Manuel P. Teodoro, *Environmental Federalism in Indian Country: Sovereignty, Primacy, and Environmental Protection*, Policy Studies Journal (2020), available at: <https://onlinelibrary.wiley.com/doi/full/10.1111/psj.12395>.

Page 326. Replace the first paragraph of note 3 with the following:

3. Citizen suits. In *Deschutes River Alliance v. Portland General Electric*, ___ F.3d ___, 2021 WL 2559477 (9th Cir. 2021), a citizen suit brought under the Clean Water Act against an electric utility and the Confederated Tribes of the Warm Springs Reservation in Oregon, the Ninth Circuit disagreed with and distinguished *Blue Legs*' determination that RCRA abrogated tribal sovereign immunity. Noting that both RCRA, 42 U.S.C. § 6972(a)(1)(A), and the CWA, 33 U.S.C. § 3365(a), expressly address both federal and state—but not tribal—sovereign immunity, the court determined that Congress' intent to abrogate the latter was not “unmistakably clear” notwithstanding the inclusion of “Indian tribe” as a type of “municipality” in the definition of “person.” *Deschutes River Alliance*, 2021 WL 2559477 at *8 (citations omitted). A majority of the Ninth Circuit panel also distinguished *Blue Legs* by relying on the different legislative histories of RCRA and the CWA. *Id.* at *6. Ultimately, because the tribal defendant was an indispensable party but could not be joined because of sovereign immunity, the Ninth Circuit ordered the case dismissed. *Id.* at *8. Similarly, EPA regulations specifically exclude tribal governments from citizen suits under the Clean Air Act. 43 C.F.R. § 49.4(o). For an argument that subjecting tribes to citizen suits is contrary to the doctrine requiring Congress to clearly state its intent to abrogate tribal sovereign immunity and will interfere with EPA's policy of government-to-government relations with tribes, see James M. Grijalva, *Environmental Citizen Suits in Indian Country*, in 8th Annual Conf. on Env't & Dev. in Indian Country (ABA SONREEL 1996). See also Michael P. O'Connell, *Citizen Suits Against Tribal Governments and Tribal Officials Under Federal Environmental Statutes*, 36 Tulsa L.J. 335 (2000).

Page 346. Add to End of Note on Environmental Justice

The Biden Administration has expressed strong support for the promotion of environmental justice generally, and securing environmental justice in Indian country specifically. Shortly after his inauguration, President Biden released an executive order titled, “Tackling the Climate Crisis at Home and Abroad.” 86 Fed. Reg. 7619 (Feb. 1, 2021). Section 219 of the Executive Order addresses environmental justice, explaining “[i]t is therefore the policy of [the Biden Administration] to secure environmental justice and spur economic opportunity for disadvantaged communities that have been historically marginalized and overburdened by pollution and underinvestment in housing, transportation, water and wastewater infrastructure, and health care.” *Id.* at 7629. Section 219 specifically includes “Tribal areas” among those communities to be targeted. *Id.* At Section 223, the Executive Order goes on to establish the Justice40 Initiative, which has the goal of dedicating at least 40 percent of the overall benefits of the federal government's climate change efforts toward disadvantaged communities, including tribal communities. *Id.* at 7632.

Page 348. Add to End of An Environmental Justice Case Study: Dakota Access Pipeline

On July 6, 2020, Judge Boasberg of the U.S. District Court for the District of Columbia held in the Dakota Access Pipeline case that “[c]lear precedent favoring vacatur during such a remand, coupled with the seriousness of the Corps' deficiencies, outweighs the negative effects of halting the oil flow for the thirteen months that the Corps believes the creation of an EIS will take.” *Standing Rock Sioux Tribe and Cheyenne River Sioux Tribe v. U.S. Army Corps of Engineers*

and Dakota Access, LLC, Civil Action No. 16-1534, 2 (July 6, 2020), available at: <https://turtletalk.files.wordpress.com/2020/07/standing-rock-order.pdf>. As a result, in what was heralded as a major victory for the tribes, the district court held that the Dakota Access Pipeline should be shut down within 30 days of the court's decision. See Jacey Fortin & Lisa Friedman, *Dakota Access Pipeline to Shut Down Pending Review, Federal Judge Rules*, New York Times (July 6, 2020), available at: <https://www.nytimes.com/2020/07/06/us/dakota-access-pipeline.html>. On July 14, 2020, the D.C. Circuit issued an administrative stay of the lower court's decision pending emergency review by the circuit court. *Standing Rock Sioux Tribe and Cheyenne River Sioux Tribe v. U.S. Army Corps of Engineers and Dakota Access, LLC*, 1:16-cv-01534 (July 14, 2020), available at: <https://www.bloomberglaw.com/public/desktop/document/StandingRockSiouxTribeetalvUnitedStatesArmyCorpsDocketNo2005197DC/2?1594799755>.

In August 2020, the administrative stay was dissolved and the Circuit court refused to enter an injunction requiring the pipeline to be shutdown and drained of oil as the parties briefed and argued the merits of the appeal. *Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, 2020 WL 4548123 *1 (D.C. Cir. Aug. 5, 2020). After an expedited briefing schedule, the D.C. Circuit ruled in January 2021 that the lower court properly vacated the easement pending the EIS, but that the injunction shutting down the pipeline was improper. *Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, 985 F.3d 1032 (D.C. Cir. 2021).

Meanwhile, despite the lack of a legal easement to do so, the pipeline continued to operate and the Corps of Engineers did not indicate how or whether the agency might address the pipeline's trespass. In light of that uncertainty, Judge Boasberg took up the Tribes' request for injunctive relief, which sought to force the Corps to shut down the pipeline until a new EIS could be completed. On May 21, 2021, Judge Boasberg denied that relief, finding that the plaintiffs had not demonstrated the likelihood of irreparable harm due to the pipeline's continued operation. *Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, Slip op., 2021 WL 2036662 (Dist. D.C. May 21, 2021). In doing so, however, Judge Boasberg made clear his frustration with the Corps of Engineers:

Ever since this Court's vacatur order in July 2020, and across two presidential administrations, the Corps has conspicuously declined to adopt a conclusive position regarding the pipeline's continued operation, despite repeated prodding from this Court and the Court of Appeals to do so. On the one hand, the agency has refrained from exercising its enforcement powers to halt Dakota Access's use of the pipeline, notwithstanding its status as an unlawful encroachment. At the same time, however, neither has the Corps affirmatively authorized the pipeline's occupation of the area underneath Lake Oahe per the process contemplated in its internal procedures. Its chosen course has instead been — and continues to be — one of inaction. Such indecision, it is important to note, does not stem from a lack of time. Nor from a lack of attention. Whatever the reason, the practical consequences of the Corps' stasis on this question of heightened political controversy are manifest: the continued flow of oil through a pipeline that lacks the necessary federal authorization to cross a key waterway of agricultural, industrial, and religious importance to several Indian Tribes. *Id.* at *1.

Nonetheless and despite the Tribes’ “understandable frustration with a political process in which they all too often seem to come up just short,” *id.* at *2, the court determined the risks posed by the pipeline were not sufficient to justify an injunction. The court explained that before granting an injunction the required four-part test must be met. The party moving for the injunction must demonstrate: 1) irreparable injury; 2) inadequate remedies at law, such as money damages; 3) the balance of hardships favors equitable relief; and 4) the public interest “would not be disserved by a permanent injunction.” *Id.* at *12 (citations omitted). Since the court considered an injunction to be a “drastic” remedy and “not be granted as a matter of course,” the court focused on the first prong of the test, finding that the tribes had failed to establish that a leak causing damage to the water was “likely” because the Tribes’ argument rested on several contingent events that must happen to realize the claimed harm. Because any oil spill in the future is not certain, the harm is not likely and therefore fails to meet the requirement for irreparable injury. The Tribes claimed two additional harms: the “ongoing trauma” of the government’s refusal to comply with the law, and the “undermining [of] the tribes’ sovereign government role to protect their members and respond to potential disasters.” *Id.* at 24 (citations omitted). Because both additional claims of harm turn on risk of a pipeline spill, which the court considered to be a remote threat, it rejected these arguments for the same reasons.

Without an injunction or other decision by the Corps to address the lack of an easement, and with the Corps working on an EIS, Judge Boasberg dismissed the case but made clear that the Tribes could file suit challenging the EIS if and when completed. See Amy Sisk, *Judge closes out Dakota Access lawsuit; future legal challenges still possible*, Bismark Tribune (June 22, 2021), https://bismarcktribune.com/bakken/judge-closes-out-dakota-access-lawsuit-future-legal-challenges-still-possible/article_4f815b7e-2e2b-577a-b3ab-94ea4a4cc1c9.html#tracking-source=home-top-story. So, oil continues to flow through the Dakota Access Pipeline.

Pipelines and proposed pipelines have sparked similar tribal resistance elsewhere, including the Keystone XL pipeline in the upper Great Plains and Enbridge Line 5 in the Great Lakes, among others. For an argument that pipelines violate tribal rights and culture, see Ashley A. Glick, *The Wild West Re-Lived: Oil Pipelines Threaten Native American Tribal Lands*, 30 Vill. Env’tl. L.J. 105 (2019) (explaining how oil pipelines are a repeat of history that has “reallocated, allotted, restructured, and taken” land from Native American tribes since white colonists first landed on North American shores). See also Guillermo J. Garcia Sanchez, *When Drills and Pipelines Cross Indigenous Lands in the Americas*, 51 Seton Hall L. Rev. 4 (2021) (arguing that the government ignores noneconomic concerns of indigenous communities on condemned land to further the economic interests of resource extraction).

In May 2021, the Bay Mills tribal council voted to banish the Enbridge Line 5 pipeline that runs through its ceded lands in Michigan, shortly after Michigan Governor Gretchen Whitmer ordered the line shut down. The Tribe claimed that the Enbridge pipeline, which traverses the Straits of Mackinac, threatened petroleum spills that imperiled its rights to hunt, fish, and gather in its ceded territories, which include Lakes Superior, Michigan, and Huron. See Mary Annette Pembrer, *Michigan tribe banishes Enbridge Line 5 pipeline*, Indian Country Today (May 11, 2021), <https://indiancountrytoday.com/news/michigan-tribe-banishes-enbridge-line-5-pipeline>.

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); and Elizabeth Ann Kronk Warner, Kathy Lynn & Kyle Whyte, *Changing Consultation*, 54 U.C. Davis L. Review 1127 (2020).

On January 26, 2021, President Biden affirmed his administration’s commitment to effective tribal consultation, stating that “[i]t is a priority of my Administration to make respect for Tribal sovereignty and self-governance, commitment to fulfilling Federal trust and treaty responsibilities to Tribal Nations, and regular, meaningful, and robust consultation with Tribal Nations cornerstones of Federal Indian policy.” 86 Fed. Reg. 7491 (Jan. 29, 2021). To accomplish this goal, President Biden affirmed his commitment to President Clinton’s Executive Order 13175, calling on agencies to develop a plan for compliance with Executive Order 13175 and to provide annual reporting on their compliance progress.

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 June 21, 2021).

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 Warner, 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 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 1:

The Second Circuit recently revisited the issue of whether a treaty pre-empted the collection of individual income tax from a married couple, one of whom was a citizen of the applicable tribe, for income obtained in mining gravel from land owned in fee by a tribe. *Perkins v. Commissioner of Internal Revenue*, 19-2481 (2nd Cir. Aug. 12, 2020), available at: <https://turtletalk.blog/2020/08/13/second-circuit-holds-treaties-do-not-provide-tax-immunity-for-individual-indian-owned-business-on-fee-lands/> The court upheld the tax court’s determination that the two treaties in question did not create an exemption from the federal income taxes. Although the court acknowledged that treaties are to be generally liberally construed in favor of Indian tribes, the court also explained that exemptions from taxation must be clearly expressed. Additionally, the court explained that its decision was consistent with the decision of other courts to decline to extend *Squire* to income derived from land that is not allotted to an Indian taxpayer. The land at issue in *Perkins* was owned by the tribe, and the taxpayers had a permit from the tribe to mine gravel on the land.

As the cannabis industry grows, it is creating interesting tax challenges for tribes wishing to engage in the industry. For a discussion of how the cannabis industry is taxed within Indian country, see Mark J. Cowan, *Taxing Cannabis on the Reservation*, 57 Am. Bus. L. J. 867 (2020).

Also, as explained earlier, the U.S. Supreme Court’s decision in *McGirt* has profound implications for Indian country, including tax implications. For a discussion of how the decision impacts the taxing scheme in Indian country, see Stacy Leeds & Lonnie Beard, *A Wealth of Sovereign Choices: Tax Implications of McGirt v. Oklahoma and the Promise of Tribal Economic Development*, 56 Tulsa L. Rev. 417 (2021).

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 derived 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. *Tulalip 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

B. Extending the *Winters* Doctrine

Page 485. Add new Note 4.

4. Modern interpretation of reserved rights. In September 2020, the Tenth Circuit held that the Pueblos of Jemez, Santa Ana, and Zia have aboriginal water rights in the Jemez River in northern New Mexico. *United States v. Abouselman*, 976 F.3d 1146, 1150 (10th Cir. 2020). The court decided that Spain’s assertion of sovereignty over the land during 1598 did not extinguish the Pueblos’ claims to those rights. *Id.* at 1151, 1154. Relying on *Santa Fe Pacific Railroad (supra* p. 170), which required a “a sovereign to exercise complete dominion, not merely to possess complete dominion” to extinguish title, the Tenth Circuit emphasized that Spain took no affirmative action adverse to aboriginal use of the Jemez river during its sovereign reign. *Id.* at 1158, 1160 (citing *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 347 (1941)). The court declined to address whether *Winans* rights applied to the Pueblos’s claims because the issue was not before the court. *Id.* at 1152.

C. 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).

Page 496. Add to the end of note 4:

Conflict—and litigation—over water rights in the Klamath Basin continues. In 2021, the Oregon Circuit Court for Klamath County, like the Court of Federal Claims in *Baley*, reaffirmed the Klamath Tribes’ 1864 treaty entitled the tribes to sufficient water to protect their fisheries and other aquatic resources. *Waters of the Klamath River Basin*, No. WA1300001, slip op. at 4 (Or. Cir. Ct. Feb. 24, 2021). Although it granted a motion of upstream irrigators to re-quantify the Tribes’ water rights under the “moderate living” standard, *id.* at 16 (citing *Adair II*, 723 F.2d 1394, 1414–15 (9th Cir. 1983)), the court declared that, “[i]n practice the moderate living standard may not have much effect upon the level of water necessary to have a healthy and productive habitat . . . because the water level cannot be reduced below what the evidence establishes is the minimum required for a healthy and productive habitat.” *Id.* at 17. The court also found that the Tribes correctly claimed water in tributaries outside the boundaries of the reservation, but denied their claims to off-reservation water in the Klamath River because the Tribes “ceded all right, title and claim” to those waters in the 1864 Treaty. *Id.* at 12 (citing *Adair II*, 723 F.2d at 1413–14). With the prospect of a severe drought looming in 2021, additional challenges have focused on the need

for water to protect endangered species. See Associated Press, *Judge nixes reduced Klamath River flows for fish*, Greenwire (E & E News), May 10, 2021, <https://www.eenews.net/greenwire/2021/05/10/stories/1063732107>.

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 in northern California and southern Oregon served by the Klamath Basin Project. It took this action in order to 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). On April 28, 2021, the Ninth Circuit reversed, determining that the Nation was not seeking a determination of its water rights but was instead asserting a breach of trust claim alleging that the United States failed to adequately determine, consider, and protect those rights, even if yet to be determined. *Navajo Nation v. Dept. of the Interior*, 996 F.3d 623, 634-35 (9th Cir. 2021). Having found jurisdiction, the panel went on to hold that the Nation's rights, established under *Winters* and the Nation's 1868 Treaty with the United States, were sufficient to trigger a trust duty on the part of the federal government:

We hold that the Nation has successfully identified specific treaty, statutory, and regulatory provisions that, taken together, anchor its breach of trust claim. First, we have the implied treaty rights recognized in *Winters*, which in itself gives the Tribe the right to proceed on a breach of trust claim here; second, the 1868 Treaty, which recognizes the Nation's right to farm Reservation lands and, under *Adair*, gives rise to an implied right to the water necessary to do so; third, the [federal] statutes that grant the Secretary authority to exercise pervasive control over the Colorado River; and fourth and finally, the Nation has pointed to Interior regulations and documents in which Federal Appellees have undertaken to protect Indian Trust Assets, including the Nation's as-yet-unquantified *Winters* rights.

Having established that a fiduciary duty exists, we hold that common-law sources of the trust doctrine and the control the Secretary exercises over the Colorado River firmly establish the Federal Appellees' duty to protect and preserve the Nation's right to water. *Id.* at 641.

The panel remanded the case to the District Court with instructions to allow the Nation to amend its complaint accordingly. *Id.* at 643.

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 577. Add to the end of note 1:

The Oregon Circuit Court for Klamath County is currently addressing the quantification of both on and off-reservation water rights of the Klamath Tribes. See note 4, page 496 above.

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/>. The conflict continues to simmer, although both protests and the pending construction of the TMT were interrupted by the COVID-19 global pandemic. Most recently, the Hawaii House of Representatives adopted a resolution calling for a new working group to discuss how best to manage Mauna Kea. See Haw. H.Res. No. 33, 31st Leg., Reg. Sess. (Haw. 2021), available at https://www.capitol.hawaii.gov/session2021/bills/HR33_HD1_.pdf. The House Resolution calls for the working group to develop recommendations by December 31, 2021, for a “new governance and management structure for Mauna Kea that collaboratively engages with all stakeholders, particularly the Native Hawaiian community.” *Id.*

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. 2019).

Page 644. Add after note 5 as new note 6.

6. Tribal consultation in Klamath dam removal. Klamath River salmon runs have diminished alarmingly over the years, in large part due to Klamath Basin dams and irrigation practices. In the early 20th century, FERC (then the Federal Power Commission) licensed the predecessor of PacifiCorp, a private utility, to construct and operate several hydroelectric dams, collectively known as the Klamath Hydroelectric Project, which has substantially obstructed fish migration on the Klamath River. Under the Federal Power Act, utilities such as PacifiCorp have limited license terms and, upon relicensing, must take into account modern environmental conditions such as fish passage. As the Klamath Hydroelectric Project’s FERC license was set to expire in 2004, PacifiCorp faced expensive relicensing conditions, including fish passage and water quality improvements. Tribal advocates and environmentalists began to campaign for dam removal. To avoid the expense of relicensing, PacifiCorp agreed to dam removal, beginning in 2020. The plan was to create a nonprofit corporation that would remove the dams and limit PacifiCorp’s liability, so PacifiCorp sought a license transfer to the Klamath River Renewal Corporation (KRRC). However, in July 2020, FERC, which must accept the surrender of PacifiCorp’s license and its transfer to the KRRC, decided that PacifiCorp’s surrender request to be relieved of liability for costs associated with the scheduled dam removal was imprudent. Consequently, the commission required that PacifiCorp, the managing entity over the Klamath dams, to remain a licensee with the nonprofit throughout the dam removal process.

In November 2020 and in response to FERC’s decision, PacifiCorp, KRRC, the Tribes, and the States of Oregon and California signed a Memorandum of Agreement (MOA), which doubled the contingency funds for any potential cost overruns. The agreement was reached in part as a result of consultation with the Tribes and as a means through which to urge FERC to transfer

the dam licenses from PacifiCorp to the KRRC. In June 2021, FERC regulators approved those transfers relying in large part upon the terms of the MOA. See George Plavin, *FERC approves license transfer of Klamath River dams slated for removal*, Capitol Press (June 17, 2021), https://www.capitalpress.com/ag_sectors/water/ferc-approves-license-transfer-of-klamath-river-dams-slated-for-removal/article_a9dcdfd4-cf8f-11eb-b2a3-ef5e2ac53dd5.html.

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 1004 (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. On June 2, 2021 in an unpublished memorandum opinion, the Ninth Circuit partially reversed, ruling that the District Court had misinterpreted the court’s prior opinion in *Lummi III* and remanded “for the purpose of entering judgment in favor of the Lummi Nation on the ground that the Lummi Nation U&A includes the entirety of the area contested in this subproceeding.” *Lower Elwha Klallam Indian Tribe v. Lummi Nation*, __ Fed. Appx. __, 2021 WL 2259393 *1.

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 685. Add to the end of note 2:

In the waning days of the Trump Administration, Interior Solicitor Daniel H. Jorjani withdrew a series of earlier Solicitor Opinions regarding the application of the ESA and the MBTA to reserved tribal hunting and fishing rights. Interior Sol. Op. M-37063, *Withdrawal of Solicitor Opinion M-36936, ‘Application of Eagle protection and Migratory Bird Treaty Acts to Reserved Indian Hunting Rights;’ Solicitor Opinion M-36926, ‘Application of the Endangered Species Act to Native Americans with Treaty Hunting and Fishing Rights;’ and Solicitor Opinion M-27690, ‘Migratory Bird Treaty Act,’* (Jan. 15, 2021), <https://www.doi.gov/sites/doi.gov/files/m-37063.pdf>. The Opinion noted that the earlier (now withdrawn) interpretations pre-dated *Dion* and, therefore, relied on outdated abrogation analyses of those statutes. With regard to the application of the ESA and notwithstanding the flawed analysis of the earlier Opinion, the withdrawal did not dispute its conclusion and, instead, restated “the position of the United States that the federal government has the authority to enforce the ESA against tribal members.” *Id.* at 2.

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). 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 S.M.U. L. Rev. F. 140 (2020) <https://doi.org/10.25172/slrf.73.1.13>

On December 16, 2020, the U.N. General Assembly adopted without a vote a resolution entitled, “Rights of indigenous peoples.” A/75/475, available at: <https://www.undocs.org/en/A/75/475> In the resolution, the U.N. announced the launch of the International Decade of Indigenous Languages in 2022. The resolution also calls upon Member States to ensure the protection of indigenous peoples impacted by COVID-19 and prevent all forms of discrimination, especially in the areas of timely, universal, inclusive, equitable, and non-discriminatory access to safe, quality, effective and affordable health care services.

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).