Native American Natural Resources Law

CASES AND MATERIALS

FIFTH EDITION

2024 SUPPLEMENT

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E-mail: cap@cap-press.com
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Native American Natural Resources Law, 5th ed.
Teachers Update, 2024

Chapter 1: Land, Religion, and Culture

Page 22; add to the end:

In March 2024, an en banc 9th Circuit, on a 6-5 vote, affirmed the lower court, holding that the transfer of Oak Flat to a private company for copper mining did not violate the Free Exercise Clause of the First Amendment or the Religious Freedom Restoration Act (RFRA). *Apache Stronghold v. United States*, 95 F.4th 608 (9th Cir. 2024).

In the majority opinion authored by Judge Collins, the Court clarified that RFRA's protection against substantial burdens on religious exercise does not supersede the holding in *Lyng*, which determined that the government did not violate the Free Exercise Clause when permitting actions on federal land that could harm religious practices, as long as those activities do not coerce individuals into violating their religious beliefs. *Id.* at 621-23, 632; *Lyng v. Nw. Indian Cemetery Protective Ass'n,* 485 U.S. 439 (1988). The Court emphasized that the land exchange for the copper mine was "indistinguishable from *Lyng*," since the land exchange neither coerced individuals into violating their religious beliefs, nor penalized religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens. *Id.* at 622. The court concluded that *Lyng's* interpretation of what constitutes a substantial burden on religious exercise remains applicable under RFRA. Therefore, the land exchange did not substantially burden the religious exercise of the Western Apache in a manner that would trigger RFRA's strict scrutiny test. The majority's adherence to *Lyng* maintained a high bar for Native American claims under the Free Exercise Clause and RFRA, requiring proof of direct coercion or discrimination.

The 5-member dissent by Chief Judge Murguia disagreed with the majority's reliance on *Lyng*, deciding that Lyng "erroneously conclud[ed] that preventing a religious practice is neither prohibitory nor coercive." *Id.* at 700. The dissent also took issue with the majority's interpretation of "substantial burden" under RFRA, asserting that the majority improperly narrowed the scope of RFRA's protections. According to the dissent, RFRA aimed to provide broader protection for religious exercise than the First Amendment. Consequently, the dissent would have subjected the transfer of Oak Flat to the mining company to strict judicial scrutiny because the destruction of Oak Flat would adversely "substantially burden" the Western Apaches' religious practices. *Id.* at 700-01.

In May 2024, the court denied a petition for rehearing before the full Ninth Circuit. *Apache Stronghold v. United States,* 101 F.3d 1036 (9th Cir. 2024). In doing so, the court issued an amended per curiam opinion laying out the divisions among the en banc panel. As stated in the per curiam opinion, despite their differences on the merits of Apache Stronghold's claims, "[a]

majority of the en banc court … overrule[d] *Navajo Nation v. U.S. Forest Service* to the extent that it defined a 'substantial burden' under RFRA as 'imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (Sherbert) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (Yoder).'" *Id.* at 1043. Instead, under both RFRA and the Religious Land Use and Institutionalized Persons Act (RLUIPA), "preventing access to religious exercise is an example of substantial burden." *Id.* Consider whether and how this standard might have changed the outcome of the next case. Despite this narrow win, Apache Stronghold intends to file a petition for review of the outcome of the case by the Supreme Court.

Page 33; add to the end of note 1:

Beyond these conceptual issues with the Ninth Circuit's opinion, a majority of the Ninth Circuit sitting en banc in *Apache Stronghold v. United States* recently overruled the standard for finding substantial burden relied upon by the *Navajo Nation* court. Rather than the narrow *Sherbert*- or *Yoder*-based standard, the *Apache Stronghold* majority found that "preventing access to religious exercise is an example of substantial burden." *Apache Stronghold v. United States*, 101 F.3d 1036, 1043 (9th Cir. 2024). Despite that change in standard, however, Apache Stronghold's claims met the same fate as those of the Navajo Nation before the Ninth Circuit, with a different majority of the en banc court holding that, "under *Lyng*, a disposition of government real property does not impose a substantial burden on religious exercise when it has 'no tendency to coerce individuals into acting contrary to their religious beliefs,' does not 'discriminate' against religious adherents, does not 'penalize' them, and does not deny them 'an equal share of the rights, benefits, and privileges enjoyed by other citizens.'" *Id.* at 1044.

Page 39: add to the end of the page:

Note: In June 2024, a federal panel charged with considering and recommending changes to derogatory place names on federal public lands adopted a recommendation to formally change the name of Devil's Tower to Bear Lodge. *See* DRAFT Recommendations from the Geographic Features Subcommittee Advisory Committee on Reconciliation in Place Names for June 10-11, 2024, Rapid City, SD Meeting, *available at* https://www.nps.gov/orgs/1892/upload/DRAFT_Recommendations_Geographic-Features-SC_June-2024.pdf (last visited June 30, 2024); Michael Doyle, *Interior name advisors seek to topple 'Devils Tower'*, E&ENews (June 20, 2024), https://www.eenews.net/articles/interior-name-advisers-seek-to-topple-devils-tower/.

Page 44; add to end of the first full paragraph:

In 2023, the district court dismissed the cases challenging the Bears Ears National Monument's designation, although the state continues to pursue litigation over the monument's boundaries. *Garfield Cty. v. Biden*, No. 4:22-cv-00059-DN-PK, 2023 U.S. Dist. (D. Utah Aug. 11, 2023). The Arizona legislature has pursued a similar challenge to the more recently proclaimed Baaj Nwaavjo I'tah Kukveni-Ancestral Footprints of the Grand Canyon National Monument. *See* Complaint, *Arizona Legislature v. Biden*, 3:24-cv-08026-SMM, 2024 U.S. Dist (D. Ariz. Feb. 12, 2024). Notwithstanding these pending legal challenges, co-management of Bears' Ears is now underway, meaning that the land will be managed by the BLM and five sovereign tribal nations. A draft management plan provides 5 alternative management pathways, all of which all highlight tribal co-management. The co-management plans attempt to balance both Tribal interests and public interest in grazing and recreation. 87 Fed. Reg. 52992 (2022).

Page 44; delete the last (carryover) sentence on the page (starting with "In late 2022…") and replace with:

On March 21, 2023, President Biden proclaimed Avi Kwa Ame National Monument, noting that "the Tribal Nations that trace their creation to Avi Kwa Ame, the power and significance of this place reside not just in the mountain itself, but radiate across the valleys and mountain ranges of the surrounding desert landscape containing the landmarks and spiritually important locations that are linked by oral traditions and beliefs." 88 Fed. Reg. 17,987 (March 27, 2023). In August 2023, President Biden also proclaimed Baaj Nwaavjo I'tah Kukveni – Ancestral Footprints of the Grand Canyon National Monument near the Grand Canyon. See 88 Fed. Reg. 55,331 (Aug. 15, 2023).

Page 48; add to note before subsection b:

Following *Solenex v. Bernhardt*, 962 F.3d 520, 528-29 (D.C. Cir. 2020), *Solenex, LLC v. Haaland*, 626 F. Supp. 3d 110 (D.D.C. 2022) ensued, in which Judge Richard J. Leon ruled that the government lacked authority to rescind the lease. In September 2023, the federal government reached a $2.3 million settlement with Solenex, in which the company agreed to relinquish its contested oil and gas lease. *See* Native American Rights Fund: Cases and Projects, *Protecting Badger-two Medicine, the Backbone of the World* (*Solenex v. Haaland*) (Sept. 2023); Amanda Eggert, *Solenex will retire last oil and gas lease in Badger-Two Medicine*, Montana Free Press (Sept., 2023).

Page 49; add before the last (carryover) paragraph:

In December 2022, the Department of the Interior announced updates to its Departmental Manual regarding policies on tribal consultation. *See Interior Department Strengthens Tribal Consultation Policies and Procedures*, USDOI (Dec. 1, 2022),

https://www.doi.gov/pressreleases/interior-department-strengthens-tribal-consultation-policies-and-procedures. Those new policies set forth the following policy of the Department:

> It is the policy of the Department to recognize and fulfill its legal obligations to identify, protect, and conserve Tribal trust resources; carry out its trust relationship with Federally recognized Tribes and Tribal members; and invite Tribes to consult on a government-to-government basis whenever there is a Departmental Action with Tribal Implications. All Bureaus and Offices shall make good-faith efforts to invite Tribes to consult early in the planning process and throughout the decision-making process and engage in robust, interactive, predecisional, informative, and transparent consultation when planning actions with Tribal implications. It is the policy of the Department to seek consensus with impacted Tribes in accordance with the Consensus-Seeking Model. Section 4.4, 512 DM 4 (Nov. 30, 2022), *available at* https://www.doi.gov/sites/doi.gov/files/elips/documents/512-dm-4_2.pdf.

In December 2023, the Biden administration announced a policy on Tribal consultation with the Department of Labor. The rule is a response to Executive Order 13175, which required all government agencies to consult with Tribes on the agencies' policies and practices. E.O. 13175 (Nov 6, 2000).

The 2023 policy aims to improve and increase consultation with Tribes regarding Department actions that may affect federally recognized Tribes. For example, the Department's consultation with Indian tribes affects many DOL actions such as "joint efforts to improve tribal management, rulemaking, regulations policies, waivers and flexibility, grant programs, contracting opportunities, and regulatory guidance." 88 Fed. Reg. 89472 (Dec. 27, 2023). The policy recognizes the federal government's complex and political relationship with tribes, and purports to address that relationship by facilitating "greater consistency across the DOL in carrying out tribal consultations and will improve collaboration with Indian tribes at all levels of departmental organizations and offices". 88 Fed. Reg. 89467 (Dec. 27, 2023). While this policy does not directly impact natural resources, it acts as an example of increased focus on Tribal consultation.

Page 5048, add following a new note 2.c:

Note on c. The Federal Trust Doctrine and Natural/Cultural Resources Protection.

The legal enforceability of the federal government's trust duty has been hollowed out by recent Supreme Court decisions, most recently the Court's 5-4 decision in Arizona v. Navajo Nation, *Arizona v. Navajo Nation,* 599 U.S. 555 (2023) (also discussed on pp. 11 and 12-14 of this supplement), in which the Court majority declared that an enforceable trust was created only by

express language in a treaty, statute, or executive action. Thus, the government's trust duty did not require identifying and conserving unquantified reserved tribal water rights in the Colorado River because an 1868 treaty with the Navajos did not expressly mention the word "trust" or, in the view of the Court's majority, expressly impose such a duty on the United States. Importantly, however, neither the majority nor any of the parties disputed that the treaty impliedly reserved rights to water on behalf of the Navajo and other Tribes, and that such water, once identified and allocated, would be held in trust for the benefit of the Tribes by the United States.

As described in more detail in Chapter 2, the Supreme Court identified and developed the trust relationship between the United States and Native Nations based in part on the language of treaties made on a government-to-government basis between those two sovereigns. In *Cherokee Nation v. Georgia*, 30 U.S. 1, 16 (1831), for example, Chief Justice Marshall described how the "numerous treaties made with [the Cherokee Nation] by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community," and, based on that relationship, laid the foundation of the trust relationship. Nowhere in those treaties did the United States expressly declare that it was committing itself to an enforceable trust duty. Nonetheless, the Supreme Court implied such duties based on the treaty language and those duties would come to define the foundations of federal Indian law ever since. In fact, in a case arising over a century after those foundations were laid, the Court made clear that the federal government's trust responsibility must be carried out in accordance with "the most exacting of fiduciary standards." *U.S. v. Seminole Nation*, 316 U.S. 286 (1942). But, as evidenced by its more recent rulings, like *Arizona v. Navajo Nation*, the Court never precisely defined the scope and limits of the trust duty with regard to its judicial enforceability, leaving the modern Court to demand express Congressional language setting forth a duty and federal liability in the event of a breach of that duty, in order to allow an action to enforce the trust duty to go forward.. Aside from this narrowing of the federal government's enforceable duties to tribal nations, this recent jurisprudence seems to ignore the history of the trust relationship, particularly its very origins in the judicial interpretation of the duties implied, not expressed, by treaties cementing the government-to-government relationship.

Despite the largely parsimonious interpretative approach of the modern Supreme Court, the Biden administration initiatives concerning co-management--which expressly mention the trust duty--should fall within *Navajo Nation*'s call for an explicitly reference to the trust doctrine, presenting the possibility that they would meet the standard of *Navajo Nation*. For example, Joint Secretarial Order 3403, issued by the Secretaries of the Interior and Agriculture and later joined by the Secretary of Commerce, states that "I[i]n managing Federal lands and waters, the Departments are charged with the highest trust responsibility to protect Tribal interests and further the nation-to-nation relationship with Tribes. The Departments recognize and affirm that the

United States' trust and treaty obligations are an integral part of each Department's responsibilities in managing Federal lands."

The *Navajo Nation* majority determined that "unless Congress has created a conventional trust relationship with a tribe as to a particular trust asset, this Court will not "'apply common-law trust principles to infer duties not found in the text of a treaty, statute, or regulation.'" Although not congressional action, the Joint Secretarial Order is an express recognition of the trust duty by executive action and may support an argument that its terms create an enforceable trust. A court could interpret this language as long overdue recognition that in ceding vast amounts land to the U.S., land cession agreements——-as faithfully interpreted under the canons of construction—to impose an implicit duty upon by the federal government to give the Tribes a voice in federal land management of their unsettled, ceded lands. If so, these Biden initiatives may not be easily revocable by a succeeding administration. *See* Michael C. Blumm & Adam Eno, *Tribal Co-Management in the Biden Administration: Affirming a Commitment to Honor Tribal Voices on Ceded Lands* (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4887637.

Page 56; Add to end of note 3:

In June 2023, the state of Oregon made historic co-management strides. Four tribes in Oregon, – The Confederated Tribes of Siletz Indians, the Confederated Tribes of Coos, The Lower Umpqua and Siuslaw Indians, Cow Creek Band of Umpqua Tribe of Indians, and the Coquille Indian tribe – entered into agreements with the Oregon Department of Fish and Wildlife that affirmed Tribal hunting and fishing rights under Tribal licenses. The shift is significant as it represents a transition away from state-authorized rights and to tribal rights instead. Karina Brown & Nika Bartoo-Smith, *2 more tribes make historic co-management agreements with Oregon,* Oregon Public Broadcasting (June 20, 2023). *Memorandum of Agreement for Off-reservation and Non-trust Land Hunting, Fishing, Trapping and Gathering*, Between the Confederated Tribes of the Grand Ronde Community of Oregon and the State of Oregon, Through the Oregon Department of Fish and Wildlife (2023).

In August, 2023, the National Oceanic and Atmospheric Association along with Tribes in California made history when they announced a proposal for the creation of a marine sanctuary that would be managed by the Santa Ynez Chumash Tribe. The proposed plan from NOAA provides a framework detailing how the Ynez Band of Chumash Indians and the State of California will co-manage the sanctuary. *See* NOAA, *Proposed Chumash Heritage National Marine Sanctuary; Draft Management Plan* (Aug. 2023).

For more background, examples of, and laws, policies, and regulations addressing tribal co-stewardship and co-management, *see Sovereign-to-Sovereign Agreements*, hosted by the

University of Washington School of Law Gallagher Law Library, *available at* https://lib.law.uw.edu/cooperative.

Page 57-58; add to end of note a:

In December 2023, the DOI promulgated a rule revising its NAGPRA implementation. The rule aims to improve current procedures for preserving and respecting Indian items of cultural significance by (1) requiring museums and federal agencies to obtain consent from Tribal descendants prior to researching or displaying Indian cultural items, (2) requiring museums and federal agencies to provide inventory updates regarding their cultural Indian items within 5 years, and (3) increasing reporting or transparency of collections that museums or federal agencies may have, including those holdings which are unreported under the current rule. *See* U.S. Dept. of the Interior, *Interior Department Announces Final Rule for Implementation of the Native American Graves Protection and Repatriation Act*, 88 Fed. Reg. 86452 (Dec. 13, 2023).

Since the implementation of the rule, museums have had to cover up displays that featured Native American artifacts. The Field Museum in Chicago covered some of its Native American artifacts located in the museum's "halls of the Ancient Americas," stating that they had to cover them while consultation with tribes was ongoing. *See* Julia Jacobs & Zachary Small, *Field Museum Covers Some Native Displays as New Rules Take Effect*, N.Y. Times (Jan. 11, 2024).

Page 71; add to end of Note on Resource Protection Through Personhood:

In 2020, the Nez Perce Tribe passed a resolution recognizing the legal rights of Snake River, giving the river legal personhood. The resolution explained the cultural and spiritual significance of Snake River and recognized that "Snake River is a living entity that possesses fundamental rights…" Nez Perce, Snake River Resolution (June 2020).

Chapter 2: Some Basics of Federal Indian Law

Page 122; add to end of Note on Alaskan Subsistence:

In March 2023, the case was remanded to state court after Alaska's motion to enjoin the FSB was denied. *Alaska v. Fed. Subsistence Bd.*, 501 F. Supp. 3d 671 (D. Alaska 2020).

Page 130; add to the end of the first full paragraph (beginning with "25 C.F.R. 151.10…."):

In December 2023, the Department of the Interior (DOI) promulgated the final rule revising this land-into-trust process . The rule, substantially similar to the proposed regulations in the accompanying text, aims to speed up the fee-to-trust process, establishing a new 120-day time-

frame for the Bureau of Indian Affairs to issue a decision on a Tribe's application. 88 Fed. Reg. 86222 (Dec. 12, 2023).

Page 131; add to the end of note 3:

The Bison Range has adopted several co-management techniques in order to conserve the bison and their habitat. While the Comprehensive Conservation Plan for Bison Range is vague on the exact co-management actions that Bison Range will implement, the plan emphasized that Tribes and the state government have shared responsibility to manage fish and wildlife within Bison Range. The plan requires that cases involving resource management require consultation with Tribes and collaboration between the two parties to ensure objectives are met on both ends. U.S. Fish and Wildlife Service, *Comprehensive Conservation Plan: National Bison Range* 52 (Dec. 2019).

Page 133; add to end of note 6:

In February 2023, Members of Congress introduced House Bill H.R. 1208 and Senate Bill S. 563 to effectively overrule the *Carcieri* decision and reaffirm the authority of the Secretary of the Interior to take land into trust for Indian Tribes, regardless of when a tribe became recognized. H.R. 1208, 118th Cong. (2023); S. 563, 118th Cong. (2023). The Bills follow an earlier Bill, H.R. 375, referred to as the "*Carcieri* fix,*"* which passed the House in 2019 and was referred to the Committee on Indian Affairs but never reached a Senate vote. H.R. 375, 116th Cong. (2019). As of 2024, the Senate version, S.563, has been referred to the Senate Committee on Indian Affairs, and the House version, H.R.1208, has been referred to the Subcommittee on Indian and Insular Affairs. S. 563, 118th Cong. (2023);; H.R. 1208, 118th Cong. (2023).

Page 167; add to end of note 5:

Reconciling *McGirt* and *Castro-Huerta*

In *Castro-Huerta*, Justice Kavanaugh, writing for a 5-4 majority, held that, despite *McGirt*, Oklahoma retained concurrent jurisdiction with the federal government over crimes committed by non-Indians on-reservation. *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2499 (2022). Since after *McGirt* about 43% of Oklahoma—including Tulsa—is now considered Indian country, the majority emphasized the importance of concurrent state and federal jurisdiction, noting that because Castro-Huerta accepted a plea agreement from a federal court, he essentially received a 28-year reduction in the sentence imposed by the state court. *Id.* at 2499. Kavanaugh observed that reduced sentencing in federal courts was now a "familiar pattern" post-*McGirt. Id*. at 2486.

Justice Gorsuch dissented, maintaining that the majority's professed concern over the length of Castro-Huerta's sentence was less determinative than preserving Oklahoma's continuing

"legal foothold" over tribes and tribal lands, explaining that "the real party in interest here isn't Mr. Castro-Huerta but the Cherokee, a Tribe of 400,000 members with its own government." *Id*. at 2510-11. The majority's lack of concern over the effects of concurrent state jurisdiction on Tribal sovereignty was probably due to a change in the Court's composition, with the ascension of Justice Coney Barrett.

Castro-Huerta did not overrule *McGirt,* but instead held that clarified that *McGirt's* recognition that Congress never terminated the Muscogee-Creek reservation (and by implication other tribes' reservations) did not mean that the state lacked concurrent jurisdiction over on-reservation crimes committed by non-Indians. Whether the decision will lead to further incursions on Tribal sovereignty is unclear.

Castro-Huerta has affected Indian law across the country, especially of course in Oklahoma. The Oklahoma Court of Criminal Appeals, in *Deo v. Parish,* 541 P.3d 833 (Okla. 2023), denied a writ of mandamus because petitioner failed to raise a claim for lack of subject matter jurisdiction. The court noted that it is "no longer convinced that Congress has preempted Oklahoma State Courts' subject matter jurisdiction" because of the reasoning in *Castro-Huerta*. *Id.* at 837. Since *McGirt* and *Castro-Huerta,* Oklahoma courts have been able to clarify the borders and effect of Indian territory within the state. The Oklahoma Supreme Court in *Wilburn v. State,* 535 P.3d 1235 (Okla. 2023) held that the question of an Indian child's custody was subject to concurrent jurisdiction from the State and the child's Indian tribe. The court cited *Castro-Huerta,* explaining that "When determining jurisdictional disputes for cases arising within the external boundaries of a reservation, we must remember that Oklahoma's sovereignty does not stop at reservation borders." *Id.* at 1242.

Chapter 4: Land Use and Environmental Protection

Page 300, note 1a. Add a new note: Water quality standards and Tribal reserved rights:

As discussed in the update to page 321, n. 1 below, in 2024, EPA promulgated revisions to its water quality standards regulations requiring that EPA consult with Tribes before setting or approving revised water quality standards (mostly set by states) to consider water-dependent Tribal rights. 89 Fed. Reg. 35717 (May 2, 2024). A dozen states have filed suit to enjoin implementation of the revised regulation, *see State of Idaho et al. v. U.S. Environmental Protection Agency et al*., Case No. 1: 24-cv-00100, D.N.D. (May 28, 2024). Several tribes have intervened to support the EPA rule. *See* Native American Rights Fund, *Tribes Move to Defend EPA's Tribal Water Rights Rule,* NARF News (June 28, 2024), https://narf.org/epa-water-rights-rule/.

Page 312; add to the end of note 2:

In 2024, the U.S. Supreme Court overruled *Chevron* in *Loper-Bright Enterprises v. Raimondo*, __ U.S. __ (2024), 2024 WL 3208360. Chief Justice Roberts, writing for a six-member majority, found that *Chevron* was inconsistent with traditional separation of powers principles as well as the text of the Administrative Procedures Act (APA). *See, e.g.*, Slip op. at 15 ("*Chevron* defies the command of the APA that 'the reviewing court'—not the agency whose action it reviews—is to 'decide all relevant questions of law" and 'interpret ... statutory provisions.'"). Calling *Chevron* "unworkable," the Court majority overruled the 40-year old precedent but made clear that "[b]y doing so, however, we do not call into question prior cases that relied on the *Chevron* framework." *Id.* at 21. Nonetheless, it remains to be seen how judges across the country will interpret and apply the majority's direction that "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires," rather than following the *Chevron* framework of deference to agency scientific and technical expertise. *Id.* at 22. The Court, of course, has no scientific or technical expertise, just law graduates serving as law clerks.

Page 321; add to the end of note 1:

In June 2024, EPA promulgated revised water quality standards regulations to protect tribal reserved water rights. The regulations direct EPA and the states to consider tribal water rights--defined at "rights to Clean Water Act-promulgated aquatic and/or aquatic-dependent resources reserved to tribes through treaties, statutes, or executive orders"--in setting water quality standards. Tribes must assert these rights in writing for consideration. The regulations require consideration of tribal reserved rights when adopting or revising designated uses, including anticipated future exercise of those rights, and establish water quality criteria that either expressly protect or encompass the reserved right. EPA is to assist Tribes in evaluating reserved rights in reviewing state water quality standards to determine whether they appropriately considered applicable Tribal reserved rights. *See* 89 Fed. Reg. 35717 (May 2, 2024).

Page 339; add to the end of note 3:

For a recent case involving whether tribal cultural properties can be considered in the context of natural resource damages claims, see *Pakootas v. Teck Cominco Metals Ltd.*, 2024 WL 1559540 (E.Dist. Wa. 2024) (rejecting cultural resource damages claims).

Page 364; add to the end of note 1:

On June 18, 2024, NOAA published the final rule "to allow the Makah Indian Tribe to conduct a limited ceremonial and subsistence hunt of up to 25 … gray whales over a 10-year period in

accordance with the Treaty of Neah Bay of 1855 and the quota first established by the International Whaling Commission in 1997." 89 Fed. Reg. 51,600 (June 18, 2024).

Page 373; add to the end of the note:

On December 1, 2023, the commission approved the permit. *See MPSC approves siting permit for Enbridge to relocate Line 5 in Straits of Mackinac, with conditions; finds tunnel best option* (Dec. 1, 2023), https://www.michigan.gov/mpsc/commission/news-releases/2023/12/01/mpsc-approves-siting-permit-for-enbridge-to-relocate-line-5.

Chapter 5: Natural Resource Development

Page 423; add to the end of note 7:

In 2023, the Supreme Court, 5-4, reversed a Ninth Circuit decision and ruled, in *Arizona v. Navajo Nation*, 599 U.S. 555 (2023), that although the Navajos' 1868 treaty implicitly reserved sufficient water to fulfill the reservation's purpose, the treaty imposed no implicit trust rights requiring the federal government to determine the tribe's water needs or formulate a plan to meet them. Despite acknowledging the existence of a trust relationship, Justice Kavanaugh determined that the fiduciary rules usually owed to a beneficiary do not apply to a sovereign like the United States. *Id.* at 563-65. Because of its sovereignty, the U.S. was not subject to common law equitable principles of trust relationships. Instead, any trust obligations are established by Congress and/or the president. *Id.* Thus, unless either explicitly creates "a conventional trust relationship with a tribe as to a particular trust asset," common law trust principles are inapplicable "to infer duties not found in the text of a treaty, statute, or regulation." *Id.* at 566. Since nothing in the Navajo's 1868 treaty established a conventional trust relationship with respect to water, "the 1868 treaty did not impose a duty . . . to take affirmative steps to secure water," to provide an accounting of water use, or even to determine the water needs of the Tribe. *Id.*

The result was that the Navajo treaty recognized only "bare property rights" like the land reservation and the accompanying reserved water rights, but imposed no fiduciary obligations on the government. Justice Thomas concurred, but suggested that the canons of treaty interpretation should be reexamined as no longer necessary.

Chapter 7: Water Rights

Page 513; add to the end of note 4, Modern interpretation of reserved rights:

In 2023, on remand from the 10th Circuit, the New Mexico District Court determined that *Winans* rights applied to the Pueblos' claims. *United States v. Abousleman*, 2023 WL 6314882, 12 (D.N.M. Sept. 28, 2023). Relying on the 10th Circuit's 2020 decision, the court explained that "*Winans* rights are essentially recognized aboriginal rights," and determined that the state and the Coalition failed to show that "governmental recognition of aboriginal water rights must occur in a treaty between the subject Indians and the United States." *Id.* at 13.

Concerning the standards that apply to quantify *Winans* rights, the court explained that they "deviate from aboriginal rights in that they are governmentally recognized;" however, proof of their scope is "essentially identical to that required to prove the existence of an aboriginal claim." *Id.* at 12. The scope of a *Winans* right is therefore "dependent on actual use over an extended period of time," as such rights "preserve pre-existing uses, rather than establishing new uses." The priority of *Winans* rights dates from pre-white settlement, or time immemorial, and the quantity of water reserved is based on a "needs-based" test rather than practicably irrigable acreage. *Id.*

Page 527; add to the end of note 4:

In 2023, the Oregon Circuit Court for Klamath County upheld the Tribes' reserved water and treaty rights. The court rejected arguments that a prior ruling had terminated those rights. *In Re Waters of the Klamath River Basin*, Case Number WA1300001 (Or. Cir. 2023). This decision has not been appealed.

Page 527; add new Note on Arizona v. Navajo Nation and the Colorado River Settlement:

In 2023, the Supreme Court, 5-4, reversed a Ninth Circuit decision and ruled in *Arizona v. Navajo Nation,* 599 U.S. 555 (2023), that although the Navajos' 1868 treaty implicitly reserved sufficient water to fulfill the reservation's purpose, the treaty imposed no implicit trust rights requiring the federal government to determine the tribe's water needs or formulate a plan to meet them. According to the majority (per Kavanaugh, J.), any enforceable trust duties imposed on the federal government must come from express provisions in treaties, statutes, or regulations. The result was that the Navajo treaty recognized only "bare property rights" like the land reservation and the accompanying reserved water rights, but imposed no fiduciary obligations on the government. Justice Thomas concurred, but suggested that the canons of treaty interpretation should be reexamined as no longer necessary.

Justice Gorsuch wrote for the dissent, observing that the 1868 treaty allowed the Nation's citizens to return to their homelands with a promise of adequate resources. In light of the canons of interpretation--requiring the courts to interpret treaties as tribes would understand--Gorsuch maintained that, given the factual context, the tribes would have thought that the treaty required the government to take affirmative steps to secure the water needed to fulfill the treaty's purposes. Gorsuch cited language in the Supreme Court's 1908 *Winters* decision naming the federal government a "fiduciary" of reservation resources as a justification for requiring affirmative federal action. He complained that the federal refusal to fulfill the Treaty's promises has been around since 'Elvis was still making his rounds on The Ed Sullivan Show' and offered suggestions as to how the Navajo Nation might be able to litigate future treaty rights over waters of the Colorado River.

Litigation might not prove necessary in light of a subsequent–but complex–settlement of the Navajo Nation's water rights reached in May 2024 between the federal government, several tribes, the state of Arizona, numerous cities and water districts, and other parties. Under the settlement, the Navajo will receive over 48,000 acre-feet of water per year (AFY) from the Upper and Lower Colorado basins, the Hopi Tribe over 8,000 AFY, both tribes would obtain groundwater rights, and the Navajo would receive all surface water flows reaching its reservation, estimated at

122,000 AFY. The agreement also established several trust funds for water infrastructure, operation and maintenance, and water rights acquisition. In all, the Navajo would receive in excess of $500 million, in the largest compensation ever for mismanaging the tribe's water rights. More details are available from the Navajo Nation's Water Rights Commission, https://nnwrc.navajo-nsn.gov/.

Page 527: add Note on Navajo Nation's Legacy:

A year after *Navajo Nation,* a divided Federal Circuit denied the Ute Tribe's claim of gross mismanagement of its reserved water rights, despite a 1906 statute that included a trust duty to "protect and preserve" the Tribe's water rights, in *Utah Indian Tribe of the Uintah & Ouray Indian Reservation,* 99 F.4th 1353 (Fed. Cir. 2024). In 1967, the federal government agreed to build water infrastructure to benefit the tribe, but never implemented the agreement. Over the years, the Tribe pursued numerous claims in several venues without success. The Federal Circuit agreed with the lower court that the federal government had no duty to secure water rights for the Tribe, despite promises in an 1899 statute, reiterated in the 1906 statute, that the government would "secure water" for the Tribe. That promise, according to the court, was meant only to prevent the government from interfering with the Tribe's "paramount use to water" if it authorized the construction of diversions that took water from the Reservation.

The court did rule that the government breached its trust duty concerning the management of existing irrigation structures that had fallen into disrepair, since the 1906 statute required the structures to be managed "in trust" for the Tribe. A dissent distinguished the *Navajo Nation* case because the "plain language of the 1899 Act create[d] fiduciary obligations on the Secretary that are objectively clear and unambiguous." Yet the majority thought that the statutory directive was not sufficient to hurdle the high bar for enforcing damage claims for failure to satisfy fiduciary obligations erected by *Navajo Nation.*

Page 557: add to the end of note 1 (carries over from 556), before note 2:

Agua Caliente II remains in mediation as of early 2024.

Page 600; add to the end of note 2:

The Supreme Court's 2023 decision in *Arizona v. Navajo Nation* reversed the Ninth Circuit, holding, 5-4, that the federal government can only incurs a fiduciary obligation to a Tribe if it expressly accepted that fiduciary duty in a treaty, statute, or regulation. *Arizona v. Navajo Nation,* 599 U.S. 555 (2023). Thus, the Court refused to hold the federal government accountable for the (unquantified) water rights it holds in trust for the Nation Tribe because its 1868 treaty made no mention of water or any corresponding duties of the United States. *Id.* at 569. The majority found no affirmative duty by the government to take steps to identify and account for the Nation's reserved water rights in the Colorado River necessary to make their homelands livable and productive. *Id.*

The Court agreed that the Nation had a reserved *Winters* water right, and that "the United States maintains a general trust relationship with Indian tribes, including the Navajos." *Id.* at 565. But analogizing to the law of private trusts, the majority decided that any fiduciary duties must be the result of express language that was lacking in the Nation's 1868 treaty. *Id.* at 564-66. Despite acknowledging the existence of a trust relationship, Justice Kavanaugh for the 5-member majority determined that the fiduciary rules usually owed to a beneficiary do not apply to a sovereign like the United States. *Id.* Because of its sovereignty, the U.S. was not subject to common law equitable principles of trust relationships. Instead, any trust obligations are established by Congress and/or the president. *Id.* Thus, unless either explicitly creates "a conventional trust relationship with a tribe as to a particular trust asset," common law trust principles are inapplicable "to infer duties not found in the text of a treaty, statute, or regulation." *Id.* at 566. Since nothing in the Navajo's 1868 treaty established a conventional trust relationship with respect to water, "the 1868 treaty did not impose a duty . . . to take affirmative steps to secure water," to provide an accounting of water use, or even to determine the water needs of the Tribe. *Id.*

The dissent (by Justice Gorsuch) charged the majority with neglecting at least three crucial facts necessary to decide the case: (1) the history between the Navajo Nation and the United States that led to the 1868 Treaty, (2) the discussions surrounding the 1868 Treaty itself, and (3) "an appreciation of the many steps the Navajo took to avoid this litigation." *Id.* at 575. The result was a hollowed-out version of the federal trust responsibility, allowing the beneficiary's trust property to be used by others.

The dissent charged that the majority's decision effectively nullified the government's trust fiduciary duties imposed by the trust doctrine by focusing narrowly on the text of the treaty without considering broader fiduciary principles and the significant control the United States exercises over water resources, perpetuating a long history of unmet promises and unaddressed needs. *Id.* at 575-76. Underscoring the importance of "promise of the United States to make the Nation's Reservation lands a permanent homeland for the Navajo people," the dissent maintained that the majority's ruling would set a dangerous precedent by allowing the government to neglect its trust obligations unless explicitly mandated by law, thereby weakening the protections intended to support and preserve Native American tribes and their resources and leaving the Navajo Nation with no clear path to secure its water rights, which are essential for making their homelands livable and productive. *Id.* at 583-84, 598-99.

Chapter 8: Usufructuary Rights: Hunting, Fishing, and Gathering

Page 664; add to end of note 3, just before last sentence starting "This conflict between….":

For more on the Boldt decision, *see* Charles Wilkinson, *Treaty Justice; The Northwest Tribes, the Boldt Decision, and the Recognition of Fishing Rights* (Univ. of Washington Press, 2024).

Page 688; add to the end of note 6:

As of 2024, the dams along the Klamath have been or are being removed. *See No turning back: The largest dam removal in U.S. history begins*, NPR.org (Jan. 13, 2024), https://www.npr.org/2024/01/12/1224494403/klamath-river-begins-to-flow-again-with-dam-removal-project

Page 728; add to the end of the Note on Abrogation versus Regulation:

On June 18, 2024, NOAA published the final rule "to allow the Makah Indian Tribe to conduct a limited ceremonial and subsistence hunt of up to 25 … gray whales over a 10-year period in accordance with the Treaty of Neah Bay of 1855 and the quota first established by the International Whaling Commission in 1997." 89 Fed. Reg. 51,600 (June 18, 2024).

Chapter 10: Afterword

Add a new final chapter, following page 756:

Native American Natural Resources Law at the end of the first quarter of the 21st century is in flux. The Biden administration made a number of new commitments to consult with Tribal governments on federal approvals of projects that may affect them and has created the potential for an entirely new era of tribal co-stewardship in federal public land management (pp. 48-50 & 379-80 of casebook and accompanying updates). Tribal governments have the interest, expertise, and often the resources to ensure that federal land management is protective of Tribal natural and cultural resources.

Treaty rights have produced substantial salmon habitat restoration, as evidenced by the ongoing effort to unblock barrier road culverts in Western Washington (pp. 689-94 and accompanying update). Salmon habitat will also be restored as a result of the removal of four dams on the Klamath River, which will benefit Tribal harvests, although that is a consequence of Tribal participation in the federal dam relicensing process, not treaty rights. Tribes' use of the regulatory process has led to a number of permit denials for fossil-fuel energy projects from federal, state, and even local agencies (pp. 696-97). Tribes also continue to assume regulatory authority under provisions of the federal pollution control statutes with some frequency (pp. 303-39 and accompanying update).

These developments over the half-century of the so-called self-determination era have strengthened Tribal governments and their authority to manage and harvest natural resources, making clear that the notion that the U.S is a country with dual federal and state sovereigns is now a myth: Tribal governments have strengthened and expanded their role as an important third sovereign.

Although the Biden administration did much to advance Tribal sovereignty in fulfillment of its trustee responsibilities, the U.S. Supreme Court continued to narrow the scope of the federal government's enforceable trust responsibilities to tribal nations. This trend was epitomized by the Court's 2023 decision in *Arizona v. Navajo Nation* (2024 update), in which a narrow five-member Court majority decided that the federal government owed the Navajo no duty to account for and protect its reserved water rights in the Colorado River because the Nation's 1868 treaty contained no express mention of trust responsibilities. Contrary to the longstanding foundations of the trust duty set forth by Chief Justice Marshall over a century-and-a-half ago, which relied upon judicial interpretation of statutory and treaty language rather than express guarantees of a fiduciary duty (pp. 81-93), the modern Court hollowed out the legally enforceable protections of the historic federal-Tribal trust relationship.

Nonetheless, tribal nations in the 21st century deftly advocate within and rely on the political branches of government for protection of their sovereignty and resources, an ironic result given the past efforts of those branches to remove Tribes from their homelands, to "pulverize" Tribes during the allotment era, and terminate them in the post-World War II era (pp. 73-80). Thus, although the current moment continues to present difficult challenges for Tribes and their advocates--and the future promises equally, if not more complex difficulties-- history demonstrates the power of Tribal nations and their leaders to not just survive, but to flourish.