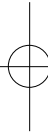

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**Native American
Natural Resources Law**
Cases and Materials

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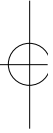
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We dedicate this book to Indian Law students
concerned about the environment of Indian country.





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Preface

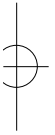
For some time we have thought that the law school curriculum needs an advanced course in Indian law. There is simply too much material in the introductory Indian law course to give adequate coverage to the many aspects of this fascinating, important, and growing area of the law. Students who have an abiding interest in the issues of Indian law are unlikely to be satisfied with the three-hour basic course. Our response to what we view as a hole in the curriculum is this casebook.

Although we have designed this book for use in an advanced course for students who have already taken the basic Indian law course, we do not think the introductory course has to be a prerequisite to Native American Natural Resources Law. In fact, one of us does not require the introductory course as a prerequisite, and the results have been quite satisfactory. We think professors following this example would want to have their students carefully consider the basics of Federal Indian Law contained in Chapter II. Professors requiring the introductory course as a prerequisite may wish to skip or be selective in their assignments of Chapter II. There remains ample material for a three-unit course.

We also view this course as an ideal component of a natural resources or environmental law curriculum. The origins of the course actually lie in those fields, since it was conceived as part of the extensive natural resources and environmental law curriculum at Northwestern School at Lewis and Clark College. One great advantage of the course is that it allows consideration of both natural resources law and environmental law issues in the same course, something we think is overdue in the law school curriculum.

Professor Blumm began teaching Native American Natural Resources Law in the late 1980s. Professor Royster sat in on the course when she was Natural Resources Law Fellow at Northwestern School of Law of Lewis and Clark College in 1987-88, and she contributed materials on the taxation of natural resources to the primitive version of the course Blumm then taught. Royster went on to develop the materials in courses she taught at the University of Tulsa College of Law. Blumm began using her materials a few years ago, when they agreed to collaborate on their publication. Royster is responsible for most of the organization of the book, except for chapter VIII, but both have contributed cases and notes throughout.

We hope that this course finds its way into the law school curriculum as either an advanced Indian Law course or as an advanced course in the natural resources/environmental law curriculum. We know a generation of law students who are strong advocates of the course. We hope that professors looking for a new and dynamic course with a compelling historical dimension, great contemporary economic issues, and offering models for natural resource protection and use for the twenty-first century will carefully consider using these materials.



Introduction

Native American Natural Resources Law is a growing, dynamic, exciting area of the law, involving important economic resources. Yet it has deep historical roots which are inextricably linked to the nation's ethical and legal obligations to the continent's first peoples. The field includes transcendent issues, such as compensation for or restoration of lost resources, as well as pragmatic concerns, such as the ability to site or maintain major facilities, the allocation of water supplies, and pollution control. In a larger sense, the study of Native American Natural Resource Law is a worthy endeavor because, as Felix Cohen noted, it serves as a reflection of the dominant society's tolerance for diversity. Moreover, by providing new laboratories to test novel management approaches, the dominant society may learn valuable natural resources lessons for the future.



Themes of Native American Natural Resources Law



There are several enduring themes in this text. We believe the material is better understood if the following points are introduced at the outset:

- 1) Most of the core conflicts in this field are jurisdictional: conflicts over which government has sovereign control over which resources;
- 2) What you learned in high school civics class—that the United States has a federal system of government with dual sovereigns, the states and the federal government—is not true. Tribal governments are an important third source of sovereignty that play an increasingly important role in natural resources allocation.
- 3) A critical distinction, one not always recognized in the case law, concerns the difference between questions of sovereignty—which government has authority to control natural resource allocation—and questions of property: that is, ownership of resources.
- 4) Large variations in the history of Native American policy continue to influence natural resources allocation today. In particular, the legacy of the allotment era (1887-1934), when tribes lost more than sixty percent of their land base in a purported effort to “assimilate” the tribes into the mainstream of American life, looms large.
- 5) The historical record reveals that, although the federal Congress and Executive have trust responsibilities to protect tribal lands and resources, they have not always been able to fulfill those responsibilities without assistance from the federal courts.
- 6) Ironically, however, some of the most innovative aspects of Native American Natural Resources Law in recent years have come from the U.S. Environmental Protec-

tion Agency, under congressional authority to treat tribes as states for pollution control purposes. These initiatives come at a time when the Rehnquist Court has frequently treated tribal claims of inherent sovereignty with hostility.

7) Perhaps the chief characteristic of this field of law is its relative lack of universal principles that apply to all situations. The great diversity in Indian country in terms of distinct treaties, statutes, executive orders, and histories—what Charles Wilkinson has called the “scattering forces” in Indian country—makes case by case adjudication the norm and generic statements hazardous.

