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NATIVE AMERICAN NATURAL RESOURCES LAW

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Teacher's Update for 2010-11
Addendum
August 2011

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Note to teachers: This is an addendum to the Teacher's Update for 2010-11 rather than a replacement. This addendum contains only those updates of most importance during the last year. We are planning a new edition to be available for use in Fall 2012. Elizabeth Kronk of Texas Tech will be joining us on the third edition.

Chapter V: Natural Resource Development

A. The Federal Role in Resource Development

Page 338, note 3. Add the following:

On April 26, 2011, the U.S. Supreme Court decided *United States v. Tohono O'Odham Nation*, 131 S.Ct. 1723. The case centered on interpreting 28 U.S.C. § 1500, which provides that:

> [t]he United States Court of Federal Claims shall not have jurisdiction of any claim *for or in respect to* which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

As a result of § 1500, the Court of Federal Claims (CFC) does not have jurisdiction over a claim if the plaintiff has another suit related to the same claim against the United States or its agents pending elsewhere. In the case at issue, the Tohono O'Odham Nation brought two claims based on the same allegations of breach of fiduciary duty. The first claim was filed against federal officials in federal district court for equitable relief for breach of trust, including an accounting; a second claim, based on essentially the same allegations, was filed in the CFC for monetary damages for breach of trust. The CFC dismissed the claim for want of jurisdiction, finding that the two suits were essentially the same and, as a result, § 1500 precluded jurisdiction. The Court of Appeals for the Federal Circuit reserved, as there was no overlap between the relief requested in both claims.

The Supreme Court granted certiorari to address the issue of what it means for two suits to be "for or in respect to" the same claim. The Court had previously partially addressed this question in *Keene Corp. v. United States*, 508 U.S. 200 (1993), when the Court determined that suits are "for

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or in respect to" the same claim when they are largely based on the same facts. The present case however raised the new issue of whether suits are "for or in respect to" the same claim if, while based on essentially the same operative facts, the suits request different relief. Ultimately, the Court concluded that "[t]wo suits are for or in respect to the same claim, precluding jurisdiction in the CFC, if they are based on substantially the same operative facts, regardless of the relief sought in each suit." *Tohono O'Odham*, 131 S.Ct. at 1731.

In reaching this conclusion, the Court explained that the text of § 1500 suggests that the phrase "for or in respect to" merely refers to facts. Additionally, the Court reasoned that because of the limited jurisdiction of the CFC, an instance when the relief requested by a claim filed in a federal district court and CFC would be the same would only rarely occur. As a result, a contrary holding would essentially eviscerate the purpose of § 1500. Furthermore, the Court explained that its decision was consistent with the traditional understanding of claim preclusion. The Court also failed to find that its holding provided any hardship for the Nation or tribes in a similar situation. The Court explained that similarly-situated tribes could either file in the CFC alone for monetary damages or "[i]t also seems likely that Indian tribes in the Nation's position could go to the district court first without losing the chance to later file in the CFC, for Congress has provided in every appropriations Act for the Department of Interior since 1990 that the statute of limitations on Indian trust mismanagement claims shall not run until the affected tribe has been given an appropriate accounting." *Id.* at 1731 (citation omitted). Finally, from a policy perspective, the Court pointed out that the Nation did not have a right to monetary relief, as such relief is only available by the "grace" of Congress. Therefore, should the Nation disagree with the Court's decision, the proper remedy would be to bring a complaint to Congress. Ultimately, because the operative facts underlying the Nation's claims in federal district court and the CFC were practically identical, the Court held that the CFC did not have jurisdiction under § 1500.

Page 338, note 4. Add to the end of the information in the teacher's update:

The *Cobell* settlement was passed by both houses of Congress and signed into law on December 8, 2010. Claims Resolution Act of 2010, Pub. L. No. 111-291. An order granting final approval to the settlement was entered by the District of Columbia District Court on July 27, 2011, and the final judgment was filed on August 4. On August 6, class member Kimberly Craven filed a notice of appeal.

Page 341, new note 5. Replace new note 5 in the teacher's update with the following:

On June 13, 2011, the U.S. Supreme Court decided *United States v. Jicarilla Apache Nation*, 131 S.Ct. 2313. The Court's decision in *Jicarilla* builds on the Court's past decisions regarding the extent of the federal trust relationship in *Mitchell* I, *Mitchell* II, *Navajo Nation* and *White Mountain Apache*. *Jicarilla* differs procedurally from the previous federal trust relationship decisions in that the appeal to the Supreme Court came as a writ of mandamus by the United States to vacate an order requiring the United States to release certain documents in a breach of trust claim brought against the federal government in the Court of Federal Claims. At issue in the underlying litigation is the

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federal government's management of the Nation's trust accounts from 1972 to 1992. Asserting the attorney-client privilege and attorney work-product doctrine, the federal government declined to turn over 155 documents requested by the Nation. The Nation filed a motion to compel production, and the Court of Federal Claims granted the motion in part. The Court of Federal Claims found that communication relating to the management of the Nation's trust funds fell within the "fiduciary exception" to the attorney-client privilege, and, as a result, that these documents should be produced. The federal government petitioned the Court of Appeals for the Federal Circuit with a writ of mandamus to prevent disclosure, but the Court of Appeals upheld the Court of Federal Claims decision.

The issue before the Supreme Court was whether the common-law fiduciary exception to the attorney-client privilege applied to the United States when acting in its capacity as trustee for tribal trust assets. In concluding that the fiduciary exception did not apply, the Court explained that the federal government resembles a private trustee in only limited instances. Furthermore, the Court reasoned that "[t]he Government, of course, is not a private trustee. Though the relevant statutes denominate the relationship between the Government and the Indians a 'trust,' that trust is defined and governed by statutes rather than the common law." *Id.* at 2323. Ultimately, the Court concluded that while common law principles may "inform our interpretation of statutes and to determine the scope of liability that Congress has imposed … the applicable statutes and regulations 'establish [the] fiduciary relationship and define the contours of the United States' fiduciary obligations.'" *Id.* at 2325 (citing *Mitchell II*).

The Court explained that two features must exist in order for the common-law fiduciary exception to apply: 1) a "real client" and 2) duty to disclose information regarding the trust. The Court concluded that the present case lacked both factors. First, the Court determined that the Jicarilla Apache Nation was not a real client of the federal government's attorneys as the Nation did not pay the attorneys. Additionally, the federal government sought advice from its attorneys in its role as a sovereign and not as a fiduciary for the Nation. Moreover, the Court determined that the federal government has an interest in its capacity as a sovereign in the administration of the Indian trust accounts separate from the interests of the beneficiaries.

With regard to the second feature that must exist for the fiduciary exception to apply, the Court rejected the Nation's argument that the federal government had a duty to disclose under statutes setting out federal responsibilities for tribal trust funds. The Court stated that "[w]hatever Congress intended, we cannot read the clause [providing that the government's trust responsibilities "are not limited to" those set out in the statute] to include a general common-law duty to disclose all information related to the administration of Indian trusts. … Reading the statute to incorporate the full duties of a private, common-law fiduciary would vitiate Congress' specification of narrowly defined disclosure obligations." *Id.* at 2330. Based on the foregoing, the Court reversed and remanded, leaving the Court of Appeals to determine whether the standards for granting the federal government's writ of mandamus were met.

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VI. Taxation of Natural Resources

C. State Taxation

Page 396, note 3. Add to end of note:

The Ute Mountain Ute Tribe brought suit alleging that the same five state taxes at issue in *Cotton Petroleum* were preempted as applied to oil and gas companies operating on the New Mexico portion of the Ute Mountain Ute Reservation. *Ute Mountain Ute Tribe v. Rodriguez*, – F.3d –, 2011 WL 3134838 (10th Cir. July 27, 2011). Under the "flexible" preemption analysis of *Cotton Petroleum* and prior Supreme Court cases, the tribe argued that its situation was distinguishable from that in *Cotton Petroleum*. The Tenth Circuit disagreed.

The Ute Mountain case involved both leases under the Indian Mineral Leasing Act and minerals agreements under the Indian Mineral Development Act, although the appeals court determined that like the IMLA, the IMDA neither clearly authorized nor prohibited state taxation of nonmembers. The Tenth Circuit then determined that the federal scheme for oil and gas was not "exclusive" because the state regulated certain aspects on-reservation (detailed in the opinion), that the tribe suffered only the "indirect" economic burdens of not being able to raise its own taxes and attract new companies, and that the state's interests were more than minimal. The most important state interest – "and the one that primarily justifies the New Mexico taxes at issue" – was the *off-reservation* infrastructure that allowed the oil and gas to be transported to market. Accordingly, the Tenth Circuit found the taxes not preempted.

In dissent, Judge Lucero argued that the evidence of economic impacts presented by the tribe distinguished the case from *Cotton Petroleum*, where no expert testimony had been offered to support economic effects. Moreover, Judge Lucero argued that off-reservation state services justified the state in taxing only the off-reservation activities of the oil and gas companies. Because the state provided no on-reservation services to either the tribe or the companies, the state's interest was too minimal to support the on-reservation taxes.

IX. International Approaches to Indigenous Lands and Resources

A. International Instruments for the Protection of Indigenous Rights

Page 600. Note on U.N. Declaration. Add to information in the teacher's update:

On December 16, 2010, at the White House Tribal Nations Conference, President Obama stated that "today I can announce that the United States is lending its support to this declaration." *See* <http://www.whitehouse.gov/the-press-office/2010/12/16/remarks-president-white-house-tribal-nations-conference>.