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NATIVE AMERICAN NATURAL RESOURCES LAW

(3D ED., 2013)

Teacher's Update for 2016–17

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Judith V. Royster
Michael C. Blumm
Elizabeth Ann Kronk Warner

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Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
E-mail: cap@cap-press.com
www.cap-press.com

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I. Land, Religion, and Culture

A, Legal Protection of Religion and Cultural Resources

Page 49. Add a new paragraph at the end of the chapter:

In 2015, a study by University of Copenhagen (Denmark) geneticists concluded that, based on DNA testing, Kennewick Man's closest contemporary relatives were Native Americans, not Asian Americans, as earlier studies based on craniometric studies that did not incorporate DNA analysis had suggested. But since the DNA study did not indicate to which current tribe the skeleton was most closely related, it is not clear whether it will lead to repatriation of the remains, which are currently housed at the University of Washington's Burke Museum. *See* Carl Zimmer, *New DNA Results Show Kennewick Man Was Native American*, N.Y. Times, June 18, 2015, http://www.nytimes.com/2015/06/19/science/new-dna-results-show-kennewick-man-was-native-american.html?_r=0.

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II. Some Basics of Federal Indian Law

C. Tribal Sovereignty

Page 69. Add new note 1a. Contemporary Tribal Sovereignty. For a cogent justification of tribal sovereignty by a knowledgeable commentator, see Joseph William Singer, *The Indian States of America: Parallel Universes & Overlapping Sovereignty* 38 Am. Indian L. Rev. 1 (2014) (listing 566 recognized tribes in an appendix).

Page 70. Replace the last sentence of the first full paragraph with the following:

For a recent list of the 567 "Indian Entities Recognized and Eligible to Receive Services from the Bureau of Indian Affairs," see 81 Fed. Reg. 26826 (May 4, 2016).

Replace 2d and 3d paragraphs with the following:

In 2015, the Secretary revised the Part 83 acknowledgement regulations, 25 C.F.R. §83, 80 Fed. 37,862 (July 21, 2015). The revisions state that the BIA will not require conclusive proof of facts and only "substantially continuous" community or political influence from 1900. But tribes must meet all seven criteria specified in § 83.11 of the regulations (identification, community, political influence, etc.). A recent treatise has suggested that the federal recognition process is lengthy expensive, lacking in clear standards and precedents, and "too political. In short, the process is designed to root out fraudulent tribes, but utilizes 18th century ethnocentric conceptions of what an Indian nation appears to be." Mathew L.M. Fletcher, *Federal Indian Law* 172 (West 2016).

E. Indian Country

2. Expanding Indian Country

Page 96, note 3. Add to the first paragraph before the citation to Sheppard:

Frank Pommersheim, *Land into Trust: An Inquiry into Law, Policy, and History*, 49 Idaho L. Rev. 519 (2013).

At the end of the first paragraph, replace the citation to the *Fee-to-Trust Handbook* with:

U.S. Bureau of Indian Affairs, *Fee-to-Trust Handbook: Version* IV (rev. 1) (June 28, 2016), available at www.bia.gov/WhatWeDo/Knowledge/Directives/Handbooks/index.htm.

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III. Land: The Fundamental Resource

Page 99. Add new note 7 before Section 3:

7. Land into trust in Alaska. In 2014, the Department of the Interior issued a rule deleting the Alaska Exception to taking land into trust under 25 C.F.R. § 151. *See* 79 Fed. Reg. 76888 (Dec. 23, 2014). Applications for taking land into trust in Alaska now proceed under the same regulations as land into trust elsewhere. In 2016, the D.C. district court dismissed Alaska's appeal for lack of jurisdiction, noting that the intervenor state had raised no independent claim for relief in the district court case that gave rise to the 2014 rule, and that the dispute between the tribes and the Department of the Interior was moot. *Akiachak Native Community v. U.S. Dep't of Interior*, -- F.3d --, 2016 WL 3568092 (D.D.C. July 1, 2016).

3. Contracting Indian Country: Reservation Diminishment

Page 114. Add the following new case at the end of the section:

Nebraska v. Parker
136 S.Ct. 1072 (2016)

[This case involves approximately 50,000 acres of land in Nebraska, lying west of a now-abandoned railroad right-of-way, within the boundaries of the Omaha Reservation as established by treaties in 1854 and 1865. The village of Pender sits within the disputed lands west of the right-of-way. Pender has approximately 1300 residents, few of whom are Omaha; less than 2% of tribal members have lived within the disputed lands for over a century. In 2006, the tribe applied its Beverage Control Ordinance to retailers in Pender, requiring a liquor license and imposing a fine for violations. Pender retailers brought suit, claiming that an 1882 Act had diminished the reservation; the state intervened on behalf of the retailers. The United States intervened on behalf of the Omaha Tribal Council member defendants.

[The Court, in a unanimous decision by Justice Thomas, first reiterated the diminishment factors from *Solem* and *Yankton Sioux*.]

A

The 1882 Act bore none of these hallmarks of diminishment. The 1882 Act empowered the Secretary to survey and appraise the disputed land, which then could be purchased in 160–acre tracts by nonmembers. The 1882 Act states that the disputed lands would be "open for settlement under such rules and regulations as [the Secretary of the Interior] may prescribe." And the parcels would be sold piecemeal in 160–acre tracts. So rather than the Tribe's receiving a fixed sum for all of the disputed lands, the Tribe's profits were entirely dependent upon how many nonmembers purchased the appraised tracts of land.

From this text, it is clear that the 1882 Act falls into another category of surplus land Acts: those that "merely opened reservation land to settlement and provided that the uncertain future proceeds of settler purchases should be applied to the Indians' benefit." Such schemes allow "non-

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Indian settlers to own land on the reservation." But in doing so, they do not diminish the reservation's boundaries.

B

We now turn to the history surrounding the passage of the 1882 Act. The mixed historical evidence relied upon by the parties cannot overcome the lack of clear textual signal that Congress intended to diminish the reservation. That historical evidence in no way "*unequivocally* reveal[s] a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation."

C

Finally, we consider both the subsequent demographic history of opened lands, which serves as "one additional clue as to what Congress expected would happen once land on a particular reservation was opened to non-Indian settlers," as well as the United States' "treatment of the affected areas, particularly in the years immediately following the opening," which has "some evidentiary value." Our cases suggest that such evidence might "reinforc[e]" a finding of diminishment or nondiminishment based on the text. But this Court has never relied solely on this third consideration to find diminishment.

As petitioners have discussed at length, the Tribe was almost entirely absent from the disputed territory for more than 120 years. The Omaha Tribe does not enforce any of its regulations—including those governing businesses, fire protection, animal control, fireworks, and wildlife and parks—in Pender or in other locales west of the right-of-way. Nor does it maintain an office, provide social services, or host tribal celebrations or ceremonies west of the right-of-way.

This subsequent demographic history cannot overcome our conclusion that Congress did not intend to diminish the reservation in 1882. And it is not our role to "rewrite" the 1882 Act in light of this subsequent demographic history. After all, evidence of the changing demographics of disputed land is "the least compelling" evidence in our diminishment analysis, for "[e]very surplus land Act necessarily resulted in a surge of non-Indian settlement and degraded the 'Indian character' of the reservation, yet we have repeatedly stated that not every surplus land Act diminished the affected reservation."

Evidence of the subsequent treatment of the disputed land by Government officials likewise has "limited interpretive value." Petitioners highlight that, for more than a century and with few exceptions, reports from the Office of Indian Affairs and in opinion letters from Government officials treated the disputed land as Nebraska's. It was not until this litigation commenced that the Department of the Interior definitively changed its position, concluding that the reservation boundaries were in fact not diminished in 1882. For their part, respondents discuss late–19th–century statutes referring to the disputed land as part of the reservation, as well as inconsistencies in maps and statements by Government officials. This "mixed record" of subsequent treatment of the disputed land cannot overcome the statutory text, which is devoid of any language indicative of Congress' intent to diminish.

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Petitioners' concerns about upsetting the "justifiable expectations" of the almost exclusively non-Indian settlers who live on the land are compelling, but these expectations alone, resulting from the Tribe's failure to assert jurisdiction, cannot diminish reservation boundaries. Only Congress has the power to diminish a reservation. And though petitioners wish that Congress would have "spoken differently" in 1882, "we cannot remake history."

* * *

In light of the statutory text, we hold that the 1882 Act did not diminish the Omaha Indian Reservation. 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. Cf. *City of Sherrill v. Oneida Indian Nation of N.Y.,* 544 U.S. 197, 217–221 (2005) [excerpted at pages 122-125].

Notes

1. Demographics. Is the Court's view of the importance of demographics consistent with the views it expressed in *Solem* and *Yankton Sioux*? After this decision, what part will the "actual state of things" play in diminishment cases? In light of *Parker*, was the Osage diminishment case (page 113, note 3) correctly decided?

Page 126, note 1. Add to the end of the note:

The Second Circuit reaffirmed its ruling in *Madison County* that an Indian tribe has sovereign immunity from suit by a county to foreclose on tribally-owned fee land for nonpayment of ad valorem property taxes. *Cayuga Indian Nation v. Seneca County*, 761 F.3d 218 (2d Cir. 2014). The court declined to "attempt to discern the implied message" in the Court's vacatur of *Madison County* in light of subsequent Supreme Court opinions upholding tribal sovereign immunity. It also stated that "we read no implied abrogation of tribal sovereign immunity from suit" into *Sherrill*.

Page 133. **Add following second full paragraph**:

In 2014, *Tsilhqot'in Nation v. British Columbia*, 2014 S.C.C. 44, the Supreme of Canada handed down a highly significant aboriginal rights decision concerning the claims of a semi-nomadic grouping of six bands sharing common culture and history, which have lived in a remote valley bounded by rivers and mountains in central British Columbia. The bands are among hundreds of indigenous groups in British Columbia with unresolved land claims. In 1983, B.C. granted commercial logging licenses on land considered by the Tsilhqot'in to be part of their traditional territory. The bands objected and sought a declaration prohibiting commercial logging on the land. After negotiations failed, the bands filed suit. Their aboriginal rights claim was opposed by both the federal and provincial governments. A trial court upheld the claim, but the British Columbia Court of Appeal largely reversed, indicating that aboriginal title was limited to small intensively used tracts.

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The Canadian Supreme Court disagreed, ruling that aboriginal title requires only evidence of regular and exclusive use and occupation of land. The use and occupation must sufficient, continuous, and exclusive. In determining what constitutes sufficient occupation, which was the heart of the Tsilhqot'in appeal, the Court determined that aboriginal title is not confined to specific sites of settlement but instead extends to tracts of land regularly used for hunting, fishing, or otherwise exploiting resources and over which the group exercised effective control at the time of assertion of European sovereignty. The court consequently upheld the trial judge's determination, even though the Tsilhqot'in population was small, because there was sufficient evidence that the parts of the land were regularly used by the Tsilhqot'in. The evidence also showed that historically the Tsilhqot'in repelled other people from their land and demanded permission from outsiders who wished to pass over it.

The Court stated that the nature of aboriginal title is that it confers on the group that holds it the exclusive right to decide how the land is used and the right to benefit from those uses, subject to the restriction that the uses must be consistent with the group nature of the interest and the enjoyment of the land by future generations. Moreover, prior to establishment of title, the Crown must consult in good faith with any aboriginal groups asserting title to the land about proposed uses of the land and, if appropriate, accommodate the interests of such groups. The level of consultation and accommodation required varies with the strength of the aboriginal group's claim to the land and the seriousness of the potentially adverse effect upon the interest claimed.

And where aboriginal title has been established, the Crown must not only comply with its procedural duties, but must also justify any incursions on aboriginal title lands by ensuring that the proposed government action is substantively consistent with the requirements of section 35 of the Canadian Constitution Act of 1982, which requires a demonstration of both a compelling and substantial governmental objective, and that the government action is consistent with the fiduciary duty owed by the Crown to the aboriginal group. According to the Court, the government must act in a way that respects the fact that aboriginal title is a group interest that inheres in present and future generations. Fulfilling that duty requires consultation with and consent by with the group. The Court concluded that the province breached its duty by issuing the 1983 licenses, since the honor of the Crown required consultation with the Tsilhqot'in and accommodation of their interests.

Page 141. Add note 7.

7. The Tejon Ranch Claim. In 2015, the Ninth Circuit affirmed a district court's rejection of the non-recognized Kawaiisu Tribe's aboriginal claim to Tejon Ranch, some 270,000 acres of private lands in southern California, because of the tribe's failure to present the claim to a board of commissioners established by the California Land Claims Act of 1851. The court also ruled that a subsequent treaty did not recognize the tribe's aboriginal claim, nor did an unratified treaty. *Robinson v. Jewell*, 790 F.3d 910 (9th Cir. 2015) (also rejecting claims of forgery and deception in Mexican land grants that occurred before the land claims process established by the 1851 statute).

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E. Allotted Lands

Page 186, note 2. Add to the end of the note:

The Claims Resolution Act of 2010 that ended the *Cobell* trust litigation—see note 4, pages 308–309—included a $2 billion Trust Land Consolidation Fund. Over $1.5 billion of that is set aside for the purchase of fractionated interests in allotments. The Land Buy-Back Program for Tribal Nations allows individuals to voluntarily sell their interests, with the land placed immediately in trust for the tribe with jurisdiction. The initial implementation plan in 2012 reported over 10 and a half million fractionated acres, with close to 3 million fractionated interests in them, and over 90,000 tracts that are fractionated.

The program concentrates on the 40 reservations that the government believes will experience the most benefit from the consolidation of land administration. The first reservation on which allotment owners received offers to sell was the Pine Ridge Reservation in South Dakota, considered the most fractionated of all reservations. Pine Ridge had nearly 6000 fractionated tracts, with close to 1.2 million acres and over 194,000 interests eligible for purchase. http://www.doi.gov/news/pressreleases/ http://www.doi.gov/buybackprogram/index.cfm.

At the end of fiscal year 2015, the Department of the Interior reported that:

> The Program began land consolidation purchases in December 2013 and thus far has made offers to nearly 66,500 unique individuals totaling more than $1.7 billion for interests at 19 locations. In Fiscal Year 2015 (FY 2015) alone, the Program paid nearly $550 million to landowners who accepted offers. The Program has paid landowners nearly $715 million since its inception, and it has created or increased tribal ownership in more than 26,400 tracts of land – with more than 1,060 of those tracts reaching 100 percent tribal trust ownership. The Program has transferred the equivalent of nearly 1,500,000 acres of land to tribal trust ownership.

U.S. Dep't of the Interior, Land Buy-Back Program for Tribal Nations: 2015 Status Report 1-2 (Nov. 4, 2015), available at https://www.doi.gov/sites/doi.gov/files/uploads/Buy-Back_Program_2015_Status_Report.pdf.

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IV. Use and Environmental Protection

A. Authority to Control Land Use

Page 195. Add to the end of note 1:

For an argument that the treaty right to undisturbed use and occupation recognizes and preserves tribes' full authority over nonmembers on trust lands, see Judith V. Royster, *Revisiting Montana: Indian Treaty Rights and Tribal Authority over Nonmembers on Trust Lands*, 57 Ariz. L. Rev. 889 (2015).

Page 217: Add to end of note 3:

In *Dollar General v. Mississippi Band of Choctaw Indians*, 136 S.Ct. 2159 (June 23, 2016), an equally divided Supreme Court affirmed the Fifth Circuit's decision in the case without opinion. The Fifth Circuit, 732 F.3d 409 (5th Cir. 2013), invoked the *Montana* consensual relations exception (the first circuit court to do so) to find tribal court jurisdiction over a tort claim against a nonmember whose action took place on trust land.

B. Environmental Protection

Page 221, note 1. Add to the end of the note:

On January 9, 2014, EPA Administrator Gina McCarthy reaffirmed the EPA's Indian Policy first adopted in 1984. In her statement, Administrator McCarthy stated:

> the EPA reiterates its recognition that the United States has a unique legal relationship with tribal governments based on the Constitution, treaties, statutes, executive orders and court decisions. The EPA recognizes the right of the tribes as sovereign governments to self-determination and acknowledges the federal government's trust responsibility to tribes. The EPA works with tribes on a government-to-government basis to protect the land, air and water in Indian Country.

Memorandum from Gina McCarthy, EPA Administrator, to All EPA Employees (January 9, 2014), available at: http://www.epa.gov/tribal/basicinfo/1984-indian-policy-reaffirmation%20emo-09JAN14.pdf.

Page 234, note 1. Revise last full sentence as follows:

As of mid-2016, the agency had approved water quality standards for 42 tribes (of the 53 tribes the agency determined were eligible to administer a water quality standards program). U.S. Environmental Protection Agency, *EPA Approvals of Tribal Water Quality Standards*, https://

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www.epa.gov/wqs-tech/epa-approvals-tribal-water-quality-standards (last visited Aug. 5, 2016) (listing tribes).

Page 239, note 2. Revise note as follows:

In 2016, EPA published its revised interpretation of the CWA's TAS provision to help streamline how tribes apply for TAS status under the CWA. EPA concluded "definitively that section 518 includes an express delegation of authority by Congress to eligible Indian tribes to administer regulatory programs over their entire reservations." 81 Fed. Reg. 30,183 (May 16, 2016). This reinterpretation makes EPA's interpretation of the CWA consistent with the agency's interpretation of the CAA and would be consistent with EPA's interpretation of tribal regulation under the CAA, and eliminate the need for tribes to demonstrate inherent authority to regulate. *Id.* The reinterpretation did not change any regulatory text.

EPA's reinterpretation may obviate the need to assign the *Montana v. EPA* case (p. 235).

Page 247, note 2. Add to the end of the note:

The District of Columbia Circuit struck down a similar argument in *Oklahoma v. Environmental Protection Agency*, 740 F.3d 185 (D.C. Cir. 2014). EPA attempted to establish a federal rule for attainment of national ambient air quality standards in Indian County not located within reservations. 76 Fed. Reg. 38,748 (July 1, 2011). According to the CAA, tribes may manage and protect resources within "the exterior boundaries of the reservation or other areas within the tribe's jurisdiction." 42 U.S.C. §7601(d)(2)(B). Under the EPA's tribal authority rule (TAR), upheld in *Arizona Public Service Co. v. EPA*, a tribe may implement the CAA within its reservation without proving jurisdiction, but must demonstrate jurisdiction over non-reservation areas. Under the TAR, a federal implementation plan applied to all of Indian country nationwide except where EPA had already approved a tribal program. Oklahoma challenged the rule, alleging that a state's plan applied to pollution sources outside reservations until EPA demonstrates the existence of tribal regulatory authority. The court agreed with the state, finding that the newly promulgated rule was arbitrary and capricious under the Administrative Procedure Act for two reasons. First, no regulatory gap (a justification for the new rule) exists as the State Implementation Plan applies unless a tribe demonstrates regulatory authority. Second, EPA cannot institute a Federal Implementation Plan until it has determined that the jurisdiction's plan is inadequate. The court did not reach the second issue, as it found in Oklahoma's favor on the first issue. Until a tribe demonstrates jurisdiction over non-reservation Indian country, the court found that jurisdiction resides in the state. Accordingly, the court determined that EPA's interpretation under the newly promulgated rule was not entitled deference because its interpretation violates the CAA and was therefore arbitrary and capricious.

Further, in December 2008, the Eastern Shoshone and Northern Arapaho Tribes applied to the EPA for treatment as a state under the CAA. The Tribes asserted jurisdiction over Riverton, Wyoming in their application. On December 19, 2013, EPA approved the Tribes' application, and the approved jurisdictional area included Riverton, Wyoming. In February 2014, Wyoming petitioned the U.S. Court of Appeals for the Tenth Circuit to review EPA's decision, and it filed

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its opening brief with the court in December 2014. The issue before the Tenth Circuit is whether EPA was correct to include Riverton, Wyoming within the boundaries of the Tribes' reservation for purposes of a tribal air monitoring program under the CAA. Wyoming argues that EPA's decision was erroneous because several acts of Congress diminished the Tribes' reservation, and, as a result, the Tribes no longer have jurisdiction over the town. For copies of the briefs filed in this case, see https://turtletalk.wordpress.com/2014/10/23/tenth-circuit-briefs-in-state-of-wyoming-v-epa-challenge-tas-status-to-wind-river-reservation/. For a discussion of reservation diminishment, see Chapter 2, pages 99-114.

Pages 253-254, Note on Tribal Environmental Law. Add to the end of the note:

A recent study looked at the tribal environmental codes of 74 federally recognized tribes located within Arizona, Montana, New York and Oklahoma. The study determined that approximately half of the tribal codes reviewed, or the tribal codes of 36 tribes, included code provisions related to air pollution, water pollution, solid waste disposal or environmental quality generally. Elizabeth Ann Kronk Warner, *Examining Tribal Environmental Law*, 39 Colum. J. Envt'l L. 42 (2014). Examining the environmental tribal laws of the same 74 federally recognized tribes, a second article considered how tribes have adopted and adapted federal environmental laws within the tribal context. Elizabeth Ann Kronk Warner, *Tribes as Innovative Environmental "Laboratories,"* 86 Colo. L. Rev. 789 (2015). Additionally, the third article in the series considers sources of law, other than tribal codes, adopted to regulate their environments by tribes under their inherent tribal sovereignty. The article also argues that tribes are truly innovating in the area of environmental regulation, and are therefore valuable regulatory laboratories that other sovereigns can look to for guidance as to effective environmental regulation. Elizabeth Ann Kronk Warner, *Justice Brandeis and Indian Country: Lessons from the Tribal Environmental Laboratory*, 47 Ariz. State L. Journal 857 (2015).

Page 264, note 1. Add to the end of the note.

NEPA can apply to actions of the BIA related to Indian county. For example, in *Citizens for a Better Way, et al. v. United States Dept. of the Interior, et al.*, No. 2:12-cv-3021, 2015 U.S. Dist. LEXIS 128745 (E.D. Cal. 2015), the court considered arguments related to the application of NEPA to a fee-to-trust acquisition project related to a proposed casino. In relevant part, the plaintiffs argued that the BIA violated NEPA in three ways, in addition to arguing that the BIA violated the APA and Indian Gaming Regulatory Act. The court, however, failed to find that the BIA violated NEPA.

In *Jamul Action Committee v. Jonodev Chaudhuri*, however, the court found that NEPA did not apply, as the application of NEPA would create an irreconcilable statutory conflict with the Indian Gaming Regulatory Act. No. 15-16021 (9th Cir. Amended July 15, 2016). In this case, plaintiffs argued that the National Indian Gaming Commission acted in an arbitrary and capricious manner when it failed to comply with the NEPA prior to approving the Jamul Indian Village's gaming ordinance for a casino. In reaching its decision for the Commission, the court explained that two exceptions to the application of NEPA exist, and one exemption occurs when an irreconcilable statutory conflict exists. Given the Indian Gaming Regulatory Act requires the Commission to act within 90 days of a tribal gaming ordinance or resolution being submitted and

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it typically takes at least 360 days to prepare an environmental impact statement under the EIS, the court found that it was impossible to reconcile the requirements of NEPA with this specific requirement of the Indian Gaming Regulatory Act.

Page 264, note 2. Add to the end of the note.

As a recent example of how tribes attempted to use NEPA as a "shield," see *Center for Biological Diversity, et al. v. Salazar, et al.*, 706 F.3d 1065 (9th Cir. 2013). Environmental organizations, the Kaibab Band of Paiute Indians, and the Havasupai Tribe alleged the Secretary of the Interior and Bureau of Land Management (BLM) violated NEPA, in addition to the Federal Land Policy and Management Act and BLM regulations, when the agencies permitted a mining company to restart uranium mining after a 17-year hiatus without a new mine plan or a new environmental impact statement. The 9th Circuit upheld the district court's decision to allow the restart because the court deferred both to BLM's interpretation of its mine plan regulations and its interpretation of its NEPA responsibilities, including its determination that a required gravel permit qualified for a categorical exclusion.

Page 273. **Add new note 6.**

6. Presidential Memorandum on mitigating environmental impacts. Beyond NEPA, the federal government has taken other steps to mitigate environmental damage. On November 3, 2015, the White House released a Presidential Memorandum titled "Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment." Office of the Press Secretary, White House, "Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment," (Nov. 3, 2015), available at: https://www.whitehouse.gov/the-press-office/2015/11/03/mitigating-impacts-natural-resources-development-and-encouraging-related (last visited July 26, 2016). The Memorandum states that "[i]t shall be the policy of the Departments of Defense, the Interior, and Agriculture; the Environmental Protection Agency; and the National Oceanic and Atmospheric Administration; and all bureaus or agencies within them … to avoid and then minimize harmful effects to land, water, wildlife, and other ecological resources (natural resources) cause by land- or water-disturbing activities, and to ensure that any remaining harmful effects are effectively addressed, consistent with existing mission and legal authorities. Agencies shall adopt a clear and consistent approach for avoidance and minimization of, and compensatory mitigation for, the impacts of their activities and projects they approve." The Memorandum encourages federal agencies to take advantage of existing plans, such as tribal plans, in their planning. The Memorandum, however, is intended for internal guidance for federal agencies, and is not legally enforceable by third parties.

Pages 275, Note on Environmental Justice. Add to the end of the note:

On July 24, 2014, the EPA released the *EPA Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous Peoples*, which is available at: http://www.epa.gov/oecaerth/environmentaljustice/resources/policy/indigenous/ej-indigenous-policy.pdf. The EPA defines "environmental justice" as the "fair and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies." The new

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policy is designed to integrate environmental justice principles into the Agency's work with federally recognized tribes and indigenous peoples. The Policy is based on three key documents: 1) Executive Order 12898 (page 275); 2) the *EPA Policy for the Administration of Environmental Programs on Indian Reservations* (page 220); and 3) Plan EJ 2014, which is the EPA's overarching strategy for advancing environmental justice, available at: http://www.epa.gov/environmentaljustice/plan-ej/. The policy divides 17 principles into four categories: 1) promoting environmental justice principles in EPA direct implementation of programs, policies, and activities; 2) promoting environmental justice principles in tribal environmental protection programs; 3) promoting environmental justice principles in EPA's engagement with indigenous peoples; and, 4) promoting environmental justice principles in intergovernmental coordination and collaboration.

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V. Natural Resource Development

A. The Federal-Tribal Relationship in Resource Management

Page 281. Add a new note 4 before the Note on Resource Development Statutes

4. DOI's duty to consult. In 2011, the Secretary of the Department of the Interior issued Order No. 3317, setting forth the Department of the Interior Policy on Consultation with Indian Tribes, designed to carry out Executive Order 13175: Consultation and Coordination with Indian Tribal Governments. The policy is set forth in section 4:

> a. Government-to-government consultation between appropriate Tribal officials and the Department requires Departmental officials to demonstrate a meaningful commitment to consultation by identifying and involving Tribal representatives in a meaningful way early in the planning process.
>
> b. Consultation is a process that aims to create effective collaboration with Indian tribes and to inform Federal decision-makers. Consultation is built upon government-to-government exchange of information and promotes enhanced communication that emphasizes trust, respect, and shared responsibility. Communication will be open and transparent without compromising the rights of Indian tribes or the government-to-government consultation process.
>
> c. Bureaus and offices will seek to promote cooperation, participation, and efficiencies between agencies with overlapping jurisdictions, special expertise, or related responsibilities when a Departmental action with Tribal implications arises. Efficiencies derived from the inclusion of Indian tribes in all stages of the tribal consultation will help ensure that future Federal action is achievable, comprehensive, long-lasting, and reflective of tribal input.

In 2016, the federal district court in Wyoming struck down a final rule by the Bureau of Land Management (BLM) regulating hydraulic fracturing (fracking) on federal and Indian lands. *Wyoming v. U.S. Dept. of the Interior*, -- F.Supp.3d --, 2016 WL 3509415 (D. Wyo. June 21, 2016). The court determined that BLM had exceeded its delegated authority when it attempted to regulate fracking not involving the use of diesel fuels. The court did not address the intervenor Ute Tribe's claim that the rule was contrary to the federal trust obligation to tribes.

In an earlier opinion granting a preliminary injunction against implementation of the rule, however, the court did address BLM's responsibility to consult with Indian tribes:

> The Court also finds merit in the Ute Indian Tribe's argument that the BLM failed to consult with the Tribe on a government-to-government basis in accordance with its own policies and procedures.
>
> Effective December 2, 2014, still prior to publication of the Fracking Rule, the DOI converted the provisions of Order No. 3317 to the DOI Departmental Manual. *See* Departmental Manual, Part 512, Chapters 4 and 5. * * * The DOI's policies and procedures

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> reflect the unique relationship between Indian tribes and the federal government and recognize Indian tribes' right to self-governance and tribal sovereignty.
>
> The BLM contends it engaged in extensive tribal consultation when promulgating the Fracking Rule by holding four regional tribal consultation meetings ("information sessions") and distributing copies of a draft rule to affected tribes for comment in January 2012, and offering to meet individually with tribes after those regional meetings. In June 2012, after publication of the proposed rule on May 11, 2012, and again after publication of the supplemental proposed rule in May of 2013, the BLM held additional regional consultation meetings and individual consultations with tribal representatives. In March 2014, the BLM invited tribes to another meeting in Lakewood, Colorado and offered to meet with individual tribes thereafter.
>
> The BLM's efforts, however, reflect little more than that offered to the public in general. The DOI policies and procedures require extra, *meaningful* efforts to involve tribes in the decision-making process. The record reflects the BLM spent more than a year developing the proposed rule before initiating any consultation with Indian tribes. The BLM had already drafted a proposed rule by the time the agency initiated consultation with Indian tribes in January of 2012. Although the BLM asserts comments from affected tribes were considered in developing the final rule, the preamble cites only two changes resulting from tribal consultations: a clarification that tribal and state variances are separate from variances for a specific operator, and a requirement that operators certify to the BLM that operations on Indian lands comply with applicable tribal laws. Several tribal organizations attempted to assert their sovereignty by encouraging an "opt out" provision for Indian tribes or allowing the tribes to exercise regulatory authority over hydraulic fracturing. However, despite acknowledging "the importance of tribal sovereignty and self-determination," the BLM summarily dismissed these legitimate tribal concerns, simply citing its consistency in applying uniform regulations governing mineral resource development on Indian and federal lands and disavowing any authority to delegate regulatory responsibilities to the tribes. This failure to comply with departmental policies and procedures is arbitrary and capricious action.

Wyoming v. United States Dep't of the Interior, 136 F. Supp. 3d 1317, 1344–46 (D. Wyo. 2015), vacated and remanded, No. 15-8126, 2016 WL 3853806 (10th Cir. July 13, 2016). For an argument that the final rule promulgated by the BLM (now void) violated its responsibility to consult with tribes, relied on an improper interpretation of federal statutes to extend the rule to Indian lands, and was contrary to the federal trust responsibility to tribes, see Monte Mills, *What Should Tribes Expect from Federal Regulations? The Bureau of Land Management's Fracking Rule and the Problems with Treating Indian and Federal Lands Identically*, 37 Pub. Land & Resources L. Rev. 1 (2016).

Page 284, note 4. Add to the end of the note on page 286:

The HEARTH Act has proved more popular with tribes than the TERA provision of ITEDSA on which it was modeled. By mid-2016, no tribe had yet submitted a TERA application. U.S. Department of Interior Indian Affairs, *News*, www.bia.gov/News/index.htm (last visited Aug.

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5, 2016). By the end of July 2016, by contrast, 25 tribes had received approval of their HEARTH Act regulations. Each received approval for residential and/or business leases, but a few are also authorized to enter into resource leases: Ho-Chunk Nation (agricultural), Makah Tribe (wind and solar leases), and Gila River Indian Community (solar). *See* News Release (Jan. 5, 2016), available at www.bia.gov/News/index.htm (listing 23 tribes then authorized); subsequent authorizations have been issued for the Twenty-Nine Palms Band of Mission Indians (June 2016) and Shakopee Mdewakanton Sioux Community (March 2016).

On January 21, 2015, Senator John Barrasso (R-Wyo.) introduced a bill, S. 209, designed to streamline the TERA process so that it is easier for tribes to enter into TERAs. Senator John Tester (D-Mont.) co-sponsored the bill. The bill is also designed to help ensure tribal access to long-term supplies of woody biomass materials. *See* S. 209 – Indian Tribal Energy Development and Self-Determination Act Amendments of 2015, available at https://www.congress.gov/bill/114th-congress/senate-bill/209. A substitute amendment passed the Senate by unanimous consent, and was referred to various House subcommittees in December 2015.

B. The Breach of Trust Action for Federal Resource Mismanagement

Page 303, note 1. Add to the end of the note on page 304:

The Supreme Court's direction in *Navajo II* that "liability cannot be premised on control alone" led the Court of Federal Claims to dismiss an action brought by the Hopi Tribe regarding its water resources, on the ground that the claims court lacked subject matter jurisdiction. In *Hopi Tribe v. United States*, 113 Fed. Cl. 43 (2013), the tribe sought damages for breach of trust for the federal government's failure to ensure that reservation drinking water contained safe levels of arsenic. Public water systems on the eastern part of the reservation contained arsenic at levels exceeding EPA standards. The tribe argued that the executive order and statute establishing the reservation, along with a slew of statutes relating to tribal and Hopi water supplies, gave the federal government sufficient control over the water supply to give rise to fiduciary obligations. The court found no specific duties with respect to Hopi water supplies, and distinguished *White Mountain Apache*. In that case, the court said, "the specific statutory provision at issue simultaneously used the word 'trust' in connection with imparting to the federal government a right to 'use' the land." The statute for the Hopi Reservation, by contrast, "does not confer on the federal government comparable authority or, indeed, any kind of authority to use or manage the land." Has the Court of Federal Claims effectively limited *White Mountain Apache* to situations where the federal government is in actual physical control of trust property?

Page 308, note 3. Add to the end of the note:

The Court of Federal Claims has addressed these questions. In *Otoe-Missouria Tribe of Indians v. United States*, 105 Fed. Cl. 136 (2012), the court held that the order of filing was crucial. The tribe had filed in the morning in the Court of Federal Claims, and that same afternoon in federal district court. The claims court held that "pending" in the statute "refers to cases that are filed." At the time the tribe filed in the claims court, no other lawsuit had been filed. "It is from the moment of the filing, not necessarily the date of filing," that the court determines which lawsuit

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was filed first. Because no case was therefore pending when the tribe filed in the claims court, that court had proper subject matter jurisdiction.

The Court of Federal Claims ruled that it lacked jurisdiction, however, in a case filed in federal district court and transferred in part to the claims court. *Jackson v. United States*, 107 Fed. Cl. 495 (2012). Individual members of the Shoshone-Bannock Tribe filed claims for negligence and breach of fiduciary duty in federal district court. The court granted summary judgment against the tribal members on the negligence claims, and transferred the breach of trust claims to the claims court. Under the transfer statute, 28 U.S.C. § 1631, the transferred claim is to be treated as if it were filed in the claims court on the date it was actually filed in district court. As a result, the claims in the district court and in the claims court were considered to be filed simultaneously. Under a 1999 case not involving Indian claims, the claims court had held that in that situation, the district court claims are "pending" for purposes of § 1500. The Court of Federal Claims appeared sympathetic to the plaintiffs, but held itself bound by precedent to dismiss the case.

Page 308, note 4. Add to the end of the note:

In September 2014, the United States entered into the largest settlement ever with a single tribe, the Navajo Nation. The federal government agreed to pay $554 million for its historical mismanagement of funds and natural resources on the Nation's reservation. Some of the claims that were settled dated back 50 years. In exchange for the settlement monies, the Nation agreed to drop its existing claims and forego future litigation involving this historical mismanagement. The settlement, however, does not preclude the Nation from bringing claims related to federal mismanagement in the future. *See* Sari Horwitz, *U.S. to pay Navajo Nation $554 million in Largest Settlement with Single Indian Tribe*, The Washington Post, Sept. 24, 2014, available at https://www.washingtonpost.com/world/national-security/us-to-pay-navajo-nation-554-million-in-largest-settlement-with-single-indian-tribe/2014/09/24/4dc02cc6-434e-11e4-9a15-137aa0153527_story.html.

Page 320, add a new note following note 4.

On April 16, 2015, the Mandan, Hidatsa, and Arikara Tribes of the Fort Berthold Reservation pursuant to tribal resolution 15-059 asserted authority to "regulate, monitor and register all companies … providing work and business within the boundaries of the West Segment [of the Reservation]." Because tribal leaders are concerned that not enough is being done to protect the land during oil and gas development, the Tribes created the West Segment Regulatory Commission through which the Tribes intend to impose their own oil and gas regulations. The Tribes' Reservation is located within the Bakken oil shale area. *See* James MacPherson, *Tribal panel aims to regulate oil on part of North Dakota reservation; jurisdiction questioned*, Associated Press, June 24, 2015, available at http://indiancountrytodaymedianetwork.com/2015/08/11/toxic-river-spill-flowing-across-navajo-nation-3-million-gallons-not-one-epa-161348.

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Page 324. Add a new Section D to Chapter V.

D. Energy Rights-of-Way

Recall that Indian country, as defined by federal statute:

> means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, *including rights-of-way* running through the reservation, … and (c) all Indian allotments, the Indian titles to which have not been extinguished, *including rights-of-way* running through the same.

18 U.S.C. § 1151 (emphasis added). Rights-of-way across Indian lands include oil and gas pipelines and electric transmission and distribution lines, as well as roads and highways, railroads, telephone lines, and the like. While most rights-of-way are granted pursuant to a 1948 statute that authorized them for all purposes (25 U.S.C. §§ 323-328), oil and gas pipelines are also authorized by a 1904 statute (25 U.S.C. § 321).

Blackfeet Indian Tribe v. Montana Power Company
838 F.2d 1055 (9th Cir. 1988)

The Blackfeet Indian Tribe seeks to have rights-of-way granted over tribal lands invalidated. The appeal presents the question of whether the Secretary of the Interior exceeded his authority by allowing a fifty-year term for natural gas pipeline rights-of-way across Blackfeet *tribal primacy* lands. We hold he did not.

I.

Between 1961 and 1969, the Secretary of the Interior (Secretary) granted The Montana Power Company (MPC) five rights-of-way for natural gas transmission pipelines across Blackfeet Indian Tribe (Tribe) lands on the Blackfeet Indian Reservation *in taxation* Montana. Each right-of-way was granted by the Secretary pursuant to his approval power, and each was for a fifty-year term. At the time of approval, the Tribe also consented to each right-of-way.

In 1981, the Tribe objected to the fifty-year term and notified MPC of its objection. The Tribe contended the terms were limited to twenty rather than fifty years. * * * [T]he Tribe alleged the right-of-way had expired and MPC was therefore occupying the land as a trespasser.

II.

In 1904, Congress enacted a statute authorizing the Secretary to grant rights-of-way as easements for oil and gas pipelines through any Indian reservation for a period no longer than twenty years. The statute reads as follows:

> The Secretary of the Interior is authorized and empowered to grant a right of way

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> nature of an easement for the construction, operation, and maintenance of pipe lines for the conveyance of oil and gas through any Indian reservation ... *Provided,* That the rights herein granted shall not extend beyond a period of twenty years: *Provided further,* That the Secretary of the Interior, at the expiration of said twenty years, may extend the right to maintain any pipe line constructed under this section for another period not to exceed twenty years from the expiration of the first right, upon such terms and conditions as he may deem proper. The right to alter, amend, or repeal this section is expressly reserved.

25 U.S.C. § 321.

With the 1904 Act still in effect, in 1948 Congress passed the Indian Right-of-Way Act. The 1948 Act empowered the Secretary to grant rights-of-way across Indian lands for all purposes. The statute provides:

> The Secretary of the Interior be, and he is empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes, communities, bands, or nations, or any lands now or hereafter owned, subject to restrictions against alienation, by individual Indians or Indian tribes, communities, bands, or nations, including the lands belonging to the Pueblo Indians in New Mexico, and any other lands heretofore or hereafter acquired or set aside for the use and benefit of the Indians.

25 U.S.C. § 323. The 1948 Act included a second statute which required tribal consent for rights-of-way, stating, in relevant part: No grant of a right-of-way over and across any lands belonging to a tribe ... shall be made without the consent of the proper tribal officials. 25 U.S.C. § 324. Additionally, the 1948 Act provided that:

> Sections 323 and 328 of this title shall not in any manner amend or repeal the provisions of the Federal Water Power Act, ... nor shall any existing statutory authority empowering the Secretary of the Interior to grant rights-of-way over Indian lands be repealed.

25 U.S.C. § 326.

Pursuant to the authority granted by the 1948 Act, empowering the Secretary to grant rights-of-way Asubject to such conditions as he may prescribe, the Secretary promulgated a regulation in 1960 which allowed rights-of-way for oil and gas pipelines for a period not to exceed fifty years. * * * In 1968, the regulation was amended to allow the Secretary to grant rights-of-way for *all* easements, *including* oil and gas pipelines, for an unlimited term of years.

However, the regulation promulgated pursuant to the 1904 Act limited oil and gas pipeline rights-of-way to not more than 20 years * * *. Thus the rights-of-way acquired by MPC could be subject to [the regulation] covering all rights-of-way and allowing unlimited terms; or subject to [the regulation] covering only oil and gas pipeline rights-of-way and limiting the term of years to

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not more than twenty; or subject to the original regulation providing for not more than a fifty-year term for all rights-of-way.

Because the rights-of-way at issue here were limited to fifty years, we need not consider the validity of the 1968 amendment insofar as it allowed terms in excess of fifty years. * * * As a result, the essential question is whether the 1904 Act, the 1948 Act, or both, control the five rights-of-way the Secretary granted MPC.

IV.

The starting point for an issue involving statutory construction is the language in the statute itself. Where two statutes are involved, legislative intent to repeal an earlier statute must be clear and manifest. In the absence of such intent, apparently conflicting statutes must be read to give effect to each if such can be done by preserving their sense and purpose. This is because statutory repeals by implication from a later enacted statute are disfavored. Also, where possible, we resolve legal ambiguities in favor of Indians, but we cannot ignore the plain intent of Congress.

Here, the language in neither Act speaks to the relationship of the Acts *inter se.* We therefore look to congressional intent with an eye toward upholding both statutes. The 1904 Act is specific. It authorizes the Secretary to grant rights-of-way for oil and gas pipelines for up to a twenty-year period. The later enacted Act of 1948 is more general; it grants the Secretary the power to grant rights-of-way for *all* purposes subject to the conditions he prescribed. Additionally, the 1948 Act stated that it was not to in any manner amend or repeal ... any existing statutory authority empowering the Secretary of the Interior to grant rights-of-way over Indian lands....

There is no express congressional intent to repeal § 321, even with the law's unaffected language contained in § 326. In 1904, the Secretary was given the authority to grant easements for oil and gas pipelines. Later, in an attempt to broaden the Secretary's powers in granting rights-of-way for access to Indian lands for other purposes, the 1948 Act was passed. It was meant to Asatisfy the need for simplification and uniformity in the administration of Indian law.@ To avoid confusion, the existing special purpose statutes (such as section 321) were preserved in anticipation of implementation of the general purpose statute of § 323.

The Act of 1904 and the Act of 1948 can be read as coexisting. The former allows a term of 20 years, the later a term of 50 years. No matter which term the Secretary permits the consent of the Tribe is still required. Presumably, if the Tribe did not approve a 50-year term, approval of a 20-year term would be much more likely. In either case, the Tribe has preserved its election and its ability to protect Tribal interests. Thus the two Acts are not in direct conflict, and effect can be given to each while still preserving their sense and purpose.

Since effect can be given to both the 1904 and the 1948 Acts, both should be applied. This gave the Tribe a choice between either the 20-year term under the earlier statute or up to a 50-year term under the latter statute. The Tribe consented to a 50-year term. The term of years was controlled by both Acts and the Secretary did not exceed his authority in providing regulations allowing 50-year terms.

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V.

We hold the term of years for the rights-of-way can be either 20 or 50 years. Since the Tribe consented to the 50-year term, the Secretary's regulations with respect to term of years are valid.

Notes

1. Indian Land Right-of-Way Study. In the Energy Policy Act of 2005, Congress directed the Departments of Energy and Interior to conduct a study of energy rights-of-way on tribal lands. *See* Energy Policy Act of 2005, Section 1813 Indian Land Rights-of-Way Study: Report to Congress (May 4, 20162007), available at: http://nni.arizona.edu/application energy.gov/sites/prod/files/8914/6254/9090/2016_Croman_why_beggar_thy_Indian_neighboroe prod/ DocumentsandMedia/ EPAct_1813_Final.pdf.

One of the issues addressed by the study was complaints by energy companies that obtaining tribal consent to rights-of-way was a lengthy and occasionally contentious process, too often resulting in high costs and relatively short duration of rights-of-way. The study concluded, however, that the problem was greatly exaggerated, that costs had not increased as a result of negotiations with tribes, and that any diminishment of tribal consent authority would undermine tribal sovereignty. To help streamline the process, however, the study recommended a comprehensive right-of-way inventory to ensure that all parties were negotiating from a base of full information, the development of model or standard business practices (but not through legislation or federal regulation), and broadening the scope of energy right-of-way negotiations. It further recommended that if a failure of negotiations significantly affected regional or national supply, price, or reliability of energy resources, Congress should resolve the matter by legislation specific to the particular case and not by broad legislation that would adversely impact tribal sovereignty.

2. Rights-of-way under a tribal energy resource agreement. Under the Indian Tribal Energy Development and Self-Determination Act of 2005, tribes are authorized to enter into tribal energy resource agreements (TERAs) with the Department of the Interior. See note 4, at page 285. A tribe with an approved TERA may then enter into certain energy transactions without specific secretarial approval, including rights-of-way for pipelines and energy transmission and distribution lines. By mid-2016, however, no tribe had applied for a TERA.

Nebraska Public Power Dist. v. 100.95 Acres of Land
719 F.2d 956 (8th Cir. 1983)

This case concerns the authority of a public utility to condemn tracts of land held in trust by the United States for individual Indians and for Indian tribes. We hold that pursuant to 25 U.S.C. § 357 the utility has the authority to condemn land allotted in severalty to Indians but not land in which the Indian tribe holds an interest.

This litigation arose from a plan of Nebraska Public Power District (NPPD) to construct an electric transmission line across the Winnebago Indian Reservation. The Winnebago Tribe has

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opposed construction of the proposed power line. NPPD brought this action in federal district court to condemn a right-of-way across twenty-nine tracts of land within the reservation. The tracts sought to be condemned by NPPD were allotted by the United States to individual Indians pursuant to either the Indian General Allotment Act or the treaty between the United States and the Winnebago Tribe.

I. ALLOTTED LAND

25 U.S.C. § 357, enacted by Congress in 1901, provides as follows:

> Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

Section 357 clearly authorizes the judicial condemnation of a right-of-way across allotted Indian land for the construction of an electric transmission line. The question on appeal is whether, as the district court held, section 357 has been impliedly repealed in part by the more recently enacted Indian Right-of-Way Act of 1948, which conditions condemnation of a right-of-way across allotted Indian land upon consent of the Secretary of Interior, and in certain cases, upon consent of the individual allottee.

To determine whether an earlier statute has been impliedly repealed by a later one, we are guided by familiar principles. The intent of Congress must be clear and manifest to support an implied repeal. The cardinal rule is that repeals by implication are not favored. Absent affirmative evidence of congressional intent to repeal the earlier statute the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable. "[W]hen two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."

In this case, we find no clearly expressed congressional intent impliedly to repeal section 357. Prior to 1948, access across Indian lands was governed by an amalgam of special purpose access statutes dating back as far as 1875. This statutory scheme limited the nature of rights-of-way to be obtained, and in certain cases, created an unnecessarily complicated method for obtaining rights-of-way. Each application for a right-of-way across Indian land had to be examined painstakingly to assure that it fit into one of the narrow categories of rights-of-way authorized by statute. When a right-of-way was not authorized under one of the existing statutes, which often was the case, it became necessary to obtain easement deeds, approved by the Secretary of the Interior, from each of the Indian owners. Frequently, many individual Indians, often widely scattered, owned undivided interests in a single tract of land. Obtaining the signatures of all the owners was time-consuming and burdensome process, both for the party seeking the right-of-way and for the Interior Department.

The purpose of the 1948 Act was to simplify and facilitate this process of granting rights-of-way across Indian lands. * * * The 1948 Act does not, by its express terms, amend or repeal any existing legislation concerning rights-of-way across Indian lands. On the contrary, the

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statute provides that any existing statutory authority empowering the Secretary of the Interior to grant rights-of-way over Indian lands is not repealed. The legislative history explains that this provision to preserve the existing statutory authority relating to rights-of-way over Indian lands was included to avoid any possible confusion which may arise, particularly in the period of transition from the old system to the new. This provision was aimed at the special purpose access statutes which authorized rights-of-way upon secretarial consent and does not expressly address section 357. Nevertheless, the explanation of this provision does suggest a general intent in the 1948 Act of adding to, rather than replacing, existing legislation concerning rights-of-way across Indian lands.

In sum, it is apparent from the legislative history that the 1948 Act was not enacted as a restrictive measure in response to problems engendered by section 357, which authorized condemnation pursuant to state law without secretarial consent. Rather, the 1948 Act was a response to quite the opposite problems; the limited nature of rights-of-way authorized by statute, and the difficulty of obtaining easement deeds from all the various owners. Conditioning rights-of-way in certain cases upon consent of only the Secretary was intended to make the law more lenient in situations where consent of all the owners previously had to be obtained. Thus, it is not consistent with the legislative history of the 1948 Act expansively to interpret the secretarial consent provision as an intended restriction upon obtaining all rights-of-way across Indian lands.

Finding no clearly expressed congressional intent to repeal section 357, we consider whether section 357 is in irreconcilable conflict with the 1948 Act.

The specific conflict presented in this case "the alleged inconsistency between section 357 and the 1948 Act" has been addressed in three courts of appeals decisions. In *Nicodemus v. Washington Water Power Co.,* 264 F.2d 614 (9th Cir.1959), the Ninth Circuit held that the 1948 Act and section 357 offered "two methods for the acquisition of an easement across allotted Indian land for the construction of an electric transmission line." In *Southern California Edison Co. v. Rice,*685 F.2d [354 (9th Cir. 1982)], the Indian allottees contended that the 1948 Act was the exclusive means by which the company could obtain a right-of-way across the allotted Indian lands. The Ninth Circuit reaffirmed its holding in *Nicodemus* that section 357 "is an *alternative* method for the acquisition of an easement across allotted Indian land to which the United States has consented." Similarly, in *Yellowfish v. City of Stillwater,* 691 F.2d 926 (10th Cir. 1982), an Indian allottee contended that section 357 was impliedly repealed in part by the 1948 Act. The Tenth Circuit concluded that in spite of the 1948 Act, "federal courts have jurisdiction under section 357 to condemn rights-of-way over allotted Indian land without secretarial or Indian consent." The court found no irreconcilable conflict between section 357 and the 1948 Act. Indeed, it concluded that the two provisions could be harmonized: "The two statutes provide alternative methods for a state-authorized condemnor to obtain a right-of-way over *allotted* lands."

We agree with the other circuits that have considered the issue that section 357 and the 1948 Act can be reconciled. The statutes serve similar but not identical purposes: Section 357 authorizes the condemnation of land while the 1948 Act provides for the granting of consent for rights-of-way. Thus, based on the disfavor of an implied repeal of a statute, the absence of any clearly expressed congressional intent to repeal section 357, and finally, the compatibility of section 357 and the 1948 Act based on the case law of this and other circuits, we hold that the

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district court committed error in its conclusion that the 1948 Act impliedly repealed the authorization for obtaining rights-of-way by condemnation proceedings in section 357.

Notes

1. Consent of allottees. Why must tribes consent to rights-of-way, but allottees may be subject to rights-of-way by condemnation? Note that under current regulations, all individual landowners must be notified, but consent is required from only the owners of the majority interest in the allotment. 25 C.F.R. § 169.107(b). No owner needs to consent if there are 50 or more co-owners (and it is thus impracticable to obtain individual consent) and the BIA determines that the right-of-way will "cause no substantial injury" and that the landowners will be adequately compensated. Given those regulations, should consent (whether from allottees or the BIA) always be required for a right-of-way across allotted land?

2. Parcels co-owned by allottees and tribes. What if a parcel of land is held in trust for co-owners that include both individual tribal members and tribes? A public utility sought to condemn a right-of-way for an electric transmission line across five allotments. The Navajo Nation held an undivided beneficial interest in two of those allotments: a 13.6% interest in one and a 0.14% interest in the other. In *Public Service Co. of New Mexico v. Approximately 15.49 Acres of Land*, -- F.Supp.3d --, 2016 WL 877951 (D.N.M. Mar. 2, 2016), the court held that condemnation was authorized only for individual lands, not tribal. If the tribe holds an interest in a tract, it is considered tribal land and tribal consent is required for a right-of-way. Note the potential impact of the Land Buy-Back Program described in this update as an addendum to note 2, page 186. Since implementation began in 2013, the program "has created or increased tribal ownership in more than 26,400 tracts of land."

Note on Tribal Regulatory Authority over Rights-of-Way

In 1997, the Supreme Court held that a highway right-of-way across reservation land was the "equivalent, for nonmember governance purposes, to alienated, non-Indian land." *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), excerpted at page 212. The Court relied on the concept that the tribe had retained no "gatekeeping" interests in the right-of-way:

> Forming part of the State's highway, the right-of-way is open to the public, and traffic on it is subject to the State's control. The Tribes have consented to, and received payment for, the State's use of the 6.59–mile stretch for a public highway. They have retained no gatekeeping right. So long as the stretch is maintained as part of the State's highway, the Tribes cannot assert a landowner's right to occupy and exclude. We therefore align the right-of-way, for the purpose at hand, with land alienated to non-Indians. Our decision in *Montana,* accordingly, governs this case.

Applying the *Montana* framework [see Chapter IV, Part A], the Court held that the tribal court lacked jurisdiction over a vehicle accident between two nonmembers on the highway right-of-way, finding no consensual relationship and no adverse effects on tribal self-government.

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Lower federal and state courts subsequently expanded the idea of rights-of-way as fee-land equivalents to situations where the rights-of-way at issue were not broadly open to the public. *See Burlington Northern R.R. Co. v. Red Wolf*, 196 F.3d 1059 (9th Cir. 1999) (accident on railroad right-of-way that resulted in death of two tribal members); *Big Horn Electric Coop., Inc. v. Adams*, 219 F.3d 944 (9th Cir. 2000) (tribal property tax on utility property on right-of-way) [discussed at note 3, page 341]; *Arrow Midstream Holdings v. 3 Bears Construction*, 873 N.W.3d 16 (N.D. 2015) (lien against holder of pipeline right-of-way for oil, gas, and water lines). In each case, as a result, the courts applied the *Montana* framework and held against tribal jurisdiction over the nonmember holder of the right-of-way.

In 2016, the Department of the Interior issued amended right-of-way regulations. Among the provisions is 25 C.F.R. § 169.10, intended to address the problem created by *Strate* and its progeny:

> A right-of-way is a non-possessory interest in land, and title does not pass to the grantee. The Secretary's grant of a right-of-way will clarify that it does not diminish to any extent:
>
> (a) The Indian tribe's jurisdiction over the land subject to, and any person or activity within, the right-of-way;
>
> (b) The power of the Indian tribe to tax the land, any improvements on the land, or any person or activity within, the right-of-way;
>
> (c) The Indian tribe's authority to enforce tribal law of general or particular application on the land subject to and within the right-of-way, as if there were no grant of right-of-way;
>
> (d) The Indian tribe's inherent sovereign power to exercise civil jurisdiction over non-members on Indian land; or
>
> (e) The character of the land subject to the right-of-way as Indian country under 18 U.S.C. 1151.

Similarly, § 169.125(c)(1) provides that a grant of a right-of-way "will state that: The tribe maintains its existing jurisdiction over the land, activities, and persons within the right-of-way under § 169.10 and reserves the right of the tribe to reasonable access to the lands subject to the grant to determine grantee's compliance with consent conditions or to protect public health and safety."

The Part 169 regulations apply only to rights-of-way granted under the 1948 Indian Right-of-Way Act, 25 U.S.C. §§ 323-328. They do not apply to rights-of-way acquired on allotments by condemnation. *See* 25 C.F.R. § 169.1(a); *Public Service Co. of New Mexico v. Approximately 15.49 Acres of Land*, -- F.Supp.3d --, 2016 WL 877951 (D.N.M. Mar. 2, 2016) ("The new regulations and the comments reaffirm that the Amended Part 169 regulations do not govern condemnation actions under § 357.").

How should courts treat tribal jurisdiction over rights-of-way created by condemnation after April 2016 (when the amended regulations took effect)? If you represented a public utility

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seeking a new right-of-way across allotted land for an electric transmission line, would you prefer to seek the allottees' consent or to proceed by condemnation?

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VI. Taxation of Natural Resources

C. State Taxation

Page 329, note 5. Add to the end of the note.

The federal courts, however, have allowed for the application of federal taxes on individual members of tribes, even when the income being taxed derives directly from a tribe's trust account. In *Cypress v. United States*, sixteen members of the Miccosukee Tribe of Florida brought a claim against the United States and its representatives seeking declaratory relief in order to avoid federal income tax on distributions, including gaming proceeds, paid to them directly from the Tribe's trust account. No. 15-10132, 2016 U.S. App. LEXIS 5390 (11th Cir. 2016). The U.S. Court of Appeals for the Eleventh Circuit affirmed the lower court's decision that the federal courts lacked subject matter jurisdiction over the claim, as the United States had not waived its sovereign immunity as to the members' claim.

Page 363, note 2. Add to the end of the note.

For a discussion of how state and tribal taxation (or dual taxation) impacts Indian country, see Kelly S. Croman and Jonathan B. Taylor, *Why beggar thy Indian neighbor? The case for tribal primacy in taxation in Indian country*, Joint Occasional Papers on Native Affairs, JOPNA 2016-1 (May 4, 2016), available at: http://nni.arizona.edu/application/files/8914/6254/9090/2016_Croman_why_beggar_thy_Indian_neighbor.pdf.

Page 365, note 6. Add to the end of the note.

The United States Court of Appeals for the Ninth Circuit decided that a treaty provision did not exempt a business owned by a tribal member and partially located within the tribe's reservation from a state escrow tax. *King Mountain Tobacco Comp. Inc. v. McKenna*, 768 F.3d 989 (9th Cir. 2014). The court upheld Washington's application of its escrow tax on the King Mountain Tobacco Company Inc., which is owned by a citizen of the Yakama Nation and the company grows and processes some of its tobacco within the Nation's reservation. The escrow tax requires that money be put into an escrow account to reimburse Washington for health care costs related to the use of tobacco products. The company argued that a provision of the Nation's 1855 treaty precluded application of the tax. However, the court disagreed explaining that because the escrow statute is a nondiscriminatory law and the company's activities and sales occurred largely off of the reservation the escrow tax applied. Further, the court held that the plain text of the Nation's treaty did not create a federal exemption from the escrow statute.

The Department of Interior recently released HEARTH Act Approval of the Seminole Tribe of Florida Regulations. 80 Fed. Reg. 47949 (Aug. 10, 2015). In the notice, the Department explained that tribal leasing regulations adopted under the HEARTH Act will preempt state and local taxation. Specifically, "[t]he strong Federal and tribal interests against State and local taxation of improvements, leaseholds, and activities on land leased under the Department's leasing

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regulations apply equally to improvements, leaseholds, and activities on land leased pursuant to tribal leasing regulations approved under the HEARTH Act." *Id.*

The question of federal preemption of state sales tax was also at issue in a recent decision of the U.S. Court of Appeals for the Eleventh Circuit. *Seminole Tribe of Florida v. Stranburg*, No. 14-14524. 2015 WL 5023891 (11th Cir. 2015). In *Stranburg*, the Seminole Tribe opposed the application of rental tax and utility tax as applied against two non-Indian corporations with twenty-five year leases to conduct food-court operations for the Tribe's casinos. The court determined that the state rental tax was not applicable for two reasons. First, the court found that the application of the rental tax would be inconsistent with the U.S. Supreme Court's decision in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). Also, the court found that the state's rental tax was preempted under the *Bracker* analysis. The court, however, found that there was no evidence that the state's utility tax fell on the Tribe and also that the Tribe failed to show that preemption applied as to the utility tax.

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VII. Water Rights

C. Scope and Effect of Water Rights
2. Rights to Groundwater

Page 404, note 2. Add after the citation to *U.S. v. Washington Dep't of Ecology* (2005) on page 405:

See also Agua Caliente Band v. Coachella Valley Water Dist., 2015 WL 1600065 (C.D. Cal. Mar. 20, 2015) (holding that "the federal government impliedly reserved groundwater, as well as surface water, for the Agua Caliente when it created the reservation," but noting that the court was reserving the question of whether groundwater sources were necessary to fulfill the purposes of the reservation). The case has been argued and is awaiting a decision by the 9th Circuit.

Page 405. Add to the end of the note:

See Stephen v. Quesenberry, Timothy C. Seward & Adam P. Bailey, *Tribal Strategies for Protecting and Preserving Groundwater*, 41 Wm. Mitchell L. Rev. 431 (2015).

D. Determination of Water Rights

Page 439, note 1. Add to the end of the note on page 440:

In *Hopi Tribe v. United States*, 113 Fed. Cl. 43 (2013), the United States "concedes that it holds plaintiff's water rights in trust, but argues that this general trust relationship does not suffice to establish a specific trust duty to maintain water quality." In the case, summarized above as an addition to Chapter V, page 303, the Court of Federal Claims agreed with the federal government and dismissed (for lack of subject matter jurisdiction) the tribe's claim that the United States had an enforceable duty to ensure safe levels of arsenic in reservation drinking water supplies.

Page 440, note 2. Add to the end of the note on page 441:

By contrast, the Washington Supreme Court held that federal proceedings in *United States v. Ahtanum Irrigation District*, 330 F.2d 897 (9th Cir. 1964), adjudicated the non-tribal rights in Ahtanum Creek (a tributary of the Yakima River that forms the northern boundary of the Yakama Reservation), but did not quantify the practicably irrigable acreage on the Yakama Reservation. *In re Yakima River Drainage Basin*, 177 Wash. 2d 299 (2013). The state trial court determined the PIA based on a 1957 pretrial order in the federal lawsuit, but the state supreme court ruled that the pretrial order only referred to the PIA claimed by the United States. At no time did the federal court make a finding of fact as to PIA, and consequently the state supreme court remanded to the trial court for a determination. (In the federal litigation, the United States claimed 5,100 PIA; the state trial court determined PIA to be 4,107 acres; the United States and the Yakama Nation argue in the current litigation that the correct figure is 6,381 acres.)

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VIII. Usufructuary Rights: Hunting, Fishing, and Gathering

Page 494: Note on Limiting Treaty Rights on Public Safety Grounds. Insert after the second paragraph:

Limitations based on public safety may change over time. For example, in 2015 the *LCO* court reversed its ban on night hunting ("shining" or "spotlighting") of deer:

> [The tribe's] right to hunt deer at night throughout the ceded territory was prohibited in the final judgment entered in 1991 only because I found then that the state defendants had shown such hunting to be a hazard to public safety, that the particular regulation was necessary to prevent the hazard and that it was the least restrictive alternative to the accomplish the safety purpose. Now, with the benefit of 24 years of state experience with night hunting, the tribes have been able to show that the prohibition on off-reservation night deer hunting is no longer necessary for public safety purposes, when properly regulated. It remains plaintiffs' right, as well as its responsibility, to promulgate and enforce the regulations; not defendants'. Defendants' role is limited to showing that plaintiffs' regulations are inadequate.

Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 2015 WL 5944238 at *2 (W.D. Wis. Oct. 13, 2015).

Page 508. Add a new note 4a.

4a. In-Lieu Fishing Sites. In 1945, to compensate tribes for the devastation of many tribal "usual and accustomed fishing grounds" caused by federal dams, Congress authorized the creation of several "in-lieu" fishing sites and added to them in 1988 "for the permanent use and enjoyment of Indian tribes." One such site was Maryhill, where Lester Ray Jim, a Yakama tribal member was cited by the state of Washington for unlawfully harvesting an undersized sturgeon. In *State v. Jim*, 273 P.3d 434 (Wash. 2012), the Washington Supreme Court affirmed an appeals court dismissal of the charge and held that the state lacked criminal jurisdiction over the in-lieu fishing site because federal regulations made clear that the fishing right at such sites was reserved exclusively for the tribes.

Page 510. Add to the end of note 8:

A divided Ninth Circuit reversed a district court and ruled that the eastern boundary of the Lummi Nation's usual and accustomed fishing ground had not been established by "law of the case." The court therefore decided that the boundary dispute between the Lummi and the Klallam Tribes would have to be resolved at trial before the district court. *United States v. Lummi Nation*, 763 F.3d 1180 (9th Cir. 2014).

Page 516, note 5. Add at the end of the note:

In May 2016, the federal district court in Oregon issued a 149-page opinion that struck down the National Marine Fisheries Service's biological opinion (BiOp) on Columbia Basin

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hydroelectric operations for the fourth time during the past two decades. The court determined that BiOp's conclusion that some 73 "reasonable and prudent alternatives" (RPAs) would avoid jeopardy to listed salmon species was arbitrary and capricious because it employed an improper "jeopardy" standard ("trending toward recovery"), failed to consider the climate change-induced effects on the RPAs, and relied on measures that were reasonably certain to occur. The court also concluded that the federal agencies responsible for implementing the RPAs (the Corps of Engineers, the Bureau of Reclamation, and the Bonneville Power Administration) violated NEPA by not preparing a comprehensive environmental impact statement the measures implementing the BiOp, although the court did not enjoin ongoing hydroelectric operations. Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 2016 WL 2353647 (D. Or. May 4, 2016).

Page 519. Update note 1 to include the following:

When several years of settlement negotiations failed, in 2013, Judge Martinez issued an injunction requiring the state to begin repairing more than 600 state-owned road culverts blocking salmon migration, giving the state 17 years to complete the task. The court ruled that an injunction was necessary because the state had reduced repair efforts in recent years, resulting in a net increase of fish blocking culverts, meaning that.at the current rate repairs would never be completed. The decision found that the state's duty to fix the culverts did not arise from a "broad environmental servitude" but instead from a "narrow and specific treaty-based duty that attaches when the state elects to block rather than bridge a salmon-bearing stream. . ." *United States v. Washington*, No. C70-9213, 2013 WL 1334391 (W.D. Wash. Mar. 29, 2013) (finding that the tribes had been irreparably harmed "economically, socially, educationally, and culturally by the generally reduced salmon harvest."). The Ninth Circuit decided the case on May 27, 2016. An excerpt is below.

Page 519. Add a new paragraph at the end of note 3:

In August 2014, the state of Oregon rejected a permit from Ambre Energy, an Australian company which sought to construct the Coyote Island Terminal on the Columbia River to export 8.8 million tons of coal annually to Asia. Although environmental groups opposed the terminal on grounds that it would unwisely expand the use of coal and accompanying greenhouse gas emissions, the state based its denial large on the disruption the terminal would cause to tribal fisheries. Then-Governor John Kitzhaber stated, "Columbia River tribes have fundamental rights to these fisheries," and any project that threatens those rights should be held to high standards. See http://thehill.com/policy/energy-environment/215463-oregon-blocks-major-coal-export-terminal.

In May 2016, the U.S. Army Corps of Engineers rejected a permit for largest coal port ever proposed in North America, at Cherry Point, Washington, north of the Lummi Tribe's coastal reservation. The Corps did so on the ground that the project, which could have involved nearly 500 ships per year serving Asian markets, would interfere with tribal treaty fishing rights, particularly crab and herring fisheries. The Lummi Tribe opposed the project not only due to vessel traffic and pollution risks but also its adverse effects on one of the tribe's oldest and largest villages and a burial site. *See, e.g.,* Lynda V. Mapes, *Tribes Prevail, Kill Proposed Coal Terminal at Cherry Point*, Seattle Times (May 9, 2016), http://www.seattletimes.com/seattle-news/environment/tribes-prevail-kill-proposed-coal-terminal-at-cherry-point/. The Corps reasoning in rejecting the

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permit makes for surprisingly good reading. See https://turtletalk.files.wordpress.com/2016/05/160509mfruademinimisdetermination.pdf.

Page 520. Add the following new case before the *Nez Perce* case:

United States v. Washington
-- F.3d --, 2016 WL 3517884 (9th Cir. May 27, 2016)

[Some 46 years after the tribes filed suit, a unanimous 9th Circuit panel affirmed Judge Martinez's injunction requiring the state to correct road culverts blocking salmon migration because they violated treaty fishing rights. In doing so, the court rejected the state's claim that the federal government had waived the treaty right by actions and inaction over the years, stating that the federal government had no authority to waive tribal rights, and it also rejected the state's argument that the federal government should be required to fix its culverts first on sovereign immunity grounds. If the federal government violated the treaties with its culverts, according to the court, that was a matter for the tribes to maintain, which they had not chosen to pursue.

After discussing the centrality of salmon to the tribes negotiating the Stevens Treaties and long and tortuous litigation leading up to the decision, the court invoked the canons of treaty interpretation (most citations omitted)]:

We have long construed treaties between the United States and Indian tribes in favor of the Indians. Chief Justice Marshall wrote in the third case of the Marshall Trilogy, "The language used in treaties with the Indians should never be construed to their prejudice." "If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense."

Negotiations for the Stevens Treaties were conducted in the Chinook language, a trading jargon of only about 300 words. The Treaties were written in English, a language the Indians could neither read nor write. Because treaty negotiations with Indians were conducted by "representatives skilled in diplomacy," because negotiators representing the United States were "assisted by . . . interpreter[s] employed by themselves," because the treaties were "drawn up by [the negotiators] and in their own language," and because the "only knowledge of the terms in which the treaty is framed is that imparted to [the Indians] by the interpreter employed by the United States," a "treaty must . . . be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." "[W]e will construe a treaty with the Indians as [they] understood it, and as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection, and counterpoise the inequality by the superior justice which looks only to the substance of the right, without regard to technical rules." "[W]e look beyond the written words to the larger context that frames the Treaty, including the history of the treaty, the negotiations, and the practical construction adopted by the parties."

The Supreme Court has interpreted the Stevens Treaties on several occasions. In affirming Judge Boldt's decision, the Court wrote:

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> [I]t is the intention of the parties, and not solely that of the superior side, that must control any attempt to interpret the treaties. When Indians are involved, this Court has long given special meaning to this rule. It has held that the United States, as the party with the presumptively superior negotiating skills and superior knowledge of the language in which the treaty is recorded, has a responsibility to avoid taking advantage of the other side. "[T]he treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." This rule, in fact, has thrice been explicitly relied on by the Court in broadly interpreting these very treaties in the Indians' favor.

Washington has a remarkably one-sided view of the Treaties. In its brief, Washington characterizes the "treaties' principal purpose" as "opening up the region to settlement." Opening up the Northwest for white settlement was indeed the principal purpose of the United States. But it was most certainly not the principal purpose of the Indians. Their principal purpose was to secure a means of supporting themselves once the Treaties took effect.

The Indians did not understand the treaties to promise that they would have access to their usual and accustomed fishing places, but with a qualification that would allow the government to diminish or destroy the fish runs. Governor Stevens did not make, and the Indians did not understand him to make, such a cynical and disingenuous promise. The Indians reasonably understood Governor Stevens to promise not only that they would have access to their usual and accustomed fishing places, but also that there would be fish sufficient to sustain them. They reasonably understood that they would have, in Stevens' words, "food and drink . . . forever." As the Supreme Court wrote in *Fishing Vessel*:

> Governor Stevens and his associates were well aware of the "sense" in which the Indians were likely to view assurances regarding their fishing rights. During the negotiations, the vital importance of the fish to the Indians was repeatedly emphasized by both sides, and the Governor's promises that the treaties would *protect that source of food and commerce* were crucial in obtaining the Indians' assent. It is absolutely clear, as Governor Stevens himself said, that neither he nor the Indians intended that the latter should be excluded from their ancient fisheries, and it is accordingly inconceivable that either party deliberately agreed to authorize future settlers to crowd the Indians out of any *meaningful use* of their accustomed places to fish. (emphasis added).

Even if Governor Stevens had not explicitly promised that "this paper secures your fish," and that there would be food "forever," we would infer such a promise. In *Winters v. United States*, the treaty creating the Fort Belknap Reservation in Montana did not include an explicit reservation of water for use on the reserved lands, but the Supreme Court inferred a reservation of water sufficient to support the tribe. The purpose of the treaty was to reserve land on which the Indians could become farmers. Without a reservation of water, the "lands were arid, and . . . practically valueless." "[B]etween two inferences, one of which would support the purpose of the agreement and the other impair or defeat it," the Court chose the former.

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Similarly, in *United States v. Adair*, the Klamath Tribe in Oregon had entered into an 1854 treaty under which it relinquished 12 million acres, reserving for itself approximately 800,000 acres. The treaty promised that the tribe would have the right to "hunt, fish, and gather on their reservation," but contained no explicit reservation of water rights. A prime hunting and fishing area on the reservation was the Klamath Marsh, whose suitability for hunting and fishing depended on a flow of water from the Williamson River. A primary purpose of the treaty was to "secure to the Tribe a continuation of its traditional hunting and fishing" way of living. Because game and fish at the Klamath Marsh depended on a continual flow of water, the treaty's purpose would have been defeated without that flow. In order to "support the purpose of the agreement," we inferred a promise of water sufficient to ensure an adequate supply of game and fish.

Thus, even if Governor Stevens had made no explicit promise, we would infer, as in *Winters* and *Adair*, a promise to "support the purpose" of the Treaties. That is, even in the absence of an explicit promise, we would infer a promise that the number of fish would always be sufficient to provide a "moderate living" to the Tribes. Just as the land on the Belknap Reservation would have been worthless without water to irrigate the arid land, and just as the right to hunt and fish on the Klamath Marsh would have been worthless without water to provide habitat for game and fish, the Tribes' right of access to their usual and accustomed fishing places would be worthless without harvestable fish.

In *Washington III*, we vacated the district court's declaration of a broad and undifferentiated obligation to prevent environmental degradation. We did not dispute that the State had environmental obligations, but, in the exercise of discretion under the Declaratory Judgment Act, we declined to sustain the sweeping declaratory judgment issued by the district court. We wrote, "The legal standards that will govern the State's precise obligations and duties under the treaty with respect to the myriad State actions that may affect the environment of the treaty area will depend for their definition and articulation upon concrete facts which underlie a dispute in a particular case."

We concluded:

> The State of Washington is bound by the treaty. If the State acts for the primary purpose or object of affecting or regulating the fish supply or catch in noncompliance with the treaty as interpreted by past decisions, it will be subject to immediate correction and remedial action by the courts. In other instances, the measure of the State's obligation will depend for its precise legal formulation on all of the facts presented by a particular dispute.

There is no allegation in this case that in building and maintaining its barrier culverts the State has acted "for the primary purpose or object of affecting or regulating the fish supply or catch in noncompliance with the treaty." The consequence of building and maintaining the barrier culverts has been to diminish the supply of fish, but this consequence was not the State's "primary purpose or object." The "measure of the State's obligation" therefore depends "on all the facts presented" in the "particular dispute" now before us.

The facts presented in the district court establish that Washington has acted affirmatively to build and maintain barrier culverts under its roads. The State's barrier culverts within the Case

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Area block approximately 1,000 linear miles of streams suitable for salmon habitat, comprising almost 5 million square meters. If these culverts were replaced or modified to allow free passage of fish, several hundred thousand additional mature salmon would be produced every year. Many of these mature salmon would be available to the Tribes for harvest.

Salmon now available for harvest are not sufficient to provide a "moderate living" to the Tribes. The district court found that "[t]he reduced abundance of salmon and the consequent reduction in tribal harvests has damaged tribal economies, has left individual tribal members unable to earn a living by fishing, and has caused cultural and social harm to the Tribes in addition to the economic harm." The court found, further, that "[m]any members of the Tribes would engage in more commercial and subsistence salmon fisheries if more fish were available."

We therefore conclude that in building and maintaining barrier culverts within the Case Area, Washington has violated, and is continuing to violate, its obligation to the Tribes under the Treaties.

B. Waiver by the United States

[Rejecting the state's waiver claim, the court concluded:]

The United States may abrogate treaties with Indian tribes, just as it may abrogate treaties with fully sovereign nations. However, it may abrogate a treaty with an Indian tribe only by an Act of Congress that "clearly express[es an] intent to do so." Congress has not abrogated the Stevens Treaties. So long as this is so, the Tribes' rights under the fishing clause remain valid and enforceable. The United States, as trustee for the Tribes, may bring suit on their behalf to enforce the Tribes' rights, but the rights belong to the Tribes.

The United States cannot, based on laches or estoppel, diminish or render unenforceable otherwise valid Indian treaty rights. The same is true for waiver. Because the treaty rights belong to the Tribes rather than the United States, it is not the prerogative of the United States to waive them.

[The court proceeded to uphold the district court's injunction, finding that it was based on "extensive" record evidence, including from the state itself, that barrier culverts have substantial adverse effects on salmon, and that the district court did not ignore the state's expertise, citing a state expert's conclusion that removing barrier culverts would produce "the biggest bang for the buck." The court also thought the state's cost estimates for fixing the culverts were exaggerated, and that the injunction violated no federalism principles.]

Conclusion

In sum, we conclude that in building and maintaining barrier culverts Washington has violated, and continues to violate, its obligation to the Tribes under the fishing clause of the Treaties. The United States has not waived the rights of the Tribes under the Treaties, and has not waived its own sovereign immunity by bringing suit on behalf of the Tribes. The district court did not abuse its discretion in enjoining Washington to correct most of its high-priority barrier culverts

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within seventeen years, and to correct the remainder at the end of their natural life or in the course of a road construction project undertaken for independent reasons.

Affirmed.

Notes

1. Commentary on the culverts case. For an assessment of the case, see Michael C. Blumm, *Indian Treaty Fishing Rights and the Environment: Affirming the Right of Habitat Protection and Restoration,* http://ssrn.com/abstract=2813894 (forthcoming 2016)

Page 541. Add note 2a. Lacey Act:

The Lacey Act makes violation of tribal fishing laws a federal offense, 16 U.S.C. § 3372(a)(1). In *United States v. Brown*, No. 13-3800 (8th Cir. Feb. 10, 2015), the Eighth Circuit affirmed the dismissal of federal criminal charges against members of the Minnesota Chippewa Tribe under the Lacey Act for violating the Leech Lake Conservation Code by fishing on-reservation with gillnets for commercial purposes and subsequently selling the fish to non-Indians. The tribal code prohibited commercial fishing without a permit and banned gillnetting for other than personal use. The appeals court agreed with the lower court that the Chippewa Tribe reserved exclusive on-reservation fishing rights under its 1837 treaty and an 1855 Executive Order, and that these rights included commercial fishing with no specifications as to how to fish. The Eighth Circuit decided that although the tribe might be able to enforce its code against the defendants, "[t]ribal fishing laws enforceable in tribal court do not change the scope of treaty protections which tribal members may assert as a defense to prosecution by the United States." The court also found no treaty abrogation under the standards set by the Supreme Court's *Dion* decision because Congress never abrogated the treaty rights by actually considering and choosing to abrogate them in clear and plain legislation.

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IX. International Approaches to Indigenous Lands and Resources

A. International Instruments for the Protection of Indigenous Rights

Pages 549–550. Add to the end of the Note on the U.N. Declaration on the Rights of Indigenous Peoples:

Since the original vote of the U.N. General Assembly, the United States, Australia, Canada and New Zealand have all endorsed the U.N. Declaration on the Rights of Indigenous Peoples. In 2009, Australia endorsed the Declaration. In April 2010, New Zealand endorsed the Declaration. In November 2010, Canada endorsed the Declaration, but maintains that the document is merely aspirational. And, in December 2010, President Obama announced that the United States supported the Declaration. For more information on the United States' position on the Declaration, see *Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples*, available at: http://www.state.gov/documents/organization/153223.pdf.

Page 564. Add to "Note: The Inter-American Human Rights System":

Tribes and Native communities have petitioned the Inter-American Commission on Human Rights (IACHR) to address environmental wrongs. For example, in 2005, the Inuit Circumpolar Conference requested assistance from the IACHR to address the human rights abuses arising from the United States' greenhouse gas emissions, which were leading to climate change in the Inuit Arctic environment. *See* Elizabeth Ann Kronk Warner, *Working to Protect the Seventh Generation: Indigenous Peoples as Agents of Change*, 13 Santa Clara J. of Int'l L. 273 (2015). On March 2, 2015, the Navajo Nation filed a petition in the IACHR seeking redress for human rights violations arising from the authorization of a commercial ski facility to use treated sewage effluent, or "reclaimed wastewater," to produce artificial snow on the San Francisco Peaks in North Arizona. The San Francisco Peaks are of great religious and cultural significant to the Navajo people, and at least thirteen other indigenous peoples in the United States. Navajo Nation, Petition to the Inter-American Commission on Human Rights (March 2, 2015), available at: http://www.nnhrc.navajo-nsn.gov/docs/sacredsites/Navajo%20Nation%20Petition%20to%20IACHR%20March%202%202015.pdf.