Tulsa Law Review

Volume 42
Issue 1 *Native American Natural Resources*

Fall 2006

Symposium Foreword

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Recommended Citation
Judith V. Royster, *Symposium Foreword*, 42 Tulsa L. Rev. 1 (2013).

Available at: https://digitalcommons.law.utulsa.edu/tlr/vol42/iss1/1

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SYMPOSIUM: NATIVE AMERICAN NATURAL RESOURCES

SYMPOSIUM FOREWORD

Judith V. Royster*

The genesis for this symposium was a 2004 essay by Professor Debra Donahue of the University of Wyoming entitled *A Call for Native American Natural Resources in the Law School Curriculum.*[1] In her essay, Professor Donahue argued for the need to teach across the subjects of federal Indian law and natural resources law in order to do justice to either one. Natural resource issues are central to an understanding of modern Indian law,[2] and Indian law is equally crucial to the full picture of natural resources management and development.

A couple of years later, I was elected Chair of the Association of American Law Schools (AALS) Section on Natural Resources, and Professor Steven Gunn of the Washington University School of Law was elected Chair of the AALS Section on Indian Nations and Indigenous Peoples. Remembering Professor Donahue's exhortation, and in light of our own interests in the intersection of these fields, we decided to offer a joint program at the 2007 AALS Annual Meeting with the focus on cooperation in management of tribal natural resources.

We invited Professor Donahue to lead off the program by talking about the teaching of Indian natural resources law, Professors Robert Anderson of the University of Washington School of Law and Kristen Carpenter of the University of Denver College of Law to address specific aspects of natural resources, and Frank Ettawageshik, President of the Little Traverse Band of Ottawa Indians, to speak about his experience with cooperative management in the Great Lakes region. Several of the papers in this symposium issue reflect the presentations at the AALS joint program.

In the spirit of inclusiveness, *Tulsa Law Review* opened the symposium issue to other essays and articles on topics of Native American natural resources law. As with our previous symposium issues, the Indian law professoriate responded to our call for

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1. 24 J. Land Resources & Envtl. L. 211 (2004).

2. *See generally* Judith V. Royster & Michael C. Blumm, *Native American Natural Resources Law: Cases and Materials* (Carolina Academic Press 2002).

papers with an excellent and eclectic mix of pieces. It is my pleasure to introduce this ninth Indian law symposium issue of *Tulsa Law Review*.

Professor Debra Donahue opens the symposium issue with an essay that begins where her *A Call for Native American Natural Resources in the Law School Curriculum* ended.[3] Here, she argues that merely teaching the case law in the field can lead students to a gloomy view of tribal sovereignty under unremitting attack. While that view is not without some truth, Professor Donahue urges teachers to focus more on the vibrant "on the ground" sovereignty of tribes engaged in creative and active cooperative management of their natural resources. For examples that teachers could use to their and their students' advantage, Professor Donahue analyzes a number of tribal initiatives and programs featured by the "Honoring Nations" program of the Harvard Project on American Indian Economic Development.[4]

Professor Robert Anderson focuses on what may prove to be the most important resource of the current century—water—by contrasting the litigation and settlement models.[5] Following a summary of Indian water law as it has developed through case law, Professor Anderson turns to the Snake River settlement[6] as an example of the benefits of this alternative approach to litigation of tribal water rights. He concludes that the Snake River settlement was a positive development for all parties involved and particularly notes that the Snake River experience could lead to more flexible and creative approaches to federal contributions.

Professor Kristen Carpenter addresses cooperative management in the context of an important off-reservation tribal resource: sacred sites located on federal lands.[7] She notes the history of conflict and polarization over use of sites on public lands that tribes consider sacred. As a way to mitigate divisiveness and begin to create commonalities of interest, Professor Carpenter advocates using "models of peoplehood" to establish common ground and mutual respect among various user groups. Using the example of the snowmaking plan at the Arizona Snowbowl, authorized by the United States Forest Service on lands of religious importance to the Navajo Nation,[8] Professor Carpenter explores how a peoplehood model approach would have differed from the decision-making model actually used. Finally, she raises and responds to various critiques of the peoplehood model.

Professor Ezra Rosser takes issue with too rosy a view of cooperative approaches.[9]

3. Debra L. Donahue, *Education and Cooperative Management of Tribal Natural Resources*, 42 Tulsa L. Rev. 5 (2006).

4. *See* Harvard University, *The Harvard Project on American Indian Economic Development*, www.ksg.harvard.edu/hpaied (accessed Mar. 19, 2007).

5. Robert T. Anderson, *Indian Water Rights: Litigation and Settlements*, 42 Tulsa L. Rev. 23 (2006).

6. Snake River Water Rights Settlement Act, Pub. L. No. 108-447, 108 Stat. 2809 (2004).

7. Kristen A. Carpenter, *The Interests of "Peoples" in the Cooperative Management of Sacred Sites*, 42 Tulsa L. Rev. 37 (2006).

8. As this issue was going to press, the Ninth Circuit Court of Appeals issued its opinion in the Arizona Snowbowl case, holding that the Forest Service's approval of the snowmaking plan violated the Religious Freedom Restoration Act and that the Final Environmental Impact Statement for the project failed to comply with the National Environmental Policy Act in one respect. *Navajo Nation v. U.S. Forest Serv.*, 2007 U.S. App. LEXIS 5710 (9th Cir. Mar. 12, 2007).

9. Ezra Rosser, *Caution, Cooperative Agreements, and the Actual State of Things: A Reply to Professor Fletcher*, 42 Tulsa L. Rev. 57 (2006).

Although he agrees that tribes can benefit from cooperation, he argues for a "healthy skepticism" from tribes entering into cooperative negotiations. Professor Rosser sees two fundamental problems with viewing cooperative agreements as always the best policy. First, if cooperative agreements are a goal, internal tribal priorities and decision making may give way to the needs of the moment. Second, the history of relations between tribal and non-Indian government has generally been one of hostility—a relationship that may persist today. Professor Rosser thus advises that tribes take a cautious and qualified approach to cooperative agreements.

In the final article in this issue, attorney Paul Frye examines the Indian Lands Rights-of-Way Study mandated by Congress in 2005.[10] After tracing the statutory and regulatory scheme for rights-of-way in Indian country, Mr. Frye turns to the rights-of-way study, which focuses on pipelines and electric transmission lines. In contrast to the cooperative approach that is the focus of this symposium, he argues that industry proponents of the study are hoping for a mechanism to obtain rights-of-way across Indian lands on terms to which Indian tribes do not consent. Mr. Frye analyzes the implications of the rights-of-way study on treaty rights, tribal sovereignty, tribal property interests, tribal economic development, and the modern congressional policy favoring tribal self-determination.

The Indian law symposium issue closes with two book reviews. Professor Lorie Graham reviews Professor Robert Williams' book, *"Like a Loaded Weapon:" The Rehnquist Court, Indian Rights and the Legal History of Racism in America.*[11] She describes Professor Williams' thesis that federal Indian law has been rooted in racist conceptions and fears of Indians from its inception in the 1820s, that no paradigm shift equivalent to *Brown v. Board of Education*[12] ever occurred in the Supreme Court's Indian law jurisprudence, and that the Rehnquist Court perpetuated the racist underpinnings of Indian law. Professor Graham then tests this theory against a recent case involving land rights of the Oneida Nation[13] and finds Williams' theory sound. Finally, she explores Williams' proposal that American courts look to modern international law principles to inform Indian law jurisprudence. Incorporating those principles, Williams asserts, would help ensure basic human rights protections for tribes and a rejection of the discourse of racism in Indian law.

Professor Alex Skibine reviews Professor Robert Miller's book, *Native America, Discovered and Conquered: Thomas Jefferson, Lewis & Clark, and Manifest Destiny.*[14] Professor Miller's book explores the doctrine of discovery, its role in early Supreme Court Indian law jurisprudence, its influence on Thomas Jefferson and the Lewis and Clark expedition, and its continued influence on modern federal Indian law. In his review, Professor Skibine focuses on the doctrine of discovery as applied by Chief

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10. Paul E. Frye, *Section 1813 of the Energy Policy Act of 2005: Implications for Tribal Sovereignty and Self-Sufficiency*, 42 Tulsa L. Rev. 75 (2006).

11. Lorie M. Graham, *The Racial Discourse of Federal Indian Law*, 42 Tulsa L. Rev. 103 (2006).

12. 347 U.S. 483 (1954).

13. *See City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005).

14. Alex Tallchief Skibine, *Chief Justice John Marshall and the Doctrine of Discovery: Friend or Foe to the Indians?* 42 Tulsa L. Rev. 125 (2006).

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Justice John Marshall in the 1823 case of *Johnson v. M'Intosh*,[15] taking issue with aspects of Professor Miller's approach. Professor Skibine argues that Marshall did not apply a customary international doctrine of discovery to the United States' dealings with Indian tribes but rather interpreted and altered the doctrine to achieve a result that was in the best interests of the federal government.

Finally, in addition to the symposium pieces, we are pleased to publish two student articles on topics of Indian law. The first, by Joshua Sohn, a recent graduate of Harvard University, was the winning entry in the National Native American Law Students Association writing competition for 2006.[16] Mr. Sohn argues that the explosion of tribal gaming may have unintended adverse consequences for tribal sovereignty. The second, by University of Tulsa third-year student Kelly O'Neill, explores the issue of the NCAA's ban on using Indian tribes as college sports mascots.[17]

15. 21 U.S. 543.

16. Joshua L. Sohn, *The Double-Edged Sword of Indian Gaming*, 42 Tulsa L. Rev. 139 (2006).

17. Kelly O'Neill, *Sioux Unhappy: Challenging the NCAA's Ban on Native American Imagery*, 42 Tulsa L. Rev. 171 (2006).

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