

AALS Section on Indian Nations & Indigenous Peoples

2016-2017 Section Newsletter

Upcoming Conferences:

Thursday, January 5, 2017: AALS Annual Conference
8:30-10:15 am, Section on Indian Nations and Indigenous Peoples Scholarly Paper Presentations - The Supreme Court's Recent Indian Law Jurisprudence, San Francisco, California.

Thursday, Feb. 2 - Friday, Feb. 3, 2017: Sovereignty and E-Commerce: Innovating and Reshaping the Borders of Indian Country, Sandra Day O'Connor College of Law at Arizona State University, Tempe, Arizona.

Friday, March 10, 2017: Annual Tribal Law and Government Conference focused on Indian Gaming, University of Kansas School of Law in Lawrence, Kansas.

Thursday, April 6 - Friday, April 7, 2017: Federal Bar Association Annual Indian Law Conference, Scottsdale, Arizona.

Thursday, September 7 - Friday, September 8, 2017: University of Washington 30th Annual Indian Law Symposium, Seattle, Washington.

Wednesday, September 13 - Friday, September 15, 2017: 10th Anniversary Celebration, United Nations Declaration on the Rights of Indigenous Peoples, University of Colorado School of Law (in partnership with the UN Permanent Forum on Indigenous Issues), Boulder, Colorado.

Thursday, October 12 - Friday, October 13: Public Lands & Resources Law Review Biennial Public Lands Conference, Alexander Blewett III School of Law, University of Montana, Missoula, Montana.

Thursday, October 26 - Friday, October 27: Third Annual Indian Law and Policy Center/Tribal In-House Counsel Association Conference, Michigan State University College of Law, East Lansing, Michigan.

Section Officers

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Message from the Chair

In early 2016, when we were thinking about potential topics for the 2017 AALS Indian Nations and Indigenous Peoples Section Meeting, the Dollar General case loomed large on the horizon. It seemed as though the U.S. Supreme Court might finally acknowledge that the Montana exceptions have meaning and substance supporting inherent tribal jurisdiction; or else confirm the fears of tribes and their advocates to find that the Montana rule had, in effect, swallowed the exceptions. After the 4-4 tie at the Supreme Court left undisturbed the 5th Circuit's affirmance of inherent jurisdiction, the jurisdictional question presented by Dollar General will have to wait for another day in that forum. However, we anticipate a lively discussion at the AALS Annual Section Meeting of the important upcoming issues and recent decisions of the Supreme Court and other ways in which the Court affects the lives of Indigenous people.

Like you, I have watched in hope, despair, amazement, and disbelief as indigenous peoples and their allies and advocates from around the world have rallied to Stand With Standing Rock in opposition to the Dakota Access Pipeline. I have been devastated to see the abuse of power as the water protectors have been assaulted by private and public law enforcement in the exercise of their first amendment rights. I have been inspired by their strength in demanding a better future for the generations yet to come. Their voices have been amplified through unity and through skilled advocacy by many of you. The cause has been magnified by you in the courts, in public discourse through social media, and before the agencies charged with the pipeline decisions. I know many of you contributed time, money, and legal skills to helping reach the milestone in early December of the easement being denied.

Your efforts represent the best of our profession. I look forward to the continued advocacy and scholarship that will be inspired by this important historical moment. I hope we will use the unity and inspiration generated by this moment to continue to demand appropriate consultation for tribes, to educate our students to be compassionate and skilled advocates, and to contribute to the scholarly discussion. One great pleasure of seeing the Section Newsletter come together is to see the marvelous scholarship and achievements of section members assembled. I am a great admirer of the work you do to prepare new lawyers to be the caring advocates tribes and others need. I also greatly admire your scholarly achievements that enliven and enrich the legal landscape for tribes and tribal members.

I look forward to seeing many of you in San Francisco on January 5, 2017 for the Section Meeting. I hope you will consider joining Section leadership to keep our section vibrant and unified for the challenges that lie ahead. Thank you for all you do. It is an honor to be counted in your number.



- Michalyn Steele, Associate Professor of Law, Brigham Young University, J. Rueben Clark Law School

Scholarly Accomplishments of Section Members

Publications:

Nadia Ahmad:

- *Blood Biofuels*, 60 DUKE ENVTL. L. & POL'Y FORUM (forthcoming 2017);
- *The Baseline Bar*, 60 U. KAN. L. REV. (forthcoming 2017);
- *Trust or Bust: Complications with Tribal Trust Obligations and Environmental Sovereignty*, 41 VT. L. REV. (forthcoming 2017);
- *A Primer: Air and Water Environmental Quality Standards in the United States*, 40 WM. & MARY ENVTL. L. & POL'Y REV. 115 (2016) (with Jason Czarnezki and Siu Tip Lam);
- *Financial Incentives for Wetland Protection and Restoration*, in THE WETLAND BOOK: STRUCTURE AND FUNCTIONS, MANAGEMENT AND METHODS (Springer 2016);
- *Monsoons, Hydropower, and Climate Justice in Pakistan's River Communities*, in CLIMATE JUSTICE: CASE STUDIES IN GLOBAL AND REGIONAL GOVERNANCE CHALLENGES (Envntl. Law Inst. 2016).

Robert T. Anderson:

- *Federal Treaty and Trust Obligations, and Ocean Acidification*, 6 WASH. J. ENVTL. LAW & POL'Y 474 (2016);
- *Sovereignty and Subsistence: Native Self-Government and Rights to Hunt, Fish, and Gather After ANCSA*, ALASKA L. REV. (forthcoming 2016).

Bethany Berger:

- *Resurrecting the Third Sovereign in the United States Supreme Court*, U. ILL. L. REV. (forthcoming 2017);
- *The Illusion of Fiscal Illusion in Regulatory Takings*, 66 AMERICAN U. L. REV. 1 (2016);
- *Birthright Citizenship on Trial: Elk v. Wilkins and United States v. Wong Kim Ark*, 37 CARDOZO L. REV. 1185 (2016);
- *Reclaiming Lone Wolf?: Review of Michalyn Steele, Plenary Power, Political Questions, and Sovereignty in Indian Tribes*, 63 UCLA L. REV. 666 (2016), and Jotwell (2016), available at <http://lex.jotwell.com/reclaiming-lone-wolf/>;
- *Kelo and the Constitutional Revolution that Wasn't*, 48 CONN. L. REV. (forthcoming 2016) (invited commentary).

Michael Blumm:

- *Indian Treaty Fishing Rights and the Environment: Affirming the Right to Habitat Protection and Restoration*, WASH. L. REV. (forthcoming 2017).

Kristen A. Carpenter & Angela Riley:

- *Standing Tall: The Sioux's Battle Against the Pipeline*, SLATE (Sept. 23, 2016), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/09/why_the_sioux_battle_against_the_dakota_access_pipeline_is_such_a_big_deal.html.

Hillary Hoffman:

- Written Testimony Before the U.S. House of Representatives, Committee on Natural Resources, Hearing on H.R. 866 and H.R. 1484 (Impacts of Oil and Gas Development on Indian Country and Federal Lands) (Nov. 14, 2016);
- *Fracking the Sacred: Resolving the Tension Between Unconventional Oil and Gas Development and Tribal Cultural Resource Protection*, DENV. U. L. REV. (forthcoming 2016/2017).

Sarah Krakoff:

- *They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum*, 69 STAN. L. REV. (forthcoming 2017).

Elizabeth Ann Kronk:

- *Indian Law*, in 2016 KANSAS ANNUAL SURVEY VOLUME XXVII (Hon. Steve Leben, et al. eds., Kansas Bar Ass'n 2016);
- *Returning to the Tribal Environmental "Laboratory": An Examination of Environmental Enforcement Techniques in Indian Country*, MICH. J. ENVTL. & ADMIN. L. (forthcoming 2017);
- *Everything Old is New Again: Enforcing Tribal Treaty Provisions to Protect Climate Change Threatened Resources*, 94 NEB. L. REV. 916 (2016);
- *Looking to the Third Sovereign: Tribal Environmental Ethics as an Alternative Paradigm*, 33 PACE ENVTL. L. REV. 397 (Spring 2016);
- *Justice Brandeis and Indian Country: Lessons from the Tribal Environmental Laboratory*, 47 ARIZ. ST. L.J. 857 (2015).

Robert J. Miller:

- *Consultation or Consent: The United States Duty to Confer with American Indian Governments*, 91 N.D. L. REV. 37 (2015);
- *American Indian Constitutions and Their Influence on the United States Constitution*, 159 Proceedings of the American Philosophical Society 32-56 (2015);
- INDIAN ENTREPRENEURSHIP, IN UNLOCKING THE WEALTH OF INDIAN NATIONS (Terry L. Anderson, ed., Lexington Books 2016);
- *The Treaties of the Eastern Shawnee Tribe*, and, *The Federal, Tribal, and State Laws Impacting the Eastern Shawnee Tribe*, in THE EASTERN SHAWNEE TRIBE OF OKLAHOMA: RESILIENCE THROUGH ADVERSITY (Univ. of Oklahoma Press, 2017);
- *Forum: American Indians and the History of U.S. Foreign Relations*, NETWORKS.H-NET.ORG (June 15, 2016), <https://networks.h-net.org/node/28443/discussions/129731/h-diplo-article-review-forum-620-%E2%80%9Cforum-american-indians-and>.

Monte Mills:

- *New Approaches to Energy Development in Indian Country: The Trust Relationship and Tribal Self-Determination at (Yet Another) Crossroads*, 63 FED. LAW, April 2016, at 50;
- *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 & RES. L. REV. 1 (2016).

Angela Riley:

- *Native Nations and the Constitution: An Inquiry into "Extra-Constitutionality"*, HARV. L. REV. FORUM (forthcoming 2017) (invited piece);
- *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564 (2016);

Judith V. Royster, Michael C. Blumm & Elizabeth Ann Kronk:

- 2016 update to Native American Natural Resources Law, 3rd ed.

Jessica Shoemaker:

- *Emulsified Property*, 43 PEPP. L. REV. 945 (2016);
- *Complexity's Shadow: American Indian Property, Sovereignty, and the Future*, MICH. L. REV. (forthcoming 2017).

Michalyn Steele:

- *Plenary Power, Political Questions, and Sovereignty in Indian Affairs*, 63 UCLA L. REV. 666 (2016);
- IDENTIFYING AND REDUCING DISPARITIES IN MENTAL HEALTH OUTCOMES AMONG AMERICAN INDIANS AND ALASKAN NATIVES USING PUBLIC HEALTH, MENTAL HEALTHCARE AND LEGAL PERSPECTIVES. ADMINISTRATION

AND POLICY IN MENTAL HEALTH AND MENTAL HEALTH SERVICES RESEARCH (2016) In Press (with H. Payne, J. Bingham & C. Sloan).

Melissa Tatum:

- CONSTITUTION AS DIALOGUE: LEGAL PLURALISM AND THE AMERICAN EXPERIENCE. IN CONSTITUTIONAL RECOGNITION OF AUSTRALIA'S FIRST PEOPLES (forthcoming Fed'n Press 2016) (with Dr. Jen Hendry);
- GUIDE FOR DRAFTING OR REVISING TRIBAL LAWS TO IMPLEMENT THE TRIBAL LAW AND ORDER ACT AND THE VIOLENCE AGAINST WOMEN REAUTHORIZATION OF 2013 (Tribal Law and Policy Inst. 2015) (with Maureen L. White Eagle & Chia Halpern Beetso);
- *Human Rights, Indigenous Peoples, and the Pursuit of Justice* 34 YALE L. & POL'Y REV. 351 (2016) (with Dr. Jen Hendry);
- *Indigenous Child Welfare in the U.S.*, AUSTL. INDIGENOUS L. REV. (forthcoming 2016);
- *On-the-Ground VAWA Implementation: Lessons from the Pascua Yaqui Tribe*, 55 JUDGES J. 8 (ABA 2016) (with Alfred Urbina, Attorney General for the Pascua Yaqui Tribe);
- *Dehumanization and Control: Not a Gorilla, Not an Emblem*, LCBACKERBLOG.BLOGSPOT.COM (June 8, 2016), <http://lbackerblogger.blogspot.com/2016/06/dehumanization-and-control-essay-by.html> (with Dr. Jen Hendry).

Jeannette Wolfley:

- *Biagaweit: Securing Water from the Mighty River in the Snake River Basin Adjudication*, 52 IDAHO L. REV. 313 (2016);
- *Reclaiming a Presence in Ancestral Lands: The Return of Native Peoples to the National Parks*, 56 NAT. RESOURCES J. 55 (2016);
- *You Gotta Fight for the Right to Vote: Enfranchising Native American Voters*, 18 U. PA. J. CONST. L. 265 (2015).

Presentations:

James Grijalva:

- *The Role of Non-Governmental Organizations in Assisting Tribes and Tribal Grassroots Organizations to Achieve Environmental Justice*, Side Event, Annual Meeting, United Nations Permanent Forum on Indigenous Issues, U.S. Mission to the United Nations, New York City, NY (2016);
- *Environmental Law Trainer, 4-hour Training Program for Federal and Tribal Governmental Officials on EPA's 1984 Indian Policy and the 1992 General Assistance Program for Developing Tribal Environmental Regulatory Capacity*, Tribal Lands and Environment Forum, Mohegan Sun Resort, Uncasville, CT (2016).

Jacqueline P. Hand:

- *The Duty to Consult Indigenous Peoples: Creating Sustainable Relationships*, Annual Meeting, Association for the Study of Law, Culture and Humanities (Apr. 2016);
- *Unintended Consequences of Intestacy: The Experience of Indian Tribes and Detroiters*, Annual Meeting, Association for Law, Property and Society (May 2016);
- *The Duty to Consult Indigenous People: A Comparison of United States and Canadian Implementation*, Workshop on "La Consulta Previa, Libre E Informada: Estado del Arte en Law Americas, Universidad Internacional del Ecuador (Oct. 2016);
- *The Right to Prior Consultation and Natural Resources*, Universidad de Los Andes (Nov. 2016).

Hillary Hoffman:

- *The Federal Lands Freedom Act and H.R. 1484, The Honor Nevada Enabling Act of 1864 Act (Impacts of Oil and Gas Development on Indian Country and Federal Lands)*, Testimony, Legislative Hearing on H.R. 866, House Committee on Natural Resources (Nov. 2016);
- *Environmental Law in Indian Country*, Federal Bar Association, Washington, D.C. (Oct. 2016).

Elizabeth Ann Kronk:

- *Legal Dimensions of the Protest at Standing Rock Sioux Reservation*, Keeping the Sacred Conference, Haskell Indian Nations University, Lawrence, KS (Oct. 2016);
- *Tribal Water Law and Policy*, 2016 Kansas Planning Conference, Lawrence, KS (Oct. 2016);
- *Examining the Legal Issues Related to the Standing Rock Sioux Protest of the Dakota Access Pipeline*, University of Kansas School of Law, Lawrence, KS (Sept. 2016);
- *Tribal Environmental Law*, BYU Law Colloquium Class, Provo, UT (Sept. 2016);
- *Environmental Justice in Indian Country*, Second Annual Sustainability Conference of American Legal Educators, Sandra Day O'Connor College of Law, Arizona State University, Phoenix, AZ (May 2016);
- *2016 Climate Change and Indigenous Peoples Lecture*, keynote lecture with Professor Maxine Burkett, University of Oregon, Eugene, OR (Apr. 2016);
- *Tribal Sovereignty & Climate Change for Alaska Natives*, Alaska Policy & Climate Adaptation Webinar Series (online presentation) (Jan. 2016);
- *Environmental Justice as It Applies to Contemporary Environmental Challenges in Indian Country*, Civil Rights: The Present and Future of Civil Rights Movements – Race and Reform in the 21st Century America, Duke Law School, Durham, NC (Nov. 2015);
- *Development of Tribal Environmental Law*, Annual Indigenous Law and Policy Center Conference, Michigan State University Law School Indigenous Policy Center, East Lansing, MI (Nov. 2015);
- *Climate Change and Indigenous Peoples*, LatCrit Conference, Anaheim, CA (Oct. 2015);
- *Protecting the Seventh Generation: How Tribes in the United States are Adapting to Climate Change*, UNFCCC Forum, Taipei, Taiwan (Aug. 2015).

Angela Riley:

- *Tribes as Extra-Constitutional Entities*, Harvard Law School Symposium, Harvard Law School, Cambridge, MA (Oct. 2016) (speaker and conference organizer);
- *Crime and Governance in Indian Country*, Harvard Law School Faculty Workshop, Harvard Law School, Cambridge, MA (Apr. 2016);
- *The Jurisgenerative Moment in Indigenous Human Rights*, Federal Bar Association/Native American Bar Association Annual Indian Law Conference, Phoenix, AZ (Apr. 2016);
- *Crime and Governance in Indian Country*, James E. Rogers College of Law, University of Arizona, Tucson, AZ (Mar. 2016);
- *Crime and Governance in Indian Country*, UCLA Law Review Symposium Honoring Professor and Vice Chancellor Carole Goldberg, UCLA School of Law, Los Angeles, CA (Feb. 2016) (speaker and conference organizer);
- *Performing Indian Identity*, Radcliffe College, Harvard University, Cambridge, MA (Jan. 2016).

Ann Tweedy:

- *Tribal Laws and Same-Sex Marriage*, Law and Society Annual Conference (June 2016);
- *Bi/sexuality at the Margins*, Rubash Distinguished Lecture in Law and Social Work University of Pittsburgh School of Law, Pittsburgh, PA (Mar. 2016).

Accomplishments (and other news):

Robert T. Anderson reports that, drawing upon the strength of the University of Washington School of Law's Native American Law Center, the Sustainable International Development (SID) L.L.M. program now offers a concentration track in Indigenous Rights Law. The track will allow students with a particular interest in indigenous rights and Native (first peoples) issues to avail themselves of the rich curricular offerings in Indian law available at the law school as part of their SID degree. More information here: <https://www.law.uw.edu/apply/llm/sid/indigenous-rights-track/>.

Bethany Berger was appointed the Wallace Stevens Professor of Law and co-authored (with Colette Routel, an Amicus Brief on behalf of Legal and Historical Scholars in *Nebraska v. Parker*, 136 S. Ct. 1072 (2016) (concerning

Indian country boundaries). Bethany is also on the Editorial Board of the Connecticut Law Tribune and a Board Member of the Open Communities Alliance, and served as Conference Co-Chair in 2016 for the American Society for Legal History.

Kirsten Matoy Carlson became tenured and was promoted to Associate Professor of Law at Wayne State University in August. She also received the Junior Faculty Award from the Wayne State University Academy of Scholars.

Sarah Krakoff filed an amicus brief with co-counsel Harry Sachse in *Dolgenercorp, Inc. v. Mississippi Band of Choctaw Indians* and also had the privilege of serving as a *pro tem* justice for the Hopi Tribe Court of Appeals, along with Carole Goldberg and Wes Williams, Jr.

Robert J. Miller was appointed to the Navajo Nation Council of Economic Advisors and is a Series Co-Editor for the University of Nebraska Press' "New Visions in Native American and Indigenous Studies."

Melissa Tatum received the University of Arizona's 2016 Superior Teaching Award in the University of Arizona Humanities Seminar Program for *Manifest Destiny: Four US Army Generals and the Face of Modern Native America*.

Ann Tweedy accepted an appointment at University of Tulsa as an adjunct professor in the Master's of Jurisprudence Program.

Jeannette Wolfley reports that the University of New Mexico Law School is opening a new Natural Resources and Environmental Law Clinic in January 2017. She will be the supervising attorney with eight third-year law students representing rural communities, non-profit organizations, and tribal governments, including providing legal services relating to natural resources and environmental preservation and protection to five tribal governments in New Mexico. The clinic will draft regulations, policies, and codes to strengthen the sovereignty of tribes, and to provide for the protection of resources for tribal communities. She is also serving on the National Park Service Intermountain Region Committee to draft a Sacred Sites Guidance document for the numerous national park staff to assist them in exercising best practices in providing access to tribes for traditional sacred sites and landscapes.

United States Supreme Court Forthcoming Indian Law Jurisprudence

On September 29, 2016, the Supreme Court granted certiorari in *Lewis v. Clarke*, 15-1500, which presents the following question: Whether the sovereign immunity of the Mohegan Tribe bars an individual-capacity damages action against a tribal employee for torts committed in the scope of employment. Petitioners Brian and Michelle Lewis seek the Court's review of the decision by the Supreme Court of Connecticut, which directed the dismissal of their suit against an employee of the an employee of the Mohegan Tribal Gaming Authority (MTGA) on the basis of tribal sovereign immunity. *Lewis v. Clarke*, 135 A.3d 677, 685 (Conn. 2016). Respondent Clarke was driving casino patrons home from the Mohegan Sun Casino in a MTGA-owned limousine when he rear-ended the Lewis' vehicle. Rejecting the plaintiffs' argument that tribal immunity should not apply because the tribe is neither party to the case nor responsible for any remedy that might result, the Connecticut Supreme Court determined that "the doctrine of tribal sovereign immunity extends to the plaintiffs' claims ...because the undisputed facts ... establish that [Clarke] was an employee of the tribe and was acting within the scope of his employment when the accident occurred." *Id.* The Supreme Court will hear the case on January 9, 2017.

Thanks to Courtney Damron and Katherine Ore, 3Ls in the Margery Hunter Brown Indian Law Clinic at the Alexander Blewett III School of Law at the University of Montana, for their contributions to and assistance with this newsletter.