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INDIAN LAW SEMINAR B584A

Winter - Spring 2008

Syllabus

Syllabus

Professor William H. Rodgers, Jr.
408 William H. Gates Hall
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4 Credits

Wednesday 3:30 p.m.—5:20 p.m.

William H. Gates Hall, Room 217

Professor's Note:

We will call this seminar, “Global Warming in Indian Country.” It’s the same old story of the native peoples being the “Canary in the Coal Mine.” Except that we propose to do something about it. The seminar will undertake the hypothetical representation of four tribal groups from around the world representing the ongoing climate-related disasters of melting, flooding, fire and drought. As a group, we will develop a document entitled, “Tribal Legal Strategies for Challenging Global Warming.” We will do our best to make it real and useful. Tribal lawyers might want to read it. Perhaps it will be published.

Our effort requires a crash course in the science of global warming and a demanding inquiry into the useful parts of federal Indian law, environmental law, international law, human rights and any and all better-disguised legal theories. We want to go way beyond talk and deep into action. The Greenland ice sheet is well on its way to complete destruction. Entire Pacific

nations will be flooded. The Amazon may well be gone by 2050. It is time for something to be done and the aboriginal people of the world (as they usually are) are in the center of the storm. We will give our best thought to what should be done and who should do it.

The Columbia River enters our picture because the tribes there (after 120 years of litigation) have become a recognizable legal, political, and economic regional “third force.” This has brought new opportunities and new challenges. Their hard-fought and cutting-edge legal experiences help us frame—and give context to—our broader inquiry into tribal-specific responses to the ravages of global warming. Conveniently for us (as students of the law), the twenty-year “crisis” in the management of the Columbia River fisheries is in the middle of dramatic redefinition.

Dates	Topic	Assignment
Wed., Jan. 9	Introduction to Global Warming in Indian Country (William H. Rodgers, Jr.)	pp. 1-2: Michael B. Gerrard, Graphic on climate change litigation ; also, from Climate Change Domestic Debate at www.eenews.net , chart of Global Warming Court Cases
		Native Communities and Climate Change: Protecting Tribal Resources as Part of National Climate Process , Sept. 19, 2007 Report at University of Colorado’s Natural Resource Law Center web site.
		Peter Gelling, Focus of Climate Talks Shifts to Helping Poor Countries Cope , The New York Times, Dec. 13, 2007
Wed., Jan. 16	The Inuit Petition	Petition from the Inuit Circumpolar Conference to the Inter-American Commission on human rights. Submitted December 5, 2005, 8-page summary of 175-page document at http://inuitcircumpolar.com/index.php?ID=316&Lang=En

		Arctic Climate Impacts Assessment, 26-page summary of 146-page document at http://www.amap.no/acia/ .
		Barbara Miller, Arctic ice melt worse than predicted: scientists , ABC News, Dec. 13, 2007. (2 pages)
		Seth Borenstein, AP Science Writer, Ominous Arctic melt worries experts , Dec. 12, 2007. (2 pages)
		Hari M. Osofsky, <i>The Inuit Petition as a Bridge? Beyond Dialectics of Climate Change and Indigenous Peoples' Rights</i> , 31 Am. Indian L. Rev. 675 (2007) (18 pages). Hein Online Westlaw
		Notes on Inuit Petition
Wed., Jan. 23	Cultural Rights and the Spill of the Exxon Valdez	UN Declaration on the Rights of Indigenous Peoples (12 pages) at web site for International Workgroup for Indigenous Affairs at http://www.iwgia.org/sw248.asp . This passed in September over only 4 negative votes from the US, Canada, Australia, and New Zealand.
	<p>Article 27 of the Universal Declaration; Article 13 of the American Declaration; and Articles 15.1 and 15.2 of the ICESCR all contain articulations of the right to culture. In addition, Article 27 of the International Covenant on Civil and Political Rights states:</p> <p style="padding-left: 40px;">In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.</p> <p>International Covenant of Civil and Political Rights, Dec. 16, 1966, art. 27, 999 U.N. T.S. 171.</p>	

		<p>William H. Rodgers, Jr., et al., <i>The Exxon Valdez Reopener: Natural Resources Damage Settlements and Roads Not Taken</i>, 22 Alaska L. Rev. 135. (Read 5 pages excerpted here for class).</p> <p>Hein Online Westlaw</p>
		<p>Petition of the Alaska Intertribal Commission to the U.S. on Natural Resource Damages Resulting from the Spill of the Exxon Valdez (27 pages)</p>
		<p>U.S. / Alaska Reopener demand letter filed with Exxon, June 1, 2006. Additional information at http://www.evostc.state.ak.us/News/reopener.cfm</p>
Wed., Jan. 30	Environmental and Indigenous Rights Under the Alien Tort Claims Act	<p>Richard L. Herz, <i>Litigating Environmental Abuses Under the Alien Tort Claims Act: A Practical Assessment</i>, 40 Va. J. Int'l L. 545, 547-49 (2000).</p> <p>Hein Online Westlaw</p>
		<p>David Hunter, James Salzman & Durwood Azelke, <i>International Environmental Law & Policy</i> 1338-1356 (2d ed. 2002) (18 pages).</p>
		<p>Alien Tort Claims Materials, in regards to <i>Sarei v. Rio Tinto, PLC</i>, in the Ninth Circuit Court of Appeals</p>
	<p><i>Sarei v. Rio Tinto, PLC</i> - En Banc Review Granted</p> <p>On August 20, the Ninth Circuit granted the defendants-appellees' petition for rehearing en banc in <i>Sarei v. Rio Tinto, PLC</i>. Papua New Guinea nationals first filed suit in 2000 under to the Alien Tort Statute, alleging, inter alia, complicity in war crimes and crimes against humanity, violations of the United Nations Convention on the Law of the Sea (environmental harms), and racial discrimination by the defendant mining companies. The district court granted the defendants' motion to dismiss (under Rule 12(b)(6)) in July 2002. The case was first argued before the Ninth Circuit on September 8, 2003 and reargued July 23, 2005 (following the Supreme Court's decision in <i>Sosa v. Alvarez-Machain</i>). The panel issued its first opinion on August 7, 2006, but, on petition for rehearing or rehearing en banc, the panel</p>	

withdrew its 2006 opinion and issued a [new opinion](#) on April 12, 2007. In that opinion, the panel reversed or vacated the district court's dismissal of the plaintiffs' claims on justiciability grounds (political questions, act of state, and international comity). The panel affirmed the district court's finding that the plaintiffs were not required to exhaust remedies in Papua New Guinea. The 2007 panel opinion has now been withdrawn by the en banc court, the opinion of which will be greatly anticipated.

Sarei v. Rio Tinto, PLC, 02-56256

Listen to **Oral Arguments** before the Ninth Circuit en banc at

<http://www.ca9.uscourts.gov/ca9/media.nsf/Media+Search?OpenForm&Seq=1>

At the prompt for case number,
enter 02-56256

Sarei v. Rio Tinto, PLC, 02-56256 / 02-56390

Three-Judge Panel Opinion: 487 F.3d 1193 (9th Cir. 2007)

Order Taking Case En Banc: 499 F.3d 923 (9th Cir. 2007)

Date of Order Taking Case En Banc: August 20, 2007

Status: Argued and submitted October 11, 2007

Members of En Banc Court: Mary M. Schroeder, Harry Pregerson, Stephen R. Reinhardt, Andrew J. Kleinfeld, Barry G. Silverman, M.M. McKeown, Marsha S. Berzon, Johnnie B. Rawlinson, Consuelo M. Callahan, Carlos T. Bea, Sandra S. Ikuta.

Subject Matter: Appeal of the district court's dismissal of a class action complaint brought by current and former residents of the island of Bougainville in Papua New Guinea against a mining company under the Alien Tort Claims Act.

Holding: Not yet decided.

Wed., Feb. 6	Cross-Boundary Pollution: The Trail, B.C. Smelter—International and CERCLA Theories	Edith Brown Weiss, Stephen C. McCaffrey, Daniel Barstow Magraw & A.D. Tarlock, <i>International Environmental Law & Policy</i> 259-76 (2007, Aspen, N.Y., N.Y.).
		<i>Pakootas V. Teck Cominco Metals, Ltd.</i> , 452 F.3d 1066 (9th Cir. 2006).
		<i>United States v. Newmont USA limited and Dawn Mining Co., LLC.</i> , (Eastern District Washington, August 21, 2007). Memorandum Opinion
Wed., Feb. 13	The Tribes, the Fish, and the Columbia River Crisis: The Last Twenty Years	William H. Rodgers, Jr., <i>Environmental Law in Indian Country</i> § 1:27 at 774-786.
		<i>American Rivers v. NOAA Fisheries</i> , 2006 WL 2792675

		Newspaper clippings
Wed., Feb. 20	The Columbia River	Michael C. Blumm, Sacrificing the Salmon: A Legal and Political History of the Decline of the Columbia Basin Salmon, ch. 13 (31 pages).
Wed., Feb. 27	Tim Weaver, Columbia River and the Yakama Indian Nation Through Legal Time	
Wed., Mar. 5	Andre L'Heureux, Salmon Restoration from Inside the Bonneville Power Administration	
Wed., Mar. 12		
—End of Quarter—		

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