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# The Aboriginal Land and Water Rights of the Jemez Pueblo

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# I. INTRODUCTION

Much of the industrialized world today cowers nervously before an unprecedented array of threats: economic and environmental breakdown from resource exhaustion; heat death from climate change; political and social violence linked to inequality, religious division, and racism; and the complete futility of negotiation, democracy, the law, and the free market.[1] The global pandemic of 2020 made this compendium a perfect storm threatening the very existence of western society.[2]

Against this ominous twilight, the hopeful might perceive some shafts of light. Indigenous people have united with the young to restate some fundamental principles of the natural and common law.[3] As plaintiffs, they espouse a sacred, ideological continuum, stretching from aboriginal practice to constitutional rights, which might anchor a holistic, sustainable future—or at least serve as benchmarks or lighthouses to guide a resurrection.[4] Cormac McCarthy wrote of Sheriff Ed Tom Bell's dream about his father:

> [I]t was like we was both back in older times and I was on horseback goin through the mountains of a night. Goin through this pass in the mountains. It was cold and there was snow on the ground and he rode past me and kept on goin. Never said nothin. He just rode on past and he had this blanket wrapped around him and he had his head down and when he rode past I seen he was carryin fire in a horn the way people used to do and I could see the horn from the light inside of it. About the color of the moon. And in the dream I knew that he was goin on ahead and that he was fixin to make a fire somewhere out there in all that dark and all that cold and I knew that whenever I got there he would be there. And then I woke up.[5]

One of the notable efforts has been the attempts by the New Mexico Pueblo of Jemez to procure federal judicial declarations of continuing, unextinguished aboriginal rights to water, land, and sacred sites in the Valles Caldera area.[6] Another attempt is that of minority-age plaintiffs to secure rights to a sustainable future from within the contours of due process, public trust, and common law.[7] The outcome of these legal crusades may be problematic due to the limited reach of constitutional and common law precedents[8] and beyond because of the judicial system's circumscribed powers of remedy.[9] But the cases discuss aspirations and provide imagery and direction, if not immediate results,[10] much like the horn of fire described by McCarthy. Thus, dreams and revisioning, if not revolution, are carried in the timeless crucibles of sustainable practice.

1. WILLIAM OPHULS, IMMODERATE GREATNESS: WHY CIVILIZATIONS FAIL 7–69 (2012).
2. *See generally*, AYOUB BRAIKI, CORONAVIRUS AND ECONOMIC CRISIS (Peter C. Earle ed., 2020).
3. *See* Juliana v. United States, 217 F. Supp. 3d 1224, 1233–34, 1248 (D. Or. 2016); *see also* Pueblo of Jemez v. United States, 790 F.3d 1143, 1146–47 (10th Cir. 2015).
4. *See id.*
5. CORMAC MCCARTHY, NO COUNTRY FOR OLD MEN 309 (2005).
6. *See Pueblo of Jemez*, 790 F.3d at 1172.
7. *See Juliana*, 217 F. Supp. 3d at 1233.
8. *See* Pueblo of Jemez v. United States, 430 F. Supp. 3d 943, 1219–29 (D.N.M. 2019).
9. Juliana v. United States, 947 F.3d 1159, 1171 (9th Cir. 2020).
10. *See id.* at 1188–89 (Staton, J., dissenting).

## II. THE CONCEPT OF ABORIGINAL RIGHTS

The aboriginal vision of the human relation and obligation to land and nature differed sharply from the legal concept of aboriginal rights used in the law and courts of the conqueror.[11] The Europeans viewed aboriginal property as a target for acquisition, whether voluntary or involuntary.[12] Either way, the Colonists wanted to replace the light, inefficient touch of the natives. They wanted to erect fences, enclose the land, commodify it into merchantable increments, and sell it for profit in the free market.[13] They wanted growth, not inertia, and not empathy for the land,[14] which did not really emerge as a public motive until the set-aside of Yellowstone National Park in 1872.[15]

The natives, on the other hand, saw the world as a sacred, essentially perfect community, bound by the timeless principles of reciprocity.[16] Natives viewed reciprocity as an endless pattern of exchanges, but not like the utilitarian exchanges made by individualized gain-seekers in the free market. A variety of non-remunerative motives—love, duty, empathy, and trust—undiluted by linear quantifications inspired the exchanges of reciprocity.[17] The natives generally approached the inherent indeterminacy of first genesis by the logical approaches of holistic respect, acceptance, and protection. Tribalists believed in an infinite community, comprised of both the animate and the inanimate.[18] The community includes humans, animals, birds, fish, and insects. It also involves less animate forms of life like trees, plants, and grass. The Community could also embrace inanimate forms like rocks, soil, planets, stars, air, and some intangible, inanimate concepts such as sacredness, night, day, season, space, and time.[19]

Traditional indigenous persons view all of these manifestations as reciprocating with the origin and with each other.[20] They spiral, evolve, and flow in constant, vibrant, united motion. Though the internal reciprocity involves perpetual interaction, it is not random, nor is it linear. The continuous reverberation of reciprocal relationships leaves the whole tending, like a gyroscope, toward an overall state of balance.[21] Thus, the community here is the central sustainable point of departure and return for all particulate oscillation.[22] The centripetal force around the community's core—both physical and intangible—is a key to what David Getches saw as the Native American's legacy of a "philosophy of permanence."[23] The social and economic practices of the aboriginal community were the incremental, cyclical, rhythmic manifestations of native's lives as

11. *See* WALTER R. ECHO-HAWK, IN THE COURTS OF THE CONQUEROR: THE 10 WORST INDIAN LAW CASES EVER DECIDED 55–77 (2012) .

12. *Id.* at 73–74.

13. J. DONALD HUGHES, AMERICAN INDIAN ECOLOGY 105–16 (Univ. of Tex. at El Paso ed., 1983).

14. *Id.*

15. DYAN ZASLOWSKY & T. H. WATKINS, THESE AMERICAN LANDS 17 (1994); *see also* ALFRED RUNTE, NATIONAL PARKS 29–41 (2010).

16. LAURA THOMPSON & ALICE JOSEPH, THE HOPI WAY 36–37 (1965).

17. *Id.* at 37.

18. *Id.* at 36–37.

19. *Id.* at 36–37; *see also* JOSEPH EPES BROWN, THE SPIRITUAL LEGACY OF THE AMERICAN INDIAN 115–21 (1982).

20. *See* THOMPSON & JOSEPH, *supra* note 16 at 36–37.

21. *See* JOHN COLLIER, INDIANS OF THE AMERICAS 99–111 (1947).

22. *See* JOHN COLLIER, ON THE GLEAMING WAY 77 (1962).

23. DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW 36 (7th ed. 2011) (citing David Getches, *A Philosophy of Permanence: The Indians' Legacy for the West*, 29 J. WEST 54 (1990)).

religious practice.[24] Each act and each breath was a prayer for the balance of the community and all within.[25] Each nomadic hunter, each subsistence agriculturalist, each fisherperson, aimed at basic equilibrium and survival for all parties; not for wealth or acquisition. The objective was continuity, sustainability, modest surplus and life within the carrying capacity of the region. Theoretically, the stable state society might exist indefinitely.[26]

In truth, the equilibrium of the altruistic communities does shift by degrees from time to time. Often there will be wobbles or at least notable changes; sometimes, there are harsh extremes. These can include long-term drought, destruction of the soil and vegetation – and external, dominating socio-political force. In spite of all these swings, the tendency of the traditional people has, until relatively recently, been back toward the sustainability known since time immemorial, and not into the thermodynamically impossible pursuit of exponential material growth.[27]

At the subsistence level of hunting, gathering and agriculture, the indigenous economic units were generally scattered in location, and limited in size, often no larger than an extended family.[28] The limits on scale were necessitated by the immediate imperatives of subsistence, the mobility of wild game, and the precariousness of the agricultural environment.[29]

As the bands moved with the game, the rains, and with the seasons, they maintained their balance and cohesion with internal altruism, equality, consensus decision-making, and responsible power.[30] Those persons with special skills in economy or religion were accountable to all the people and their needs before the service of their own.[31]

The bands, in effect, were like sovereign trusts—timeless, continuous, and dedicated to the good of community.[32] Facing inward, the band entwined the past, present, and future. It transcended each individual within, but found a place, purpose, and role for all.[33] Looking outward, the bands were in a common union with the world's cycles and reciprocating patterns—the light and dark, the sun and clouds, the changing of the seasons, and the celestial orbits.[34] Overall, and with each relationship, the bands moved toward the central point of balance. In general, they did not seek exponential economic growth, excessive wealth, or religious hegemony; rather, they pursued sustainability and continuity for the community.[35]

24. *See* JOE S. SANDO, PUEBLO NATIONS: EIGHT CENTURIES OF PUEBLO INDIAN HISTORY 30 (Ann Mason ed., 1992).

25. *See* WALTER COLLINS O'KANE, THE HOPIS: PORTRAIT OF A DESERT PEOPLE 156–69 (1953); *see also* SANDO, *supra* note 24, at 30–35.

26. WALTER COLLINS O'KANE, SUN IN THE SKY 235–43 (1950); *see also* CHARLES A. EASTMAN, THE SOUL OF THE INDIAN 3–24 (1980).

27. *See* LAURA THOMPSON, CULTURE IN CRISES 173–77 (1950); *see also* DOROTHY K. WASHBURN, LIVING IN BALANCE 2, 16–17 (1995) (many scholars feel that the traditional core of aboriginal sustainability has been severely wounded by the pressures of the growth of society by the vast non-Indian majority and by the pervasiveness of the cash economy).

28. *See* GARRETT HARDIN, THE LIMITS OF ALTRUISM 26–27 (1977).

29. *See* HUGHES, *supra* note 13, at 1–9; HARDIN, *supra* note 28 at 26–27 (stating that pure altruism was possible only within small intimate groups).

30. K. N. LLEWELLYN & E. ADAMSON HOEBEL, THE CHEYENNE WAY 212–38 (1978).

31. *See* EASTMAN, *supra* note 26, at 99–104.

32. MARY CHRISTIANA WOOD, NATURE'S TRUST 136–38 (2014).

33. CHARLES A. EASTMAN, FROM THE DEEP WOODS TO CIVILIZATION 1–8 (2003).

34. CLIFFORD E. TRALZER, *Forward, in* TRUST IN THE LAND ix–xii (2011).

35. SIDNEY L. HARRING, CROW DOG'S CASE 104–05 (1994); ROXANNE DUNBAR-ORTIZ, ROOTS OF RESISTANCE 26–27 (1980); ANGIE DEBO, A HISTORY OF THE INDIANS OF THE

And, in general, it worked—for thousands of years. When the Europeans arrived, they saw the continents as unspoiled, uninhabited, natural paradises—free from human exploitation or dominion without obligation.[36]

## III. THE RISE—AND OCCASIONAL FALL—OF SUSTAINABILITY AS A SOCIETAL PARAGON

### A. THE BEGINNING

At first, self-control, especially in the face of abundance, seems counter-intuitive as a core value. But it may be more acceptable with reflection. Virtually all cultures would acknowledge that original creation infinitely exceeds our ability to emulate, or even to understand. We have a fleeting, finite existence in a timeless place that preceded us and will continue without us.[37] The indigenous people, as well as contemporary ecologists and naturalists like Aldo Leopold, would hold that people or power cannot own the world—rather mankind and nature must share it with the highest respect and care.[38] Leopold wrote: "A thing is right when it tends to preserve the integrity, stability and beauty of the biotic community . . . ."[39]

Leopold felt that the ethic was difficult to achieve because of the ingrained concepts that land is a commodity and property is for individual gain. Leopold expounded that "[w]e abuse land because we regard it as a commodity belonging to us. When we see land as a community to which we belong, we may begin to use it with love and respect."[40] In a related sense, William Ophuls recently wrote: "Ecology precedes humanity. Hence nature is the measure of all things."[41]

The low-impact economy of the pre-1492 Indian population followed this measure in the general form of an active, reciprocating whole. The Indians hunted game, cut trees, used fire to clear lands, planted crops, and even drove buffalo herds off cliffs. But they made these changes with efficiency, a complete and thorough harvesting, respect, and a feeling of partnership and community.[42]

A significant aspect of the low-impact economy is the modest amount of surplus—or capital—that one can generate. Prehistoric farmers, especially those in areas such as the American Southwest with its harsh environments, fragile soil and unreliable precipitation, lived on a knife-edge.[43] They were remarkably skilled in techniques of dry farming, primitive irrigation, and the storage of surplus.[44] But the surplus was, even so, of ultimately perishable commodities and thus offered no transcendence of the natural rhythms and limits. Native bands were still vulnerable to extended drought and tied to cyclical, solar-based production.[45]

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UNITED STATES 3, 6, 13–18 (1970).

36. *See* BARRY LOPEZ, THE REDISCOVERY OF NORTH AMERICA 17 (1990).

37. *See* VINE DELORIA, GOD IS RED 77–94 (2003).

38. *Id.* at 61–66.

39. ERIC T. FREYFOGLE, THE LAND WE SHARE 143 (2003) (citing ALDO LEOPOLD, A SAND COUNTY ALMANAC 262 (1974)).

40. *Id.*

41. WILLIAM OPHULS, SANE POLITY 5 (2012).

42. *See* HUGHES, *supra* note 13, at 4–6; *see also* CHARLES C. MANN, 1491: NEW REVELATIONS OF THE AMERICAS BEFORE COLUMBUS 326 (2005).

43. *See* THOMPSON & JOSEPH, *supra* note 16, at 24–26.

44. R. DOUGLAS HURT, INDIAN AGRICULTURE IN AMERICA 17–22 (1987).

45. JARED DIAMOND, COLLAPSE 155–56 (2005).

The bands remained internally stable within the limitations of short-term surplus. They believed in the basic equality and worth of all tribal members. They were predisposed to sharing and cooperation. These practices generated a centripetal force and a circular path around an eternal center. Even without the guarantees afforded by large surpluses and technological dominance, the people maintained a belief in reciprocity and their communities, with a rich intellectual culture available to all, and survived for thousands of years.[46]

## B. OCCASIONAL LOSSES OF BALANCE

The stable state, with its diverse self-sufficient aggregations, was not invulnerable. There were several sources of disruption that could temporarily throw the entities off-balance—sometimes violently. The environment could change or fail, sometimes for extended periods, and over large areas, and force tribes to move or abandon their belongings. Loss of precipitation or ground water, in particular, could imperil the delicate survival of high-desert agriculture. Extended droughts or shifts in precipitation patterns from gentle spring rains to violent summer cloudbursts, could dramatically shorten growth cycles or cause arroyo-cutting which lowered the water table below reach.[47]

Sometimes simultaneously, the thin desert soil could become depleted or sterile. Tribes could deforest or over-harvest the timber necessary for heating, cooking and construction, forcing long journeys for replacement and extensive times for regrowth. Further, they risked over-consuming wild game.[48]

Though epidemics among the indigenous societies became more obvious after European intrusion, it is likely that viral outbreaks could have occurred in the prehistoric past. Epidemics can be linked to viral transmissions between bats, birds, swine, and humans, and then spread rapidly among people living in close quarters. The decentralization of the native unit might limit the overall scope of the disease, but the impact on particular villages could likely be complete.[49]

Innovations in prehistoric economy and technology could also produce ripple effects through a stable state. The introduction of corn or maize was the prelude to sedentary agriculture and the beginning of the Indians' transition away from hunting and gathering.[50] The bow and arrow replaced the spear and atlatl, and revolutionized hunting and warfare.[51] The use of fire, for cornering game and for improving agricultural areas, changed social practices and regional ecologies from forest to prairie.[52]

Generally, prior to the European entrance into North America, a tribe's dislocation in stability was temporary. Most bands would eventually return to a central concern of sustainability.[53] One should note, however, that a tribe's basic focus on rhythm, balance, equality, reciprocity and seasonal cycles did not preclude its simultaneous interest in

46. *See* SANDO, *supra* note 25, at 43.

47. *See* SHEPARD KRECH III, THE ECOLOGICAL INDIAN: MYTH AND HISTORY 211–13 (1999).

48. STEPHEN LEKSON, A HISTORY OF THE ANCIENT SOUTHWEST 16–21 (2008).

49. *See* RUSSELL THORNTON, AMERICAN INDIAN HOLOCAUST AND SURVIVAL 40 (1987).

50. R. DOUGLAS HURT, AMERICAN AGRICULTURE 19 (2002).

51. E. JAMES DIXON, *Paleo-Indian* in ENVIRONMENT, ORIGINS, AND POPULATION, VOL. 3 HANDBOOK OF NORTH AMERICAN INDIANS 140 (Douglas H. Ubelaker ed., 2006); *see also* JARED DIAMOND, GUNS, GERMS AND STEEL 343 (2005).

52. ROXANNE DUNBAR-ORTIZ, AN INDIGENOUS PEOPLES' HISTORY OF THE UNITED STATES 27–31 (2014); MANN, *supra* note 42, at 249–52.

53. MELINDA HARM BENSON & ROBIN KUNDIS CRAIG, THE END OF SUSTAINABILITY 79–82 (2017).

surplus. In fact, some surplus was necessary as a bridge over episodic shortages and disruptions. The perishable nature of the surpluses limited the scope of the aboriginal surplus technique.[54] But surplus can possibly expand into capital, harden the land community into commodity, and may shatter reciprocity into competitive individualism. These possibilities mark the ultimate point of divergence between the Indians' stable state and the European's new worldview.[55]

## C. THE VISION OF GROWTH—FROM INCIPIENT IMPULSE TO SIREN-SONG

The European vision of creation was hardly one of reverence for a completed masterpiece. Instead, as soon as the Europeans achieved a foothold of survival, they tended to view native as a license bestowed on white Christianity.[56] There was a right—even a duty—to subdue, commodify, and consume. Infidels or the indigenous could, if necessary, bear the expense. This road to dominance may have begun as a sidelight to the religious premise of individual salvation. However, once unleashed, it moved inexorably beyond the restraints of family, community, and place.[57]

The promise of never-ending growth and the unquenchable desire for individual fulfillment were the antitheses of sustainability. Growth might accompany the idea of sustainable development to a point, but its trajectory is upward, apart, and beyond. It seems destined to fail. The laws of thermodynamics counsel that growth within finite limits cannot be endless, and that entropy is inevitable.[58] Even before the ultimate collision between Euro-centric growth and the indigenous stable-state, there was a prehistoric lesson provided to the tribalists from the rise and fall of the Chacoan state.

## D. THE CHACO PHENOMENON

The rise and fall of the Chacoan state was a visible example of a divergence from sustainability to a pursuit of expansion, a loss of balance, an ultimate collapse, and a somber, wiser return. Chaco Canyon is an unspectacular encirclement of an ephemeral watercourse by low rock walls and a wide flood plain. It lies in the heart of the vast and dry San Juan Basin—south of the San Juan River and equidistant from the Jemez Mountains to the east, the Zuni Mountains to the south, the Chuska Range to the west, and the Southern San Juans to the north. The climate is semi-arid, the ground sparsely timbered and cut by numerous ephemeral washes which carried only the temporary rain waters and were prone to long periods of dryness.[59]

The soil, however, was not unproductive and Chacoans harvested the little precipitation, even if variable, through the use of natural reservoirs in rocky canyon walls and human-made canals which could irrigate gardens in the floodplains.[60]

54. *See* DUNBAR-ORTIZ, *supra* note 52, at 27–31.

55. *Id.* at 32–36; *see also* Thomas Piketty, *Capital*, (2014) at 46–47.

56. See LYNN WHITE, JR., *The Historical Roots of Our Ecological Crisis*, 155 SCI 1203, 1203–07 (1967).

57. FREYFOGLE, *supra* note 39, at 52–54.

58. HERMAN E. DALY & JOSHUA FARLEY, ECOLOGICAL ECONOMICS: PRINCIPLES AND APPLICATIONS 64–70 (2d ed. 2011); WILLIAM OPHULS, APOLOGIES TO THE GRANDCHILDREN: REFLECTIONS ON OUR ECOLOGICAL PREDICAMENT, ITS DEEPER CAUSES, AND ITS POLITICAL CONSEQUENCES 1–23 (2018).

59. *See* DAVID ROBERTS, THE LOST WORLD OF THE OLD ONES: DISCOVERIES IN THE ANCIENT SOUTHWEST 129 (2015); *see also* RUTH M. VAN DYKE, THE CHACO EXPERIENCE: LANDSCAPE AND IDEOLOGY AT THE CENTER PLACE 12–16 (2007).

60. *Id.* at 17.

The pit-house villages of the pre-Chacoan fluorescence were spread throughout the San Juan Basin area in accordance with the carrying capacity of the land and the housing patterns could shift with precipitation and arability, but the continuity of the lifestyle also seemed dependent on exchange and trading between the thousands of scattered habitation sites.[61]

By the year 1000, the Pueblo settlements had expanded to virtually all the farmable land in the San Juan Basin and the limits of the lifestyle.[62] The Pueblo village typical of the time was about six to twelve rooms on the surface with several pits interspersed and used for storage, living space, and ceremonies. These small groupings collectively farmed the San Juan Basin with an overall productivity capable of sustaining the still-growing population. But each producing unit was itself not necessarily self-sufficient. Variation in climate and land health made disparities amount the producers inevitable—and a source of conflict. Resolution would require central exchange and redistribution.[63]

This is where the genius—or the curse—of the Chaco Canyon came about. David Stuart wrote: "A new growth dynamic, contrary to 8,000 years of experience, had been set in motion. The Chaco Anasazi turned to power, to the economic principles that govern our own world."[64]

Chaco Canyon, located in the center of the Basin, was poised to be the clearing-house for all disparate producers in a 40,000 square mile region, and all the culturally related religious adherents.[65] The centralized control was, in a sense, over intellectual rather than tangible property. The Chacoans sought prominence as the center place of ritual and belief.[66] They materialized these visions in the iconic great houses: massive, symmetrically balanced, astronomically-oriented monuments of stone that could accommodate the activities of many more than the local populace. There were hundreds of rooms, and up to five floors in some of the houses, such as Pueblo Bonito, which they used for temporary or permanent habitation, and for vast amounts of storage for perishables and materials.[67] The Puebloans linked the great houses in the canyon itself—downtown Chaco[68]—to the other great houses around the region by carefully bermed and engineered highways, up to 30 feet in width and obsessively straight. These roads probably served ceremonial purposes in large part, since the Chacoans did not have wheeled vehicles.[69]

The interior of the canyon featured a number of great kivas and large amounts of public space. One kiva, currently called Casa Riconada, stands apart from any particular great house and was large enough to accommodate regional gatherings.[70] In sum, the Chaco Phenomenon transcended localism and seemed instead to be a crossroads

61. DAVID E. STUART, PUEBLO PEOPLES ON THE PAJARITO PLATEAU: ARCHAEOLOGY AND EFFICIENCY 48–57 (2010).

62. DAVID E. STUART, ANASAZI AMERICA: SEVENTEEN CENTURIES ON THE ROAD FROM CENTER PLACE 73 (2d ed. 2014).

63. *Id.* at 153.

64. *Id.* at 69.

65. STEPHEN H. LEKSON, A HISTORY OF THE ANCIENT SOUTHWEST 128–29 (2008).

66. *See* KATHRYN GABRIEL, ROADS TO THE CENTER PLACE: A CULTURAL ATLAS OF CHACO CANYON AND THE ANASAZI 1–8 (1991).

67. STEPHEN H. LEKSON, *Architecture*, in IN SEARCH OF CHACO 23, 23–30 (David Grant Noble ed., 2004).

68. *Id.* at 28.

69. *See* GABRIEL, *supra* note 66, at 59–69.

70. VAN DYKE, *supra* note 59, at 122–28.

for the various regional Pueblo people to gather, exchange goods, meet unfulfilled local needs, and celebrate their mutual beliefs.[71]

The unprecedented construction, in a relatively short time frame, necessitated a dramatic increase in specialized elite leaders and workers. It required a stratified hierarchy of planners, engineers, timber-cutters, and rock-quarriers. Such divisions of labor and prestige and centralized decision-making were an abrupt transformation of the equalitarian, self-sufficient, locally autonomous Pueblo.[72]

Yet it seems to have occurred in a peaceful, voluntary way. Chaco Canyon had an open center, and was not maintained by closed walls, force or armed defenders. Instead, the Chaco center-place was an invitation to peaceful regional interaction, the exchange of materials, the redistribution of food and the confirmation of mutual belief.[73] How did this epic leap occur?

This requires a quick review of the Chacoan roots. In the middle 900s, there had been a stability to the local precipitation patterns, and great expansion of both agricultural productivity and population. This led to the beginnings of centralization at Chaco and regional exchanging. But, despite all the ingenuity, hard work, and intense rituals, life in the desert depends, ultimately and absolutely, on water. Around 1000, the rains failed, and drought threatened to overwhelm the whole experiment. Instead of retreating to the decentralized stability of the past, however, the elites of Chaco—perhaps on impulse, perhaps on inspiration from Mesoamerica—plunged forward and doubled-down on centralization and construction.[74] Coincidentally—and perhaps symbolically—the precipitation began to increase, the drought eased, and, perhaps the Chacoan's viewed these as favors for their endeavors.[75] But there was another growing problem.

The centralization of planning and supervision and the necessary divisions of labor had led to the opening of extreme disparities, with elites living in the big central great houses like Pueblo Bonito and Cheto Ketl, and the workers living in modest quarters on the outskirts of Chaco.

In effect, Chaco society became a stratified transcendence of place rather than a traditional equalitarian balance. The goals were control, expansion and wealth, rather than sustainability. It revolved around the central ritual hierarchy rather than the resilience and harmony of the community.[76] Ironically and inevitably, the great colossus became fragile and vulnerable because of its complexity, its disparity in wealth and power, and the entropy inflicted on the overborn area resources.[77]

Though the practice at Chaco had become keyed to wealth and expansion, the vision at the center was still ostensibly a religious one, and there was still a desire for overall greatness and success—even if not equally enjoyed. At the end of the 11th century, the rains again ceased and the droughts returned. New buildings and increased rituals did not, this time, lead to a return of water. When the rituals lost their power, so did

71. LINDA S. CORDELL, *Chaco's Corn*, IN SEARCH OF CHACO 39–40 (David Grant Noble ed., 2004).

72. *See* STEPHEN H. LEKSON, THE CHACO MERIDIAN: ONE THOUSAND YEARS OF POLITICAL AND RELIGIOUS POWER IN THE ANCIENT SOUTHWEST 7–38 (2d ed. 2015); *see also* STUART, *supra* note 61, at 67–69.

73. *See* STUART, *supra* note 62, at 117–18.

74. STUART, *supra* note 61, at 64–65.

75. *Id.*; *see also* STUART, *supra* note 62, at 142–43.

76. *Id.* at 148–53.

77. *See* OPHULS, *supra* note 1, at 7–53.

the center place. The society, rudderless, began to collapse, and the people, especially the poor, began to walk away.[78]

At its peak, Chaco was a phenomenon, an open, accessible, largely free society built around trade and redistribution, rather than coercion. There was no standing army, no gates, no repression. There were disparities, but, overall, there was, at its peak, surplusage, and a growing population. But in the collapse, there were vast numbers without subsistence, and a massive impact on the land's carrying capacity.[79] The desperate people moved into the surrounding highlands, and spent several violent centuries in pursuit of the peace, cooperation, and resilience that had preceded the rise of Chaco.[80] The balance of the old ways was eventually recovered and has largely been maintained—a noteworthy feat since the surrounding nonindigenous society was still keyed to growth. Traditional Pueblos of the Rio Grande Valley, however, recognize exponential growth as vulnerable and unsustainable and their core beliefs remain reciprocity and sustainability.[81]

The aboriginal lesson from Chaco about the futility of continuous growth within finite boundaries was only part of the problem. The larger, more intractable issue was the pressure of growth from outside. A stable, subsistence-directed community is perhaps inevitably vulnerable, like plants before a locust swarm, to the inexorable, unapologetic, consumptive forces of continuous growth. Such began with the non-indigenous rediscovery of North America.[82]

## IV. THE EUROPEAN INVASION AND THE EXTINGUISHMENT OF ABORIGINAL RIGHTS

### A. THE DOCTRINE OF DISCOVERY

The beginning of displacement of the non-Christian indigenous states were the Crusades—assaults on the culture and property of non-European societies on the dubious premises of religion and race. It was essentially genocidal and done with the blessing of the Catholic Church and the presumed approval of God.[83]

The Doctrine of Discovery emerged from the Pope's authorization of the voyages and claims of sovereignty and property in the names of God and the discoverer's Catholic homeland. The discoverer and the homeland were awarded priority and exclusivity by the Pope, among other Catholic countries.

Would-be contenders, fearing excommunication, were observant.[84] This became the foundational idea of the preemptive right of the first discoverer and it persisted beyond the Reformation as a principal of International Law. Thus, other non-Catholic Christian nations such as France and England, when freed from the yoke of Catholic sponsorship, were anxious to join the race for the first, and now preemptive, discovery in foreign lands.[85]

One of history's greatest international legal scholars, the Spaniard Francisco de Victoria, tempered the idea that Christian discoverers had absolute, preclusive rights to

78. STUART, *supra* note 62, at 123–24.

79. STUART, *supra* note 61, at 76–81.

80. *Id.* at 81.

81. *See id.* at 117–19.

82. *See* LOPEZ, *supra* note 36, at 49.

83. *See* ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT 15–16 (1990).

84. *Id.* at 78–80.

85. *Id.* at 122–26.

the property of the indigenous. While discovery might provide preemptive rights against other European discoverers, Victoria felt that natives held rights of possession under natural law due to their status as rational human beings.[86] Beyond, Victoria saw the natives as participants in the international order. They had, in addition to possessory rights, duties to allow travel, access, and trade with other nations.[87] If the natives were unaware of these duties, they could be instructed by the discoverer or placed under guardianship.[88]

Victoria's assertions of the rights and responsibilities of indigenous people may have moderated and humanized the international law of nations, but they still gave the discovering nation the preemptive right to deal exclusively with the natives and acquire their possessory rights by consent.[89]

## B. THE DOCTRINE OF DISCOVERY IN AMERICAN LAW

Since, under international practice, a discovering nation got exclusive priority to deal with natives regarding possession, any transfer by the indigenous, voluntary or involuntary, was invalid unless authorized by the discoverer.[90] This principle, deemed to be binding by Great Britain as discoverer, was also the law of the United States as successor sovereign. It became formalized in one of the first statutes of the new country—the Indian Trade and Intercourse Act of 1790.[91]

Through time, the Supreme Court integrated the legal nature of the Indian possession and the impacts of the Doctrine of Discovery and the ensuing statutes into United States property law.[92]

## C. JOHNSON V. M'INTOSH[93]

Indian tribes in the Ohio Valley were, before the Revolution, under the overarching sovereignty of Great Britain which held that crown authorization was necessary for any settlement on or transfer of native title. When Great Britain issued the Proclamation of 1763, precluding white settlement or land purchases beyond the Allegheny Crest, all non-Indian purchases in the area were theoretically unauthorized and void.[94] Several such purchases were apparently made by the plaintiffs in 1773 and 1775 from chiefs of the Illinois and Piankashaw Tribes. The question in the case was whether these purchases were valid and had priority over the subsequent acquisition of the lands and grants by the United States.[95] Justice Marshall wrote:

> [Since] they were all in pursuit of nearly the same object, it was necessary, . . . to establish a principle, which all should acknowledge as

86. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, (Neil Jessup Newton, ed., 2012).

87. *Id.* at 9–10.

88. *Id.*

89. *Id.* at 12–13.

90. *Id.* at 13.

91. Trade and Intercourse Act of 1790, Act of July 22, 1790, ch. 33, 1 Stat. 137; *see also* WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 459–60 (7th ed. 2020).

92. CANBY, *supra* note 91 at 460.

93. Johnson v. M'Intosh, 21 U.S. 543 (1823).

94. *See, e.g.*, LINDSAY G. ROBERTSON, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS 75 (2005); see also MATTHEW L. M. FLETCHER, FEDERAL INDIAN LAW 2 (2016).

95. FLETCHER, *supra* note 94, at 22–23.

> the law . . . . This principle was, that discovery gave title to the government by whose . . . authority [discovery] was made, against all other European governments . . . . The exclusion of all other Europeans necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it.[96]

The case thus established, as the Supreme property law of the new United States, the idea that the first European Christian discoverer, by a simple non-invasive act of discovery cleaved off the legal title, the most important part of the common law's fee simple absolute, and bestowed it, without real logic or reason, on the non-Indians. The Indians did not know that this had happened, and certainly would not have understood, how this relatively innocuous act of encountering a place inhabited for thousands of years could leave their fundamental possession, later to be called their aboriginal rights, at the subsequent mercy of this stealthy conqueror.[97] It was covert racism, injected surreptitiously, at the time when the Indians were strong and the discoverer weaker. Later, when the balances of population and power had shifted, the full dispossession would be far easier.[98] In the interim, the original fundamental principle, that discovery gave exclusive legal title to the European discoverer, denied tribalists power to dispose of the soil, at their own will.[99]

## D. EXTINGUISHMENT

The extinguishment of Indian aboriginal title was a process left vague but undeniable by *Johnson v. M'Intosh*: either by purchase or conquest.[100] The option of contract or treaty was clearly the choice in the pre-Constitutional era when the invaders were weaker, but Felix Cohen has written that most of the acquisitions of Indian land, even in the later eras, were still by agreement.[101] He wrote that the "purchase of more than two million square miles of land from the Indian tribes represents what is probably the largest real estate transaction in the history of the world."[102] Certainly there were imbalances in the negotiations and probably fraud, duress, and underpayment for which the Indian Claims Commission Act of 1996 later made partial recompense.[103] Cohen said, "[w]e have been human, not angelic, in our real estate transactions."[104]

The conquests are another story. Some clearly were by direct violence and force.[105] In addition, widespread abandonment at the approach of the whites produced similar involuntary, non-negotiated results.[106] But many other conquests were acts of thoughtless, selfish indifference by the dominant sovereign—self-serving actions that displaced Indian tribes from land or resources without request or compensation. Nor, as it later turned out, was compensation constitutionally required for any taking of aboriginal land

96. See *Johnson*, 21 U.S. at 573.
97. *See* FLETCHER, *supra* note 94, at 27–28.
98. *See* WILLIAMS, *supra* note 83, at 316–17, 325–26.
99. *Id.* at 315.
100. *See Johnson*, 21 U.S. at 587.
101. *See, e.g.*, Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 40–41 (1947).
102. *Id.* at 42, 59.
103. *See* GETCHES ET AL., *supra* note 23, at 306–20; *see also* 25 U.S.C. § 33 70–70v.
104. *See* Cohen, *supra* note 101, at 42.
105. FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 27–30 (abridged ed., 1986).
106. BRIAN W. DIPPIE, THE VANISHING AMERICAN 32–44 (1982).

or rights, at least according to a case almost unfathomable under the civil rights era precedents of racial equality that existed in 1955. That case, the notorious *Tee-Hit-Ton v. United States*,[107] dealt with the tribal assertion of aboriginal rights over 350,000 acres partially within the boundaries of Alaska's Tongass National Forest. The Secretary of Agriculture, with jurisdiction over the National Forest System, had been authorized by Congress to sell all the merchantable timber in the area "notwithstanding any claim of possessory rights."[108] The tribe claimed a possessory interest in the area and its timber, and the right to compensation for the partial taking.[109] The United States, however, denied that the tribe had any interest beyond a license or the ability to use the land at the will of the government.

The Court agreed that there was nothing to indicate formal recognition of any tribal rights beyond permissive occupation.[110] Furthermore, the Court felt that such possession was not a vested property interest and was subject to termination by the sovereign without any constitutional obligation of just compensation.[111] The Court, showing concern with the financial problems of growth for the United States,[112] felt that discovery and conquest were simultaneous and that "after conquest [the Indians] were permitted to occupy portions of territory over which they had previously exercised 'sovereignty'."[113] This conflation, however, contradicts that language of *Johnson v. M'Intosh* which stated:

> The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian *title* of *occupancy*, either by *purchase* or by *conquest*; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise (emphasis added).[114]

It did *not* say that discovery *was* conquest, but, later in the opinion, Marshall notes that much land was *neither* purchased nor conquered—it was *abandoned* by Indians withdrawing and moving west.[115] It was, in a sense, a form of conquest that started with a discovery that, under international precedent, conferred *only* a naked legal title and *not* possessory title. This could only come later with purchase, conquest–or voluntary abandonment.

The manipulation of *Johnson v. McIntosh*'s language in the *Tee-Hit-Ton* case is a clear example of how the intoxicating power of economic growth can compromise not only the unpurchased, unconquered, and uncompensated aboriginal ownership of a

107. Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955); *see* ECHO-HAWK, *supra* note 11, at 359–94.

108. *Id.* at 276 (citing Joint Resolution of August 8, 1947, 61. Stat. 921, § 2(a)).

109. *Id.* at 278.

110. *Id.* at 278–79.

111. *Id.* at 283–84.

112. *See, e.g.*, *id.* at 285 n. 17 (explaining that the Government pointed out that if aboriginal rights were compensable, the claims with interest would total $9,000,000,000); *see also* GETCHES ET AL., *supra* note 23, at 280.

113. *Tee-Hit-Ton*, 348 U.S. at 279.

114. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 587 (1823).

115. *See id.* at 590–91.

timeless sovereignty–but the morality of the dominant sovereign's law. One can, perhaps, take some solace in the fact that the Court contemplated some non-obligatory gratuities as partial recompense:

> In the light of the history of the Indian relations in this Nation, no other course would meet the problem of the growth of the United States except to make congressional contributions for Indian lands rather than to subject the Government to an obligation to pay the value when taken with interest to the date of payment. Our conclusion does not uphold harshness as against tenderness toward the Indians, but it leaves with Congress, where it belongs, the policy of Indian gratuities for the termination of Indian occupancy of Government-owned land rather than making compensation for its value as a rigid constitutional principle.[116]

This was forthcoming in the Alaska Native Claims Settlement Act.[117]

## E. WESTERN MOVEMENT AND ECONOMIC GROWTH IN THE 19TH CENTURY

Armed with the powers of regulatory sovereignty, the purse, property, and eminent domain, the new nation moved west throughout the nineteenth century. This necessitated occasional wars, the extinguishment of the Indian possessory title, the surveying and commodification of the land, and the disposition of interest to the new states, transportation companies, miners, timbermen, ranchers, and settlers.[118]

Part of the early efforts involved treaties of cession and removal, especially after the Removal Authorization Act of 1830.[119] This allowed the President to negotiate treaties to provide for the sale of Indian homelands in the east and south, and relocate the tribes on extensive reserves beyond a mid-continent line, on approximately the western Missouri border.[120] The line, which extended north and south, and which proponents called the permanent Indian frontier,[121] and the vast reserves beyond it were basically outside of white interest or presence except for denominational missionaries.[122] The permanence of the frontier and the tribal control of their internal sovereignty and culture, however, was to last only several decades.

The pressures of the looming Civil War, the West Coast gold rush, and the growing land hunger of the pioneering whites precipitated another round of removal treaties in the 1850s and 1860s.[123] The Government concentrated the again-displaced tribes on reserves in the Oklahoma Territory (again with promises of permanence)[124] and on

116. *Tee-Hit-Ton*, 348 U.S. 290–91.

117. 43 U.S.C. 33 §§ 1601–28; *see, e.g.*, CANBY, *supra* note 91, at 494–595.

118. *See* T. H. WATKINS & CHARLES S. WATSON, JR., THE LANDS NO ONE KNOWS 45–71 (1975).

119. Removal Act, ch. 148, 4 Stat. 411–12 (1830); *see* GETCHES ET AL., *supra* note 23, at 97–98.

120. *See* PRUCHA, *supra* note 101, at 64–66, 69–70, 72, 75, 96; *see also* GRANT FOREMAN, INDIAN REMOVAL 13–15 (1972).

121. *See* GEORGE W. MANYPENNY, OUR INDIAN WARDS 111–12, 114, 122 (1880); PRUCHA, *supra* note 101, at 96.

122. *See* PRUCHA, *supra* note 105, at 99–102.

123. *See id.* at 108–19.

124. *See* Montana v. United States, 450 U.S. 544, 547–51, 556 n.5 (1981) (explaining that the Crow Tribe and the United States argued that the Treaty of Fort Laramie in 1868 set aside the

reserves along the course of the upper Missouri River.[125] After treaty-making ended in 1871,[126] the Government dealt with land issues by statute or executive order, and gradually whittled down the large reserves to the more confined parameters typical of today.

Under Supreme Court law and the doctrine of plenary power,[127] there were only two real prerequisites to the formal extinguishment of aboriginal rights by statutory action—a congressional intent and clarity of expression.[128] The less formal extinguishment of the possessory interest, by complete occupation or dominion, demanded clarity of government intent from the scope and depth of events rather than explicit writing.[129]

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bed of the Big Horn River for federal and tribal ownership and cited several removal treaties to Arkansas as precedent) ("Under the Choctaw treaty, the United States promised to convey new lands west of the Arkansas Territory in fee simple, and also pledged that 'no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation . . . and that no part of the land granted to them shall ever be embraced in any Territory or State.' Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333–344, quoted in *Choctaw Nation v. Oklahoma*, 397 U.S., at 625, 90 S. Ct., at 1331. In 1835, the Cherokees signed a treaty containing similar provisions granting reservation lands in fee simple and promising that the tribal lands would not become part of any State or Territory. *Id.* at 626, 90 S. Ct., at 1332.")

125. *See id.* at 553–55 (agreeing that the Treaty *did* promise that the *land* was "set apart for the absolute and undisturbed use and occupation of the Indians herein named" but because the treaty didn't mention the Big Horn River which flowed through the middle of the reservation, it felt the Oklahoma tribe principles didn't apply, and the equal footing doctrine passed title to the bed of the river to Montana at statehood) (emphasis added) (quoting Second Treaty of Fort Laramie, May 7, 1868, Art II, 15 Stat. 650).

126. The Indian Appropriations Act, 16 Stat. 544 (1871) said in effect that the House of Representatives didn't want to fund reservations unless they could have a say on the negotiations. The effect on the Indians was minimal; agreements were still negotiated in the field by the executive and were subject to approval by both the House and the Senate. *See* GETCHES, ET AL., *supra* note 23, at 151–52.

127. United States v. Kagama, 118 U.S. 375, 384–85 (1886) is the forerunner of the plenary power doctrine, which means that Congress has, among all the other branches of government, the complete power over Indian relations—even if the power is not specifically authorized in the Constitution. This is because of the responsibility of *wardship*. The Court said "[t]he power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else; because the theater of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes." Though Congress may possess plenary *institutional* power over the contours of tribal *sovereignty* and *property*, there are *constitutional* constraints of due process and just compensation. *See infra* note 122.

128. *See Kagama*, 118 U.S. at 382–83, which allowed Congress to penetrate the tribal sovereignty over intramural criminal law with federal standards. The intent and language were clear, and this was the difference from the earlier, unsuccessful effort in *Ex parte* Kan-Gi-Shun-Ca (otherwise known as Crow Dog), 109 U.S. 566, 572 (1883) where the Court said: "to uphold the jurisdiction exercised in this case, would be to reverse in this instance the general policy of the government towards the Indians, as declared in many statutes and treaties, and recognized in many decisions of this court, from the beginning to the present time. To justify such a departure, in such a case, requires a clear expression of the intention of congress, and that we have not been able to find;" *see also* United States v. Santa Fe Pac. R. Co., 314 U.S. 339, 354 (1941) ("Congress could have effected such an extinguishment is not doubted. But an extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards . . . . the rule of construction recognized without exception for over a century has been that 'doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith'.") (quoting Choate v. Trapp, 224 U.S. 665, 675 (1912)).

129. *See, e.g.*, United States v. Shoshone Tribe, 304 U.S. 111, 112–15 (1938) (explaining that the Shoshone Tribe held 3,054,182 acres under the Treaty of 1868 that called for "absolute and undisturbed use," and the United States, without tribal consent, and without formal language of extinguishment, placed a band of Arapahoe Indians on the same tract. This was the

One court embraced dominion with a doctrine–or an observation–called the "increasing weight of history."[130] The court essentially based this doctrine on demographics and eliminated express intent as a requirement. So also did the utilization of involuntary procedural extinguishment by statutes of limitation[131] and the equitable doctrines of estoppel and laches.[132]

Roxanne Dunbar-Ortiz has eloquently described the western movement as replacing tribalism and aboriginal lifeways with mercantilism, capitalism, and free-market growth—all fueled by the industrial revolution.[133] The pressure increased for the tribes in the post-Civil War era, with the policy of assimilation and the tribal wrecking ball of allotment.[134] Both initiatives aimed at breaking down the tribal mass and sought to replace ideals of cyclical balance and community with the linear tools of property and the cash economy: square, limited tracts of land, free-market competition, and with the Christian faith in individual salvation.[135]

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extinguishment of a one-half undivided interest and was accomplished by complete dominion. The extinguishment stood–but not without constitutional consequence of just compensation).

130. *See* Vermont v. Elliott, 616 A.2d. 210, 218 (Vt. 1992) ("We differ with the trial court principally in its application of the test for extinguishment to discrete events in Vermont's history, rather than to the cumulative effect of many historical events. The legal standard does not require that extinguishment spring full blown from a single telling event. Extinguishment may be established by the increasing weight of history.").

131. *See* Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist., No. EDCV 13-883-JGB, 2015 WL 1600065, at *11 ("In this case, the Tribe alleges they have occupied the Coachella Valley since time immemorial. Within the framework established . . . that means they held an aboriginal right of occupancy under Mexican law, and then a right of occupancy under United States law following the Treaty of Guadalupe Hidalgo. The Tribe admits that no claim was filed on its behalf as part of the claims process under the Act of 1851 . . . *so like the Indians in* all other cases *interpreting the Act of 1851, the Agua Caliente's aboriginal claim was effectively extinguished after the two-year claims window closed, and its territory subsumed with the public domain.*") (emphasis added).

132. City of Sherill v. Oneida Indian Nation, 544 U.S. 197, 216–17 (2005) ("The Oneidas did not seek to regain possession of their aboriginal lands by court decree until the 1970's . . . . This long lapse of time, during which the Oneidas did not seek to revive their sovereign control through equitable relief in court, and the attendant dramatic changes in the character of the properties, preclude the [Oneidas Indian Nation] from gaining the disruptive remedy it now seeks. The principle that the passage of time can preclude relief has deep roots in our law, and this Court has recognized this prescription in various guises. It is well established that laches, a doctrine focused on one side's inaction and the other's legitimate reliance, may bar long-dormant claims for equitable relief.").

133. *See* DUNBAR-ORTIZ, *supra* note 52, at 72–73, 169 ("When the capitalist economy entered New Mexico, the Pueblos were able to maintain a larger proportional land base than the Mexican settlements were. The Pueblos' longstanding organization as nations, as city-states, allowed them to carry out unified resistance to U.S. colonialism. However, the entrance of twentieth-century industrial capital, an inability to expand the land base, and the advance of a money/credit economy curbed the potential for subsistence agriculture for both Pueblo Indians and Mexican villagers. Neither could compete commercially. The majority of both groups was transformed into laborers, though many Pueblo artisans developed crafts for the tourist industry and the national market. But these pursuits were completely divorced from agricultural production and normal cultural practices. Crafts as commodities for exchange is a recent development related to the demands of a capitalist economy.")

134. *See* FREDERICK E. HOXIE, A FINAL PROMISE 38–39 (1984); JANET A. MCDONNELL, THE DISPOSSESSION OF THE AMERICAN INDIAN 1887–1934 1–5 (1991); GETCHES, ET AL., *supra* note 23, at 165–75.

135. *See generally* HOXIE, *supra* note 134, at 38–39; GETCHES, ET AL., *supra* note 23, at 165–75.

Yet the aboriginal heart was still beating, and the wounded tribal governments were still intact, at least as matters of law.[136] These legal shells had survived what Frederick Jackson Turner called, the end of the frontier,[137] the massacre of the tribal dreams of resurrection at Wounded Knee,[138] and the subdivision of the reservation homelands into largely useless plots.[139]

The remnant of the aboriginal worldview also survived the extinguishment of traditional possession and the substitution of allotments.[140] They inhered in the land view of their Indian ancestors and their descendants, as well as the modern ecologist.[141] This shared modern sentiment—the still beating heart of aboriginal practice—is the idea that land is a community that can be joined, respected or revered, but not abused.[142] The aboriginal worldview continues in the use of water, the practices of traditional agriculture, the visitation to sacred sites, and the practices of ritual and restoration.[143] Often these places are on property that, under the legal dispositions of the federal government or the regulatory laws of the states, are owned or controlled exclusively by others—settlers, ranchers, miners, loggers, states and local governments, and by the United States.[144]

The traditional people still come to the land and waters, on rhythmic cycles from out of the past.[145] They come as parishioners, stewards, trustees and guests.[146] They come as licensees or as trespassers.[147] Increasingly they come as litigants.[148] In sum, they come—as they have always—to affirm their belief in reciprocity, cooperation and community, to express their love and obligation. They come to rekindle the sacred fire.[149] And to pass this on to the future.

136. *See* Harjo v. Kleppe, 420 F. Supp. 1110, 1118 (1976) ("[D]espite the general intentions of the Congress of the late nineteenth and early twentieth centuries to ultimately terminate the tribal government of the Creeks, and despite an elaborate statutory scheme implementing numerous intermediate steps toward that end, the final dissolution of the Creek tribal government created by the Creek Constitution of 1867 was never statutorily accomplished, and that government was instead explicitly perpetuated.")

137. THE OXFORD HISTORY OF THE AMERICAN WEST, 4 (Clyde A. Milner II, Carol A. O'Connor, Martha A. Sandweiss, eds., 1994) [hereinafter THE AMERICAN WEST].

138. ROBERT M. UTLEY, THE INDIAN FRONTIER OF THE AMERICAN WEST, 1846–1890, 253–61 (Ray Allen Billington et al. eds., 1984).

139. *Id.* at 269.

140. *See id.*

141. *See* JOE S. SANDO, NEE HEMISH, A HISTORY OF THE JEMEZ PUEBLO 17 (1st ed. 1982).

142. *See* FREYFOGLE, *supra* note 39, at 149–156; *see* SANDO, *supra* note 141, at 15–18. "Jemez has had to fight the rapacious conquerors long and hard for its lands and its traditional system of usufruct, because our values and cultures are so different. Justice is delayed; the United States government is guilty of malfeasance and nonfeasance, as is evidenced by the Indians' loss of choice farm land, forest land, and grazing land along the Rio Grande and its tributaries. The future is perplexing: Many Indian tribes throughout America are demanding the return of aboriginal land illegally taken over by non-Indians and the supposedly benign federal government. There is no reason to believe that the struggle for what is rightfully ours will cease in the near future."; *Id.* at 49.

143. FREYFOGLE, *supra* note 39, at 41, 72–81.

144. *See, e.g.*, *id.* at 15–16.

145. *Id.*

146. *Id.*

147. *Id.*

148. *See generally*, NATIVE AMERICAN CULTURAL AND RELIGIOUS FREEDOMS, (John R. Wunder, Ed.) (1996).

149. *See supra*, at n. 3–4.

## V. JEMEZ PUEBLO AND THE ABORIGINAL RIGHTS IN THE VALLES CALDERA[150]

The Jemez Mountains are a massive volcanic uplift in north-central New Mexico, west of present-day Santa Fe, and northwest of Albuquerque.[151] The center of the uplift, called the Valles Caldera, is the collapsed and dormant center of an ancient super volcano which, spent of its force, settled into a collection of wide grass valleys, covered with rich basaltic soil and pine forests, and surrounded and interspersed with high peaks.[152]

For over 800 years, the Jemez people have lived near the Jemez River, draining the southern flank of the range, and have used the uplands around the Caldera for hunting, gathering, timber, agriculture, and spiritual observance.[153] The village and the uses continue today.[154] The people make regular visits on sacred trails to procure materials, conduct rituals, and leave offerings.[155] A vital point of visitation is Redondo Peak, the second-highest point in the region,[156] the center of the Caldera, the source of the Jemez River, and the holiest of places to the Jemez people.[157]

### A. THE SUCCESSION OF SOVEREIGNS AND THE DOCTRINE OF DISCOVERY

With the arrival of the Spanish shortly after 1500, the Jemez faced superior armed force, greater numbers, an aggressive religion, and the invocation of the Doctrine of Discovery.[158] The colonization of the northern New Mexico region was a combination of military and religious forces—both physical and cultural domination.[159] The church and the secular governments, backed by the military, combined to impose crushing burdens on the Pueblos including forced tribute slavery, religious persecution, and executions.[160] These forces, along with diseases to which the Indians had no immunity, had by 1680 driven the Pueblos to the brink of extinction.[161]

On August 10, 1680, the autonomous Pueblo peoples of the area united for the first time and violently expelled the Spanish—priests, officials, settlers, women and children.[162] The independence was to last only twelve years; in 1692 a force of 800 soldiers,

150. Parts of the next section were covered in a previous article – John Ragsdale, *Time Immemorial: Aboriginal Rights in the Valles Caldera, the Public Trust and the Quest for Constitutional Sustainability*, 86 UMKC L. REV. 869 (2018).

151. *Id.* at 878 (citing VALLES CALDERA TRUST, *Valles Caldera National Preserve: Framework and Strategic Guidance for Comprehensive Management* (William deBuys 2003)).

152. *Id.*

153. *Id.* at 39.

154. *Id.* at 34–38.

155. *Id.* at 37.

156. Redondo Peak, in the center of the Caldera, is listed at 11,254', while Chicoma Mountain, on the northeast rim of the Caldera is 11,561'. *See Redondo Peak*, PEAK BAGGER.COM, https://www.peakbagger.com/peak.aspx?pid=3992 (last visited 6/25/2020); *Chicoma Mountain,* PEAK BAGGER.COM, https://www.peakbagger.com/peak.aspx?pid=3989 (last visited 6/25/2020).

157. *See* T.S. Last, *Jemez Pueblo to Appeal Court Decision,* ALBUQUERQUE J., October 6, 2013; https://www.abqjournal.com/276467/jeme-zpueblo-to-appeal-court-decision.html.

158. DUNBAR-ORTIZ, *supra* note 52, at 32-40.

159. *Id.*

160. DAVID J. WEBER, THE SPANISH FRONTIER IN NORTH AMERICA, 122–33 (William Cronon et al. eds., 1992).

161. KURT F. ANSCHUETZ AND THOMAS MERLAN, VALLES CALDERA NATIONAL PRESERVE LAND USE HISTORY 26 (2007).

162. David Roberts, THE PUEBLO REVOLT 14 (2004).

settlers and priests began the recolonization.[163] The new Spanish presence was, however, not as inclined toward retribution as much as reconciliation with a higher measure of economic religious and economic freedom for the Indians.[164] The heart of this was a recognized minimum entitlement to land under a part of Spanish law applicable to the Pueblos. The Spanish called this concept the "Pueblo League"—which was approximately 17,350 acres.[165]

In addition, Spanish officials gave Pueblos additional grazing land grants to be used in common.[166] Under colonial administration, the Pueblos were considered wards of the Spanish Crown, and the Crown forbade all other Spanish citizens to live on Pueblo lands.[167] The Puebloans did not formalize these grants into writing, however, until the Nineteenth century.[168]

After achieving independence from Spain in 1821, the Mexican government accorded the Pueblo tribes both citizenship and title to their lands.[169] In 1846, the United States began a pretextual war with Mexico that resulted in a lopsided victory and the cession of half of Mexico's territorial sovereignty.[170] It created the basis for the future states of Arizona, New Mexico, California, Nevada and Utah.[171] It amounted to 529,000 square miles and was the largest United States acquisition since the Louisiana Purchase.[172] Of particular significance to the Pueblo, it created a new sovereign and new laws for the tribes to deal with.[173]

Under the Treaty of Guadalupe Hidalgo,[174] the United States agreed to respect the property rights of all Mexican citizens that lived within the ceded area.[175] Within this area, "federal law recognize[d] certain [property] rights connected to original Indian occupancy."[176] In California, the observance of these rights required territorial commissions that offered little if any notice to Indians.[177] No such required confirmations or

163. WEBER, *supra* note 160, at 137–38.

164. *Id.* at 141; *see also* THE AMERICAN WEST, *supra* note 137, at 56.

165. *See* MALCOLM EBRIGHT, ET AL., FOUR SQUARE LEAGUES, 11–15 (2014); *see also* ANSCHUETZ & MERLAN, *supra* note 161, at 26.

166. DUNBAR-ORTIZ, *supra* note 52, at 52–53, 64–65. Apparently, the Valles Caldera was a common area and was grazed by both Indians and Spanish settlers. *See* ANSCHUETZ & MERLAN, *supra* note 161, at 26; *see also* CRAIG MARTIN, VALLE GRANDE 16 (2003); Valles Caldera Trust, *Physical, Cultural and Socio-Economic Setting*, 12 https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5383831.pdf.

167. DUNBAR-ORTIZ, *supra* note 52, at 64–65.

168. ANSCHUETZ & MERLAN, *supra* note 161, at 26.

169. DUNBAR-ORTIZ, *supra* note 52, at 91–93.

170. THE AMERICAN WEST, *supra* note 137, at 167.

171. *Id.* at 168.

172. *Id.* at 167–68.

173. PATRICIA NELSON LIMERICK, THE LEGACY OF CONQUEST 235–36 (1987).

174. Treaty of Guadalupe Hidalgo, 9 Stat. 922 (1848).

175. LIMERICK, *supra* note 173, at 237.

176. Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist., No. EDCV 13-883-JGB, 2015 WL 1600065, at *9 (C.D. Cal. Mar. 20, 2015).

177. *See id.* at *9, *11 ("In this case, the Tribe alleges they have occupied the Coachella Valley since time immemorial . . . . [T]hat means they held an aboriginal right of occupancy under Mexican law, and then a right of occupancy under United States law following the Treaty of Guadalupe Hidalgo. The Tribe admits that no claim was filed on its behalf as part of the claims process under the Act of 1851, so like the Indians in *all other cases* interpreting the Act of 1851, the Agua Caliente's aboriginal claim was effectively extinguished after the two-year claims window closed, and its territory subsumed within the public domain.") (citation omitted).

two-year statute of limitation were present in New Mexico,[178] so aboriginal occupancy rights, such as the pre-existing aboriginal occupancy rights the Pueblos held, continued unabated.[179] But so did the United States' power of extinguishment which after *Johnson v. M'Intosh*, was unquestionable if exercised with a clarity of intent.[180]

Whether the United States had exercised this power and demonstrated this intent often became an issue when conflicts later emerged over federal dispositions of land and resources. One area of tension occurred in the New Mexican town of Las Vegas, where the availability of cheap federal land inspired Anglo-American settlers and collided with the massive private land holdings of the Baca family.[181] To resolve the impasse and honor its treaty promises, Congress passed a statute in 1860 allowing the Baca family to select almost 500,000 acres of non-mineral land elsewhere in New Mexico, distributed among no more than five tracts, if the family would forgo their Las Vegas lands.[182] One tract the Baca family selected was the Valles Caldera.[183]

It was not clear whether the federal grant of the land to the Baca's, land that the Jemez were using at the time, operated to extinguish the tribe's possessory rights. There was no such language or intent expressed in the legislation.[184] In addition, if the Jemez maintained "aboriginal use and occupancy" simultaneously with the Baca's usage, including use of the land in accordance with traditional ways of life, the Baca grant may have been subject to the Jemez's aboriginal title.[185] Indeed, the Baca family grazed the land concurrently with the Jemez, who had practiced grazing there since the Spanish colonization.[186] The Baca ownership descended through the family and became fragmented in sales to outsiders.[187] The Jemez openly continued its customary activities throughout the 19th and 20th centuries without conflict or serious incident.[188] Whether this amounted to permission, adverse possession, or an implied easement was never asserted, contested, or decided.[189] What is evident, though, is that neither the ranch

178. *See* Pueblo of Jemez v. United States, 790 F.3d 1143, 1163 n.14 (10th Cir. 2015) (citing United States *ex rel.* Chunie v. Ringrose, 788 F.2d 638, 646 (9th Cir. 1986); United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 349–51 (1941)).

179. *Id.* at 1164–65.

180. *See* cases cited *supra* note 121 and accompanying text.

181. *See* ANSCHUETZ & MERLAN, *supra* note 161, at 27, 37–38; *see also Pueblo of Jemez*, 790 F.3d at 1149 (explaining that settlement of the dispute between the Baca family and the Town of Las Vegas involved 496,447 acres).

182. *See* Act of June 21, 1860, Pub. L. No. 36-167, § 6, 12 Stat. 71, 72 (confirming certain private land claims in the Territory of New Mexico).

183. *Pueblo of Jemez*, 790 F.3d at 1149.

184. *See id.* at 1162–63.

185. *See id.* at 1163, 1165 (quoting Mitchel v. United States, 34 U.S. 711, 746 (1835); Sac & Fox Tribe of Indians v. United States, 328 F.2d 991, 998 (Ct. Cl. 1967)) (indicating that traditional Indian land usage allowed aboriginal title to persist and that land grants were subject to that title).

186. ANSCHUETZ & MERLAN, *supra* note 161, at 109.

187. *See id.* at 39.

188. *See id.* at 49–52, 56–61; *see also Pueblo of Jemez*, 790 F.3d at 1165 ("[S]imultaneous occupancy and use of land pursuant to fee title and aboriginal title could occur because the nature of Indian occupancy differed significantly from the occupancy of settlers . . . For this reason, the terms "aboriginal use and occupancy" have been defined "to mean use and occupancy in accordance with the way of life, habits, customs and usages of the Indians who are its users . . . . One must remember that much of the land involved here is remote . . . . [I]t is . . . easy to see how a peaceful and private Indian Pueblo might have used portions of this large area . . . for its traditional purposes while one agreeable rancher was using portions of it for grazing livestock. The Complaint so alleges."); *Id.* (quoting *Sac & Fox Tribe of Indians*, 328 F.2d at 998).

189. *See Pueblo of Jemez*, 790 F.3d at 1147 (suggesting that the Jemez's first legal action did not assert a form of possession beyond aboriginal title and that courts have not yet determined

operators nor the tribe viewed the situation as so intractable or even inconvenient that they sought formal legal recourse.[190]

The Indian Claims Commission Act ("ICCA") of 1946 created a quasi-judicial body, the Indian Claims Commission ("ICC"), to hear and determine all tribal claims against the United States,[191] including those for the taking of aboriginal rights, that had occurred before August 13, 1946. To facilitate these adjudications, the ICCA waived federal sovereign immunity for all claims filed within five years and recognized claims based on aboriginal title.[192]

If the Jemez tribe lost its aboriginal rights in the 1860 grant from Congress to the Baca family, then under the terms of the Act, the Jemez had to file a claim with the ICC before 1951 to escape the bar of sovereign immunity.[193] If, however, its aboriginal rights survived the 1860 grant, then that grant would have been made subject to the Jemez's unextinguished rights.[194] The Jemez could then argue that it had no obligation to file a claim with the ICC, and no reason to bring an action against the Baca descendants.[195]

Another possible issue of extinguishment arose in the latter part of the 20th century. The United States Department of the Interior had long sought to buy the Caldera and hold it either as a National Park, adjacent to the highly popular Bandelier National Monument, or as part of the Santa Fe National Forest.[196] The James Dunigan family, who had unified the private ownership of the Caldera after 1963, was equally desirous of a sale to the United States.[197] The problem was politics. The National Park Service and the National Forest Service competed over management of the Caldera.[198] Moreover, Pete Domenici, an arch conservative New Mexico senator, strongly voiced opposition to any federal public land acquisition.[199] This directly collided with the views of the other New Mexico senator, Jeff Bingaman, who strongly supported public ownership and had long sought a federal plan to buy the Baca ranch.[200]

whether they have established such title).

190. *See id.* at 1149 ("[T]he Jemez Pueblo alleges that it continued to use and occupy the Vales Caldera for traditional purposes without any opposition of interference from the Baca family.").

191. *See* DAVID H. GETCHES ET AL., *supra* note 23, at 281–82.

192. *Id.* at 282–83 (quoting Sandra C. Danforth, *Repaying Historical Debts: The Indian Claims Commission*, 49 N.D. L. REV. 359, 388–89 (1973)).

193. The district court decision under review in *Pueblo of Jemez* had dismissed the case under FED. R. CIV. P. 12(b)(1). The district court reasoned that: ("[S]overeign immunity barred the action based on its conclusion that the Jemez Pueblo's title claim against the United States accrued in 1860 when the United States granted the lands in question to the heirs of Luis Maria Cabeza de Baca (the Baca heirs). The claim thus fell within the exclusive jurisdiction of the Indian Claims Commission Act (ICCA), which waived sovereign immunity and provided a cause of action to all Indian claims against the government that accrued before 1946 so long as they were filed within a five year statute of limitations period. ICCA § 12, 25 U.S.C. § 70k (1976). Because the claim was not so filed, it became barred by sovereign immunity.")

194. *Id.*

195. *Id.*

196. *See* WILLIAM DEBUYS & DON J. USNER, VALLES CALDERA: A VISION FOR NEW MEXICO'S NATIONAL PRESERVE 16–21 (2006).

197. *Id.* at 18–19.

198. *Id.*

199. *Id.*

200. *Id.* at 20.

## B. THE VALLES CALDERA PRESERVATION ACT OF 2000

A compromise emerged when President Clinton embraced the proposal of a unique public–private trust concept that could satisfy both Senator Domenici's strong preference for private ownership and free market gain-seeking and Senator Bingaman's desire for public use, aesthetic and cultural preservation, and recreation.[201] The creation of a new managerial entity, including both public and private representation, partially resolved interagency competition.[202]

The 2000 Preservation Act[203] mandated, in effect, a public-private partnership to ensure financial sustainability.[204] The partnership's six diverse management objectives were:

> (1) operation of the Preserve as a working ranch . . . ; (2) the protection and preservation of the scientific, scenic, geologic, watershed, fish, wildlife, historic, cultural, and recreational values . . . ; (3) multiple use and sustained yield of renewable resources . . . ; (4) public use of and access to the Preserve for recreation; (5) renewable resource utilization and management alternatives . . . ; and (6) optimizing the generation of income based on existing market conditions, to the extent that it does not unreasonably diminish the long-term scenic and natural values of the area, or the multiple use and sustained yield capability of the land.[205]

A diverse, nine-member board, comprising members with a wide range of experience the President appointed would manage the preserve.[206] Both the composition of the board and the specific preservation provisions of the Act acknowledged the Jemez's interests in the Valles Caldera. For example, David Yepa of the Jemez Pueblo was selected as a member of the first Board of Trustees,[207] and the Act included a specific provision preserving Redondo Peak, the sacred mountain of the Jemez, from any construction of permanent facilities and any motorized access.[208]

The Act's mandate for economic sustainability was a departure from the aboriginal core concept of sustainability.[209] Instead of the indigenous quest for enduring balance,[210] the Act contemplated a competitive economic self-sufficiency that could successfully contend in the free market, achieve a sufficient level of economic growth, and minimize any need for federal appropriations.[211] Beyond these financial objectives, Caldera

201. *Id.* at 20–21.

202. *Id.*

203. Valles Caldera National Preservation Act, Pub. L. No. 106-248, 114 Stat. 598 (2000) (codified as amended at 16 U.S.C. §§ 698v–698v-10 (2012) (repealed 2014)).

204. *See* Melinda Harm Benson, *Shifting Public Land Paradigms: Lessons from the Valles Caldera National Preserve*, 34 VA. ENV'T L.J. 1, 1–2 (2016).

205. *Id.* at 13 (quoting Valles Caldera National Preservation Act § 16 U.S.C. 698v-6(d)).

206. *Id.* at 14.

207. DEBUYS & USNER, *supra* note 196, at 169.

208. Valles Caldera National Preservation Act § 16 U.S.C. 698v-3(g).

209. *See* Ragsdale, *supra* note 150, at 872–73 (explaining that native peoples' traditional understanding of sustainability is not based on economic growth).

210. *See id.* at 872 ("[For] the Pueblo people of the Southwest . . . the lifeways were attuned not to linear growth as much as rhythm and balance, within the group and within the land.").

211. *See* VALLES CALDERA TRUST, *supra* note 151, at 54 (describing the purposes established in the 2000 Preservation Act).

management assured land health, protected singular aesthetic and cultural resources, and presented a desirable recreational opportunity to the public.[212]

Melinda Benson has pointed out that many private ranching operations are marginally successful on federal lands, even with subsidies, such as below-market leases.[213] This certainly seems true with respect to multiple use lands the Department of the Interior owns and manages, and it may be an inescapable reality for lands statutes also singled out for non-remunerative preservation duties to the public and future generations.[214]

In the end, the Valles Caldera Trust was a failure as far as economic sustainability.[215] However, the not-for-profit objectives of preservation and collaboration were distinctly more successful. Melinda Benson wrote:

> Public lands hold a special place in the American imagination. From the beginning, public land has embodied the cultural values of the nation. Among these values are two competing and even paradoxical ideas. The first is preservation—the idea that some lands are too special to be owned by any one individual. As much as anything, this is the cultural belief that precipitated the original purchase of the Baca Ranch in order to make it public land. The second idea is conservation—the progressive notion that public lands should be used for multiple purposes in order to meet the needs of society. These ideals are clearly reflected in the Trust's guiding principles for management of the Preserve. Even with a new management paradigm, the Preserve became subject to these beliefs and ideas about what public land is.[216]

And, in the end, preservation prevailed.

## C. THE VALLES CALDERA NATIONAL PRESERVE ACT OF 2015 ("VCNP")

In December 2014, President Obama signed legislation that brought the experiment in public-private sustainable partnerships for economies, environment, and culture to an official end. The VCNP transferred the Valles Caldera National Preserve to the National Park Systems ("NPS"),[217] where its new mission was "[t]o protect, preserve, and restore the fish, wildlife, watershed, natural, scientific, scenic, geologic, historic, cultural, archeological, and recreational values of the area."[218]

The new mission of the Valles Caldera unit is in close accord with that which the National Park Service has had for over a century. The original Park Service Organic Act[219] called for the units to "conserve the scenery and the natural and historic objects and the wildlife therein . . . and to provide for the enjoyment of the same in such

212. *Id.* at 56–58, 60–61.
213. Benson, *supra* note 204, at 35–36.
214. *See id.* at 50.
215. *Id.* at 37.
216. *Id.* at 50.
217. Valles Caldera National Preservation Act 16 U.S.C. § 698v-11.
218. *Id.* at (b)(1).
219. 16 U.S.C. § 1 (current version at 54 U.S.C. § 100101).

manner and by such means as will leave them unimpaired for the enjoyment of future generations."[220]

The VCNP made some specific mission inclusions to protect and benefit the Pueblo Indians in the area:

> The Secretary, in consultation with Indian tribes and Pueblos, *shall insure* the protection of traditional cultural and religious sites in the Preserve . . . [and] *shall* provide access to the sites described . . . by members of Indian tribes or Pueblos for traditional cultural and customary uses; and . . . may on request of an Indian tribe or pueblo, temporarily *close* to general public use specific areas of the Preserve to protect traditional cultural and customary uses . . . .[221]

In sum, it might seem that the Jemez had a protective framework for its aboriginal practices at the end of 2014 superior to the period of coexistence with private grantees beginning with the Baca family, and the fourteen years of statutory management under the original VCNP Act of 2000 ( which sought to couple preservation and religious practice with ongoing, but ultimately futile, efforts to wrest financial sustainability out of the Caldera's opportunities for timbering, mining, grazing, fishing, and hunting). Why, then, did the Jemez file a quiet title action against the United States in 2012, when the transfer to the NPS seemed imminent?

## D. PUEBLO OF JEMEZ V. UNITED STATES (D.N.M. 2013)[222]

The Pueblo of Jemez filed an action in federal district court in 2012 under the Quiet Title Act.[223] The Tribe sought a declaratory judgment confirming that it had continuing and exclusive aboriginal rights to the Valles Caldera.[224] The contention of exclusivity might have seemed far-fetched, as the Jemez had been sharing possession with a succession of private and public holders without legal incident since the mid-19th century.[225] Under the precedents for aboriginal title, however, exclusivity has been interpreted to mean that a tribe attempting to prove aboriginal rights had to show exclusivity *against other tribes*, and not with respect to non-Indians.[226] Cooperation with non-Indian grantees and their successors could be indicative that the 1860 grant to the Baca's was subject to unextinguished aboriginal rights and therefore was not absolute.[227] Thus, the Jemez claim could, perhaps, best be seen as one to quiet title to *aboriginal rights in a servitude* that burdened both the Baca grant and, after transfer, the possession of the United States.[228]

220. *Id.*; *see* Robin Winks, *The National Park Service Act of 1916: A Contradictory Mandate?*, 74 DENV. UNIV. L. REV. 575 (1997) (noting that the mandate to conserve and also to provide for enjoyment has been called potentially contradictory).

221. 16 U.S.C. § 698v-11(b)(11) (emphasis added).

222. No. CIV 12-0800 RB/RHS, 2013 WL 11325229 (D.N.M. Sept. 24, 2013), *rev'd. and remanded*, 790 F.3d 1143 (10th Cir. 2015).

223. *Id.* at *1; 28 U.S.C. § 2409a.

224. *Pueblo of Jemez*, 2013 WL 11325229, at *1.

225. *See supra* text accompanying notes 163–89.

226. *See* Native Vill. of Eyak v. Blank, 688 F.3d 619, 623–24 (9th Cir. 2012).

227. *See Pueblo of Jemez*, 2013 WL 11325229, at *2.

228. *See id.* ("On July 25, 2000, Defendant purchased the property interests of the Baca heirs' successors-in-interest to establish the Valles Caldera National Preserve. Plaintiff argues that the property interest held by Defendant remains subject to Plaintiff's aboriginal title.").

The Baca's might have been forced to bear the burden of such a servitude under the theory of a grant subject to the burden of unextinguished aboriginal rights[229] or under the alternative theory of a prescriptive easement under New Mexico state property law.[230] The United States, unlike the Bacas, would have to bear such a servitude only as a matter of choice and could extinguish it with just compensation as a vested property interest or without any compensation if the interest was found to be only non-recognized aboriginal rights.[231] What then inspired the Jemez to bring a quiet title claim, especially since the National Preserve status seemed to provide more literal protection?

It is possible that the Jemez wished to establish that unextinguished rights of possession still existed on lands now held under federal reserve status. If so, then the United States might have to assert the politically unpopular *Tee-Hit-Ton* case,[232] or it might have to take the only slightly less unpolitical approach of condemning the tribal possession for a public playground.[233] To avoid unseemly displays of arrogant force, the United States might be moved to make a settlement: either the transfer of reorganized title to key sites like Redondo Peak,[234] or the creation of a plan for cooperative management and, possibly, joint ownership.

The T'uf Shur Bien Preservation Area Act[235] might be a model of what the Jemez could have pursued. The Act settled a dispute between the Pueblo of Sandia and the National Forest Service over the cultural rights of the Indians and the management of the Sandia Mountain Wilderness Area. The Act seeks to preserve in perpetuity the rights and interests of the [tribe], as well as the character of the land.[236] It also specifically recognized the Sandia Pueblos rights of cultural access, rights of consultation and administration, and rights of compensation in the event of diminishment by future legislation.[237] The VCPA of 2015 does give the Jemez rights of consultation and temporary closure to protect cultural activities, but these rights are not exclusive and do not provide for co-management or compensable property interests.[238]

The New Mexico District Court did not decide if the Jemez had unextinguished aboriginal rights that continued after the federal acquisition of Baca title in 2000 and after transfer to the National Park System in 2014.[239] Rather, the court decided that the only issues were whether the aboriginal rights were extinguished by the 1860 Act providing for the Baca grant, and whether any claim that the Jemez may have had should have been presented to the Indian Claims Commission within the statutory time frame. The court decided:

> Through the ICCA, Congress waived its sovereign immunity over any claim of aboriginal title to the subject property, but Plaintiff failed

229. *See* United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 347 (1941).

230. *See, e.g.*, State *ex rel.* Zuni Tribe v. Platt, 730 F. Supp. 318, 319 (D. Ariz. 1990) (demonstrating a theory of prescriptive easement under Arizona state law).

231. *See* Tee-Hit-Ton v. United States, 348 U.S. 272, 289 (1955), *reh'g denied* 348 U.S. 965 (1955); *supra* text accompanying notes 100–10.

232. *Tee-Hit-Ton*, 348 U.S. at 289–90.

233. *See generally* ROBERT H. KELLER & MICHAEL F. TUREK, AMERICAN INDIANS AND NATIONAL PARKS 232–40 (1998).

234. *See, e.g.*, R. C. GORDON-MCCUTCHAN, THE TAOS INDIANS AND THE BATTLE FOR BLUE LAKE 214–19 (1991).

235. 16 U.S.C. § 539m-2.

236. § 539m-2(a).

237. § 539m-3.

238. *See supra* text accompanying note 189.

239. *See Pueblo of Jemez*, 2013 WL 11325229, at *5.

> to take advantage of that waiver. In that Plaintiff did not comply with the requirements of the ICAA with respect to its claims to the lands comprising the Valles Caldera National Preserve, its claim is barred by Defendant's sovereign immunity.[240]

### E. PUEBLO OF JEMEZ V. UNITED STATES (10TH CIR. 2015)[241]

In an exhaustive, carefully written opinion, Judge Stephanie Seymor of the Tenth Circuit examined the law of extinguishment with particular regard to the Jemez, emphasizing the long-asserted standard that Congressional extinguishment of aboriginal rights has been upheld if the intent was clear. Furthermore, the court noted that courts should resolve doubtful or vague expressions in favor of tribal possession.[242] The court stated that the 1860 Act did not show the clear, unambiguous expression of Congressional intent necessary to extinguish the aboriginal title.[243] The Baca family and their successors thus received their grant of fee lands subject to the servitude of the Indians aboriginal interests.[244]

Moreover, the Tenth Circuit also found the subsequent joint occupancy and use of the lands was possible and achieved without significant conflict.[245] While some usages by the respective groups were similar in nature—grazing, hunting, wood gathering—the area was extensive, allowing for operations in different locations.[246] However, the Indians religious practices were quiet, sacred and fundamentally separate from farming land.[247] In short, the Tenth Circuit felt that the Baca grant, and subsequent simultaneous usage, did not result in any significant disruption or any claim that the Jemez had to submit to the ICC by 1951:

> Given our conclusions that the Baca grant did not extinguish aboriginal title of the Jemez Pueblo and that there is no evidence the Pueblo had a claim against the United States prior to 1946 with respect to the land involved in this action, we disagree with the government that the Jemez Pueblo could have brought its current claims before the ICC in the prior litigation.[248]

Thus, in 2014, the Jemez could argue its rights in the Caldera had existed continuously and exclusively with respect to other tribes and had not been clearly extinguished by Congress. The tribe could then bring a timely quiet title action to establish both the existence and validity of its rights and that the United States was currently interfering with them by VCP regulations, even if conjunctive, compatible usage had existed in the past.[249]

The Tenth Circuit noted in closing that the government contention, that the VCPA of 2014 was itself a sufficient showing of federal intent to extinguish, was of no avail:

240. *See id.*; *see also supra* text accompanying notes 166–67.
241. Pueblo of Jemez v. United States, 790 F.3d 1143 (10th Cir. 2015).
242. *Id.* at 1162.
243. *Id.* at 1163.
244. *Id.* at 1163–65.
245. *Id.* at 1165.
246. *Id.*
247. Pueblo of Jemez v. United States, 790 F.3d 1143, 1149 (10th Cir. 2015).
248. *Id.* at 1171.
249. *Id.* at 1171–73.

"[N]owhere in the Preservation Act did Congress say it intended to extinguish aboriginal title. Rather, as the Jemez Pueblo and Amici point out, one of the purposes of the Act was to preserve the cultural and historic value of the land . . . while avoiding interference with 'Native American religious and cultural sites' . . . ."[250]

The Tenth Circuit remanded the case to the district court to determine whether the Jemez could establish aboriginal rights in fact.[251]

## F. PUEBLO OF JEMEZ V. UNITED STATES (D.N.M. 2019)[252]

The New Mexico District Court agreed with many of the substantive elements of the Jemez claim even though it concluded, after an exhaustive 375-page opinion, that the Jemez had not established the exclusivity necessary for a viable aboriginal right claim to the Valles Caldera. Still, the opinion is a complete exposition of the law of aboriginal rights, and it may point the way to other options that can utilize and promote the concepts of sustainability.

The district court made clear that the use and occupancy necessary for an aboriginal rights showing need not be a literal continuity in terms of time or space. Rather, such rights can inhere in a continuity based on the seasonal nature of the activity and the variable presence of the resources.[253] The court noted precedents supporting claims of flexible land use rights in varied physical environments and with respect to a diverse, mobile presence of plants and animals.[254]

The court noted that, between 1300 and 1700, the Jemez had built 35 villages in the Rio Jemez watershed, and over 100 fieldhouses in the Caldera.[255] They used the fieldhouses for at least 3 months during the growing season, and at other times of the year for hunting, gathering of medicinal plants, and the mining of obsidian.[256]

The district court also found that the Spanish, despite having the sovereign prerogative to extinguish Indian possession, did not sufficiently disrupt the Jemez usage of the Caldera to amount to an extinguishment of aboriginal rights.[257] For one thing, the court noted that the Spanish often made grants to the Pueblo of recognized title and did not preclude aboriginal rights outside the grants boundaries.[258] With particular respect to the Caldera, the Spanish did attempt to remove the Jemez prior to 1600 but the Jemez resisted all efforts and returned before and after the Pueblo Revolt of 1680.[259] Thereafter, the Spanish granted the Jemez 17,500 acres on the lower Jemez River and designated the Caldera itself as public domain.[260] The district court felt that this allowed the continuation of traditional uses in agriculture and natural hunting and crafts—even if it did not convert the aboriginal possession into recognized title.[261] Spain was less tolerant

250. *Id.* at 1172.
251. *Id.* at 1173.
252. Pueblo of Jemez v. United States, 430 F. Supp. 3d 943 (D.N.M. 2019).
253. *Id.* at 1206.
254. *Id.* at 1206–07.
255. *Id.* at 1207.
256. *Id.*
257. *Id.*
258. Pueblo of Jemez v. United States, 430 F. Supp. 3d 943, 1207–08 (D.N.M. 2019).
259. *Id.* at 1208.
260. *Id.*
261. *Id.* at 1208 ("[T]he Court disagrees with Jemez Pueblo that, through this designation, Spain recognized that the Pueblos could continue to use the lands they had traditionally used before the Spanish arrived or that Jemez Pueblo had any property interest in the Valles Caldera, the Court concludes that the public-lands designation facilitated Jemez Pueblo's ability to

of the Pueblo religion and it tried—unsuccessfully—to stop pilgrimages to Redondo Peak.[262] In sum, the district court felt that although Spain did try to impose some restrictions, and although the Jemez declined in numbers, the "Jemez Pueblo nevertheless did not cease its actual and continuous Valles Caldera use during the Spanish colonial period."[263]

In 1821, Mexico acquired independence from Spain after the signing of the Treaty of Cordova.[264] The Treaty and the Mexican Plan of Iguala obligated Mexico to respect and protect the Pueblo property interests.[265] Thereafter, all Mexican land grants to non-Indians were subject to aboriginal rights.[266] At the district court trial, there was no showing of any Mexican interference with the Jemez usage in the Caldera, from the time of independence until the United States conquest in 1846.[267]

The Treaty of Guadalupe Hidalgo ended Mexican sovereignty over the southwest and obligated the United States to honor the aboriginal rights of Indians as well as the entitlements of Mexican grantees.[268] The United States Army built a 40 person outpost in the Caldera for use in a campaign against the Navajo, but it was in use for less than a year.[269] The district court concluded that the modest fort had no bearing on whether Congress intended to extinguish aboriginal rights in the Caldera.[270] In fact, the 1860 Congressional Act, designed to settle the Las Vegas land dispute, allowed the Baca heirs to select the Valles Caldera tract while specifying that their selection should only be construed as a quit-claim deed "*[A]nd [should] not affect the adverse rights of any other person or persons . . . .*"[271] The Tenth Circuit concluded, as a matter of law, that there was no language in the Act of 1860 that expressed a Congressional intent to extinguish aboriginal rights, nor was there any authority of extinguishment conveyed to the Surveyor General, who was unaware of the Jemez presence.[272] Thus, the grant passed to the Baca heirs along with the servitude of unextinguished aboriginal rights.

Beyond existence at the time of the grant in 1860, the aboriginal rights must meet the continuity requirement thereafter, until the date of the trial in 2019. If the Baca heirs interfered with the Indian's usage after the grant subject to unextinguished rights was made and the heirs voluntarily left the Caldera, the continuity of usage might be broken.[273] Non-Indian encroachment could not by itself extinguish the rights unless it was specifically authorized in the grant. The only party that can terminate Indian title

continue to use the Valles Caldera for traditional activities such as grazing livestock and collecting herbs. Moreover, Spain encouraged Jemez Pueblo's traditional agricultural and artisanal activities given that such activities ensured Jemez Pueblo's ability to pay tribute to Spain.").

262. *Id.*

263. *Id.*

264. Pueblo of Jemez v. United States, 430 F. Supp. 3d 943, 1209 (D.N.M. 2019).

265. *Id.*

266. *Id.*

267. *Id.* ("The record indicates that the Mexican government was virtually absent from the Jemez Mountains during the Mexican period, which spanned from 1821 to 1848, and is otherwise silent regarding Jemez Pueblo's actual and continuous Valles Caldera use after Mexico assumed sovereignty over those lands.").

268. Treaty of Guadalupe Hidalgo, U.S.-Mexico, Feb. 2, 1848, 9 Stat. 922.

269. Pueblo of Jemez v. United States, 430 F. Supp. 3d 943, 1210 (D.N.M. 2019).

270. *Id.* at 1211.

271. *Id.* at 1212 (quoting *Pueblo of Jemez*, 790 F.3d at 1157).

272. *Id.* at 1170 (concluding that, as a matter of law, no language in the Act of 1860 expressed Congressional intent to extinguish aboriginal rights); *Pueblo of Jemez*, 790 F.3d at 1163–64 (stating that there is no authority of extinguishment conveyed to Surveyor General).

273. Pueblo of Jemez v. United States, 430 F. Supp. 3d 943, 1214–15 (D.N.M. 2019).

is Congress.[274] However, the Jemez had to show continuous use of the land as long as they were able, to avoid a finding of abandonment.[275]

The district court found on remand from the Tenth Circuit that various actions of the subsequent private owners of the Caldera affected the Jemez.[276] However, the Jemez continued an unbroken practice of use despite the attempts at constraint. Private efforts at restriction were generally not absolute in terms or effect. They were usually conditioned on permission—which was usually received, or its refusal ignored.[277] Thus, the district court concluded that the "Jemez Pueblo actually and continuously used the Valles Caldera during the . . . private ownership period."[278]

The district court was tasked on remand to determine whether the VCPA of 2015 might have expressed a congressional intent to extinguish.[279] The district court noted that the 2015 Act included provisions that: (1) expressly protected aboriginal use and occupancy; (2) required managerial consultation on land use projects; and (3) limited motorized access, and construction above 9,600 feet, while still allowing tribal access for traditional religious and cultural use.[280] Thus, despite the fact that the 2015 Act repealed its predecessor, the district court agreed with the Tenth Circuit that the new Act expressly preserved "valid existing rights," and that the 2015 Act neither extinguished aboriginal rights nor barred an aboriginal title claim.[281]

## G. EXCLUSIVITY

Jemez Pueblo was, however, not able to convince the district court on remand that its use of the Caldera—though long-term, continuous, and unextinguished by Congress—was either exclusive with respect to other tribes, or within a recognized exception. This failing has stymied aboriginal rights claims not only for plaintiff tribes but other tribes in an area of obvious significance to Indians.[282] The insistence on proof of an individual tribes' exclusivity with respect to other tribes is thus not an effort to protect Indian interests in important areas, but rather to limit them.

As noted, the prerequisite of intertribal exclusivity does not require a claimant to prove that no non-Indian shared the claim;[283] thus, the insistence that a plaintiff prove exclusive use with respect to all other tribes might seem a condescending judicial effort to infuse the European property law of enclosure and commodification into the Indian worldviews of non-ownership, reciprocity, and commonality. More likely, however, the requirement is an effort to preclude all Indian claims. The Federal Circuit case of

274. Pueblo of Jemez v. United States, 790 F.3d 1143, 1166–67 (10th Cir. 2015).

275. *See Pueblo of Jemez*, 430 F. Supp. 3d at 1215.

276. *Id.* at 1215–16.

277. *Id.* at 1216.

278. *Id.*

279. *Pueblo of Jemez*, 790 F.3d at 1172.

280. *Pueblo of Jemez*, 430 F. Supp. 3d at 1217.

281. *See Pueblo of Jemez*, 790 F.3d at 1173 (stating the district court agreed with the Tenth Circuit that the new Act preserved "valid existing rights"); *Pueblo of Jemez*, 430 F. Supp. 3d at 1218 (stating that the 2015 Act neither extinguished aboriginal rights nor barred an aboriginal title claim).

282. *See, e.g.*, Bonnichsen v. United States, 217 F. Supp. 2d 1116, 1157–58 (D. Or. 2002) (explaining that tribes, seeking the return of the remains of Kennewick man, were unable to claim that the site of discovery was on tribal aboriginal land because the site was so heavily used by so many tribes that it could not be deemed the particular, exclusive property of any single claimant).

283. *See* Native Vill. of Eyack v. Blank, 688 F.3d 619, 623–24 (9th Cir. 2012).

*Wichita Indian Tribe v. United States*[284] states, "Lands continuously wandered over by adverse tribes cannot be claimed by any one of those tribes."[285]

In *United States v. Pueblo of San Ildefonso*,[286] the court said:

> Implicit in the concept of ownership of property is the right to exclude others. Generally speaking, a true owner of land exercises full dominion and control over it; a true owner possesses the right to expel intruders. . . . True ownership of land by a tribe is called in question where the historical record of the region indicates that it was inhabited, controlled or wandered over by many tribes or groups. Ordinarily, where two or more tribes inhabit an area no tribe will satisfy the requirement of showing such "exclusive" use . . . .[287]

The proof of inter-tribal exclusivity not only includes the intent to occupy exclusively, but also the ability in force and numbers to exercise control and expel intruders.[288]

Evidence at the district court trial showed that, for the last 800 years, numerous contemporary Pueblos in the Rio Grande region have used the Caldera. These modern Pueblos have, unlike the Jemez, descended from the ancestral Keres and Tewa Pueblo and are located on the southeast and northeast flanks of the Jemez range.[289] Occupants have used the Caldera to hunt, gather plants, and mine obsidian in ways similar to the Jemez.[290] Distinctive pottery fragments and tree carvings reflect their varied visits to the Caldera—as does obsidian found at all the various Pueblos that can only be obtained from the Cerro del Medio mine located within the Caldera.[291] As a whole, the archeological record does not confirm the Jemez claim of exclusive use; it shows instead that the ancestors of many modern Pueblos as well as contemporary recognized tribes have used the Caldera to sustain their aboriginal communities in ways similar to the Jemez.[292]

There are three possible exceptions to the exclusivity requirements—but the Jemez were not able to meet any of them.[293] The "joint and amicable" use exception provides that tribes in a close political and social alliance could in effect share a joint tenancy.[294] However, the tribes must have a real community of interest that goes beyond mere cooperation.[295]

The evidence failed to show such connection between the Jemez and any other Pueblo: "Far from sharing political and social alliances, Jemez Pueblo, and the Keres and Tewa Pueblos that surround the Valles Caldera, had, and continue to maintain distinct cultural traditions and languages . . . ."[296]

284. Wichita Indian Tribe v. United States, 696 F.2d. at 1378 (Fed. Cir. 1983).
285. *Id.* at 1385.
286. United States v. Pueblo of San Ildefonso, 513 F.2d 1383 (Ct. Cl. 1975).
287. *Id.* at 1394.
288. *See Village of Eyack*, F.3d at 624–25.
289. Pueblo of Jemez v. United States, 430 F. Supp. 3d 943, 1221 (D.N.M. 2019).
290. *Id.*
291. *Id.* at 1222.
292. *Id.*
293. *Id.* at 1223.
294. *Id.*
295. Pueblo of Jemez v. United States, 430 F. Supp. 3d 943, 1223–24 (D.N.M. 2019).
296. *Id.* at 1224.

In addition, the Jemez Pueblo's physical isolation from other aboriginal users precluded significant trade and, on occasion, led to violent conflicts.[297]

The "dominant use" exception to exclusivity operates where another tribe uses the land in question but is subject to claimants' ability to exclude and exercise dominance.[298] To utilize this exception, Jemez Pueblo "must prove that it dominated, or could have dominated, each of the Pueblos and Tribes that used the Valles Caldera during the relevant historical period."[299] However, evidence at the trial showed that the Jemez did not and could not have dominated a number of larger Pueblos of the Keres and Tewa groups, or other hostile area tribes, such as the Utes, Navajo or Jicarilla.[300]

For example, San Ildefonso Pueblo, Zia Pueblo, and Santa Clara Pueblo, all members of the Tewa or Keres groups, used the Caldera freely through multiple routes to hunt, gather plants, procure obsidian, visit Redondo Peak, or conduct religious ceremonies.[301]

The district court concluded that the Jemez seldom had sufficient numbers to stop other aboriginal users.[302] By 1744, the Jemez totaled as few as 100 members and only increased to less than 1,000 by the end of the Nineteenth Century.[303] Though the Jemez may have prevailed in specific, limited encounters, contrary evidence shows "on at least one occasion, members of Santa Clara Pueblo, San Ildefonso Pueblo, and the Ute Tribe imposed their will on Jemez Pueblo, and compelled Jemez Pueblo members to comply with their demands."[304]

The "permissive use" exception to the exclusivity requirement would allow a tribe to give permission to visit an aboriginal claim without defeating the exclusivity that a claim requires.[305] The record in the district court shows that other Pueblos and tribes have asked the Jemez for permission to enter the tribal trust lands; however, there was no evidence of any tribe asking or receiving permission to visit the aboriginal claim lands in the Caldera.[306] At least 15 other tribes and Pueblos had religious ties to Redondo Peak and made pilgrimages without permission from Jemez Pueblo since before the Spanish colonial period.[307]

In sum, the district court concluded that the Jemez do not have aboriginal title to the Valles Caldera or any exclusive rights of use or possession; instead, "title to the Valles Caldera. . . is quieted in . . . [the] United States . . . ."[308] But, even if the Jemez

297. *Id.*
298. *Id.*
299. *Id.* at 1225.
300. *Id.* at 1225–27.
301. Pueblo of Jemez v. United States, 430 F. Supp. 3d 943, 1224–25 (D.N.M. 2019).
302. *Id.* at 1226–27.
303. *Id.* at 1227.
304. *Id.*
305. *Id.*
306. *Id.* at 1228.
307. Pueblo of Jemez v. United States, 430 F. Supp. 3d 943, 1229 (D.N.M. 2019).
308. *Id.* The district court made similar points in a more recent (but, at 156 pages, no less exhaustive) treatment of Valles Caldera. *See* Pueblo of Jemez v. United States, No. CIV 12-0800 JB/JFR, 2020 U.S. Dist. LEXIS 160603, *196, 199–202, 221 (D.N.M. Sept. 2, 2020) The Jemez tried to narrow its focus to discrete sub-areas within the overall Caldera and assert that viable aboriginal title was established at the more localized levels. *Id.* at *193. The district court decided that all the claims, with one exception, were procedurally barred. *Id.* at *198. The one exception, to Banco Bonito, was allowed due to Jemez Pueblo's earlier summary judgment motion which had provided notice of the particular claim. *Id.* at *201. It ultimately did not provide any relief, however, because Banco Bonito, like all the other subareas of the Caldera, was not shown to have

had won the case, they still would not have held title exclusively with respect to the non-Indian successors to the original Baca grant—which now includes the National Park Service and all the citizen beneficiaries of the Valles Caldera National Preserve.[309] With respect to these, the Jemez could have established at best a continuing servitude on its title.[310] The discoverer's successors could always extinguish that servitude—and that servitude seems more secure today than ever under the trusteeship of the National Park Service.[311]

This trust, though potentially subject to shifting political winds,[312] is as strong as any of the national institutions. Thus, the aboriginal heart of the Caldera still beats—for the Jemez, and all believers in timeless sustainability.

The waters may be a trickier issue.

## VI. ABORIGINAL WATER RIGHTS

### A. SIMILARITIES AND DIFFERENCES BETWEEN LAND AND WATER AS NECESSITIES

Water and land are both essential to the immediate viability and ultimate sustainability of individuals and groups.[313] But, as observed from prehistoric times such as the rise and fall of Chaco, to modern-era problems such as those of the Jemez Pueblo, water is an immediate and absolute necessity whereas land, though critical, offers some choice as to location and mobility.[314]

In another, related sense, water, as $H_2O$, is basically fungible in nature, while land is a variable, though necessary, collection of elements; some land produces, some produced, and much never will produce.[315]

Another key distinction is that water is a flowing element, moving in an endless hydrologic cycle.[316] Whether in a stream, reservoir, or underground, it is in motion and,

been used by the Jemez to the exclusion of other Indian groups, nor was it shown to have been used by permission, by joint or amicable use, or subject to Jemez domination. *Id.* at *200–01. Thus, the district court concluded that even if it reviewed the subarea claims subject to bar, it would not find the Jemez established aboriginal title, and beyond, the Jemez had not established aboriginal title to Banco Bonito. *Id.* at *199.

309. *Pueblo of Jemez*, 430 F. Supp. 3d. at 958–59, 1033.

310. *Id.* at 1033–34.

311. *Id.*

312. *See* NRDC, *NRDC et al. v. Trump (Bears Ears)*, https://www.nrdc.org/court-battles/nrdc-et-v-trump-bears-ears (last updated Mar. 8, 2021) "On December 4, 2017, then-president Trump signed proclamations dismantling two national monuments, Bears Ears and Grand Staircase-Escalante, both in southern Utah. The move stripped legal protections from nearly two million acres of federal public lands that hold incomparable cultural, archaeological, paleontological, and ecological significance. . . . [T]he district court consolidated the [three] lawsuits. As all three lawsuits explain, President Trump had neither constitutional nor statutory authority to dismantle national monuments. On January 9, 2020, we moved for summary judgment. While we were awaiting the district court's decision, Trump's presidency ended, and President Biden took office promising to restore protections to national monuments. . . . Given the possibility of presidential action, the Biden administration has requested–and the district court has granted–a stay of the court proceedings."

313. *See supra*, Chaco Phenomenon 9–13, Jemez Pueblo 21 - 33

314. *Id.*

315. *Id.*

316. *See* A. DAN TARLOCK, JASON ANTHONY ROBISON, LAW OF WATER RIGHTS AND RESOURCES 5–21 (2018).

as far as animate life, including humans, it is used and returned.[317] It is, thus, an incomplete form of property, or a usufruct, and it does not fit easily into the pattern of exclusive ownership.[318] When humans and plants consume water, that water temporarily breaks away from the hydrologic flow cycle, but will inevitably return to the cycle.[319]

Given the flowing nature of water and its imminent necessity to life, severe drought could cripple prehistoric societies like Chaco even before the society exhausted produce stored in its thousands of rooms.[320] After the fall of Chaco, and after several centuries of turmoil in the highlands, the Pueblo reformed much of its society in the riverine Pueblos of the Rio Grande and its tributaries such as the Jemez River.[321] These Pueblos established their permanent habitation and central agricultural enterprises near the more permanent water sources and used the uplands on a seasonal basis.[322] As noted, the Jemez did not succeed in its quest to establish aboriginal rights in the high uplands of Valles Caldera, but not because of extinguishment of its possessory rights by the discovering sovereigns or the ultimate successor, the United States.[323] The tribe's failure of proof lies in the inability to show either exclusivity or an exception with respect to other Pueblos and tribes.[324] The issue now present for the Pueblo—assertion of aboriginal rights in water—focuses not on exclusivity but on the possibility of extinguishment of the aboriginal rights before the United States acquired sovereignty in the Treaty of Guadalupe Hidalgo.[325]

## B. ABORIGINAL WATER RIGHTS UNDER THE DOCTRINE OF DISCOVERY

*Johnson v. McIntosh* stands at the head of Supreme Court holdings on the rights of the indigenous and the powers of extinguishment by the discovering Christian sovereigns and their successors.[326] Justice Marshall held that under the international law, as announced by the Spanish scholar de Victoria, the first European discoverer acquired a naked, non-possessory fee title and the exclusive power, among *all other* nations, of dealing with the natives for possession.[327] The indigenous tribes were deemed to have the full rights of aboriginal use until or unless these were clearly extinguished by the conquest, purchase, or complete dominion of the discoverer or successor, or the abandonment or failure of possession by the tribe.[328]

The case of *Worcester v. Georgia*[329] softened the emphasis on conquest and emphasized the post discovery continuation of a diminished but still substantial tribal sovereignty.[330] Thus, though unable, along with the other sovereigns of Europe, to *alienate* native possession to any nation other than Great Britain or the successor, the Tribe still

317. *Id.*
318. *See* DAVID H. GETCHES, ET AL., WATER LAW IN A NUTSHELL 9 (5th ed. 2015).
319. *Id.*
320. *See supra* Part III.D.
321. *See supra* Part III.D.
322. *See Pajarito Plateau*, *supra* note 55, at 103.
323. *Id.*
324. Pueblo of Jemez v. United States, 430 F. Supp 3d. 943, 1219, 1222 (D.N.M. 2019).
325. *Id.* at 953.
326. Johnson v. M'Intosh, 21 U.S. 543, 587 (1823).
327. *Id.* at 567–68.
328. *Id.* at 586–87.
329. Worcester v. Georgia, 31 U.S. 515 (1832).
330. *Id.* at 561.

retained its inherent sovereignty as an aspect of aboriginal rights.[331] This sovereignty surrounded the rights of possession and included the ability to make their own rules for their internal practices[332] the intangible, intellectual sovereignty becomes, along with the physical manifestations of possession, a repository of the aboriginal rights.[333] Indeed, this intangible core of tribal sovereignty may be the most indestructible, inextinguishable aboriginal right of any tribe, whether recognized or not.[334] Beyond any plenary power of Congress to extinguish aboriginal rights,[335] the First Amendment assures the timeless rights of assembly and free exercise of religious beliefs. This philosophical belief in sustainability, balance, and reciprocity is a philosophy that David Getches called one of "permanence."[336] This "philosophy of permanence" can guide the tribes' manifested activities, and, even in the face of extinguishment of physical possessory rights, can, even if diminished, continue on and be the enduring legacy.[337]

### C. ABORIGINAL WATER RIGHTS UNDER TREATIES AND STATUTES

Though, within limits of the Constitution, Congress has the supreme preemptive power over Indian rights, the Supreme Court case law and federal courts have been decisive in interpretation.[338] The first of the key decisions on the ancient and continuing rights in water was *Winans v. United States*[339] which held that a treaty of cession by the Yakima tribe and the United States in 1859, had reserved for the tribe an aboriginal right to fish in the ceded area "at all the usual and accustomed places in common with citizens of the territory."[340] The *Winans* court determined the treaty of cession was a grant from the tribe, not a relinquishment of the tribe's reservation of ancient water rights.[341] The Indians thus retained an aboriginal right to use the water for fishing and a right of access across the ceded lands to get there.[342]

Three years later, the Supreme Court decided *Winters v. United States*, which used the term "reservation" in two different contexts—one of which came to define Indian water rights in the West.[343] In 1888, the United States made an agreement with several tribes, including the Gros Ventre, that ceded all of their aboriginal territory in

331. *See id.* at 553, 555, 561.

332. *See* Williams v. Lee, 358 U.S. at 217, 220 (1959) ("Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.").

333. *See id.* at 220–21.

334. *Id.*

335. *See, e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903) ("The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so.").

336. *See* GETCHES, ET AL., *supra* note 23, at 54.

337. *See, e.g.*, Harjo v. Kleppe, 420 F. Supp. 1110, 1143 (D.D.C. 1976), aff'd sub nom. Harjo v. Andrus, 581 F.2d 949 (D.C. Cir. 1978).

338. *See infra* note 285.

339. Winans v. United States, 198 U.S. 371 (1905).

340. *Id.* at 378.

341. *Id.* at 381.

342. *Id.*; *See also* United States v. Adair, 723 F.2d, 1394, 1410 (9th Cir. 1983); GETCHES, *supra* note 318, at 361 ("Reserved water rights to support aboriginal practices are referred to as *Winans* rights, and most often associated with treaty reservations, although they can be part of an Executive Order reservation.").

343. Winters v. United States, 207 U.S. 564, 568 (1908).

exchange for the newly established and much smaller Fort Belknap Reservation.[344] The agreement did not specify that either side required or reserved water rights.[345] Justice McKenna, author of the *Winans* opinion, carried forward the idea of tribal reservation of rights not granted and morphed this into a protection of water rights for nomadic hunter Indians, who allegedly desired to cede most of their hunting land and become sedentary farmers on the remnant but forgot to explicitly reserve water from the ceded area to grow future crops.[346] More realistically, the United States' probable purposes in the cession agreement were to obtain additional land for disposition to white settlers and to consign the Gros Ventre group to sedentary agriculture on the residuum. The federal government needed water from the ceded area to fulfill its purposes but failed to explicitly include corresponding water rights in the agreement.[347] The United States realized its error when new settlers in the ceded area claimed so much water under Montana prior appropriation law that the irrigation project downstream on the Fort Belknap Reservation became unviable.[348]

The Supreme Court rode both horses, determining that the Indians had reserved, by implication in their cession, enough water from the ceded area to fulfill their agricultural purposes.[349] At the same time, the *Winans* court found the United States, in setting aside a smaller amount of land for the reservation, had also demonstrated an implied intent and power to reserve enough water to fulfill its own agricultural and land-opening objectives.[350]

In sum, the Court subordinated settler water appropriations under state law to the reserved rights of both the federal government and the tribes.[351] The Court also set the federal and tribal rightsholders' priority at the date of the agreement in 1888, which preceded the Montana Statehood Act and the formal adoption of prior appropriation as the state law of water allocation.[352] Thus, these preexisting water rights were grandfathered into the chain of appropriations.

The extent of the federal reserved water right did not become clear for more than half a century after *Winans*. In *Arizona v. California*,[353] in 1983, the Supreme Court held that the implied reservation of water rights that accompanies the establishment of an Indian reservation was intended to satisfy both present and future needs.[354] To this end, the Court determined that reserved rights for agricultural purposes were to be measured by the "practically irrigable acreage" ("PIA") standard, which allotted water rights according to the amount of irrigable land within the reservation.[355]

Another noteworthy aspect of the extent of federal reserved water rights is that, unlike ordinary appropriations under state law, federal reserved water rights are not lost

344. *Id.* at 567–68.
345. *Id.* at 576–77.
346. *Id.*
347. *Id.*
348. *Id.* at 567–68.
349. Winters v. United States, 207 U.S. 564, 577 (1908).
350. *Id.* at 576–77.
351. *Id.* at 577.
352. *Id.*; *See also* COHEN'S HANDBOOK, *supra* note 80, at 1216; WATER LAW IN A NUTSHELL, *supra* note 274, at 288, 362 ("Reserved water rights established through the reservation of lands *not associated with aboriginal practices* are known as 'Winter's rights'.") (emphasis added).
353. Arizona v. California, 460 U.S. 605, 617 (1983).
354. *Id.*
355. *Id.* at 617, 626, 640–41.

through non-use or changes in nature.[356] Though such rights may be quantified by the technological and economic feasibility of irrigation, the water quantum can also usually be used for subsumed purposes such as industry, commerce, or recreation.[357] In light of this, adjudications made in more recent times have therefore opted for a more flexible standard than PIA, using viable homeland or livable environment as an alternate measure, for example.[358]

## D. RESERVED WATER RIGHTS FOR PUEBLOS

The Territorial Court of New Mexico,[359] and later, the United States Supreme Court, concluded that the Pueblos of New Mexico did not fall under the authority and protection of the Federal Non-Intercourse Act of 1934.[360] Congress could not have intended to restrain alienation by Pueblos, the courts determined, because the Pueblos owned their land in fee simple and were successful, peaceful agriculturalists.[361] This approach left the Pueblos at the mercy of the territorial, and later, the state courts, with regard to trespass by non-Indians.[362]

In 1913, the Supreme Court changed its mind and decided that Congress had intended to reach the Pueblo lands, at least with respect to the Non-Intercourse Act's prohibition on introducing alcohol into "Indian Country," which included Pueblos as "dependent Indian communities."[363] In *United States v. Sandoval*, the Court stated that the Pueblos, despite their fee lands, possible citizenship, and agricultural self-sufficiency, were "a simple, uninformed, and interior people" who needed federal protection and guidance.[364] The Court reasoned that federal powers under the Commerce Clause and the principal of wardship[365] were broad enough to establish a guardianship over the tribe as long as such powers were not asserted arbitrarily.[366] While the Pueblos did have a communal fee simple title, the Court expanded these principals of guardianship to cover land and prohibit unauthorized alienation. [367]

The conclusion that the commerce clause and wardship drove the unauthorized alienation prohibition as effectively as the Doctrine of Discovery and the sovereigns ensuing royal title, opened the way not only to protection of Pueblo land and aboriginal rights but possibly also to the doctrine of federally reserved water rights.[368]

One could argue that the United States *wardship* over the Pueblos involves the same powers and duties that accompany the *reservation* of Indian lands.[369] This could mean that the recognition of the wardship, like the reservation of land from the public domain, would by implication reserve enough water for the Pueblos' future.[370] To date,

356. A. DAN TARLOCK, ET AL., WATER RESOURCE MANAGEMENT 721–23 (7th ed., 2014).
357. *Id.* at 723; *see also* COHEN'S HANDBOOK, *supra* note 86, at 1217–20.
358. COHEN'S HANDBOOK, *supra* note 86, at 1223–24.
359. United States v. Lucero, 1 N.M. 422, 454 (1869).
360. *See* United States v. Joseph, 94 U.S. 614, 617 (1876); *Lucero*, 1 N.M. at 454.
361. *Joseph*, 94 U.S. at 616–17.
362. GETCHES, ET AL., *supra* note 23, at 190–91.
363. United States v. Sandoval, 231 U.S. 28, 46–47 (1913).
364. *Id.* at 39.
365. *Id.* at 45–46.
366. *Id.* at 46.
367. United States v. Candelaria, 271 U.S. at 432, 433–34 (1926).
368. *Id.*
369. *Id.*
370. *Id.*

this argument has not fully prevailed, but has fragmented into three areas: Pueblo land grants made by Spain and recognized by the United States, new additions made to Pueblo holdings by post-1846 statutes or executive action, or the possibility of aboriginal water rights.[371]

## E. ABORIGINAL WATER RIGHTS OF NEW MEXICO PUEBLOS

### 1. New Mexico v. Aamodt[372]

The basic issue in this pivotal case was whether the State of New Mexico's doctrine of prior appropriation should control water uses by Pueblo Indians.[373] The Pueblos based their first claim on the reserved water doctrine, but the Tenth Circuit Court of Appeals held that no treaty or executive order established reserved rights.[374] The Treaty of Guadalupe Hidalgo obligated the United States to protect rights recognized by prior sovereigns, and the United States confirmed those land titles by statute in 1858.[375] However, the court felt that this itself did not seem like a basis for a reserved right and that the 1858 Act validated only the rights as recognized by the prior sovereigns.[376]

The State of New Mexico and the non-Indian appropriators argued that whatever reserved rights the Pueblos may have had were lost under the Pueblo Lands Acts of 1924 and 1933.[377] The 1924 Act was passed to quiet title to Pueblo lands occupied between the 1876 *Joseph* case, which held that the Non-Intercourse Acts were not intended to reach the Pueblo lands, and the 1926 *Candelaria* case which held the opposite.[378] The 1924 Pueblo Lands Act quieted title in non-Indians with respect to some of the contests and announced compensation awards to the Pueblos, but the Pueblos argued that this compensation was not enough.[379] The 1933 Act approved compensation in excess of that recommended by the Pueblo Lands Board.[380]

New Mexico contended that, by accepting the increased compensation, the Pueblos lost any claim to their reserved rights.[381] However, the Tenth Circuit noted that Section 9 of the 1933 Act stated that:

> Nothing herein contained shall in any manner be construed *to deprive any of the Pueblo Indians of a prior right to the use of water from streams running through* or bordering on their respective pueblos for domestic, stockwater, and irrigation purposes for the lands remaining in Indian ownership, and such water rights *shall not be subject to loss by nonuse or abandonment thereof as long as title to said* lands shall *remain* in *the Indians*.[382] (emphasis added)

371. *See* Martinez v. Kerr-McGee Corp., 898 P.2d 1256 (N.M. Ct. App. 1995); *see also* COHEN'S HANDBOOK,*supra* note 86, at 322–23.

372. New Mexico v. Aamodt, 537 F.2d 1102 (10th Cir. 1976).

373. *Id.* at 1104.

374. *Id.* at 1108.

375. *Id.* at 1109 (citing An Act to Confirm the Land Claim of Certain Pueblos and Towns in the Territory of New Mexico, 11 Stat. 374 (1859)).

376. *Id.* at 1111.

377. *Id.* at 1009.

378. See *supra* notes 303–10.

379. *Aamodt*, 537 F.2d at 1109.

380. *Id.*

381. *Id.* at 1110.

382. *Id.*

The Court explained that the language and description were not compatible with New Mexico's law of prior appropriation[383] but still felt that the recognition of the Pueblos' fee simple title in 1858 was also inconsistent with the concept of a federally reserved right.[384] The remaining problem was the priority of Pueblo water rights with respect to the appropriations of the non-Indians with quieted titles on former Indian lands.[385] The Court did not answer this with specificity, but did say that a judicial recognition of any priority date for the Indians later than or equal to a priority date for a non-Indian would seemingly violate the mandate of Section 9.[386] Ten years later this became the apparent reality.[387]

### 2. State of New Mexico ex rel. Reynolds v. Aamodt[388]

*Reynolds* dealt with water claims on a stream system north of Santa Fe and within the lands of the Nambe, Pojoaque, San Ildefonso, and Tesuque Pueblos.[389] The defendants claimed unsuccessfully that they had superior water rights by prior appropriation under New Mexico law for use on their non-Indian lands.[390]

The district court held that although the Pueblo Lands Act of 1924 terminated Pueblo ownership of certain lands and water rights within the respective Pueblos, it did *not* terminate the prior rights of the Pueblos to the use of water on their *remaining* lands, nor did it transfer aboriginal rights to non-Pueblos.[391] Instead, Section 9 of the Pueblo Lands Act of 1933 confirmed the prior right of the Pueblos to the use of water on lands remaining in their ownership.[392]

This prior right is to use all the water from the stream system necessary for domestic use and irrigation of lands not terminated by the 1924 Pueblo Lands Act, and which has historically been under irrigation and use between 1846 and 1924.[393] In effect, according to Cohen, this meant that the aboriginal rights used by the Pueblos prior to the Treaty of Guadalupe Hidalgo included the rights of domestic use and irrigation in addition to expansion in use as needed.[394] Thus, the Pueblos could include the additional water for irrigation of lands initiated between 1846 and 1924.[395]

383. *See id.* (stating that "[s]ection 9 does not restrict the Pueblos' rights to water for use on retained land to the New Mexico appropriation laws. The provision that the Pueblos' rights are not subject to loss by nonuse or abandonment is a far cry from a submission of those rights to New Mexico law. The argument that protection against loss by abandonment is an implied recognition of New Mexico appropriation law because no protection against such loss is needed unless New Mexico law applies is unconvincing.").

384. *Id.* at 1111; COHEN'S HANDBOOK, *supra* note 86, at 322 (stating that "[b]ecause the United States did not reserve the grant lands for the Pueblos water rights for those lands were also not reserved. Instead the Pueblos hold aboriginal water rights").

385. *Aamodt*, 537 F.2d at 1112.

386. *Id.* at 1113.

387. Reynolds v. Aamodt, 618 F. Supp. 993 (D. N.M. 1985).

388. *Id.*

389. *Id.* at 995.

390. *Id.* (citing *Aamodt*, 537 F.2d at 1102, which held that that the Pueblos were entitled to have their right to the use of the water in the stream system determined under federal laws).

391. *Id.* at 1009.

392. *Id.*

393. Reynolds v. Aamodt, 618 F. Supp. 993, 1010 (D. N.M. 1985).

394. *See* COHEN'S HANDBOOK, *supra* note 86, at 323.

395. *Id.*

Richard Hughes has convincingly argued that there was no basis for limiting the amount of aboriginal water rights to lands within the Pueblos that were brought under irrigation by 1924.[396] He notes that the stalemate seemed to contradict the court's own findings that, under Spanish and Mexican law, Pueblos had rights to sufficient water for present and future needs.[397] Additionally, he noted nothing in the 1924 Pueblo Lands Act that expressed any intent to determine Pueblo water rights at that time.[398] He surmised that the court's confusing language might have been an attempt to limit the future scope of water expansion by non-Indians who acquired land and water as a result of the Pueblo Lands Act.[399]

In any event the *Aamodt* litigation remained in a state of confusion until the Claims Resolution Act of 2010.[400]

### 3. United States ex rel. Pueblos of Jemez, Santa Ana and Zia v. Abousleman[401]

The magistrate opinion dealt with the issue of what aboriginal rights the United States was obligated to recognize under the Treaty of Guadalupe Hidalgo. The Pueblos had argued that unextinguished aboriginal rights in waters, as well as land, were within the protective obligation of the United States under the Treaty.[402] There is, however, a significant difference between the use of land and water in that land can (and must) be held exclusively, while water, by virtue of its flowing nature, must be shared.[403] The magistrate, William Lynch, agreed that the Pueblos actually, continuously, and unilaterally used public water since long before the Spanish, and continued to do so on lands Spanish grant recognized.[404] The magistrate, however, felt that a legal change had taken place with respect to the water, significant enough to amount to an extinguishment of the aboriginal right to *unilaterally expand water usage*.[405]

The Pueblos argued that sovereign extinguishment of aboriginal title can only be done, in accordance with *Santa Fe Pacific,* with a clear, unambiguous, and affirmative act.[406] They would argue that this applied to water as well as land, and the absence of any affirmative action by Spain or Mexico to extinguish aboriginal water usage by the Indian Pueblos meant that the United States' duty to recognize the right survived Guadalupe Hidalgo.[407]

396. *See* Richard Hughes, *Indian Law*, 18 N.M L. REV. 403, 439–442 (1988).

397. *Id.*

398. *Id.* at 441.

399. *Id.*

400. *See* Claims Resolution Act of 2010, Pub. L. No. 111-291, 124 Stat. 3064 (2010); *see generally* Congressional Research Service, Indian Water Rights Settlements (2019), available at https://crsreports.congress.gov.

401. Proposed Findings and Recommended Disposition Regarding Issues 1 and 2 at *1, United States v. Abousleman, CV 83-1041 MV/WPL, 2016 WL 9776586 (Oct. 4, 2016).

402. *See id.* at *5–7.

403. *Id.* at *3.

404. *Id.* at *5.

405. *Id.* at *6.

406. United States v. Abousleman, CV 83-1041 MV/WPL, 2016 WL 9776586, *2 (Oct. 4, 2016) (citing United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 347, 354 (1941)).

407. *Id.* at *6.

The magistrate, and later the district court, did not agree.[408] They felt that, under the civil law of Spain, the Spanish Crown had imposed a system for public water.[409] If conflict should arise between existing or new uses, it could be resolved by the process of repartimiento, a quasi-judicial administrative proceeding in which the government applied equitable principles to apportion available water.[410] Unlike eminent domain, repartimiento was not a formal extinguishment of all aboriginal rights; instead, it was civil law balancing, akin to the common law process of correlative water rights.[411] Parties with conflicting uses could present evidence of numerous factors such as priority, need, purpose, injury, equity, legal rights, and common welfare.[412] A decision by repartimiento was thus a fact-specific, but imprecise, resolution of conflict with balancing and limited future precedent.[413]

No formal repartimiento in the Jemez River watershed ever took place, but the magistrate and the district court felt that Spain's imposition of a legal system to adjudicate *possible* conflicts in public water usage ended the exclusive and unilateral aboriginal *future* use of public water.[414] As Judge Vasquez wrote:

> Prior to the arrival of the Spanish, the Pueblos were able to increase their use of public waters without restriction. After its arrival, the Spanish crown insisted on its exclusive right and power to determine the rights to public shared waters. Spanish law plainly provided that the waters were to be common to both the Spaniards and the Pueblos, and that the Pueblos did not have the right to *expand* their use of water if it were to the *detriment* of others. Although Spain allowed the Pueblos to *continue their use of water*, and did not take any affirmative act to *decrease* the amount of water the Pueblos were using, the circumstances cited by the expert for the United States and Pueblos plainly and unambiguously indicate Spain's intent to *extinguish the Pueblos' right to increase their use of public waters without restriction* and that Spain exercised complete dominion over the determination of the right to use public waters adverse to the Pueblos' pre-Spanish aboriginal right to use water[415] (emphasis added).

Though the Jemez, after Guadalupe Hidalgo, may not have an unrestricted aboriginal right to *unilateral increase,* there was some actual level of continuous usage that could come within the Treaty obligations—especially if such usage was confirmed by

408. *Id.*
409. *Id.*
410. *Id.* at *2–3.
411. *Id.* at *3.
412. *Id.*
413. United States v. Abousleman, CV 83-1041 MV/WPL, 2016 WL 9776586, *3 (Oct. 4, 2016).
414. *Id.* at *6 (Judge Lynch writing "I find that Spain imposed a legal system to administer the use of public waters and that regalia ended the Pueblos' exclusive use of the public waters and subjected the Pueblos' later use of public waters to potential repartimientos. Such a system is a plain and unambiguous indication that the Spanish crown extinguished the Pueblos' right to increase their use of public water without restriction and as such is an exercise of complete dominion adverse to the Pueblos' aboriginal right to use water.").
415. Memorandum Opinion and Order Overruling Objections to Proposed Findings and Recommended Disposition Regarding Issues 1 and 2 at *4, United States v. Abousleman, CV 83-1041 MV/WPL, 2017 WL 4364145 (Sep. 30, 2017).

federal and state law thereafter. Such confirmation, however, may not contemplate exclusive, unilateral increase. It would seem that protectable aboriginal usage would be essentially the same as a basis for prior appropriation under state law and subject to the same limitations as to quantity and beneficial usage.[416]

The New Mexico Supreme Court dealt with the issue of the Pueblo water rights of the city of Las Vegas, New Mexico, in 2004.[417] These rights, colonial rather than aboriginal in origin,[418] were found not to include "inchoate" rights to indefinitely or unilaterally expand use of public water to meet future needs.[419] Instead, the city had to comply with the state law of prior appropriation by municipalities, which would link priority to actual application to beneficial use within a reasonable time and required a separate, subordinate priority for future visionary uses.[420] The court said, "[i]t is true that New Mexico has protected water rights in existence at the time of the treaty and before the enactment of a comprehensive water code in 1907 . . . . However, the principle of beneficial use has always circumscribed the protection and limited it to vested rights."[421] This approach could operate on aboriginal rights, as well as colonial.

### *4. Abouselman*, 976 F.3d 1146 (10th Cir. 2020)[422]

The district court below adopted the magistrate judge's findings and determined that the Jemez River Pueblos—Jemez, Santa Ana, and Zia—did at an earlier, undisputed time, possess aboriginal water rights to the Jemez River in connection with their aboriginal land title.[423] The contested issue on appeal was whether the laws of Spain unambiguously expressed Spain's intent to extinguish the Pueblos' right to increase their use of the public waters without restriction, even though Spain made no affirmative act.[424]

When Spain arrived at the Jemez River Basin in 1598, it brought with it the concept of "regalia," or the royal prerogative over natural resources, including water.[425] Thus, the crown had the power to grant dominion over water, but apparently it often allowed local authorities to oversee the distribution of resources and to respect and protect Indian rights to property.[426]

Spain's control over water was guided by two overarching principles: first, public waters were held in common and shared by all; and second, one could not use public waters to the detriment of other users.[427] These principles were to be enforced in a process called "repartimiento de aguas," which would occur only in the event of a conflict with more than one user, and such was never the situation in the Jemez Valley watershed.[428]

If the government had to undertake repartimiento, the presiding government official would apply six factors to each party claiming water: (1) prior use, (2) need, (3)

416. State *ex rel.* Martinez v. City of Law Vegas, 89 P.3d 47-60 (N.M. 2004).
417. *Id.*
418. *Id.* at 49.
419. *Id.* at 59–61.
420. *Id.* at 61.
421. *Id.* at 60.
422. United States v. Abouseleman, 976 F.3d 1146 (10th Cir. 2020).
423. *Id.* at 1152.
424. *Id.*
425. *Id.* at 1154.
426. *Id.*
427. *Id.* at 1155.
428. United States v. Abouseleman, 976 F.3d 1146, 1155 (10th Cir. 2020).

purpose of use, (4) legal rights, (5) injury to third parties, and (6) equity and the common good.[429] As noted, Spanish or Mexican authorities in the Jemez River Valley did not make any repartimientos, and only one was made in New Mexico as a whole, and that was in Taos.[430]

The concept of aboriginal title required a tribe to show actual, exclusive, and continuous use for an extended time.[431] The Pueblos in the *Abouselman* cases clearly have been able to show aboriginal title to property, emanating out of the past, but were these rights ever extinguished?[432] Only the sovereign can extinguish aboriginal rights under the international common law, and that can occur by treaty, conquest, purchase, or the exercise of complete dominion adverse to the right of occupancy.[433] Beyond methodology, the intent to extinguish must be clear and unambiguous, with any doubts resolved in favor of the Indians.[434]

Spain's actions did not indicate in any way, let alone a clear or plain way, that Spain intended to extinguish any aboriginal rights of the three plaintiff Pueblos.[435] The Spanish had the right to conduct repartimientos to allocate water under conflict—but it never did, thus, Spanish sovereignty never had any impact on the Pueblos' use of water.[436]

Chief Judge Tymkovich, in dissent, felt that the issue of extinguishment, though important, should not have been decided without considering the related issues of quantification and settled expectations, elaborating: "The Pueblos, while disclaiming an intention to seek an *expanding* water right, nonetheless assert that 'their aboriginal water rights include *an amount sufficient to satisfy their future needs' . . . .* This seems a matter of semantics . . . ."[437]

It might have been more than semantics. The Pueblo might well have an argument that the assertion of unlimited *expansion* of a right and an assertion that the original right includes a presently-unused increment necessary to satisfy reasonable and foreseeable needs of the local community differed. Indeed, the law of prior appropriation in the arid Southwest allows municipalities to make legitimate, non-speculative claims of more than immediate usage to meet the reasonable and foreseeable future public needs, as seen in *Reynolds v. City of Roswell*,[438] where the court stated that:

> The City has a right to use all of the 2,500 acre feet of water for municipal purposes. The fact that the City had previously used the water right in one part of the City and now desires to use that same right in other parts of the City does not detract from its right to use the entire amount. When determining the extent of a municipal water right, and the validity of any conditions attached thereto by the State Engineer, it is appropriate for the Court to look to a city's planned future use of water.[439]

429. *Id.*
430. *Id.*
431. *Id.*
432. *Id.* at 1156.
433. United States v. Abouseleman, 976 F.3d 1146, 1156 (10th Cir. 2020) (quoting United States v. Santa Fe P.R. Co., 314 U. S. 339, 347 (1941)).
434. *See id.* at 1157–58.
435. *Id.* at 1160.
436. *Id.*
437. *Id.* at 1161.
438. Reynolds v. City of Roswell, 654 P.2d 537 (N.M. 1982).
439. *Id.* at 540.

More recently in *Paqosa Area Water and Sanitation District v. Trout Unlimited,*[440] Justice Hobbs wrote:

> A governmental agency need not be certain of its future water needs; it may conditionally appropriate water to satisfy a projected normal increase in population within a reasonable planning period . . . Public agencies must still substantiate a non-speculative intent to appropriate unappropriated water, and they must 'have a specific plan and intent to divert, store, or otherwise capture, possess, and control a specific quantity of water for specific beneficial uses.'[441]

## VII. CONCLUSION – AND SOME LESSONS IN COLLABORATION

After some long, dogged legal battles, the Jemez appear to have lost the quest for exclusive aboriginal land rights in the Valles Caldera. In addition, the assertion of a free hand in the claiming of future water rights seems at best indeterminate. Even if the tribe succeeds in preserving their initiative as far as future increases of unclaimed public water, the insulation of such action against other new claims or state limitations seems unlikely. There is, in contrast to the past, an increasing, nonindigenous demand for water, and there is inescapable evidence of climate change and impending shortage. The future would seem to portend more of the post-*Aamodt* attempts at settlement, or the possibility of preemptive federal legislation to cut the unruly Gordian knot of state, private and tribal interests.[442]

The heart of aboriginal life, community and permanence, however, still exists—and has been legally and constitutionally recognized—in the continuing core of Tribal sovereignty. The timeless practices and values that formed a bridge to the present culture and institutions are protected by the First Amendment and the Indian Commerce Clause, by the supreme law of the Federal treaties, by international laws and conventions, and by hundreds of statutory pledges. This enduring sovereignty has provided a lighthouse for the tribal peoples—and at times for the struggling, unmoored industrial society, adrift on the unfriendly tides of economic, biological, physical and cosmic turbulence.[443]

A present emanation of this still-vibrant core of sovereignty has been the recent plan by a coalition of tribes to form a new style of national monument for indigenous lands and culture, to be managed by the Tribes in collaboration with federal officials. The plan emerged as the Bears Ears Proposal for the vast, wild area of continuous Indian presence in the Southeast corner of Utah.[444]

If the sovereign, aboriginal prerogatives of the indigenous become an element of collaborative management, is there a threat of *erosion* of tribal culture? A general acceptance of cultural *preservation* as an act of respect, trust or even inspiration might be one thing, but *cultural appropriation* might be seen as an aspect of major invasion, cultural assimilation, or even cultural genocide.[445] The question then becomes: would

440. Pagosa Area Water and Sanitation Dist. v. Trout Unlimited, 170 P.3d 307 (Colo. 2007).

441. *Id.* at 315.

442. *See* New Mexico v. Aamodt, 537 F.2d 1102 (10th Cir. 1976).

443. *See supra* notes 1–9.

444. *See* Charles Wilkinson, *At Bears Ears, We Can Hear the Voices of Our Ancestors in Every Canyon and on Every Mesa Top: The Creation of the First Native National Monument*, 50 ARIZ. ST. L. J. at 317, 318–20 (2018).

445. *See* Twila Barnes, "The White Supremacy of Elizabeth Warren," *Indian Country Today*,

collaborative management become a blending or homogenization of cultures which could ultimately assimilate the indigenous cultural singularity? Or can cultural uniqueness and integrity be preserved within the workshops of collaboration?

On December 28, 2016, in the last days of his presidency, Barrack Obama used his delegated power under the Antiquities Act[446] to establish the 1,351,840 acre Bears Ears National Monument.[447] Charles Wilkinson, the iconic Professor Emeritus from the University of Colorado Law School, and the Special Advisor to the Bears Ears Intertribal Coalition, described the profound significance of Bears Ears to the traditional Indian tribes of the area, who formally petitioned President Obama, and the public at large: "[R]anging from lithic scatter to granaries to elaborate villages, the Bears Ears landscape is America's most significant unprotected cultural area . . . ."[448]

Alfred Lomahquahu, Hopi, stated that Bears Ears, "is a part of our footprints, a path that tells a story. History is crucial to man because it tells us who we are. Those who lived before us have never left. Their voices are part of the rhythm or heartbeat of the universe and will echo through eternity."[449]

Wilkinson traces the creation of the monument proposal as one initiated and coordinated by the tribal representatives and one exploring the collaborative management of the monument between the intertribal commission and the federal agencies, and the blending of traditional indigenous knowledge and culture with existing federal land management practices.[450] He also traces the beginning of the Trumpean backlash—the executive policies and orders directing the extensive reduction of Bears Ears to benefit the mineral and development interests of the Utah delegation.[451]

Obama had previously expressed his desire to protect land and places that had special meaning to traditionally underrepresented or dispossessed people.[452] The Bears Ears proclamation went beyond the past efforts by requiring that all decisions on land use would involve not only consultation but actual collaborative management. The tribes wanted a deeper tribal-federal relationship with this monument. They wanted true joint responsibility for the management of the land. They did not want to be merely advisors, or consultants, or have any other title that connoted that their contribution to the management of the monument would be only their words. Rather, the tribes wanted to have a hand in actual land management decisions.[453]

The implicit purpose of the collaborative management was, according to Wilkinson, to honor the land and the tribes' continuous relation to it.[454] Obama's proclamation emphasized this relation and, specifically, the traditional ecological knowledge of the tribes:

(March 4, 2019), https://indiancountrytoday.com/opinion/the-white-supremacy-of-elizabeth-warren; *see generally* Marissa Wood, "Cultural Appropriation and the Plains' Indian Headdress," *VCU Auctus: The Journal of Undergraduate Research and Creative Scholarship* (2017), https://scholarscompass.vcu.edu/auctus/43.

446. 54 U.S.C. §§ 320301(a)–(b) (2021).

447. Proclamation No. 9558, 82 Fed. Reg. 1,139 (Dec. 28, 2016).

448. Wilkinson, *supra* note 444, at 318.

449. *Id.* at 319 (quoting Bears Ears Inter-Tribal Coalition., Proposal to President Barack Obama for the Creation of the Bears Ears National Monument 10 (2015), http://www.bearsearscoalition.org/wp-content/uploads/2015/10/Bears-Ears-Inter-Tribal-Coalition-Proposal-10-15-15.pdf.

450. Wilkinson, *supra* note 444, at 319.

451. *Id.* at 320.

452. *Id.* at 324.

453. *Id.* at 326.

454. *Id.* at 328.

> The presidentially-created Commission was established "to *ensure* that management decisions affecting the monument reflect tribal expertise and . . . tribal participation" to care for and manage the monument; provided that the "Secretaries shall *meaningfully engage* the Commission" in planning and management; and granted broad authority to the Commission to "effectively partner" with the agencies. To assure careful consideration of tribal suggestions, agencies must provide a "written explanation of their reasoning" if they decide to reject any Commission recommendations.[455]

As a facet of collaborative management and as a hedge against assimilation and homogenization, the Bears Ears Traditional Knowledge Institute was proposed to study and utilize the traditional, aboriginal culture passed down over the centuries and millennia, and preserve it as a distinct, unique ally of the present monument management.[456]

On December 4, 2017, less than a year after the Obama Proclamation of Bears Ears National Monument, Donald Trump followed a recommendation from Secretary of the Interior Ryan Zinke and ordered a massive reduction in the size of Bears Ears. The new boundaries were two non-contiguous units with a total of less than 15 percent of the original acreage. These excluded vast amounts of cultural sites and artifacts and posed obvious frustration for any effective collaborative management. The tribal coalition—the Hopi, Navajo, Ute Mountain and Uintah-Ouray Utes, and the Zuni—filed suit in the District Court of Washington, D.C. against Trump and his administrative officials.[457]

The Plaintiff Tribes have filed a motion for summary judgment that spoke in stark and compelling language:

> For the first time in history, five federally recognized Tribes banded together to advocate for a national monument to protect, for all Americans and for all time, a place so wondrous it had drawn people to it for more than 13,000 years. Rich in ancient and modern Native culture, and literally part of the homeland and history of the five Tribes in this case, it is known as Bears Ears National Monument. To the Tribes, it is a living and vital place where ancestors passed from one world to the next, often leaving their mark in petroglyphs or painted handprints, and where modern day tribal members can still visit them. The Tribes worked for years to gather evidence and make a case for the protection of this landscape teeming with historical objects and sites. Recognizing that Bears Ears was exactly the kind of place for which the Antiquities Act was created, President Obama designated the Monument on December 28, 2016.

455. *Id.* at 331–32 (identifying that collaborative management as a partnership is not an abdication of authority by the federal managing partner); *See* Samuel Lazerwitz, *Sovereignty – Affirming Subdelegations: Recognizing the Executive's Ability to Delegate Authority and Affirm Inherent Tribal Powers*, 72 STAN. L. REV. 1041, at 1094–1095 (2020).

456. *See* "News from Bears Ears Country – an Interview with Charles Wilkinson" (June 18, 2019), https://www.bearsearscountry.com/blog/2019/6/18/an-interview-with-charles-wilkinson.

457. John C. Ruple, *The Trump Administration and Lessons Not Learned from Prior National Monument Modifications*, 43 HARV. ENVTL'. L. REV. 1, at 3–4 (2019).

> Less than a year later, in an effort to free up lands for uranium mining and other extractive industries, President Trump purported to revoke the Monument and replace it with two smaller, non-contiguous monuments. A stunning abuse of the Antiquities Act by any measure, the Trump Proclamation removed 85 percent of the original monument lands from protection, and removed 100 percent of protection from tens of thousands (and likely more) of cultural objects in the excised lands. The Antiquities Act—a law created specifically to protect historical objects and places—was used instead to *remove* protection from irreplaceable historical objects and places.
>
> The issue here is simple: whether the President had the authority to do what he did. [ . . . ] Neither the plain text of the Antiquities Act, nor its legislative history can be reasonably construed to allow the President to do what he purported to do here. To the contrary, in revoking the original Bears Ears Monument and replacing it with two remnants, President Trump usurped power reserved only to Congress—a power that Congress has repeatedly reaffirmed and claimed for itself. This is a pure issue of law.
>
> The facts underlying this motion are not numerous and they are not subject to genuine dispute. [ . . . ] The Plaintiff Tribes are entitled to partial summary judgment [ . . . ].[458]

The future of the case is unclear. It is undeniable that the executive branch has unilaterally adjusted monument boundaries in the past, but the objectives were invariably to correct inaccurate surveys or improve management and protection—not to destroy the purpose of the monument.[459]

Beyond this, the Presidential *authority* under the Antiquities Act[460] has been broadly construed to extend to archeological sites, historic structures, scenic vistas, ecosystems, and the surrounding federal land necessary for care and management.[461] The courts have repeatedly and conclusively emphasized the validity and extent of the discretion afforded the President in *affirmative* proclamations.[462]

The courts may note that the silence of Congress with respect to some significant administrative actions on public land might be indicative of an implied delegation of legislative powers.[463] But, such indications are generally in regard to minor adjustments, improvements or protective actions—and Congress has repeatedly rejected bills authorizing monument reduction.[464] It seems highly unlikely that the courts would imply a delegation to destroy, rather than create, manage, and protect. Even though there is precedent for implied delegation by silent acquiescence, the courts have consistently

458. *See* Hopi Tribe v. Trump, No. 1:17-cv-02590-TSC, 2020 WL 755075, at *12–13 (D.D.C. Jan. 9, 2020).

459. *See* Ruple, *supra* note 457, at 6.

460. *See* 54 U.S.C. §320301 (2021).

461. Tulare Cty. v. Bush, 306 F.3d 1138, 1141–42 (D.C. Cir. 2002)

462. *See, e.g.,* Mountain States Legal Found. v. Bush, 306 F.3d 1132, 1136–37 (D.C. Cir. 2002); *Tulare Cty.*, 306 F.3d at 1141–43; Utah Ass'n of Counties v. Bush, 316 F. Supp. 2d, 1172, 1186 (D. Utah 2004).

463. *See* United States v. Midwest Oil Co., 236 U.S. 459, 479–81 (1915).

464. See Ruple, *supra* note 457, at 6, 75.

tried to square the implication with evidence of Congressional purpose and awareness.[465] The implied authority to shrink national monuments cannot be found in a diametric departure from the cultural origins and purposes, inherent and obvious, in Bears Ears.[466]

There is still the possibility that reviewing courts may grasp the principle of local custom and economy as an offset to the unilateral declaration of the executive office. In 1998, the Western Governors Association adopted a policy resolution that has come to be known as the Enlibra Doctrine.[467] The policy resolution favors state local planning for national environmental standards, thus enabling the state to give a more nuanced consideration of its particular ecological, economic, social and political differences from the rest of the nation.[468] Jeffrey Teichert says that Enlibra:

> [r]epresents a serious attempt by the elected governors of the West to articulate a theory for environmental policy formulation that is sensitive to the unique local **cultures** and circumstances of Western states and communities. These **cultures** contribute strength, diversity, and perspective to the national culture, and provide identity, moral values, and a sense of belonging and responsibility to their members. Furthermore, efforts to **protect** the environment are more likely to be successful if they are tailored to local needs, circumstances, and **cultures**, and have the support of the people closest to the land.[469]

There is little doubt that the Trump Reduction was dedicated to the interests of the state of Utah and the local extractive industries and economies that had plans for the mineral interests buried beneath Bears Ears sacred surface.[470]

Hillary Hoffman, a professor at the Vermont Law School, notes that state and local economies may depend in part on the opportunity to *lease* minerals on *federal* lands, but they do not own them.[471] She also notes that at Bears Ears, the Indian Coalition proposal presented a strong local voice as well as one that the federal government has a trust-based duty to respect.[472] Finally, the designation of Bears Ears speaks to a *national* interest in these public lands: the preservation of endangered cultures, the opportunity of popular and aesthetic and recreational enjoyment, and—of interest to the state and local economic concerns—the probability of tourist economic returns that match or exceed the mineral interests.[473]

There are other local examples of collaborative management that may be relevant to the Jemez future in the aboriginal water rights. The T'uf Shur Bien Preservation Trust Area was established within the Cibola National Forest and the Sandia Mountain

465. *Id.* at 75.

466. *Id.* at 75.

467. *See* Jeffrey B. Teichert, *The Enlibra Doctrine and Preserving the Unique Rural Cultures of the West*, 13 UTAH B.J. 10 (2000).

468. *Id.* at 10–11.

469. *Id.* at 14 (emphasis added).

470. *See* Ruple, *supra* note 457, at 75–76.

471. *See* Hillary M. Hoffman, *Speaking Regional Truth to Washington Power Over Federal Public Lands*, 20 VT. J. ENVTL. L. 160, 166-69 (2019).

472. *See id.* at 170–72.

473. *See id.* at 171–72.

Wilderness area located to the southeast of the Jemez River watershed.[474] The purposes were to recognize and protect in perpetuity the rights and interests of the Sandia Pueblo in and to the area, as specified in Section 539m-3(a),[475] the national forest and wilderness character of the area, and the longstanding use and enjoyment of the area by the public.[476]

The acequias of New Mexico are directly tied to both the aboriginal past of the Pueblos and to the future of collaboration. The acequias are community-based water distribution systems with analogues in both Spanish colonial society and in indigenous Pueblos.[477] They utilize an interlocking system of community owned and operated earthen canals, generally located on the smaller tributaries of the larger rivers like the Rio Grande or the Chama. The use rights for individuals depends on a democratic governance, compliance with systemic rules, and proportionate contributions of maintenance and repair.

The acequias fit within the state's prior appropriation systems as community rights holders with an aboriginal priority beginning with the settlements of the 1600s.[478] Much of the acequia discussion centers on the expansion and transfer of water rights.[479] Under New Mexico state law, a water right change or transfer generally requires the state engineer's approval–which would not be forthcoming if the change were detrimental to existing rights or the public welfare.[480] Under a law passed in 2003,[481] an acequia is essentially treated as a local government with the power to regulate proposed water rights changes and transfer relating to the acequia. The law gives authority only to those acequias that adopt it into their bylaws or governing rules.[482] With adoption, the acequia can deny changes or transfers detrimental to the association or its members.[483] The New Mexico Court of Appeals decision in *Peña Blanca Partnership v. San Jose Community Ditch*[484] held that the statute did not impair either individual landowners' procedural right to judicial appeal or their substantive due process rights of rational relationship to a legitimate governmental purpose.[485]

Sylvia Rodriguez wrote:

> According to most estimates, acequia irrigators use less water today than a generation ago, but the demands on surface water and groundwater are escalating because of development and gentrification. Urban and population growth are expanding at a rate projected to exceed the extant regional water supply by mid-century. Forest growth in recent decades has reduced mountain runoff from winter and summer precipitation into the streams, according to some. In this millennium, New Mexicans appear to be entering a period of severe

474. 16 U.S.C. § 539m–2 (2021).
475. 16 U.S.C. § 539m–3 (2021).
476. 16 U.S.C. § 539m–2(a) (2021).
477. SYLVIA RODRÍGUEZ, ACEQUIA: WATER-SHARING, SANCTITY, AND PLACE, 2 (2006).
478. ACEQUIA GOVERNANCE HANDBOOK 2 (New Mexico Acequia Association rev. ed. 2014).
479. *See id.* at 5.
480. *Id.* at 5–6.
481. *See* N.M. Stat. § 73-2-21-E (2021).
482. ACEQUIA GOVERNANCE HANDBOOK, *supra* note 478, at 6.
483. *Id.*
484. Peña Blanca P'ship v. San Jose De Hernandez Cmty. Ditch, 202 P.3d 814, 819–820 (N.M. Ct. App. 2008).
485. *Id.*

> drought, part of a natural cycle that global warming will exacerbate, even if it did not trigger it . . . The New Mexico water rights adjudication is a manifestation of the world-wide conflict over who owns what water, how it should be used, and whether it should be created as a human right or a commodity. In this context and in similar situations, local moral economies struggle against the hegemonic zero-sum, winner-take-all ethic of global capitalism. Acequia culture combines the sharing of river water with secular and ritual practices that unfold in space and require mutual respect: irrigation and procession. Such practices make place and self. People cherish and defend the surviving acequia systems of New Mexico not because they are a dead artifact from an archaic past, but because they continue to function, in ever-changing yet persistent form, fulfilling a range of contemporary material and social needs.[486]

In sum, collaboration speaks to the future of management, and it speaks of the timeless past of tribal sovereignty. The continuing wellsprings bring forth emanations of the resilient, enduring aboriginal lifeways. We are all beneficiaries of these gifts and opportunities.

486. *See* RODRÍGUEZ, *supra* note 477, at 408.