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TIME IMMEMORIAL: ABORIGINAL RIGHTS IN THE VALLES CALDERA, THE PUBLIC TRUST, AND THE QUEST FOR CONSTITUTIONAL SUSTAINABILITY

John W. Ragsdale Jr.*

I. INTRODUCTION

It is often – but not necessarily – true that discussions about the new, green economy, or sustainable development, or renewable alternative to carbon-based energy, impliedly, or even literally, assume that these will accompany at least a moderated or modulated amount of economic growth. It will be clean growth or growth with a happy face – growth-like, perhaps.[1] The holy grail of reform has, almost from the beginning of the environmental revolution in the 1970s, been to have it all – robust economy, continuing growth, and a pristine environment that can be passed on without diminishment to future generations. These dreams – or illusions – were companions to most of the early legislative reforms and most of them contain vestiges of a wolf in sheep's clothing. That wolf is economic growth – a yearly, exponential increase in gain for individuals, communities, and the nation as a whole.[2]

The mixture of economic growth and sustainability – true sustainability – does not seem biophysically possible.[3] The biosphere will eventually and inevitably founder under the weight of continuing exponential growth, even if softened to less than the three to four percent annual increase usually sought by both major political parties in the United States and most of the developed nations.[4] Even a two percent annual growth rate will, if pursued in an exponential fashion, lead to a doubling of the overall extractive weight on the earth's resources of land, water, soil, and environmental margins in thirty-six years.[5] Furthermore, the already eroded natural resource of the world – bereft of much or most easily procurable bounty – is now being pursued by almost seven billion hungry hearts, all wanting growth similar to that of the elite countries. The

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[1] *See* BARRY COMMONER, MAKING PEACE WITH THE PLANET 174-76 (1992).

[2] *See* MICHAEL CREVE, THE DEMISE OF ENVIRONMENTALISM IN AMERICAN LAW 18-22 (1996).

[3] *See* HERMAN E. DALY, STEADY STATE ECONOMICS 225-26 (2d ed. 1991) [hereinafter DALY].

[4] *See* Naomi Kline, *Capitalism vs. the Climate*, THE NATION (Nov. 9, 2011) [hereinafter Kline] https://www.thenation.com/article/capitalism-vs-climate/; *see also United States GDP Annual Growth Rate*, TRADING ECON., https://tradingeconomics.com/united-states/gdp-growth-annual.

[5] *See* Bradford M. Pine, *Calculate How Long it Will Take to Double Your Money Using 'The Rule of 72'*, THE BLOG OF HUFFINGTON POST (May 20, 2014), http://www.huffingtonpost.com/bradford-m-pine-/calculate-how-long-it-wil_b_4893071.html.

overshooting of the earth's carrying capacity mirrors the exponential increase of growth. [6]

There is a further problem with sustainability efforts that are incomplete or partial in terms of time or scope. If the central commitment is really more to efficiency than reduced consumption, there is a limit to how many advances in technique can result in true savings of cost.[7] The savings in any case may be illusory if they are spent on other projects or consumer goods rather than sequestered, thus shifting but not lowering costs to the environment.[8]

This problem of shifting costs can emerge even if growth is forged out of renewable energy sources like wind or sunlight, or healthy efficiencies like walking or biking. Why? Because the savings in expenditures on coal, natural gas, or automobiles might well be spent on other high entropy consumer items like yachts, houses, swimming pools, European vacations, or country clubs.

In short, if sustainability is defined simply as the reduction of the carbon footprint to a level permitting the continuation of life and society, then it must be a holistic, collective endeavor.[9] Like a diet, we must count ALL the calories – and attempt to lower or minimize throughout. But herein lies a further problem: lowering impact is a collective endeavor based on holistic means, but it must be implemented by individual units – and some may be unrepentant. Sustainability sought individually, in an isolated context, may lead to the dystopia called the Tragedy of the Commons.[10]

If a resource, such as the environmental margins of the atmosphere, is essentially an unowned or incompletely regulated commons, then individual gain-seeking competitors will continue to exploit it even when it becomes obvious that it is being compromised. The tragedy is that each rational actor will seize what is still available since the benefit can be held discretely while the cost can be externalized on the commons and on the future. An individual who forbears isolation will not save the commons from ultimate destruction, and the attempt may be economically self-defeating for the ethical non-exploiter.[11]

A possible approach to the problems of unsustainable growth, incomplete remedies and, perhaps, even to the destructive competition in the commons, is the collective embracement of true sustainability at the economic and cultural core of society, rather than the individualized pursuit of a favorable linear

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[6] *See generally* Dominique Mosbergen, *We've Already Used Up Earth's Resources For 2016 – And It's Only August*, HUFFINGTON POST (Aug. 8, 2016), http://www.huffingtonpost.com/entry/earth-overshoot-day-2016_us_57a4258fe4b056bad2151b49.

[7] *See* DALY, *supra* note 3, at 89-92, 121-22.

[8] *See* Kline, *supra* note 4, at 19; *see also* JEREMY RIFKIN, ENTROPY: INTO THE GREENHOUSE WORLD 133-57 (rev. ed. 1989); John Ragsdale, *The Nutty Putty Cave, the Zen Runner and Other Allegories About Life, Death, Value and Law*, 81 UMKC L. REV. 61, 111-13 (2012).

[9] BILL MCKIBBEN, EAARTH 124-33 (2010).

[10] *See* Garett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243-48 (Dec. 13, 1968).

[11] *Id.*; *see also* GARRETT HARDIN, THE LIMITS OF ALTRUISM: AN ECOLOGIST'S VIEW OF SURVIVAL 26-27 (1977); *see also* Ragsdale, *supra* note 8, at 112-13.

benefit-to-cost ratio. If balance rather than profit is the fundamental focal point, then the group could exist in rhythmic holism of past, present, and future rather than race into an impassible void. If cooperation and continuity are the central pillars, then all incremental movement could be toward cohesion rather than dissipation.

Can such sustainability exist? It can and it has, and it was predominant in the Americas for millennia until the free market growth machine and self-actuating technology, spawned by European concepts of individual salvation, commodified nature, and non-reciprocating anthropocentrism shattered it. Barry Lopez, in his short classic, *The Rediscovery of North America,*[12] wrote

> The assumption of an imperial right conferred by God, sanctioned by the state, and enforced by a militia; the assumption of unquestioned superiority over a resident people, based not on morality but on race and cultural comparison—or let me say it plainly, on ignorance, on a fundamental illiteracy—the assumption that one is *due* wealth in North America, reverberates in the journals of people on the Oregon Trail, in the public speeches of nineteenth-century industrialists, and in twentieth-century politics. You can hear it today in the rhetoric of timber barons in my home state of Oregon, standing before the last of the old-growth forest, irritated that any-one is saying "*enough*..., it is enough."
>
> What Columbus began, then, what Pizarro and Cortés and Coronado per-petuated, is not isolated in the past. We see a continuance in the present of this brutal, avaricious behavior, a profound abuse of the place during the course of centuries of demand for material wealth. We need only look for verification at the acid-burned forests of New Hampshire, at the cauterized soils of Iowa, or at the col-lapse of the San Joaquin Valley into caverns emptied of their fossil waters.
>
> [T]his violent corruption needn't define us. Looking back on the Spanish incur-sion, we can take the measure of the hor-ror and assert that we will not be bound by it. We can say, yes, this happened, and we are ashamed. We repudiate the greed. We recognize and condemn the evil. And we see how the harm has been perpetuated. But, five hundred years later, we intend to mean something else in the world.[13]

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[12] BARRY LOPEZ, THE REDISCOVERY OF NORTH AMERICA (1992).
[13] *Id.* at 9-11.

II. THE CONTRASTING WORLD VIEWS OF THE DISCOVERING INVADERS AND THE INDIGENOUS POPULATIONS

After the Europeans had secured their initial footing in the Americas, and as their strength in numbers and technique increased, they turned from their initial tendency toward collective subsistence and reverted to an intensified embrace of their religious and cultural antecedents. They refocused on the individual pursuit of salvation and economic gain.[14] Growth became the secular religion.[15] A linear view of sustainability was foreshortened to the length of a generation and the ability to commodify nature and increase profits at an exponential rate.[16]

The native populations, for the most part, possessed different views of time, community, the individual roles, and sustainability. The Pueblo people of the Southwest, notably the Hopi, may not have conceived of time as a linear event. Life – existence, the past, and the future – were seen more holistically, with a blending; the lifeways were attuned not to linear growth as much as rhythm and balance, within the group and with the land.[17] This concept, called the principle of reciprocity, is believed by the Pueblo to be the central dynamic of the universe involving all manifestations of existence – living, dead, animate and inanimate.[18] Reciprocity involves the mutual relationships between these aspects and posits an ongoing, eternal giving, receiving, and sharing.[19] The conjoined postulated elements of right and duty are measured by need and ability rather than contract or force.[20]

Multiple tribal societies, each living generally by principles of reciprocity, do not necessarily assure overall harmony. Most tribes are territorial and defensive and some were aggressive and predatory.[21] Groups could, at times, because of economic overreach or surmounting environmental restrictions like drought or erosion, exceed the local carrying capacities and be forced to move.[22] But there was a difference from the invaders who moved rapaciously, exhausting one resource to feast on another.[23] The tribes tended to seek rebalance and

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[14] *See* Lynn White Jr., *The Historical Roots of Our Ecological Crisis*, 155 SCI. 1203-07 (1967).

[15] WILLIAM OPHULS, ECOLOGY AND THE POLITICS OF SCARCITY 185 (1977) [hereinafter WILLIAM OPHULS].

[16] *See* SHEPARD KRECH III, THE ECOLOGICAL INDIAN 96-98 (1999) [hereinafter KRECH].

[17] *See* JOHN COLLIER, ON THE GLEAMING WAY 15-21 (1962) [hereinafter JOHN COLLIER]; *see also* J. DONALD HUGHES, AMERICAN INDIAN ECOLOGY 137-43 (1983).

[18] LAURA THOMPSON AND ALICE JOSEPH, THE HOPI WAY 36-37 (1965) [hereinafter THOMPSON & JOSEPH].

[19] *Id.*

[20] *See* CHARLES EASTMAN, THE SOUL OF THE INDIAN 99-104 (1980).

[21] *See* LAURA THOMPSON, CULTURE IN CRISIS 63-66 (1973).

[22] *See* CRAIG CHILDS, HOUSE OF RAIN, 3-8 (2008); *see also* KRECH, *supra* note 16, at 96-99.

[23] *See* John Ragsdale, *The Ozark National Scenic Riverways and the Sagebrush Rebellion in*

sustainability, and to correct the acts or practices that forced migration. Thus, population, aggregation, and internal hierarchies that led to excessive impact, inequality, or instability were reduced and returned to the more decentralized, equalitarian, and mobile approaches.[24]

The aboriginal way involved a philosophy of permanence, according to David Getches:

> The values that enabled American tribes to survive and which have kept them intact reflect a philosophy deeply embedded in aboriginal societies of the Americas. It is a philosophy that commits the people to a permanent existence in harmony with everything around them that explains the success of these people in surviving in America for thousands of years.[25]

The philosophy blended the communities of people and places across the sweep of time and approached a true sustainability without the inescapable contradictions presented by the pursuit of continuous economic growth.[26] John Collier, the Commissioner of Indian Affairs and the co-drafter of the Indian Reorganization Act of 1934,[27] had forged his thought with transformative observations of the Pueblo people and their traditional ceremonies.[28] In the heart of these ancient rhythms, the people, as individuals, moved freely but as one: with the earth, the seasons, and in a timeless fashion. Collier saw these practices, and the Indians aboriginal society, as worthy of protection and, indeed, emulation by the society.

> The Southwestern Indian tribes have a message for the world. The message is of unexceeded urgency, one dares to suggest. It is delivered to a world in terrible need. How can the message be told in few words?
>
> . . .
>
> That thesis [is] that democracy—political, social, and eco-nomic democracy, complexly realized all together—is ancient on earth; that cooperation and reciprocity were the way of men through many thousands of generations; that the conserving and cherishing of earth and its flora and creature life were man's way

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Missouri, 49 URB. LAW. 1, 14-16 (2017) [hereinafter ONSR].

[24] *See* DAVID D. STUART, ANASAI AMERICA, 199-201 (2000).

[25] David Getches, *A Philosophy of Permanence: The Indians' Legacy for the West*, J. OF THE WEST 54 (July 1990) [hereinafter Getches] cited in DAVID H. GETCHES, CHARLES F. WILKINSON, ROBERT A. WILLIAMS. MATTHEW L.M. FLETCHER. FEDERAL INDIAN LAW 6TH ED., 34 (2011) [hereinafter FEDERAL INDIAN LAW].

[26] *See generally* JOHN COLLIER, INDIANS OF THE AMERICAS, 7-16 (1947).

[27] *See* 25 USCA §§461-477 in FEDERAL INDIAN LAW, *supra* note 25, at 187-94.

[28] *See, e.g.*, JOHN COLLIER, FROM EVERY ZENITH, 124-35 and 169-92 (1963).

> through these long ages; that the art of education—the art of informing, enriching, tempering, and socializing the personality, and of internalizing the moral imperatives—was practiced triumphantly by village communities in every continent, without ceasing for tens of thousands of years; and that like countless flowers in a long April of our world human cul-tures, borne by memory alone, illuminated with all rainbow hues the almost unimaginable thousands of little societies wherein immensities of personality development were achieved across aeons of time.
>
> There came the world changes which have brought us to where we are . . . . The local community, for most Western men, dissolved. The great society and world community, for all men, unattained. Exploitation in place of reciprocity, working as a silent corrosive in the neighborhood, a tempest and flood around the globe. Wastage of cultures and value systems which ages have made, wastage of natural re-sources stored by the organic life of a billion years, wreckage of the web of life. Power conflicts, ever narrowing in their emo-tion-charged dogmatisms, lunging toward war. Things and machines, and exploiters through things and machines, the masters of men . . . .
>
> There is no hope, except in the reattainment of community. That reattainment must commence at the local level, reach to the scale of the world, return myriadly from the world to the local level; for it is locally, and there alone, that the fateful years of personality formation and attitude formation are lived out.[29]

III. THE COLLISION BETWEEN THE ABORIGINAL RIGHTS OF THE AMERICAN INDIANS AND THE LAW OF THE INVADERS

The origins of the Doctrine of Discovery began several centuries before the voyages of Columbus, when the Crusades were justified by the Catholic Church under the theory that non-Christians could be rightfully conquered and stripped of their sovereignty and property.[30] Columbus's fortuitous encounter with North America prompted an immediate response from the Papacy, which extended the principles of the Crusades to the discoveries in the new world and gave exclusive priority to the discovering country authorized by the Pope.[31]

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[29] *See* JOHN COLLIER, *supra* note 17, at 159-61.

[30] *See* ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT, 13-18 (1990) [hereinafter WILLIAMS].

[31] *Id.* at 78-81; *see also,* FEDERAL INDIAN LAW, *supra* note 25, at 48.

In 1532, a Spanish priest and scholar, Franciscus de Victoria, added nuance to the incipient discovery doctrine which later became reflected in the international law of Europe, following the Reformation.[32] Victoria wrote that the indigenous people, as rational human beings, had possessory rights to their lands that were not lost by discovery. Rather, the discovering nation acquired an exclusive, preemptive right to acquire possession by consent, or possibly conquest, in accord with international rules.[33] Though force was an option, the international law seemed clearly to prefer consent. Indeed, negotiation was the clear choice of the non-military immigrants to the eastern shores who primarily sought homeland rather than plunder and who lacked the will, numbers, and armament to seize large amounts of land. Moreover, even as European presence increased, the great majority of European acquisitions were by purchase rather than war.[34]

The legal veneer on the acquisition of possession by the first discoverer was promulgated in the collusive case[35] of *Johnson v. M'Intosh*,[36] which escaped constitutional limitations of concreteness with a rather fictitious set of facts.[37] In essence, Justice Marshall stated that the first discoverer was accorded not only priority over other European competitors, but was also a title in legal fee simple which might become absolute when consummated by the acquisition of native possession.[38] The extinguishment of the Indians' aboriginal possessory rights could, according to Marshall – and in line with de Victoria,[39] occur with either purchase or conquest.[40] Thus, extinguishment in either form would unify the fee simple absolute in the discoverer or its successors and enable the future conveyance of the title and the European settlement of the area.[41] We can also note that the extinguishment of aboriginal rights of a possession since time immemorial was the ending of the stable state and the prelude to the growth society. The operation of the competitive free market and the pursuit of individual profits would replace the stable life style of the cooperative hunter-gathers and nomadic agriculturalists that had predominated in balance with the land for countless generations.[42]

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[32] FEDERAL INDIAN LAW, *supra* note 25, at 51-56.
[33] *Id.* at 51; *see also* MATTHEW L.M. FLETCHER, FEDERAL INDIAN LAW, 21-22 (2016) [hereinafter FLETCHER].
[34] FEDERAL INDIAN LAW, *supra* note 25, at 59, citing FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, 14-15 (2005); *see also* Felix Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 34-35 (1947).
[35] *See* FLETCHER, *supra* note 33, at 26-27.
[36] 21 U.S. 543, 543 (1823).
[37] *See* FLETCHER, *supra* note 33, at 35.
[38] *M'Intosh*, 21 U.S. at 573.
[39] *See* FEDERAL INDIAN LAW, *supra* note 25, at 51.
[40] *M'Intosh*, 21 U.S. at 587.
[41] *See M'Intosh*, 21 U.S. at 589.
[42] *See* WILLIAM OPHULS, PLATO'S REVENGE, 170-78 (2011) [hereinafter PLATO'S REVENGE].

Though Marshall grew to espouse acquisition only by consent,[43] history furnished numerous examples of extinguishment by both direct and indirect force.[44] Tribes under duress were forced to sign removal treaties or simply abandon their homelands and move west, across the Mississippi.[45] In time, and with the growth of the dominant federal sovereign, duress was often displaced by the callous indifference of a dominion incompatible with the possessions of the indigenous groups. But as became clear later in the Supreme Court, such inverse condemnation with respect to the Indian aboriginal rights did not fall within the protections of just compensation and public use under the Fifth Amendment. The case of *Tee-Hit-Ton Indians v. United States*[46] held that Alaskan Natives did not hold recognized title, and their aboriginal rights could be taken without just compensation.[47] The case was riddled with superficial history and spurious reasoning, probably reflecting expedient desires for the vast timber and mineral resources held by Alaskan Indians. The Court felt that, "there must be definite intention by congressional action or authority to accord legal rights,"[48] and that, at most, prior congressional action in this case reflected only a desire to maintain the status quo.[49] Beyond this, the Court misread or misstated both history and precedent to find that the ancestral ranges of the Indians had invariably been taken by implied conquest. It said that, "even when the Indians ceded millions of acres by treaty . . . , it was not a sale but the conquerors' will that deprived them of their land."[50]

Thus, despite the fact that aboriginal title might be a stable state of culture and economy that reflected precedent and life ways since time immemorial, it still did not, according to the Supreme Court, with its eye firmly on the growth potential of Alaska, amount to a property interest protected by the Fifth Amendment. Though benevolent sovereign might – as in the case of the Alaska Native Claims Settlement Act[51] – make later amends by a statute or a claims commission,[52] these reparations were voluntary – legislative grace – and were not constitutionally compelled.

One might say that the preservation of aboriginal rights in Alaska by statute, if not constitution, is still the protection of fragile societies – strong within and balanced, but vulnerable to the growth world. However, one might

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[43] Worcester v. Georgia, 31 U.S. 515, 547-548 (1832).
[44] *See* FLETCHER, *supra* note 33, at 53-55.
[45] *See* ANGIE DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES 117-49 (1970).
[46] 348 U.S. 272 (1955).
[47] *See* FLETCHER, *supra* note 33, at 121-26.
[48] *Tee-Hit-Ton Indians*, 348 U.S. at 279.
[49] *Id.* at 278.
[50] *Id.* at 289, *but see supra* notes 33, 42.
[51] Alaska Native Claims Settlement Act, 43 U.S.C.S. §§ 1601-1628 (1971). In return for relinquishing claims to aboriginal title in Alaska, Natives received rights to 44 million acres and payments of 962.5 million dollars. *See* FEDERAL INDIAN LAW, *supra* note 25, at 889-90.
[52] Indian Claims Commission Act of 1946, 25 U.S.C.S. § 70a.

also witness the continuing threats to statutes like the Endangered Species Act which faces contrived judicial,[53] administrative,[54] and political[55] attempts at erosion in the service of economics.

Before exploring the possibilities and perhaps necessities of preserving aboriginal principles and practices of the stable state within the protective confines of statutes and trusts, we might ponder whether the wild species still persist. Are there pockets of aboriginal rights yet unextinguished outside the rain forests of Brazil, in the temperate zones of the United States? Assertions of aboriginal rights have flashed like fireflies in the post Tee-Hit-Ton legal night, largely without avail. They tend to founder on the rocks of the theory of implied extinguishment by dominion, though some result in subsequent legislative rectification.[56] The recent cases reiterate the principles that the manner, method, and time of extinguishment implied from an exercise of complete dominion are essentially non-justifiable as to substance.[57] The issues of aboriginal possession in fact and the "plain and unambiguous" intent to extinguish clearly are justifiable and have produced some varying results. The leading case of *United States* ex rel. *Hualapai Indians v. Santa Fe Railroad*[58] emphasizes that extinguishment cannot be lightly implied,[59] and the recent decision in *Native Village of Eyak v. Blank*[60] held that the plaintiffs have the burden of proving "actual, exclusive and continuous . . . occupancy . . . in accordance with the way of life, habit, customs, and usages of the Indians."[61] The majority felt that the plaintiffs had not established exclusivity of dominion with respect to other tribes.[62] In the case of *Pueblo of Jemez v. United States*,[63] the Tenth Circuit has

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[53] *See, e.g.*, People for the Ethical Treatment of Property Owners v. United States Fish & Wildlife Servs., 852 F.3d 990 (10th Cir. 2017).

[54] *See, e.g.*, Nathan Rott, *Yellowstone Grizzly Bear Removed From Endangered Species List*, ALL THINGS CONSIDERED (June 22, 2017, 4:31 PM ET), https://www.npr.org/2017/06/22/533989369/yellowstone-grizzly-bear-removed-from-endangered-species-list.

[55] *See, e.g.*, Brett Hartl, *Western Governors' Association Endorses Gutting Endangered Species Act*, CTR. FOR BIOLOGICAL DIVERSITY (June 28, 2017), https://www.biologicaldiversity.org/news/press_releases/2017/endangered-species-act-06-28-2017.php.

[56] *See, e.g.*, United States v. Gemmill, 535 F.2d 1145 (9th Cir. 1976), *cert denied*, 429 U.S. 982 (1976) (holding inclusion of aboriginal lands within a National Forest extinguishes Indian title); United States v Pueblo of San Ildefonso, 513 F.2d 1383 (Ct. Cl. 1975) (awarding compensation for aboriginal title extinguished by conveyances under the land laws, inclusion in a Forest Reserve, and inclusion in a grazing district).

[57] *See* Delaware Nation v. Pennsylvania, 446 F.3d 410, 416-17 (3d Cir. 2006).

[58] 314 U.S. 339 (1941) (demonstrating no manifest intent to extinguish aboriginal title in lands granted to railroad).

[59] *Id.* at 354.

[60] 688 F.3d 619 (9th Cir. 2012) (en banc).

[61] *Id.* at 622.

[62] *Id.* at 623-25.

[63] 790 F.3d 1143 (10th Cir. 2015).

dealt with a Quiet Title Act claim for aboriginal rights, and with it has presented a basis for this article's expanded discussion of sustainability at the heart of aboriginal rights, and the corresponding duty of the sovereign to respect and protect the remnants and islands of sustainability both in their statutory schemes and common law, and beyond, a larger scale within the contours of its constitution.[64]

IV. JEMEZ PUEBLO AND THE VALLES CALDERA

The Hemish people, called "Jemez" by the Spanish,[65] lived, according to oral histories, in the vicinity of the ancient pueblos at Mesa Verde and Chaco Canyon since about 1 A.D.[66] Following the arrival of the nomadic Athapaskans, later to become known as the Navajo and Apache sometime after 950 A.D., the Jemez left the northern area and followed what Steve Lekson has called the Chaco Meridian[67] southward, arriving in the area of the present pueblo on the southern flank of the Jemez Mountains about 1300 A.D.[68] The Jemez mountains are a massive volcanic uplift in north-central New Mexico, west of present day Santa Fe, and northwest of Albuquerque. The center of the uplift, called the Caldera or Valles Caldera, is the collapsed and dormant center of the super volcano which, not spent of its force, has settled into a rich basaltic soil covered with pine forests, surrounded by peaks, and etched with wide grass valleys or 'valles.'[69]

The Jemez people have, for over 800 years, lived in their village in the lower drainage of the Rio Puerro and used the highlands of the Valles Caldera for hunting and gathering, timber, agriculture, and spiritual observances.[70] These uses continue. The Jemez people make regular religious pilgrimages along ancient traits to sites within the Caldera, including Redondo Peak and numerous sacred springs. The members conduct rituals, leave offerings, and use the mineral and hot springs for healing.[71] Though several other Pueblo villages in the area, including Santa Clara, Zia, and Sane Ildefanso, used places around the Jemez

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[64] *See generally id.* at 1147.

[65] JOE S. SANDO, NEE HEMISH 3 (2008) [hereinafter, SANDO].

[66] Joe S. Sando, *Jemez Pueblo*, in HANDBOOK OF NORTH AMERICAN INDIANS: SOUTHWEST 418, (ALFONSO ORTIZ ed. 1979) [hereinafter, *Jemez Pueblo*].

[67] STEPHEN H. LEKSON, THE CHACO MERIDIAN 1 (2015). Lekson traces the movement of the Ancestral Pueblo between Aztec in Southern Colorado, Chaco Canyon in New Mexico's San Juan Basin, and Pacquime or Casas Grandes in Mexico. The migrations followed an exact north-south meridian.

[68] *Jemez Pueblo*, *supra* note 66, at 418.

[69] *See* VALLES CALDERA TRUST, VALLES CALDERA NATIONAL PRESERVE: FRAMEWORK AND STRATEGIC GUIDANCE FOR COMPREHENSIVE MANAGEMENT (2003) [hereinafter, FRAMEWORK].

[70] *Id.* at 39; *see also* SANDO, *supra* note 65, at 15-17.

[71] *See* Pueblo of Jemez v. United States of America, No. CIV 12-0800 RB/RHS, 2013 WL 11325229, at *2 (2013), *rev'd and remanded*, 790 F.3d 1143 (10th Cir. 2015); *see infra* note 119.

Mountains, each village had areas of predominance and, although there has been cooperation, there is still an exclusivity that is legally sufficient to satisfy requirements for aboriginal title.[72]

With the advent of the Spanish after 1500, the Jemez people faced superior force, greater numbers, an aggressive religion, and the invocation of the Doctrine of Discovery. Again, one can see the irony of a stable-state balanced society, capable of indefinite sustainability, which becomes vulnerable to the expansions of outside forces. The Spanish, however, seemed willing to allow the Pueblo to maintain possession of their lands and beliefs. Both Pueblo and Spanish settlers grazed livestock and hunted in the Valles Caldera.[73]

After Mexican Independence in 1821, the government accorded the Pueblo Indians both citizenship and title to their lands.[74] In 1846, however, the territorial United States, flexing its muscle and fueled by beliefs in exceptionalism and manifest destiny,[75] began a pretextual war with Mexico. The ensuing lopsided victory[76] resulted in a cession of half of Mexico's sovereignty, a doubling of the size of the United States, and a new national presence for the Indian tribes to reckon with.

In the Treaty of Guadalupe Hidalgo in 1848, the United States agreed to respect pre-existing property rights of all Mexican citizens, including Indians.[77] The observance of these rights in the Southwest was often made to depend on confirmation in territorial commissions that offered a short lease and little notice, especially to Indians, often of a distance and usually unfamiliar with the language. The results in California were generally dispossession of Indian titles without any actual notice until much later.[78] No such required confirmation or statutes of limitations were present in the New Mexico Territory, so aboriginal occupancy rights continued unabated.[79] But so did the United States' power of

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[72] *See* SANDO, *supra* note 65, at 83-91; Pueblo of Jemez v. United States, 790 F.3d 1143, 1165-68 (10th Cir. 2015).

[73] FRAMEWORK, *supra* note 69, at 39; *see also* CRAIG MARTIN, VALLE GRANDE 16 (2003).

[74] *See* United States v. Joseph, 94 U.S. 614, 618 (1876); United States v. Sandoval, 34 S. Ct. 1, 6 (1913).

[75] David J. Weber, *The Spanish-Mexican Rim*, in OXFORD HISTORY OF THE AMERICAN WEST 45, 73 (Clyde A. Milner, Carol A. O'Conner, Martha A. Sandweiss eds., 1994).

[76] *Id.*

[77] *See* Treaty of Guadalupe Hidalgo, U.S.-Mex., Feb. 2, 1848, 9 Stat. 922.

[78] *See* Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist., No. EDCV 13-883-JGB, 2015 WL 1600065, at *11 (C.D. Cal. Mar. 20, 2015) (stating "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 within the public domain."

[79] Pueblo of Jemez v. United States, 790 F.3d 1143, 1164-65 (10th Cir. 2015).

extinguishment which, after *Johnson v. M'Intosh*, was considered unquestionable if exercised with clarity of intent.[80]

Whether the United States exercised this power and exhibited this intent became a legal and factual issue when the federal government began to dispose of western lands and resources as a means of subsidizing internal movement and development, and as a way to defuse the tensions of social and economic inequality brought about through externalities of capitalism and the free market, and the pressures of urbanization and technology.[81] One area of distributional tension was in the growing New Mexican town of Las Vegas, on the east side of the Sangre de Christo mountains. Immigrants from the east, inspired by offers of free federal land, collided with the landholdings of the wealthy Mexican Cabeza de Baca family.[82]

To resolve the impasse, Congress passed a statute in 1860 allowing the Baca family to select 500,000 acres of non-mineral land elsewhere in New Mexico in tracts of up to 100,000 acres if they would forgo their Las Vegas lands. One tract selected by the Baca family was the Valles Caldera.[83]

Did the grant by the United States of land aboriginally used by the Jemez since time immemorial to the Cabeza de Baca family operate to extinguish the Indians' possessory rights? Certainly there was no such language or intent expressed in the Congressional legislation,[84] nor in the physical aspects of the Baca family's subsequent usage.[85] The ownership began to descend in the family and fragment in sales to outsiders; the primary usage was for grazing, timber, and sulfur mining, and dreams of economic developments remained unfulfilled.[86]

The Jemez continued their customary activities throughout the 19th and 20th centuries, openly and without conflict or incident, as far as the Baca descendants and other various interest holders.[87] Whether this was viewed as permission, as adverse possession as an easement or encumbrance – or whether the non-Indians cared at all – is not clear. What is clear is that neither the ranch operators nor the Jemez viewed the situation as so intractable or even inconvenient that they sought legal recourse. In fact, the Jemez assert that a small piece of land on the summit of Redondo Peak is owned in fee by the tribe.[88]

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[80] *See supra* notes 39, 57-58.

[81] *See* John Ragsdale, *To Return From Where We Started: A Revisioning of Property, Land Use, Economy and Regulation in America*, 45 URB. LAW. 631, 641-45 (2013).

[82] *See* U.S. Pub. L. No. 167, 36th Cong. 1st Session June 1860, *An Act to Confirm Certain Private Land Claims in the Territory of New Mexico*; MARTIN, *supra* note 73, at 28-30.

[83] WILLIAM DEBUYS AND DON J. USNER, VALLES CALDERA 15 (2006) [hereinafter, DEBUYS].

[84] *See* MARTIN, *supra* note 73, at 30.

[85] *See* DEBUYS, *supra* note 83, at 16.

[86] *Id.*

[87] *See* Pueblo of Jemez v. United States, 790 F.3d 1143, 1149, 1165 (10th Cir. 2015).

[88] *See* SANDO, *supra* note 65, at 42.

The Indian Claims Commission Act of 1946[89] created a quasi-judicial body, the Indian Claims Commission (ICC), to hear and determine all tribal claims against the United States that accrued before August 13, 1946, adjudicate them once and for all, and thus dispose of the pre-1946 claims with finality.[90] To facilitate this adjudication the ICCA waived federal sovereign immunity for all claims filed within five years.[91]

If the Jemez tribe maintained their aboriginal rights after the 1860 grant from Congress, and if the grant was made by the United States subject to their inextinguished aboriginal rights, then the Jemez might have a defense to any procedural bar set by the ICCA deadline. The Jemez could argue that their aboriginal rights continued and, thus, they had no obligation to file a claim with the ICC. The District Court of New Mexico felt that the Jemez had to file before the ICC even if the grant had not extinguished their aboriginal rights and, since they didn't, their claim was barred by the running of the filing period of the ICCA and the reemergence of sovereign immunity.[92]

The Tenth Circuit, however, overruled the District Court on this point. In the first place, the appellate court felt that it was well established that grants from the discovering sovereign or its sovereign successor could be made subject to the Indian aboriginal possession "absent express extinguishment".[93] In the second place, the court could discern no express intent to extinguish in the 1860 Act,[94] and there was thus no claim that could be or had to be presented to the ICC.[95]

V. THE VALLES CALDERA NATIONAL PRESERVE ACTS OF 2000 AND 2014

The Tenth Circuit also had to deal with another potential issue of extinguishment that the district court had bypassed with its conclusion – now overruled – that the Jemez were barred from asserting an aboriginal rights claim by the expiration of the ICCA filing deadline.[96] That issue was possible extinguishment through, somewhat ironically, acts of preservation.

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[89] The Indian Claims Commission Act of 1946 (formerly codified at §§ 70 to 70n-2) [hereinafter ICCA].

[90] Pueblo of Jemez v. United States of America, No. 12-0800, 2013 WL 11325229, at *3 (2013), *rev'd and remanded*, 790 F.3d 1143 (10th Cir. 2015) (see *infra* notes 119-156).

[91] *See id.*

[92] *Id.* at 5.

[93] Pueblo of Jemez v. United States, 790 F.3d 1143, 1164 (10th Cir. 2015) (citing United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 345 (1941) and Johnson v. M'Intosh, 21 U.S. 543, 574 (1823)).

[94] *Pueblo of Jemez*, 790 F.3d. at 1164.

[95] *Id.* at 1168.

[96] *See id.* at 1150.

In the latter part of the 20th century, the United States rekindled its long-harbored desire[97] to purchase the Valles Caldera and add it to its holdings in the Jemez Mountains either as a National Park adjacent to highly popular Bandelier National Monument or as a part of the Santa Fe National Forest. The unified owner of the Caldera since 1963, the James Dunnigen Family, had attempted to negotiate a purchase from the 1970s on, but nothing had come to fruition because, in part, of a competition between the National Park Service and the National Forest Service over responsibility for future management. Stalemate also occurred because the legendary six-term conservative New Mexico senator Pete Domenici was opposed to any further form of federal land acquisition.[98] The other New Mexico senator was, however, Jeff Bingaman, who had long had his eye on the Baca ranch and had presented a number of unsuccessful bills to secure public ownership.[99]

The compromise emerged when President Clinton brokered a unique public-private trust concept designed to satisfy Domenici's preference for private ownership of land and free market gain-seeking, and Bingaman's belief in public preservation, recreation, and trust emblematic of the National Park system.[100]

A. The Valles Caldera Preservation Act of 2000[101]

The act mandated, in effect, a public-private partnership to achieve six diverse objectives on a sustainable basis. Management was to include

> (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.[102]

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[97] *See* DEBUYS, *supra* note 83, at 18-23.
[98] *Id.* at 19.
[99] *See* Melinda Harm Benson, *Shifting Public Land Paradigms: Lessons From the Valles Calera National Preserve*, 34 VA. ENVT'L L. J. 1, 10-11 (2016) [hereinafter Benson].
[100] *Id.* at 13.
[101] Pub. L. No. 106-248, 114 Stat. 598 (2000) (codified at 16 USC §§ 698V to 698V-10 (2012)) (repealed 2014).
[102] *Id.* at 698V-6(d), quoted and excerpted in Benson, *supra* note 99, at 13.

The preserve was to be run by an eclectic nine-member board with a wide range of experience to be appointed by the President.[103] It is significant to note that one member of the first Board of Trustees was David R. Yepa of the Jemez Pueblo.[104] It is also important that 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.[105]

The Act and its management thus seemed to preserve the cooperative relation between the Jemez and their aboriginal ceremonial practices, and the utilitarian operations of the non-Indian owners. It also seems clear that the Act is focused on economic sustainability.[106] It appears that, once again, the planners want to have it all – economic sustainability and a protected environment.[107] The Jemez aboriginal practices, which might have once included both a sustainable economy and culture, were now in a truncated form to be protected for the tribalists and also to be preserved as part of the National Park System's trust for the people as a whole.[108]

The elephant in the room for the Preserve and the continuing cooperation between the United States and the Jemez inextinguished aboriginal rights was the mandate to run a profitable ranch – one that would be self-sustaining and need no further federal subsidies.[109] The results that came forth in the Valles Caldera are a caution to green economic ideals in general, and to residual forms of aboriginal rights in cultural and religious icons that embody ideals of holism, reciprocity, and sustainability for the present and the future.

Melinda Benson points out some, perhaps inherent, reasons why public-private green partnerships may not achieve economic sustainability and may threaten vulnerable cultural resources in the attempt.[110] In a paramount sense, she feels that the government is not designed as a business and cannot expect to serve its public obligations and make a profit.[111] The government has nonremunerative duties to the public such as preservation for future generations, a wilderness of specific protective statutes such as the National Environmental Policy Act, the National Historic Preservation Act, the Wilderness Act, the Wild and Scenic Rivers Act, the Endangered Species Act – and all the regulations that implement those statutes.[112] The government also faces incessant political pressures and, on the questionable road to self-sufficiency, the need for interim funding.[113]

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[103] Benson, *supra* note 99, at 10.
[104] *See* FRAMEWORK, *supra* note 69, at 165.
[105] 114 Stat. 598, § 105(g).
[106] 114 Stat. 598, § 102(a)(8).
[107] *See generally supra* notes 1-2.
[108] *See generally* JOSEPH L. SAX, MOUNTAINS WITHOUT HANDRAILS 111-13 (1980).
[109] FRAMEWORK, *supra* note 69, at 160-162.
[110] *See* Benson, *supra* note 99, at 19-46.
[111] *Id.* at 19-25.
[112] *See id.* at 26-31 & 38-43.
[113] *Id.* at 43-46.

Beyond these issues still, the economic potential of even an untethered Caldera was slim. Grazing and timbering are marginal in many, perhaps most, of private circumstances, even when subsidized by low rent federal lands.[114] As Benson said, in an understatement, "making money is not what public lands do best."[115] This seems true with respect to multiple use lands in the National Forests and on the Bureau of Land Management property, but may be an inescapable reality for lands also designated for wilderness, recreation, and cultural preservation.

B. The Valles Caldera National Preserve Act of 2014[116]

The experiment in public-private sustainable partnerships in economics, environment, and culture came to an official end in December, 2014, with the passage of an act transferring the Valles Caldera National Preserve to the National Park System (NPS).[117] The mission of the new unit was in accord with that of NPS since early in the 20th century – "To protect, preserve and restore the fish wildlife, watershed, natural, scientific, scenic, geologic, historic, cultural, archaeological and recreational values of the area."[118]

The new act was, perhaps, even clearer as to the mission of protecting the traditional cultural and religious sites in the Caldera.[119]

> The Secretary, in consultation with Indian tribes and pueblos, shall ensure the protection of traditional cultural and religious sites in the Preserve . . . .
> The Secretary, in accordance with Public Law 95-341 (commonly known as the "American Indian Religious Freedom Act") (42 U.S.C. 1996)--
> (i) shall provide access to the sites described...by member of Indian tribes or pueblos for traditional cultural and customary uses; and
> (ii) may, on request of an Indian tribe or pueblo, temporarily close to general public use 1 or more specific areas of the

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[114] *See generally* WELFARE RANCHING: THE SUBSIDIZED DESTRUCTION OF THE AMERICAN WEST 258-306 (George Wuerthner & Mollie Matteson eds., 2002).
[115] Benson, *supra* note 99, at 43.
[116] The Valles Caldera National Preserve Act of 2014, 16 U.S.C. § 698v-11.
[117] 16 U.S.C. § 698v-11(b)(1).
[118] *Id.*; *see generally* ALFRED RUNTE, NATIONAL PARKS: THE AMERICAN EXPERIENCE 1-9 (4th ed. 2010).
[119] *See* 16 U.S.C. § 698v-11(b)(11), (13).

> Preserve to protect traditional cultural and customary uses in the area by members of the Indian tribe or pueblo.[120]

In sum, it might seem that at the end of 2014 the Jemez had a protective framework for their cultural aboriginal rights superior to either the period of coexistence with the private grantees beginning with the Baca family, or the fourteen years of statutory recognition under the original VCNP Act which sought to couple preservation and religious practice with ongoing, but ultimately futile, efforts to wring financial sustainability out of the Caldera opportunities of timbering, grazing, mining, fishing, and hunting. Why then, did the Jemez Tribe file a quiet title action against the United States in 2012, during the winding-down phase of the ill-fated public-private partnership and the refiguring of a National Park addition with a much clearer preservation mandate?

C. Pueblo of Jemez v. United States, 2013 WL 11325229 (D. Ct. Ariz. 2013)

The Pueblo of Jemez filed an action under the Quiet Title Act[121] seeking a declaratory judgment that it had continuing and exclusive aboriginal rights to the Valles Caldera. The contention of exclusivity might seem 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. In fact, exclusivity has been interpreted to mean that a tribe attempting to prove aboriginal rights had to show exclusivity vis-a-vis other tribes,[122] and not with respect to non-Indians. Such cooperation with non-Indian grantees and successors was indicative that the 1860 statutory grant to the Bacas was subject to unextinguished aboriginal rights and therefore was not absolute.[123] The Jemez claim is thus better seen as one to quiet title in an encumbrance or servitude that continued after the grant of the fee – and into the possession of the United States.[124]

Private owners might have to bear the burden of such a servitude either, under the theory of inextinguishable aboriginal rights,[125] or under the finding of a prescriptive easement under state property law.[126] The United States, however, would have to bear such servitude only as a matter of choice and could extinguish it with just compensation as a protected property interest, or without

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[120] § 698v-11(b)(11)(B).
[121] 28 U.S.C. §2409a (2018).
[122] *See* Native Village of Eyak v. Blank, 688 F.3d 619, 623-24 (9th Cir. 2012).
[123] *See* Pueblo of Jemez v. United States of America, No. 12-0800, 2013 WL 11325229, at *2 (2013), *rev'd and remanded*, 790 F.3d 1143 (10th Cir. 2015).
[124] *Id.* (holding property interest held by Defendant remains subject to Plaintiff's aboriginal title.)
[125] *See* United States v. Santa Fe Pac. R.R. Co., 314 US 339, 417 (1941).
[126] State *ex rel.* Zuni Tribe v. Platt, 730 F. Supp. 318, 319 (D. Ariz. 1900).

just compensation if found to be only unrecognized aboriginal rights.[127] What then, inspired the Jemez to bring a quiet title claim, and why did they bring it in the prelude to a national park status and mandate that might well provide more clear-cut protection than the economic focus of both the Baca ranch and the original Caldera preserve?

It is possible that the Jemez wished to establish that aboriginal rights in the cultural uses of the Caldera still existed and there was no proof of federal intent to extinguish. If such a declaration was made, the United States might have to make the politically unpopular choice of applying the despised *Tee-Hit-Ton* case,[128] or take the only slightly less problematic step of condemning the aboriginal rights with compensation for a public playground.[129] To avoid these Hobbsean choices, the United States might be moved to make a settlement: either a transfer of title to key sites like Redondo Peak[130] or a cooperative plan for management and possibly ownership. The example of the T'uf Shur Bien Preservation Area Act[131] might in fact be a model of what the Jemez could pursue. The Act settled a dispute between the Pueblo and the National Forest Service over the cultural rights of the Indians and the management of the Sandia Mountain Wilderness Area. The agreement sought to preserve and protect in perpetuity the rights and interests of the Indians and the public, as well as the character of the land.[132] In addition, another related act[133] specifically recognized Pueblo rights of access for cultural uses, rights of consultation and administration, and a right to compensation in the event of diminishment of rights by future legislation.[134] The UCPA of 2014 has aspects of the T'uf Shur Bien Act in that the Jemez and other tribes are given rights of consultation and closure to protect cultural uses.[135] It did not provide, however, the distinctive rights of co-management and compensable property interests.

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[127] *See* Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 289 (1955).

[128] *See* WALTER R. ECHO-HAWK, IN THE COURTS OF THE CONQUEROR: THE TEN WORST INDIAN LAW CASES EVER DECIDED 360-63 (2010).

[129] *See generally* ROBERT H. KELLER AND MICHAEL F. TUREK, AMERICAN INDIANS AND NATIONAL PARKS 232-40 (1998).

[130] *See generally* R.C. GORDON-MCCUTCHAN, THE TAOS INDIANS AND THE BATTLE FOR BLUE LAKES, 214-19 (1991).

[131] 16 U.S.C. § 539m-2 (2003).

[132] § 539m-2(a).

[133] § 539m-3.

[134] § 539m-3(a)(b)(c); "If by an Act of Congress enacted after February 20, 2003, Congress diminishes the national forest or wilderness designation of the Area by authorizing a use prohibited by section 539m-2(e) of this title in all or any portion of the Area, or denies the Pueblo access for any traditional or cultural use in all or any portion of the Area—(A) the United States shall compensate the Pueblo as if the Pueblo held a fee title interest in the affected portion of the Area and as though the United States had acquired such an interest by legislative exercise of the power of eminent domain." § 539m-3(c).

[135] *See supra* note 118.

The District Court did not decide if the Jemez had unextinguished aboriginal rights that continued after the United States acquisition of Baca title in 2000 and after transfer to the National Park System in 2014. Rather, the District 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 ICC within the statutory time frame. With regard to that, the Court found:

> Through the ICCA, Congress waived its sovereign immunity over any claim of aboriginal title to the subject property, but Plaintiff failed to take advantage of that waiver. In that Plaintiff did not comply with the requirements of the ICCA with respect to its claims to the lands comprising the Valles Caldera National Preserve, its claim is barred by Defendant's sovereign immunity.[136]

D. Pueblo of Jemez v. United States, *790 F.3d 1143 (Tenth Cir. 2015)*

In an exhaustive, carefully written case, Judge Stephanie Seymour of the Tenth Circuit examined the law of extinguishment in general and in particular regard to the Jemez case. She began with the long-asserted standard that extinguishment of aboriginal rights must be clear and that doubtful expressions must be resolved in favor of the tribes.[137] She then held that the 1860 Act did not have clear, unambiguous expression of federal intent to extinguish the aboriginal title of the Jemez.[138] The Baca family and heirs were therefore granted fee lands subject to the Indians' aboriginal interests, even if the New Mexico Surveyor General had concluded the land was vacant.[139]

Moreover, the Tenth Circuit found that the subsequent occupancy and use of the land by the Baca heirs and successors and the Jemez was possible – continuously and without conflict – because the nature of the respective uses was significantly different.[140] In short, the Court felt, in contrast to the District Court, that the Baca grant and subsequent cooperative usage did not result in a Jemez claim for taking that had to be submitted 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 State prior to 1946

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[136] Pueblo of Jemez v. United States of America, No. 12-0800, 2013 WL 11325229, at *5 (2013), *rev'd and remanded*, 790 F.3d 1143 (10th Cir. 2015).
[137] Pueblo of Jemez v. United States, 790 F.3d 1143, 1162 (10th Cir. 2015).
[138] *Id.* at 162-63.
[139] *Id.* at 1163-65.
[140] *Id.* at 1165.

> 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.[141]

Thus, as of 2000, the Jemez could, according to the Tenth Circuit, argue that their rights in the Caldera had existed continuously and exclusively with respect to other tribes,[142] had not been clearly extinguished by Congress, and that the tribe could bring a timely Quiet Title Act to establish the validity of their rights and that the United States was currently interfering with them, even if conjunctive, compatible usage had existed in the past.[143]

The Court noted in closing that the government contention that the UCPA of 2000 (and the UCPA of 2014) are sufficient showing of federal intent to extinguish was of no avail.

> [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."[144]

The Court remanded the case to the District Court where the next task is to determine whether the Jemez can establish aboriginal rights in fact, under the test of continuous, exclusive use since time immemorial.

> Whether the Jemez Pueblo can establish that it exercised its right of aboriginal occupancy to these lands in 1860 and thereafter is a fact question to be established on remand, where it will have the opportunity to present evidence to support its claim. To do so, it must show "actual, exclusive, and continuous use and occupancy 'for a long time' of the claimed area."[145]

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[141] *Id.* at 1171.
[142] *See supra* note 121.
[143] Pueblo of Jemez v. United States, 790 F.3d 1143, 1171-72 (10th Cir. 2015).
[144] *Id.* at 1172.
[145] *Id.* at 1165.

VI. OTHER ROUTES TO CULTURAL SUSTAINABILITY AND ITS LEGAL PROTECTION

To restate a premise of this article: true sustainability requires a cyclical, reciprocating, balanced core, such as that present for thousands of years in the aboriginal economies of the indigenous inhabitants of the Americas. Such sustainability is fundamentally incompatible with growth economics – even in a moderated form, with an emphasis on efficiency, green energy, and green jobs. Aboriginal economics have been largely extinguished by growth economics and the policies and laws attending the residual doctrines of Christian discovery.

Such growth and practice, either as an aggressive, unrepentant external force or an insidious infiltration of the young,[146] will prey on the traditional internal sustainability until it erodes or vanishes. Moreover, the present course of the industrial growth-oriented world will not work for anyone in the long run and will likely end in disaster for the people and the planet.[147]

Any hope for the future of the tribes of the world may well depend on the values[148] of deep, holistic, reciprocating sustainability. And those hopes and values can be nurtured by the preservation of the glimmering cultural remains of the traditional stable-state societies. These sacred chards, like islands in a flood of growth, can revitalize our concerns and desires for stability and balance and direct our future incremental efforts to achieve them.

The recognition and judicial declaration of residual cultural rights still held by contemporary tribes like the Jemez is one route. It is, however, a route still shrouded by the politics of growth and the power of extinguishment.[149]

There are other legislative techniques that may reflect and protect the philosophies of balance and holism, but, as noted, these too remain subject to politics and revision and are not guarantees of permanence.

A. Federal Grants of Sacred Lands

The federal government, as owner and manager of federal holdings such as National Parks, National Forests, and the unreserved public domain,[150] can and has made legislative dispositions in fee of lands sacred to a particular tribe. The summit to Kohlu-Wala-Wa and the Sacred Salt Lake were conveyed to the Zuni

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[146] *See* John Dougherty, *Problems in Paradise*, HIGH COUNTRY NEWS (May 28, 2007), http://www.hcn.org/issues/347/17026 [hereinafter Dougherty].

[147] *See* PLATO'S REVENGE, *supra* note 42, at 25-94; *see also* NAOMI KLEIN, "NO" IS NOT ENOUGH 63-185 (2017) [hereinafter "No"].

[148] *See* "No", *supra* note 147, at 240-41.

[149] *See generally* Andrew O'Reilly, *Trump's Interior Department Kicks Off Battle to Shrink National Monuments*, FOX NEWS (June 13, 2017), http://www.foxnews.com/politics/2017/06/13/trump-s-interior-department-kicks-off-battle-to-shrink-national-monuments.html.

[150] *See generally* DYAN ZASLOWSKY AND T.H. WATKINS, THESE AMERICAN LANDS (1994).

in protective trust status.[151] The Sacred Blue Lake of the Taos Pueblo and 24,000 acres of surrounding national forest were conveyed in trust to the Taos people in 1975.[152]

Less-than-fee grants amounting to easements with temporary exclusivity were made to the Zuni and Acoma people in the form of the Zuni-Acoma trail running through the El Malpais National Monument in New Mexico. The trail can, under statute, be closed to the non-tribal public in order to protect the privacy of religious ceremonies.[153] Indeed, the VCNP also conveys rights of access to tribes for traditional cultural usage and provides for temporary closure on request.[154]

Specific grants to tribes and the possibility of closure to the general public may raise the possibility of constitutional challenges under the equal protection and establishment clauses. The equal protection arguments against special treatment for Indian tribes have been at least temporarily defused under the continuing authority and reasoning of *Morton v. Mancari*,[155] which refused to apply strict scrutiny, saying that the distinct, historical treatment of the tribes flows from political relations rather than race.[156]

The Tenth Circuit suggested that closures of National Monuments to the public went beyond the accommodation of tribal religion authorized in the American Indian Religious Freedom Act,[157] and could amount to an establishment of religion prohibited by the First Amendment.[158] More recent cases from the Ninth Circuit, however, emphasize that temporary closures are not an establishment of doctrinal religion or even religious accommodation as much as legitimate federal land management designed to protect the environment and the history of a site for the public in general.[159]

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[151] *See* Zuni Indian Tribe, land conveyance, Pub. L. 98-408, 98 Stat. 1533 (1984) "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That for the purpose of securing the following described lands located in the State of Arizona, upon which the Zuni Indians depend and which the Zuni Indians have used since time immemorial for sustenance and the performance of certain religious ceremonies, the following are hereby declared to be part of the Zuni Indian Reservation."

[152] *See* Amendments of 1973 to Federal Law Relating to Explosives, Pub. L. 93-639, 88 Stat. 2217; *see also* R.C. GORDON-MCCUTCHAN, THE TAOS INDIANS AND THE BATTLE FOR BLUE LAKE (1991).

[153] 16 U.S.C. § 460uu-47(c) (2018).

[154] 16 U.S.C. § 698 (b)(11)(B)(i-ii) (2018).

[155] *See* 417 U.S. 535 (1974).

[156] *Id.* at 553-53.

[157] 42 U.S.C. § 1996 (1978).

[158] *See* Badoni v. Higginson, 638 F.2d 172, 179 (10th Cir. 1980).

[159] *See* Access Fund v. United States Dep't of Agriculture, 499 F.3d 1036, 1047 (9th Cir. 2007).

B. Procedural Protections

General federal legislation, like the National Environmental Protection Act (NEPA)[160] and the National Historic Preservation Act (NHPA),[161] requires impact analysis, consultation, and considerations of mitigation and alternatives when federal action, funding, or licensing can threaten aspects of the physical, historical, and cultural environment. Though those acts are procedural in nature,[162] they can amount to substantive protection for sacred sites from the aboriginal past. Agencies may particularize their duties under NEPA and NHPA in ways that bind agencies management protocol until or unless the regulations are formally changed. These regulations can thus afford substantive, non-legislative protection, for places like Redondo Peak in VCNP, that can include both access and closure.[163]

> As part of the Tribal Access and Use Policy established in 2004, the Trust "recognizes that the religious practices of the Pueblos and Tribes are an integral part of their Indian culture, tradition, and heritage." Like other tribes under the policy, Jemez Pueblo members have access to Redondo Peak and other sacred sites on the Preserve, including access that temporarily excludes non-members from sites as needed to conduct ceremonies and engage in other religious activities.[164]

In the case of *Muckleshoot Indian Tribe v. United States Forest Service (USFS)*[165] the tribe challenged a USFS plan to exchange public forest land containing a sacred ancestral trail for logged private lands. The Court held that the USFS had procedural duties under NEPA and NHPA to consult with the tribe, assess the impact of the exchange and explore ways to ameliorate or mitigate harmful results. These duties became substantive because the USFS regulations called for specific insurance of protection, instead of merely photography and mapping, when the Trail remains of current rather than merely historical value.[166]

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[160] 42 U.S.C. § 4331(b)(1-6) (2012).
[161] 54 U.S.C. §§ 300101-320301 (2015).
[162] *See* Stryker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227 (1980).
[163] *See* Benson, *supra* note 99, at 38-41.
[164] *Id.* at 41.
[165] 177 F.3d 800 (9th Cir. 1999).
[166] *Id.* at 807-08.

C. Incorporation of Traditional Stable-State Society Within the Boundaries of National Park Trusteeship

The grants and procedures just examined have tended to focus on aspects of traditional stable-state societies – religious shrines and the right of access to them. A step beyond this would be the incorporation of a traditional stable society as a whole – economics and land as well as cultural icons – within the boundaries of a trust-like National Park. Indeed, these occurrences, though rare, would not only protect and buffer the sustainable economics and associated cultural values, they would afford a living example of a sustainable society and its values to the visitors of the park. The park would, thus, fulfill not only its statutory trust mandate of preservation of place and culture,[167] it would also embark on its larger trust duty to the general populace which must begin a true transition to stability and which needs the nurturing of the central values to get there.[168]

1. TIMBISHA SHOSHORE

The Timbisha Shoshore have lived since time immemorial in a part of Death Valley, California that is so remote and so inhospitable in climate, land, and water that, not only did non-Indians never try to live there, but they never suspected that anyone else did either. But the Timbisha did – and exemplified the refined art of sustainability. They utilized what they could and lived lightly and successfully in a perfect balance with a nearly unforgiving land.[169]

In 1933, the United States declared Death Valley a National Monument and subsequently discovered that there was indeed a living community in the midst of the inferno. The federal attempts at removal failed and, in 1938, the Civilian Conservation Corps and the Bureau of Indian Affairs built a village for the Timbisha in their ancestral home.[170] In 1983, they were formally recognized as a tribe under administrative procedures and,[171] in 2000, President Clinton signed the Timbisha Shoshone Homeland Act,[172] which transferred 7,754 acres to the tribe with some 314 acres at Furnace Creek being within Death Valley National Park.[173] Thus, the aboriginal rights and traditional lifeways of the

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[167] *See* RONALD A. FORESTA, AMERICA'S NATIONAL PARKS AND THEIR KEEPERS, 261-87 (1985).
[168] *See* "No", *supra* note 147, at 240-41.
[169] *See Native Americans Who Found Life in Death Valley Indian Country Today*, INDIAN COUNTRY TODAY (Feb. 4, 2011), https://indiancountrymedianetwork.com/news/native-americans-who-found-life-in-death-valley/; Kim Stringfellow, *How the Timbisha Shoshone Got Their Land Back*, KCET (July 8, 2016), https://www.kcet.org/shows/artbound/timbisha-shoshone-tribe-recognition-death-valley-furnace-creek [hereinafter Stringfellow].
[170] *Id.* at 8.
[171] *Id.* at 11.
[172] Timbisha Shoshone Homeland Act Pub. L. No. 106-423, 114 Stat. 1875 (2000).
[173] Stringfellow, *supra* note 169.

Timbisha Shoshore were given the veneer of recognized title and preserved as a functioning stable-state within the protective confines of a national park. National parks are, to repeat, subject to political pressures and legal transformation, but still represent perhaps the highest commitment of our society to the preservation of place and culture.

2. HAVASUPAI

The Havasupai were, by 1300 A.D., hunter-gatherers in the highlands above the Grand Canyon in the fall and winter and subsistence agriculturalists in the side canyons in spring and summer.[174] After the Mexican War and the Treaty of Guadalupe, the arrival of white cattlemen and miners began to pressure the Havasupai land and face them into the Canyon on a more permanent basis.[175] In 1880, President Rutherford B. Hayes created, by executive order, a reservation for the Havasupai on Hauasu Creek that was reduced after two years to a mere 518 acres.[176] However, in 1974, President Gerald Ford signed an act confirming 185,000 acres in trust for the tribe.[177] This indeed approved a realistic chance to protect the economic as well as the cultural basis for a stable society imbued with the aboriginal tenets of balance, rhythm, and sustainability.

As noted before, however, a sustainable internal core remains vulnerable to external pressures. In the case of the Havasupai, the growth economy might be held at bay by the remoteness of the reservation at the bottom of the canyon, and by the preservation objectives and regulations of the Park. But the penetration of the modern culture and its impacts on the younger generation has been problematic.[178]

This raises a pervasive issue: the transfer and transition of the values of permanence and sustainability over the generations. It may well be that the protection of the cultural remnants of the aboriginal society is significant for the perpetuation of the indigenous society itself, as well as for the inspiration of the larger, dominant society struggling against its own collision with the limits of the environment.

3. BOXLEY

Boxley, Arkansas is an example of a non-indigenous society still emphasizing concepts of economy that parallel the sustainable, traditional Indian

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[174] *See generally* Douglas W. Schwartz, *Havasupai*, 10 HANDBOOK OF NORTH AMERICAN INDIANS: SOUTHWEST 13-17 (Alfonso Ortiz, Smithsonian Inst. ed., 1983).
[175] *Id.* at 15.
[176] *See* Dougherty, *supra* note 146, at 2.
[177] *See* 16 U.S.C. § 228(i) (2018).
[178] *See* Dougherty, *supra* note 146, at 5-10.

communities.[179] The creation of National Parks has often portended the elimination of such inholdings within park boundaries by means of eminent domain and the forced assimilation of the displaced people and economics into the growth milieu surrounding the park.[180] Boxley was different. The government chose to leave Boxley as a viable, sustainable community and insulate it from the internal and external threats of creeping growth and commercialism through the use of conservation easements and covenants, which can limit future uses in perpetuity.[181]

D. The Religious Freedom and Restoration Act

In 1988, the Supreme Court dealt a blow to tribal hopes that the Equal Protection Clause of the United States constitution might be used to safeguard sacred sites from the impacts of federal action, financing, or licensing. The tribes had previously argued, albeit unsuccessfully, that substantial impact on religious practice might be a basis for strict scrutiny, even without a showing of discriminatory intent.[182] Finally, they achieved what appeared to be success when the Ninth Circuit held that Forest Service plans to construct a road through an area of the Six Rivers National Forest traditionally used for religious purposes produced a substantial impact on religious practice that did not meet the strict scrutiny test of compelling interest and narrowly tailored means.[183]

The Supreme Court reversed,[184] finding that strict scrutiny was not required in the absence of a showing of intentional discrimination, coercion of belief, or penalization of the exercise of belief.[185] After the case of *Employment Division v. Smith*[186] expanded the scope of *Lynq* beyond federal land management to all neutral and generally applicable laws,[187] Congress responded with the Religious Freedom Restoration Act (RFRA),[188] which was designed to reinstate *Sherbert v. Verner*[189] and apply strict scrutiny in the event of a substantial burden on an exercise of religion, even if the burden results from a rule of general applicability.[190] RFRA, though struck down at the state level,[191]

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[179] *See* ONSR, *supra* note 23, at 34-35.
[180] ROBERT H. KELLER & MICHAEL F. TUREK, AMERICAN INDIANS AND NATIONAL PARKS, 233 (Univ. Ariz. Press, 1998); ONSR, *supra* note 23, at 26-30.
[181] *See* Joseph L. Sax, *Do Communities Have Rights – The National Parks as a Laboratory of New Ideas*, 45 U. PITT. L. REV. 499, 499-503 (1983).
[182] *See generally* Sherbert v. Verner, 374 U.S. 398, 402-09 (1963).
[183] Northwest Indian Cemetery Protective Assoc. v. Peterson, 795 F.2d 688 (9th Cir. 1986).
[184] Lyng v. Northwest Indian Cemetery Protective Assoc., 108 S. Ct. 1319 (1988).
[185] *Id.* at 1325-27.
[186] 494 U.S. 872 (1990).
[187] *Id.* at 880-84.
[188] 42 U.S.C. § 2000bb (2018).
[189] § 2000bb(b)(1).
[190] *Id.*
[191] *See* City of Boerne v. Flores, 117 S. Ct. 2157, 2170-72 (1987).

still applies on the federal level[192] and has faced a division in the circuits as far as its reach.

The Ninth Circuit has interpreted RFRA in accord with the narrow test of *Lyng*, at least in the case of sacred site claims based on federal action of federal lands. The case of *Navajo Nation v. United States Forest Service*[193] held that a forest service permittee's use of treated sewage for the making of artificial snow, and its application on the sacred San Francisco Peaks[194] did not, under the *Lyng* standard, amount to coercion of belief or penalization of religious practice.[195]

The National Park Service management of the Valles Caldera does not seem to involve the intentional discrimination, coercion, or penalization for a Free Exercise cause of action under the still viable holding in *Lyng*. Thus, the Jemez Pueblo could also be precluded under the Ninth Circuit interpretation of RFRA, which seems to use a substantial infringement test virtually the same as *Lyng*'s.[196] A District Court in the Tenth Circuit, however, has held that RFRA forged a more liberal test with respect to the sacred sites of tribes that lie on federally owned lands and are substantially impacted by the management activities of the federal government.[197] Fort Sill, Oklahoma planned construction of base facilities, which would interfere with the Comanche Tribe's sacred sight lines from the Medicine Bluffs. The District Court, using a liberal substantial infringement standard derived from the incarcerated person provisions of the Religious Land Use and Institutionalized Persons Act (RLUIPA),[198] felt that the Tribe could establish a cause of action without meeting the *Lyng* standard or the Ninth Circuit test.[199]

Under their approach, Valles Caldera management plans, which might affect Jemez access or religious practice, could have an avenue of relief. It is noteworthy, however, that a recent case, involving a tribal challenge to the impact of the Dakota Access Pipeline under RFRA, was unsuccessful because the court felt that the liberal RLUIPA standard used in *Comanche* was drawn only from the prisoner cases and is not applicable in the land management cases, which are still controlled by *Lyng* and *Navajo*.[200]

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[192] Gibson v. Babbit, 273 F.3d 1256, 1258 (2000).
[193] 535 F.3d 1058 (9th Cir. 2008); *see also* Standing Rock Sioux Tribe v. U. S. Army Corps of Eng'rs, No. 16–1534, 2017 WL 908538 F. Supp. 3d at 10-18 (D. Ct. D.C. 2017).
[194] *See* Wilson v. Block, 708 F.2d 735, 742-43 (D.C. Cir. 1983).
[195] *Navajo Nation*, 535 F.3d at 1069-77.
[196] *Id.*
[197] *See* Comanche Nation v. United States, No. CIV-08-849-D, 2008 WL 4426621 (W.D. Okla. Sept. 23, 2008).
[198] 42 U.S.C. § 2000cc-5,7 (2000).
[199] *Comanche Nation*, 2008 WL 4426621, at *3.
[200] Standing Rock Sioux Tribe v. U. S. Army Corps Eng'rs, No. 16-1534, 2017 WL 908538 F. Supp. 3d at 10-18 (D. Ct. D.C. 2017).

E. Common Law: Conservation Easements, Prescriptive Easements, and Nuisance

1. EASEMENTS

An easement of access and passage, designed to save either particular adjacent property (dominant tenement) or a segment of users without benefit (easement in gross), can afford a form of protection of sacred areas and practices that is not dependent on variable politics or legislation. Such easements can be affirmative and allow a nonexclusive but constitutionally protected usage to the holder or negative in that the holder can restrain development or inconsistent uses by the servient tenant without an accompanying right of access and use by the easement holder.[201] The modern use of the negative or conservation easement, often under special statutory authority,[202] has become a frequent and useful aspect of preservation law, and one that is accepted and even popular among easement holders as well as restricted properties.[203]

The reason that those subject to conservation easements are tolerant, and even pleased, is that such easements not only assure the continuation of vulnerable uses in a rising tide of growth or transformation, but they can provide a basis for significant monetary return. A land holder can sell or donate a conservation easement to a public entity or a not-for-profit trust and, if the easement is in perpetuity, can claim a tax deduction under the internal revenue code.[204] The use of conservation easements on threatened cultural resources has become increasingly popular and tribal and federal parties can benefit from the restraints on inconsistent development or use.[205]

Tribes can also be the beneficiaries of prescriptive easements by making open, notorious, and continuous use of a place or access route by means of long-standing native. The Zuni Indians, a tribe with aboriginal routes and stable-state practices for over 500 years, have several sacred sites that were not within their recognized land base. However, the regular pilgrimages to Kohlu-Wala-Wa, which crossed private land mixed with federal public domain, was held to afford the Zuni a prescriptive easement over the private segments under Arizona law.[206]

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[201] *See* ELIZABETH BYERS & KARIN MARCHETTI PONTE, THE CONSERVATION EASEMENT HANDBOOK 7-22 (2d ed. 2005) [hereinafter HANDBOOK].
[202] *Id.* at 10-11.
[203] *See* ONSR, *supra* note 23, at 30-32.
[204] *See* HANDBOOK, *supra* note 201, at 80-99.
[205] *See* GEORGE C. COGGINS, CHARLES F. WILKINSON, JOHN D. LESHY, ROBERT L. FISCHMAN, FEDERAL PUBLIC LAND AND RESOURCES LAW 1037-38 (7th ed. 2014) [hereinafter FEDERAL PUBLIC LAND] (presenting a portion of *Mukleshoot, supra* notes 166-67).
[206] United States *ex rel.* Zuni Tribe v. Platt, 730 F. Supp. 318, 319 (D. Ariz. 1990).

Though one cannot, in general, adversely possess federal land, there is a potential federal vehicle in the form of RS 2477. This statute, repealed in 1976,[207] was passed in 1866 to facilitate access and settlement of the unreserved public domain. It states, in its entirety, "The right of way for the construction of highways across public lands not otherwise reserved for public purposes is hereby granted."[208] Though repealed in 1976, prior rights vested by construction are preserved.[209] Construction was loosely defined and, indeed, Indian trails were often used as templates by settlers and later claimed by western cities and counties as public roads.[210] It would seem possible for Indian tribes to claim RS 2477 rights for trails that were used after 1866 and before 1976 – more certainly after 1924 – when all Indians were declared to be United States citizens.[211] No tribe appears to have brought a Quiet Title Action based on RS 2477, although, as noted, Congress partially recognized and protected the aboriginal highway between the Zuni and Acoma Pueblos.[212]

2. NUISANCE

Several tribal entities have brought common law actions in public nuisance to attempt to halt or moderate threats to sacred places or environmental stability. A public nuisance is defined as an unreasonable interference with a right common to the general public. Tribes might have standing to bring public nuisance claims as themselves, public entities threatened by the actions of an external entity, or could, perhaps more clearly, have standing as an element of the general public affected by both an unreasonable impact on the environment and, more specifically, by an impact on the cultural remnants of time immemorial aboriginal rights.[213]

The common law of public nuisance is subject to legislative preemption, thus, in *Kivalina*, any federal common law cause of action was displaced by the Clean Air Act.[214] The possibilities of actions under state common law may still exist.[215]

The Hopi Tribe, which lost their RFRA claim against the USFS for licensing a ski area's snow-making with sewage effluent on the sacred San

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[207] *See* Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-65.
[208] *See* FEDERAL PUBLIC LAND, *supra* note 205, at 360-61.
[209] *Id.*
[210] *See* Butchart v. Baker County, 166 P.3d 537, 539 (Or. Ct. App. 2007).
[211] 8 U.S.C.A. § 1401(b) (1994).
[212] 16 U.S.C. § 460.00-47(d); *see supra* note 153.
[213] *See* Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849 (9th Cir. 2012); San Geronimo Caribe Project, Inc. v. Vila, 663 F. Supp. 2d 54, 63, 882 (N.D. Cal 2009) (noted special solicitude applied to tribal culture, but felt other causative elements could not be shown).
[214] *See Native Village of Kivalina*, 696 F.3d at 858.
[215] *See, e.g.*, Little v. Louisville Gas & Elec. Co., 805 F.3d 695, 698-99 (6th Cir. 2015).

Francisco peaks,[216] brought a public nuisance action against the City of Flagstaff for providing the effluent.[217] The tribe escaped issue and claim preclusion because the nuisance action was premised on harm to the public, rather than on substantial infringement to the religious practices of the tribe.[218] However, the case was dismissed on remand by the Coconino County Superior Court, which said that the tribe had not shown that the use of reclaimed water in snow-making created an unreasonable impact on the land, plants, or the public; nor did it impact the tribe's ability to conduct its ceremonies.[219]

VII. SUBSTANTIVE DUE PROCESS, EQUAL PROTECTION, AND THE EVOLVING FEDERAL TRUST

We have, so far, explored the concept of the federal trust in two phases related to sustainability: the federal trust for recognized Indian tribes, which may include a trust for both recognized title[220] and for non-recognized, residual aboriginal rights.[221] There is also a trust for the preservation of natural, wildlife, and historic values, and the enjoyment of future generations declared with respect to national parks.[222] The first trust is essentially a common law trust[223] stemming from the Marshall cases in *Cherokee Nation v. Georgia*[224] and *Worcester v. Georgia*.[225] The second trust is a statutory declaration based on the Property Clause and the plenary power of congress over the disposition and management of the public domain.[226]

We have explored a variety of tools of law and management that may sustain and nourish the trusts, and the principles of sustainability and balance that are the core of aboriginal economy and philosophy, and the central focus for the national park lands. We have also proposed that these trusts and these principles may provide a message or even a polestar for a troubled modern society perched on the unsteady edge of unsustainable exponential growth.[227]

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[216] *See supra* note 193.
[217] Hopi Tribe v. City of Flagstaff, No. 1 CA-CV 12-0370, 2013 WL 1789859 (Ariz. Ct. App. Apr. 25, 2013).
[218] *Id.* at 6-9.
[219] *See* Katherine Locke, *Hopi Tribe Lawsuit Dismissed,* NAVAJO-HOPI OBSERVER (Aug. 23, 2016), https://www.nhonews.com/news/2016/aug/23/hopi-tribe-lawsuit-dismissed/.
[220] *See, e.g.,* United States v. Mitchell, 463 U.S. 206, 225-26 (1983).
[221] *See, e.g.,* Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 379-80 (1st Cir. 1975).
[222] 54 U.S.C. § 100101 (2014).
[223] *See* Note, *Rethinking the Trust Doctrine in Federal Indian Law*, 98 HARV. L. REV. 422, 423-34 (1984).
[224] *See generally* 30 U.S. 1 (1831).
[225] *See generally* 31 U.S. 515 (1832).
[226] *See* Kleppe v. New Mexico, 426 U.S. 529, 539-40 (1976).
[227] *See generally supra* notes 11-12.

As William Ophuls said:

> I start from the radical premise that "sustainability" as usually understood is an oxymoron. Industrial man has used the found wealth of the New World and the stocks of fossil hydrocarbons to create an antiecological *Titanic*. Making the deck chairs recyclable, feeding the boilers with biofuels, installing hybrid winches and windlasses, and every other effort to "green" the *Titanic* will ultimately fail. In the end, the ship is doomed by the laws of thermodynamics and by implacable biological and geological limits that are already beginning to bite. We shall soon be obliged to trade in the *Titanic* for a schooner—in other words, a postindustrial future that, however technologically sophisticated, resembles the preindustrial past in many important respects. This book attempts to envision the politics of that smaller, simpler, humbler vessel. [228]

These trusts for sustainable principles might go beyond the obligations to the recognized tribes of observance of aboriginal and saved rights, beyond the protection of the public park lands, and beyond even the images and messages that might be provided to an observant general public. There may indeed be trust obligations and guarantees that extend to the people of the United States as a whole—immutable promises that stem from the foundational constitutional precepts of our bill of rights. This is the possible import of the recent *Juliana* case.[229]

A. The *Juliana* Case

The *Juliana* case was handed down by the Oregon District Court on November 10, 2016, and involved an action by environmental activists too young to vote and, thus, without direct access to political recourse.[230] The plaintiffs, in association with Dr. James Hansen, sought to assert their individual rights to life, liberty, and property under substantive due process, as well as their rights and the rights of future generations to a public trust in natural resources.[231] The action sought declaratory and injunctive relief against the United States, the President, and numerous executive agencies.[232] It alleged that the defendants had known for half a century that greenhouse gases (GHG) produced by burning fossil fuels were dramatically destabilizing the atmosphere on a long-term basis and that this

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[228] PLATO'S REVENGE, *supra* note 42, at xi.
[229] Juliana v. United States, 217 F. Supp. 3d 1224 (D. Or. 2016).
[230] *See id.* at 1233.
[231] *Id.*
[232] *Id.*

would threaten catastrophic consequences for the environment, the people, future inhabitants, and sustainability.[233] The plaintiffs sought a judicial declaration that their constitutional and public trust rights had been violated and an order enjoining the defendants from their violations and mandating the development of a plan to reduce GHG emissions.[234]

The Court felt that the action, despite the general sweep of the alleged harms, was not a non-justiciable political question and that it could be caused by those with constitutional standing.[235] To demonstrate standing, under Article III of the Constitution, a plaintiff must show sufficient personal stake to warrant federal court jurisdiction and remedial power.[236] This requires a demonstration of 1) injury in fact that is concrete and actual or imminent, 2) causation by the defendant, and 3) redressability by a favorable judicial decision.[237] The court felt that the plaintiffs had alleged sufficient elements to satisfy standing, at least at the motion-to-dismiss stage of the case.[238]

The Court then found that the plaintiffs' allegations under substantive due process were to be examined under the more aggressive strict standard of scrutiny rather than the deferential rational basis test. The strict scrutiny standard applies to fundamental liberty interests and forbids governmental infringement unless the impact is narrowly tailored to serve a compelling state interest.[239] Fundamental liberty interests eliciting strict scrutiny would include rights explicitly enumerated in the constitution and non-enumerated rights "deeply rooted in the Nation's history or tradition, or fundamental to our scheme of ordered liberty."[240]

The Court felt that the right to a climate "capable of sustaining human life is fundamental to a free and ordered society . . . . [A] stable climate system is quite literally the foundation of society without which there would be neither civilization nor progress."[241]

Though the Due Process Clause does not generally impose an affirmative obligation to act on the government, there is an exception in cases where the government's conduct places a person in peril with knowing indifference to their safety.[242] The Court felt that the plaintiffs had alleged that the defendants had contributed to the impending climate crisis with full knowledge of the significant

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[233] *Id.*
[234] *Id.*
[235] *Id.* at 1241.
[236] *See* Warth v. Seldin, 422 U.S. 490, 498 (1975).
[237] *See Juliana*, 217 F. Supp. 3d at 1242.
[238] *Id.* at 1242-48.
[239] *Id.* at 1248-49.
[240] *Id.* at 1249.
[241] *Id.* at 1250.
[242] *Id.* at 1251.

and unreasonable risks, and therefore plaintiffs had a sufficient basis for a substantive due process challenge.[243]

The plaintiffs also alleged a federal violation of the public trust and posited that, despite Congressional discretion under the Property Clause,[244] there are aspects of the public trust that are obligatory and cannot be legislated away.[245] Some aspects of the public trust predate the Constitution as matters of common law and are in turn secured by the Constitution.[246] Thus, the federal government may have obligations as a public trustee that are secured to the beneficiaries by the Due Process Clause.

> Although the public trust predates the Constitution, plaintiffs' right of action to enforce the government's obligations as trustee arises from the Constitution. . . . Plaintiff's public trust claims are properly categorized as substantive due process claims. As explained, the Due Process Clause's substantive component safeguards fundamental rights that are "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition"[247]

In short, the plaintiffs convinced the Court that the right to a climate system capable of sustaining human life was a fundamental personal liberty protected by the Due Process Clause,[248] and also that the government had obligations as a trustee for "essential public resources . . . necessary to provide for the well-being and survival of its citizens."[249] Both facets of interest warrant a stricter scrutiny of means and ends and both facets can be raised by individual plaintiffs in accord with protections under the Due Process Clause.

The Court felt that the public trust doctrine, as a facet of fundamental individual interest under the Due Process Clause, called for three types of restrictions on governmental authority.

> [F]irst, the property subject to the trust must not only be for a public purpose, but it must be held available for use by the general public; second, the property may not be sold, even for a fair cash equivalent; and third, the property must be maintained for particular types of uses.[250]

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[243] *Id.* at 1251-52.
[244] *See* Kleppe v. New Mexico, 426 U.S. 529 (1976).
[245] *Juliana*, 217 F. Supp. 3d at 1260.
[246] *Id.* at 1260-61.
[247] *Id.* at 1261.
[248] *Id.* at 1250.
[249] *Id.* at 1253.
[250] *Id.* at 1254 (citing Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law Effective*

The plaintiffs alleged that the scope of the constitutionally protected trust included the "atmosphere, water, seas, seashores and wildlife."[251] The Court felt it was unnecessary to determine whether the atmosphere was a public trust asset because the Plaintiffs had alleged violations of the public trust doctrine in connection with the territorial sea[252]—and the Court agreed with this.

The Defendants argued that language in several Supreme Court cases, most recently *PPL Montana, LLC v. Montana*,[253] stated that "public trust doctrine remains a matter of state law."[254] The District Court in *Juliana* said:

> Defendants and intervenors take the phrase "the public trust doctrine remains a matter of state law," and interpret it in isolation to foreclose all federal public trust claims. That is not a plausible interpretation of *PPL Montana*. The Court was simply stating that federal law, not state law, determined whether Montana has title to the riverbeds, and that if Montana had title, state law would define the scope of Montana's public trust obligations. *PPL Montana* said nothing at all about the viability of federal public trust claims with respect to federally-owned trust assets.[255]

The Court felt that the issue of a public trust in federal waters was not refuted either by the dicta from *PPL Montana*, by the dicta from *Kleppe v. New Mexico*,[256] which stated that Congress held power under the Property Clause "without limitations,"[257] or by the passage of environmental protection legislation, such as the Clean Air Act and Clean Water Act, under the authority of the Commerce Clause.[258] Rather, the public trust imposes an obligation of protection that cannot be legislated away.[259]

It might be possible, in future litigation, to expand the scope of the protectable trust. It seems possible – and appropriate – to consider a federal public trust in the atmosphere. In the Supreme Court case of *United States v. Causby*,[260] Congress had, in the Air and Commerce Act of 1938,[261] declared the

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Judicial Intervention, 68 MICH. L. REV. 471, 477 (1970)) (also citing Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452-53 (1892)); MARY C. WOOD, A NATURE'S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE 167-75 (2014).

[251] *Juliana*, 217 F. Supp. at 1255.

[252] *Id.*

[253] 565 U.S. 576 (2012) (cited in *Juliana*, 217 F. Supp. 3d at 1256-57).

[254] *Id.* at 601.

[255] *Juliana*, 217 F. Supp. 3d at 1257.

[256] *See* Kleppe v. New Mexico, 426 U.S. 529 (1976).

[257] *Id.* at 539 (cited in *Juliana*, 217 F. Supp. 3d at 1259).

[258] *Juliana*, 217 F. Supp. 3d at 1259.

[259] *Id.* at 1260.

[260] United States v. Causby, 328 U.S. 256 (1946).

navigable airspace, above the immediate reaches of ground activities, to be in the public domain.[262] The Court had declared in earlier cases that public domain lands were held in trust for the people.[263] The declaration of trust would seemingly apply to the public domain of fugacious air and atmosphere water, which are the most critical elements to life on the lands.

In addition, one might note, as did the Court in *Juliana*, that the states do not hold their lands and waters free and clear of all trust responsibility.[264] Indeed, this was a basis for *Illinois Central*, [265] which held that,

> The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.[266]

The dicta in subsequent cases, that the law of trust management is necessarily a matter of state law,[267] can best be seen as relating to the ability to make particularizations of nuance; it does *not* suggest an ability to abdicate sovereign responsibilities which, instead, continue on after statehood.[268] Indeed, lower courts have held that when the federal government requires state lands such as bedlands of navigable waters, it takes the land free of state trust law, but not free of trust obligation, which reattaches as a federal responsibility.[269]

In sum, the District Court in *Juliana* concluded that both the federal government and the state are bound by public trust obligations with respect to bedlands, and that these obligations may be asserted under the Due Process Clauses of the Fifth and Fourteenth Amendments.[270] The states have sovereign obligations with respect to the bedlands under navigable waters and the federal government has duties with respect to the bedlands of the territorial waters.[271] With respect to the plaintiffs' particular allegations in the case, they stated a valid

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[261] 49 U.S.C. § 180, cited at 328 U.S., at 263.
[262] *Causby*, 328 U.S. at 263.
[263] United States v. Trinidad Coal and Coking Co., 137 U.S. 160, 170 (1890); Light v. United States, 220 U.S. 523, 537 (1911).
[264] *Juliana*, 217 F. Supp. 3d at 1259.
[265] Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892).
[266] *Id.* at 453.
[267] *See Juliana*, 217 F. Supp. 3d at 1257.
[268] *See id.* at 1258-59; *see* Defenders of Wildlife v. Hull 199 Ariz. 411, 418-20 (Ct. App. Ariz. 2004) (holding state's attempt to disclaim public trust in bedlands of navigable waters was invalid); *see also* Ariz. Ctr. for Law in Pub. Interest v. Hassell, 172 Ariz. 356, 366 (Ct. App. Ariz. 1991) ("From *Illinois Central*, we derive the proposition that the state's responsibility to administer its watercourse lands for the public benefit is an inabrogable attribute of statehood itself.").
[269] *See* United States v. 1.58 Acres of Land, 523 F. Supp. 120, 124-25 (D. Mass. 1981).
[270] *See Juliana*, 217 F. Supp. 3d at 1261.
[271] *Id.* at 1255-57.

claim against the federal government. The federal government, like the states, holds public assets—at a minimum, the territorial seas—in trust for the people. Plaintiffs' federal public trust claims are cognizable in federal court.[272]

B. The Mandamus Action

The impact of *Juliana* may be blunted – at least in the short term and possibly beyond – by the response of the United States defendants. On June 9, 2017, the Department of Justice (DOJ) filed a mandamus petition with the Ninth Circuit Court of Appeals asking for a dismissal of the action.[273] The DOJ argued that the plaintiffs had not sufficiently alleged the essential standing elements of harm, causation, and redressability; that there was no constitutionally protectable right, fundamental or otherwise, in a stable, sustainable climate; and that there was no actionable public trust claim against the federal government.[274]

Andrew Varoe argues that the rare mandamus petition is not only warranted, but also strengthened by a separation of powers issue that cannot be waived by the parties and must be observed as jurisdictional even if not mentioned in the case or petition.[275] Professor Douglas Kysar, however, responds that the separation of powers argument misstates the plaintiffs' claim, which is that the government has a constitutional responsibility not merely a political choice.[276]

> The confusion here stems from the fact that the plaintiffs are not asking the court to order the government to solve climate change. Even if every other nation in the world expressly declared that they would continue emitting greenhouse gases, planet be damned, the *Juliana* plaintiffs would still have an

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[272] *Id.* at 1259.

[273] *See In re* United States of America, et al, Petitioners v. United States District Court for the District of Oregons and Kelsey Cascadia Rose Juliana, et al, Petition for a Writ of Mandamus In Case No. 6:15-cv-01517-TC-AA (D. Or.) (June 9, 2017) [hereinafter Petition].

[274] *Id.* at 11-31. "On March 7, 2018, The Ninth Circuit Court of Appeals denied the petition without prejudice."

[275] Andrew R. Varie, *Op Ed: Will the Ninth Circuit Rein in What Might Be 'the Most Important Lawsuit on the Planet'?*, THE RECORDER (June 20, 2017), http://www.therecorder.com/id=1202790666242/OpEd-Will-the-Ninth-Circuit-Rein-in-What-Might-Be-the-Most-Important-Lawsuit-on-the-Planet-?slreturn=20170813043527 [hereinafter Varie].

[276] Douglas A. Kysar, *Op-Ed Response: In 'the Most Important Lawsuit on the Planet,' Who Exactly Should the Ninth Circuit Rein In?*, THE RECORDER (June 23, 2017), http://www.dailyreportonline.com/id=1202791177586/OpEd-Response-In-the-Most-Important-Lawsuit-on-the-Planet-Who-Exactly-Should-the-Ninth-Circuit-Rein-In?mcode=1202617583589&curindex=6&curpage=2&slreturn=20170813044043 [hereinafter Kysar].

> interest—indeed, a fundamental right—not to have the federal government materially contribute to that demise in their name.

Kysar pointed to some international precedents that support the nature of the *Juliana* actions.[277]

C. International Precedent

The Dutch District Court in the Hagre, on June 24, 2015, handed down a historic judgment in *Urgenda Foundation v. The State of the Netherlands*, the first successful climate change action based on tort principles.[278] The Court, relying on the common law tort of negligence and on international principles of "no harm," concluded that the government had a duty to mitigate the impacts of climate change that transcended international agreements.[279] The duty was set by the Court in accordance with the latest science rather than the less restrictive text of formal accords, and was keyed to proportionate emissions rather than overall necessity.[280] The Court reasoned that individual state leadership, even if seemingly futile in view of the global threat, might inspire an upward arc by the world community.[281]

This, indeed, seems to be emerging on a number of fronts as courts in Austria, Pakistan, Colombia, and Nigeria have recently followed the leads of *Juliana* and *Urgenda* and found constitutional bases for defending against some of the risks of climate destabilization.[282] In fact, following the Stockholm Declaration of 1972, which recognized a fundamental right to "an environment of a quality that permits a life of dignity and well-being" and a "solemn responsibility to protect and improve the environment for present and future generations,"[283] some 177 out of 193 members of the United Nations have

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[277] *Id.* at 3.

[278] *See* Roger Cox, *A Climate Change Litigation Precedent: Urgenda Foundation v. The State of the Netherlands*, CTR. FOR INT'L GOVERNANCE INNOVATION 1 (2015) [hereinafter Cox].

[279] Sophie Schiettekatte, *The Urgenda Case - Building a Bridge between Science and Politics*, LEIDEN LAW 4 (Nov. 20, 2016), https://ssrn.com/abstract=2963693 [hereinafter Urgenda]. The Court was supported by the Oslo principles of 2015, which set out the nature of legal obligations to reduce GHG's on a local level. *Id.* at 2.

[280] *See* Kysar, *supra* note 276, at 3.

[281] *Id.*

[282] *See* Michael Burger, *The Battle Against Trump's Assault on Climate is Moving to the Courts*, YALE ENVIRONMENT 360 (May 2, 2017), https://e360.yale.edu/features/stopping-trump-the-battle-to-thwart-the-assault-on-climate-moves-to-the-courts [hereinafter Burger].

[283] *See* David Boyd, *The Constitutional Right to a Healthy Environment*, ENV'T (July-Aug. 2012) http://www.environmentmagazine.org/Archives/Back%20Issues/2012/July-August%202012/constitutional-rights-full.html.

recognized these rights and duties in their basic documents[284] and 92 countries have provisions in their constitutions.[285]

D. Backlash

The United States, Canada, Australia, New Zealand, and China are among the holdouts, generally on the supposition that such rights and duties would threaten the course of growth economics.[286] Indeed, the Trump Administration has heralded a sweeping push back against environmental regulations, the concepts of sustainability and plaintiffs such as in *Juliana* wielding sweeping, but potentially hortatory, constitutional claims of right and duty.[287]

"A little more than 100 days into his administration, President Donald J. Trump began to roll out his potentially disastrous environmental agenda. His assault on former President Barack Obama's legacy on climate change and energy, carried out largely through a flurry of executive orders, represents nothing less than a plan to dismantle federal climate regulation in the United States, promote the unfettered use of fossil fuels, and leave Americans fundamentally unprepared to deal with the inevitable impacts of climate change."[288]

The reasons for this rampage? Trump apparently wishes to eradicate the legacies of his loathed predecessor, Obama, including proclamations of National Monuments like Bear Ears,[289] "job killing" environmental rules on water and air,[290] and "eight years of hell" that had confined the country's "vast energy wealth" and precluded a "new era of energy dominance."[291]

To put the pretensions and aspirations of the Trump administration into a context of environmental reality, one can find no more incisive, trenchant explanation than William Ophuls's new work, *Immoderate Greatness: Why Civilizations Fail*.[292] Ophuls has restated his classic text, *Ecology and the Politics*

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[284] *Id.*

[285] *Id.*

[286] *See id.*; *see also* Burger, *supra* note 282.

[287] *See* Burger, *supra* note 282.

[288] *Id*; *See generally* Oliver Milman, *Trump's Alarming Environmental Rollback: What's Been Scrapped So Far*, THE GUARDIAN (July 4, 2017) [hereinafter Milman]; Jeff Godell, *Scott Pruitt's Crimes Against Nature*, ROLLING STONE 44-51 (Aug. 10, 2017).

[289] Stephan Nash, *Heated Politics, Precious Ruins*, N.Y. TIMES (July 30, 2017), https://www.nytimes.com/2017/07/25/travel/bears-ears-utah-politics-trump-national-monument.html).

[290] Milman, *supra* note 288, at 3-5.

[291] Mark Hand, *Trump's Road to 'Energy Dominance' Excludes Clean Energy*, THINK PROGRESS (June 29, 2017), https://thinkprogress.org/trump-announces-new-energy-actions-951a5fb20099/.

[292] WILLIAM OPHULS, IMMODERATE GREATNESS: WHY CIVILIZATIONS FAIL (2012) [hereinafter IMMODERATE GREATNESS].

of Scarcity,[293] briefly, without uncertainty, and without sugar-coating, the central biophysical restraints that bind all civilizations and portend inevitable failure for those that ignore them. The first chapter, titled "Ecological Exhaustion",[294] observes that all aggregated, urban civilizations live by parasitic exploitation of surrounding and far-flung resources and natural capital, and that "history is littered with corpses of civilizations that lived beyond their economic means."[295]

In Chapter Two, he explores the grim accelerator of exponential growth in both population and resource consumption.[296] A growth that increases by a steady, ongoing proportion to what is already there will prove "both insidious and explosive" and will, in a tsunami-like wave, "overwhelm . . . ."[297] Most who aim at annual growth of four percent a year do not fully realize, and do not prepare for, the fact that such a rate will double the extractive impact on declining resources every twenty years.[298]

The next chapter emphasizes the inescapability of the laws of thermodynamics whereby the transformation of matter and energy always results in inefficient, irreplaceable degradation of potential. The more production and consumption, the greater the entropic price.[299] The only way to delay the inevitable implosion of civilization into an inertia of inescapable high entropic waste is to minimize the conversion of precious, low-entropy, fossil fuel capital and limit human consumption to the income flows of renewable resources like wind, water, gravity, and sunlight.[300]

Another chapter explains the excessive complexity that accompanies the transcendence of natural rhythms and evolution. This not only vastly increases the problems of management and administration,[301] but produces unforeseen consequences that dwarf the original goals. For instance, the technological race to lengthen lifespan and replace labor with machinery may create almost incalculable problems of economy, politics, and social functioning.[302]

Because of modern civilization's hubris and momentum, Ophuls is deeply pessimistic. Yet, he suggests a possibility, in line with *Juliana*.

> This alternative, which could not be imposed but would have to emerge slowly and organically, should allow humans to thrive in

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[293] WILLIAM OPHULS, *supra* note 15.
[294] *See* IMMODERATE GREATNESS, *supra* note 292, at 7-12.
[295] *Id.* at 12.
[296] *See id.* at 13.
[297] *Id.* at 16.
[298] *See id.* at 13-14.
[299] *Id.* at 29.
[300] *Id.*
[301] *Id.* at 36-41.
[302] *See, e.g.*, Victor Luckerson, *5 Very Smart People Who Think Artificial Intelligence Could Bring the Apocalypse*, TIME.COM (Dec. 2, 2014), http://time.com/3614349/artificial-intelligence-singularity-stephen-hawking-elon-musk/.

> reasonable numbers on a limited planet for millennia to come. But it would require a fundamental change in the ethos of civilization—to wit, the deliberate renunciation of greatness in favor of simplicity, frugality, and fraternity. For the pursuit of greatness is always a manifestation of hubris, and hubris is always punished by nemesis. Whether human beings are capable of such sagacity and self-restraint is a question only the future can answer. [303]

This suggestion begets a conclusion—both for Ophuls[304] and for this article.

VIII. CONCLUSION

Grant Gilmore wrote that "law reflects but in no sense determines the moral worth of a society . . . the function of law . . . is to provide a mechanism for the settlement of disputes in the light of broadly conceived principles on whose soundness . . . there is a general consensus . . . ."[305]

In essence, every society gets the law it deserves.[306] In another sense, this means that values are the precursor of the law and that consensus must not only be present at the initiation of law, it must continue for the law to be sustained.[307] William Ophuls recently wrote,

> [S]ociety is constituted by its mores—that is, by its customs, usages, and values, particularly those related to morality and good behavior. Thus the idea of a value-free or antinomian society is a contradiction in terms. Unless the population by and large conforms to established moral norms, a society will simply fly apart. In the end, mores determine the character of the polity.[308]

The growth societies, their deep-set values in profits, free markets, competition, and individualism are colliding with the finite limits of the biophysical world and a new consensus may be necessary to preclude – or

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[303] IMMODERATE GREATNESS, *supra* note 292, at 69; *see also* PLATO'S REVENGE, *supra* note 42, at 129-63.

[304] *See generally* WILLIAM OPHULS, SANE POLITY (2012) [hereinafter SANE POLITY].

[305] GRANT GILMORE, THE AGES OF AMERICAN LAW 109-10 (1977).

[306] Joseph de Maistre, "Letter 76" (Aug 27, 1811), https://en.wikiquote.org/wiki/Joseph_de_Maistre; *see also id.* at 109-10.

[307] GILMORE, *supra* note 305, at 109-10.

[308] *See* SANE POLITY, *supra* note 304, at 9.

rebuild – a disastrous overshoot.[309] Can the primary values and subsequent laws for a sustainable society be found and embraced? As this article has stressed, it is possible – and it has been accomplished.

The original inhabitants of North America generally maintained sustainable societies at the time of European discovery. The Tribes fundamentally believed in rhythm, balance, reciprocity, and non-linear, timeless continuity,[310] but the aggressive invaders and their pursuit of exponential growth and technological dominance shattered the land base for their sustainable economies.[311]

Yet the philosophies, values and beliefs in permanence and sustainability remained among the traditional peoples.[312] These fundamental moves[313] are held internally and are commemorated at the sacred sites and in the timeless ceremonies at places like Redondo Peak in Valles Calderra.[314] They are protected for the tribal people by a variety of perhaps incomplete techniques: transfers of land interests, principles of property and tort law, and protection of religious practice from coercion and significant influence.[315] They are also embraced in a derivative and collective sense by the trust for national parks and the general federal obligation to protect and preserve the resources for present and future enjoyment.[316] The public trust, as noted, is a vehicle expansive enough to move beyond legislative declaration and include a constitutional basis for sustainability itself. This could place this fundamental value in the heat of the general society where it would induce the laws to confirm and support it.[317] Though this later transition is by far the more difficult, and may not emerge without a prior collapse,[318] it might not be premature to articulate, as a summation, some of the more ephemeral, less linear aspects of a central sustainability.

Ophuls states that several patterns are critical. One is that nature must be the measure:

> Ecology precedes humanity. Hence nature is the measure of all things. The famous assertion of Protagoras to the contrary is simply wrong on its face: man is an animal who owes his very existence to nature. The human race is the product of eons of evolution and is inescapably intertwined with the natural world—not separate from it, and certainly not above it. Polity,

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[309] *See* IMMODERATE GREATNESS, *supra* note 292, at 68-69.
[310] *See generally supra* notes 16-28.
[311] *See generally supra* notes 29-41.
[312] *See* Getches, *supra* note 25.
[313] *See* SANE POLITY, *supra* note 304, at 8-12.
[314] *See generally supra* notes 116-120.
[315] *See, e.g., supra* notes 148-217.
[316] *See, e.g., supra* notes 218-270.
[317] *See, e.g., supra* notes 303-307.
[318] *See* IMMODERATE GREATNESS, *supra* note 292, at 68.

> society, economy, and every other aspect of human culture depend totally on the benefits and resources provided by nature. In the end, humanity must tailor the garment of civilization to the measure of ecology.
>
> *Homo sapiens* is a clever, generalist species. Human beings have therefore been able to manipulate the natural world largely to their advantage, especially during the last three centuries. But the castle of human wealth and power rests on an ecological foundation. Humanity must therefore comply with the basic laws of nature that govern the biological world.
>
> To be specific, humankind cannot dump waste products into the environment faster than nature can digest them, use renewable resources faster than nature can replenish them, or consume nonrenewable resources as if they were infinite instead of finite. In other words, humanity cannot both overspend natural income and invade or damage the natural capital that provides the income. Nor can it survive, much less thrive, unless it conforms to natural imperatives and adjusts its social and economic ends to accommodate its ecological means.[319]

Ophuls also suggests political and economic principles that parallel ecology and the laws of thermodynamics on the road to sustainability. He states that individualism must yield to the needs of the community,[320] and that a rough equality and a constraint on free market competition are essential.[321] He says, under current capitalism "economic actors are constantly tempted to cut corners, if not commit fraud . . . ." and compete in "a race to the bottom."[322]

Walter Collins O'Kane, in describing the sustainable state of the traditional Hopi, said,

> Their civilization is successful. Rarely has it indulged in discord. Not only does it provide for each individual a full opportunity for growth, according to his capabilities, but also it stimulates in him the right kind of growth. It teaches him that only as his thoughts and desires are in accord with those of his fellows can his community lead a happy and satisfactory life. A federal administrator came to the conclusion that the Hopis achieve democracy without any of the forms and procedures which are supposed to be essential to democracy.[323]

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[319] SANE POLITY, *supra* note 304, at 5.
[320] *Id.* at 7-8.
[321] *Id.* at 61-63.
[322] *Id.* at 84.
[323] WALTER COLLINS O'KANE, SUN IN THE SKY 236 (1950).

Laura Thompson and Alice Joseph point to several related precepts at the heart of the Hopi sustainable society. One is a view of time, life, and ceremony as cyclical, rather than linear.[324] Another posits reciprocal, interdependent relationships between all the phenomena – living, dead, natural, and supernatural – that exist in the universe.[325] Finally, they note the principle of balance without division, duality, or the subordination of correlates.[326]

Alan McGlashan subsumes all these predicates into the universal force of rhythm – the diametric antidote to linear measures like growth,[327] and the endless harmonious interplay of opposites.[328] He says, "Rhythm, which is the cradle of Being, is itself the supreme paradox. It is the never-resting resting-point at the non-existing centre of existence."[329]

But, as we have noted, the journey back to such principles, as a collective endeavor, is likely to be long, rough, and uncertain. Still, we will try. With sustainability as our target, we will proceed by increments and, like Sisyphus, we might be happy along the way.[330] The tribal people carry the light of sustainability within their aboriginal practices, in their timeless ceremonies and at their sacred places. We can observe and protect these with reverence with understanding and perhaps with hope. In conclusion, Cormac McCarthy's famous concluding allegory from his novel, *No Country for Old Men*,

> [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

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[324] THOMPSON & JOSEPH, *supra* note 18, at 40-44.
[325] *Id.* at 37.
[326] *Id.* at 44.
[327] ALAN MCGLASHAN, GRAVITY AND LEVITY 125 (1976).
[328] *Id.* at 136.
[329] *Id.* at 137.
[330] ALBERT CAMUS, THE MYTH OF SISYPHUS, AND OTHER ESSAYS 1-123 (1991). "I leave Sisyphus at the foot of the mountain! One always finds one's burdens again. But Sisyphus teaches the higher fidelity that negates the gods and raises rocks. He, too, concludes that all is well. This universe henceforth without a master seems to him neither sterile nor futile. Each atom of that stone, each mineral flake of that night-filled mountain in itself forms a world. The struggle itself toward the heights is enough to fill a man's heart. One must imagine Sisyphus happy."

> all that cold and I knew that whenever I got there he would be there. And then I woke up.[331]

The tribes, the elders, the children, the unborn, the natural species, and the lovers of the sacred places, under dire threats to the survival of life, land, and future, are led through the darkness by a luminous crucible of sustainability. It comprises the brilliance and legacy of the ancient and enduring continuity, the fabric of community within and with the land, and the promise of eternity. It is carried with reverence and, because it is fragile, though strong – a gossamer web of all existence – it is protected by its acolyte guardians, both Indian and non-Indian, along its timeless course. This journey can be joined by all that listen and that can see. It can overcome, and as Vine Deloria said for all tribalists, "We will survive because we are a people unified by our humanity."[332]

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[331] CORMACK MCCARTHY, NO COUNTRY FOR OLD MEN 309 (2005).

[332] *See* Charles Wilkinson, *Vine Deloria, Jr.: Writer, Scholar and Inspired Trickster*, HIGH COUNTRY NEWS (Dec. 12, 2005) (citing VINE DELORIA JR., CUSTER DIED FOR YOUR SINS, 224 (1969)). Deloria, my classmate at Colorado Law, also wrote, "Tribalism is the strongest force at work in the world today." *Id.* at 263.