TRIBES AS TRUSTEES AGAIN (PART I): THE EMERGING TRIBAL ROLE IN THE CONSERVATION TRUST MOVEMENT*

Mary Christina Wood**
Zachary Welcker***

> History suggests that if mankind is to survive, the next five hundred years must be rooted in the pre-Columbian ethic of the Native American. The second American quincentenary belongs to the Indian. The continuation of the past, the conqueror's exploitation of the earth, can mean only one thing. No one, Indian or non-Indian, will survive.[1]
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> —Rennard Strickland
> Professor Emeritus, University of Oregon School of Law

I. INTRODUCTION

Until the most recent blink of human time, Indian tribes exercised territorial sovereignty over nearly all of the land on this continent — two billion acres. Nature was abundant and, for the most part, in a state of remarkable balance. Most tribes affirmatively managed resources to maintain a sustainable existence. Tribes of the Pacific Northwest, for example, managed a sus-

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** Philip H. Knight Professor of Law, Wayne Morse Center for Law and Politics Resident Scholar (2006-07), Luvaas Faculty Fellow (2007-08), and Faculty Leader of the Native Environmental Sovereignty Project and the Conservation Trust Project, University of Oregon School of Law. I am grateful to Margaret Hallock and Elizabeth Weber of the Wayne Morse Center for Law and Politics for all of their assistance during this project and to the Center itself for the generous research grant that supported this work.

*** J.D. University of Oregon School of Law, 2008; Fellow, Wayne Morse Center for Law and Politics; Executive Editor, Journal of Environmental Law and Litigation.

[1] Wayne Morse Center for Law and Politics, Indigenous Theme of Inquiry, Memorial Placard (June 2007).

tainable harvest of salmon that lasted for at least 10,000 years prior to the arrival of Lewis and Clark.[2] Though tribes did not describe their laws in Western legal terms, their governing sovereign mandate was essentially a trust concept. Native peoples' understanding of their traditional role as stewards of the land — a gift from the Creator — was that the Earth should be protected in perpetuity for the sake of future generations.

The occupation of indigenous America reduced tribal lands to four percent of aboriginal territory,[3] and tribal jurisdiction receded along with the retreating boundaries. Authority over Nature's Trust — the land and resources on this continent — accordingly became vested in a new set of trustees: federal and state governments. These new sovereigns had little or no experience managing natural resources. The premise of their management philosophy has been exploitation rather than conservation,[4] and they accordingly opened Native territorial lands to consumption by private interests. A philosophy more diametrically opposed to Native peoples' stewardship can hardly be imagined.

The natural and cultural losses at the hands of these new sovereign trustees have been staggering. In just the last 150 years, pollution, ecosystem fragmentation, deforestation, desertification, and sprawling urbanization have accelerated dramatically and bankrupted the natural trust sustained by tribes for millennia. As a result, biological diversity, species and habitat integrity, and cultural landscapes have been severely diminished. On nearly every scale, resources are so thoroughly affected and diminished that they are headed toward collapse.[5] Federal and state trustees continue to permit damage to Nature's Trust on a daily basis through a complex system of environmental statutes.[6] Such practices also fuel global climate change, a looming catastrophe threatening the future of all humanity.[7]

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[2] See Letter from Donald Sampson, Chairman, Confederated Tribes of the Umatilla Reservation, to William J. Clinton, President of the United States 1 (Mar. 15, 1995) (on file with the Harvard Environmental Law Review).

[3] WINONA LADUKE, RECOVERING THE SACRED: THE POWER OF NAMING AND CLAIMING 4 (2005).

[4] See generally JOSEPH M. PETULLA, AMERICAN ENVIRONMENTAL HISTORY: THE EXPLOITATION AND CONSERVATION OF NATURAL RESOURCES (1977).

[5] See REED NOSS ET AL., ENDANGERED ECOSYSTEMS OF THE UNITED STATES: A PRELIMINARY ASSESSMENT OF LOSS AND DEGRADATION, Appendix A (1995), available at http://biology.usgs.gov/pubs/ecosys.htm. The United States has lost over fifty-three percent of its wetlands in the lower forty-eight states as well as ninety percent of its old-growth forests. Ninety-eight percent of an estimated 5.2 million kilometers of streams are too polluted to qualify as federally designated wild and scenic rivers. Eighty-one percent of fish communities are threatened by human behavior. Regional ecosystems are suffering staggering losses in biodiversity.

[6] The Clean Water Act, for example, enables the U.S. Environmental Protection Agency ("EPA") to issue permits to pollute even though the Act's original goal was to eliminate discharges of pollution into navigable waterways by 1985. See 33 U.S.C. §§ 1342(b)(1)(B), 1251(a)(1) (2000).

[7] See AL GORE, THE ASSAULT ON REASON 203 (2007) ("[I]ndeed, the future of all human civilization . . . is hanging in the balance [of climate crisis]."); Mary Christina Wood, Nature's Trust: A Legal, Political, and Moral Frame for Global Warming, 34 B.C. ENVTL. AFF. L. REV.

The impoverishment of nature affects every American citizen, but it poses particularly severe threats to Native America because tribal populations today are not mobile. Sovereignty and culture are tied to a fixed, remnant land base. Environmental damage originating outside of reservations jeopardizes traditional economies, cultural ways of life, and the health of tribal citizens.[8] Winona LaDuke states: "At stake is nothing less than the ecological integrity of the land base and the physical and social health of Native Americans throughout the continent."[9] To secure their future, tribes must develop ways of protecting off-reservation resources. Though tribes are creating programs that position them to engage in off-reservation management, they have not located the legal mechanisms necessary to assert their environmental will in any substantive sense.[10] The necessity of doing so is part of an ongoing "blood struggle" tribes have waged since the time of white contact.[11]

A re-emergent tribal trust role over aboriginal lands is particularly timely due to a stark commonality shared between Native America and majority society — the need to secure natural systems necessary for human survival. Global climate change is already stressing natural ecosystems through drought, wildfire, flooding, heat waves, extinctions, collapsing food chains, hurricanes, pests, and disease.[12] Faced with this eroding natural infrastructure, survival resources carry a premium. The future of all people therefore hinges on sound care of remaining natural capital. By reclaiming a significant degree of sovereignty over natural lands, tribes can help arrest the hemorrhaging of natural systems brought about by federal and state trustee mismanagement of these assets.[13]

577, 587 (2007) [hereinafter Wood, Nature's Trust] (citing former British Prime Minister Tony Blair's statement that the climate change "disaster is not set to happen in some science fiction future many years ahead, but in our lifetime."). Americans are directly responsible for twenty-five percent of the world's carbon emissions. Jim Hansen, The Threat to the Planet, N.Y. REV. BOOKS, July 13, 2006, at 12.

[8] See Dean B. Suagee, The Cultural Heritage of American Indian Tribes and the Preservation of Biological Diversity, 31 ARIZ. ST. L.J. 483, 516-18, 523-31 (1999); Mary Christina Wood, The Tribal Property Right to Wildlife Capital (Part I): Applying Principles of Sovereignty to Protect Imperiled Wildlife Populations, 37 IDAHO L. REV. 1, 2-8 (2000) [hereinafter Wood, Wildlife Capital I].

[9] LADUKE, supra note 3, at 11.

[10] For discussion of tribal management initiatives, see JAN G. LAITOS, SANDRA B. ZELLMER, MARY C. WOOD & DANIEL H. COLE, NATURAL RESOURCES LAW 596-603 (2006). Tribes often use litigation to protect resources, but the effort is protracted and the outcome uncertain. See generally Mary Christina Wood, Restoring the Abundant Trust: Tribal Litigation in Pacific Northwest Salmon Recovery, 36 ENVTL. L. REP. 10163 (2007) [hereinafter Wood, Abundant Trust].

[11] CHARLES F. WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS, at ix-xvi (2005) [hereinafter WILKINSON, BLOOD STRUGGLE]. Blood struggle refers to tribes' fight to retain their sovereignty and identity in the midst of the industrialization of the United States. Id.

[12] See Wood, Nature's Trust, supra note 7, at 581-83.

[13] In God Is Red, Vine Deloria, Jr. wrote:

This Work explores the potential for tribes to restore their trustee role across aboriginal territories by harnessing an expanding conservation trust movement in natural resources law. The conservation trust movement has grown in non-Indian quarters in response to the widespread failure of statutory environmental law to protect natural resources. It uses private property tools employing trust concepts to protect land in perpetuity.[14] As such, it is a movement occurring within established regulatory sovereign relationships. Land trusts have proliferated across the United States, but tribal involvement in the movement is nascent.

This Work is comprised of two parts published as separate articles. This Article (Part I) outlines the broad contours of a tribal role in the conservation trust movement. Section II begins by describing the modern Native environmental sovereignty effort. Section III describes the rise of the conservation trust movement and the tools it employs to protect resources. Section IV maps out the confluence between the Native environmental sovereignty movement and the Western conservation trust movement. It suggests four models tribes can use to deploy conservation trust tools to reassert a Native environmental prerogative over ancestral lands. Section V describes the advantages such trust tools bring to the tribal effort to protect off-reservation lands and resources. Section VI examines the uniquely positive benefits a tribal trustee role can bring to Western conservation. The second part of this Work, Tribes as Trustees Again (Part II): Evaluating Four Models of Tribal Participation in the Conservation Trust Movement, then evaluates the four general models of Native engagement according to several criteria that will be important to tribes as well as non-tribal entities.[15]

> Who will find peace with the lands? The future of humankind lies waiting for those who will come to understand their lives and take up their responsibilities to all living things. Who will listen to the trees, the animals and birds, the voices of the places of the land? As the long-forgotten peoples of the respective continents rise and begin to reclaim their ancient heritage, they will discover the meaning of the lands of their ancestors. That is when the invaders of the North American continent will finally discover that for this land, God is red.

VINE DELORIA, JR., GOD IS RED 296 (2003).

[14] See generally LAITOS ET AL., supra note 10, at 706-21.

[15] The second part of this Work is Mary Christina Wood & Matthew O'Brien, Tribes as Trustees Again (Part II): Evaluating Four Models of Tribal Participation in the Conservation Trust Movement, 27 STAN. ENVTL. L.J. 477 (2008) [hereinafter Wood, Tribes as Trustees II]. Part II examines in more specific detail the tribal role in the conservation trust movement. Section I begins with an explanation of private conservation tools and dynamics. It highlights particular issues that may arise as tribes implement the models offered in this Article. Section II compares the four models according to six criteria: 1) opportunities for conservation; 2) funding potential; 3) longevity of the holder; 4) opportunities for tribal management; 5) opportunities for tribal access and beneficial use; and 6) enforcement of the easement. Section III suggests measures to seed a tribal trust movement.

II. The Native Environmental Sovereignty Movement

While assertion of Native environmental sovereignty takes shape around the modern structure of federal environmental law, its roots lie in aboriginal management of lands and resources. Part A of this Section explores some key characteristics of tribal environmental management. Part B explains Western efforts to conquer the continent in property terms and briefly discusses modern tribal efforts to reassert environmental prerogatives on lands lost during the last two centuries. An understanding of this history is necessary to appreciate the motivating forces behind Native conservation efforts and the full value tribes will bring to the conservation trust movement.

A. Traditional Management and Indigenous Knowledge

For the most part, a traditional indigenous land ethic still frames the tribal approach to natural resource issues. This ethic is grounded in traditional perspectives that have guided tribal interaction with the environment for millennia.[16] "For Indian peoples, who traditionally interpreted their relationship with the land and with future generations as holistic, cyclical, and permanent, sustainability was the natural result, if not the conscious goal, of deeply rooted environmental ethics and traditional land based economies."[17]

Of course, tribal councils today do not always make decisions that invoke their peoples' traditional values.[18] Tribes, like other governments, are susceptible to resource extraction interests and other concerns.[19] Nevertheless, the traditional Native approach to natural resource management forms a robust, sustainable alternative to the industrial management that has devastated the balance of America's ecosystems. While written descriptions of the Native approach are necessarily general and overly simplistic, a basic understanding of Native management tactics is essential if mainstream conservation groups, private landowners, and public agencies are to recognize the value of a tribal trust movement.

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[16] See Rebecca Tsosie, Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge, 21 Vt. L. Rev. 225, 272-76 (1996).

[17] Id. at 286-87.

[18] See Laitos et al., supra note 10, at 533 (describing various instances of tribal councils succumbing to harmful resource extraction and development). Because this Article focuses on demonstrating the benefit of integrating traditional Native management of natural resources with the conservation trust movement, it does not delve into the complex discussion of the ways in which some tribal governments have undermined traditional values. It focuses instead on the potential of some tribal governments to bring traditional approaches and values to the conservation trust movement.

[19] See, e.g., Judy Fahys, Family Feud: Skull Valley Goshutes Fight an Internal Battle over the Lucrative Nuclear Waste Storage Proposal, Salt Lake Trib., Aug. 18, 2002, at A1 (describing a dispute within the Skull Valley Band of Goshute Indians regarding the on-reservation siting of a nuclear waste storage facility).

Refined over thousands of years, Native worldviews intertwine a complex set of economic, social, cultural, political, and spiritual dimensions.[20] While manifesting common characteristics of this outlook, tribal management is adapted to the particular locale in which a tribe lived for centuries or even millennia.[21] "Tribal religions are actually complexes of attitudes, beliefs, and practices fine-tuned to harmonize with the lands on which the people live."[22] Therefore, the tribal land ethic is inherently site-specific. The sections below describe some of the characteristics that reflect, at the broadest level, typical features of a Native approach to ecological management.

1. Beneficial Use of Resources

Traditional Native societies made beneficial and restrained use of resources such as fish, wildlife, water, roots, plants, firewood, grasses, and various other natural materials. Tribal communities were strategically located near vital waterways and food sources. While Native rejection of Western property divisions led some early jurists to dismiss Native peoples as mere "savages" lacking any concept of property rights,[23] the relationship of Natives to their aboriginal landholdings was extraordinarily complex and, in many cases, highly refined over millennia.[24] Tribal harvest societies developed migration rituals that allowed them to move from place to place on the landscape following Nature's production cycles.[25] Productivity was cyclic in time and space as different resources became available seasonally in distinct parts of the landscape.[26] Tribes' subsistence lifestyles relied on the diversity of resources the landscape had to offer. For example, the Pacific

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[20] Tsosie, supra note 16, at 272-76.

[21] Id. at 282-85.

[22] DELORIA, supra note 13, at 69.

[23] See generally DAVID H. GETCHES, CHARLES F. WILKINSON & ROBERT A. WILLIAMS, JR., CASES AND MATERIALS ON FEDERAL INDIAN LAW 63-71 (5th ed. 2005); Johnson v. McIntosh, 21 U.S. 543, 590 (1823) ("But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness . . . ."). According to Milner S. Ball:

> The message of Johnson v. McIntosh, then, was that the natural rights of human beings to dispose of property that they held by virtue of possession did not apply to Indians in America. While [Chief Justice] Marshall had intimated that the circumscription of the rights of conquered peoples was a prerogative of conquest, he had not suggested that such a circumscription would have occurred if the conquered persons had been other than 'fierce savages,' incapable of being 'incorporated with the victorious nation' and thereby retaining 'unimpaired' their rights to property. The special principles of Indian-white property rights were a function of the 'character and habits' of the Indians.

G. EDWARD WHITE, THE MARSHALL COURT & CULTURAL CHANGE 1815-1835, at 710 (Oxford Univ. Press abr. ed. 1991).

[24] See, e.g., GETCHES ET AL., supra note 23, at 33-35.

[25] NEZ PERCE TRIBE, TREATIES: NEZ PERCE PERSPECTIVES 16 (2003) (testimony of Horace Axtell).

[26] Id.

Northwest fishing tribes took several varieties of fish, including four species of salmon, trout, whitefish, sturgeon, lamprey, chiselmouth, and suckers, as well as buffalo, camas root, berries, and more.[27]

Harvesting and gathering activities at specific places on the landscape have united and bound Native families together for thousands of years. Patterns of use and management are engrained in social and customary practices. In addition, spirituality evolved from ancestral beneficial use of resources. According to the Nez Perce Tribe, "fishing, hunting, and gathering were and are religious activities, and our movement across the landscape, our road of life, was and remains the way we express our conception of the sacred cycle of life."[28] Economic structures also formed around resources. Large trade centers such as Celilo Falls brought together magnificent markets throughout Native America.[29] This use and trade system formed the means of Native survival and connected people with the landscape in a way perhaps unfathomable to those familiar only with industrial markets and institutions.

The Indian property structure was tailored to support beneficial use, rather than exclusive use of land and resources.[30] Native property conceptions generally rejected the Western notion of fee simple absolute ownership and its feature of total dominion. Northwest Indian Prophet Smohalla declared, "[t]hose who cut up the lands or sign papers for lands will be defrauded of their rights and will be punished by the Creator's anger . . . ."[31] A central feature of beneficial use was that each generation was a beneficiary entitled to renewed natural bounty. Moreover, use of resources was often shared between tribes pursuant to organized cooperation. The Columbia River was, for example, a "great table" where many tribes would come together and partake.[32]

2. Land and Resource Ethics

A striking commonality among Native peoples' cultures worldwide is their ethic toward the natural world, a feature that distinguishes "indigenous thinking" from "industrial thinking."[33] This ethic reflects deep reverence for all parts of Nature. Animals, fish, and plants all "have spirit[ual] . . .

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[27] DAN LANDEEN & ALLEN PINKHAM, SALMON AND HIS PEOPLE: FISH & FISHING IN NEZ PERCE CULTURE 92 (1999).

[28] NEZ PERCE TRIBE, supra note 25, at 7.

[29] LANDEEN & PINKHAM, supra note 27, at 71. Celilo Falls was destroyed following the opening of the Dalles Dam on March 10, 1957. Id. at 74.

[30] See Winters v. United States, 207 U.S. 564, 576 (1908) (stating that "[t]he Indians had command of the lands and the waters, command of all their beneficial use . . . .").

[31] NEZ PERCE TRIBE, supra note 25, at 7.

[32] Seufert Bros. Co. v. United States, 249 U.S. 194, 197 (1919) (quoting an Indian witness who testified in United States ex rel. Williams v. Seufert Bros. Co., 233 F. 579 (D. Or. 1916)).

[33] Winona LaDuke, Voices from White Earth: Gaa-Waabaabiganikaag, Address at the Thirteenth Annual E.F. Schumacher Lecture at Yale University (Oct. 23, 1993), reprinted in LAITOS ET AL., supra note 10, at 536 [hereinafter Voices from White Earth].

standing on their own."[34] Because of this spiritual recognition, a traditional Native harvester taking a fish will honor and express gratitude to the fish for giving its life.[35] This outlook engenders a fundamental appreciation for the basic dependency of humans on Nature for survival. As LaDuke states, "Native rituals are frequently based on the reaffirmation of the relationship of humans to the Creation."[36] Religious rites and ceremonies incorporate offerings in gratitude for the great abundance of Nature, for only through reciprocity will tribal people continue to receive such bounties. Dr. Henrietta Mann describes Native spiritual teaching as follows:

> Over the time we have been here, we have built cultural ways on and about this land . . . . We have spiritual responsibilities to renew the Earth and we do this through our ceremonies so that our Mother, the Earth, can continue to support us. Mutuality and respect are part of our tradition — give and take.[37]

These cultural underpinnings are still evident among Pacific Northwest fishing tribes, for example, where salmon continue to define Indian identity. Tribal elders and leaders from these tribes go out to the rivers and sing and pray for the return of the salmon just as their ancestors did.[38] First Foods ceremonies are held at longhouses throughout the region when the salmon return in the spring.[39] Salmon cannot be caught until a ceremony occurs to express reverence and gratitude for the fish. "In the native tradition, these spiritual expressions ensured the return of the fish, and the return of fish assured the renewal of . . . life in the Basin."[40]

The spiritual foundation of the Native land and resource ethic also encourages temperance in the use of resources. According to LaDuke, "we are always very careful when we harvest . . . [b]ecause if you take more than you need, that means you are greedy. You have brought about imbalance;

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[34] Id.

[35] See, e.g., NEZ PERCE TRIBE, supra note 25, at 106:

> Our young people learn that when the taking of a life is necessary, as in hunting, fishing or food gathering, a special prayer is offered to thank the Creator for this life. . . . We value the sacrifice of that life so we can continue to exist. . . . Our elders remind us to make good use of this life we have on earth, and to live in a way that shows respect and honor for those whose lives we represent within our families and communities.

See also Voices from White Earth, supra note 33, at 536 ("Therefore, when I harvest wild rice on our reservation up north, I always offer asemah, tobacco, because when you take something, you must always give thanks to its spirit for giving itself to you, for it has a choice whether to give itself to you or not.").

[36] LADUKE, supra note 3, at 12.

[37] Id. at 9.

[38] Mary Christina Wood, The Politics of Abundance: Towards a Future of Tribal-State Relations, 83 OR. L. REV. 1331, 1336 (2004) [hereinafter Wood, Politics of Abundance].

[39] Id.

[40] Id.

you have been selfish. To do this in our community is a very big disgrace."[41] Another tenet of the Native ethic incorporates a binding duty to preserve resources for future generations. Current generations understand that they are only borrowing this Earth and its resources from their children.[42] The Native concept of sustainability "means ensuring the survival of the people, the land and the resources for seven generations."[43]

Specific landscapes reaffirm an interconnected worldview. Tribal communities continue to have a deep relationship with ancestral homelands for sustenance, religious communion and comfort, and to maintain the strength of personal and interfamilial identities. Through language, songs, and ceremonies, tribal people continue to honor sacred springs, ancestral burial places, and other places where ancestral communities remain alive. Particular landscapes and sacred sites are the "holy lands" of Native communities:

> There is a place on the shore of Lake Superior, or Gichi Gummi, where the Giant laid down to sleep. There is a place in Zuni's alpine prairie to which the Salt Woman moved and hoped to rest. There is a place in the heart of Lakota territory where the people go to vision quest and remember the children who ascended from there to the sky to become the Pleiades. There is a place known as the Falls of a Woman's hair which is the epicenter of a salmon culture. And there is a mountain upon which the Anishinaabeg rested during their migration, and from where they looked back to find their prophesized destination.[44]

3. Traditional Ecological Knowledge[45]

Tribal land management techniques incorporate thousands of years of ecological observation and experimentation. Underlying these techniques is

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[41] Voices from White Earth, supra note 33, at 536. See also NEZ PERCE TRIBE, supra note 25, at 106 ("We are taught never to take more than we need and never to waste food that has been provided for our use.").

[42] Mary Christina Wood, Nature's Trust: Reclaiming an Environmental Discourse, 25 VA. ENVTL. L.J. 243, 265 (2007) [hereinafter Wood, Reclaiming an Environmental Discourse] (quoting an ancient American Indian proverb).

[43] Tsosie, supra note 16, at 287 (citing LINDA CLARKSON ET AL., OUR RESPONSIBILITY TO THE SEVENTH GENERATION: INDIGENOUS PEOPLES AND SUSTAINABLE DEVELOPMENT 65 (1992)); Jose Barreiro, A Call to Consciousness on the Fate of MOTHER EARTH: Global Warming and Climate Change, NAT'L MUSEUM AM. INDIAN (Fall, 2007), at 34, 36 (quoting Henrietta Mann's statement: "We call upon all the peoples of the world to awaken and respond to our collective human responsibility to the seventh generation.").

[44] LADUKE, supra note 3, at 14. See also DELORIA, supra note 13, at 66:

> The vast majority of Indian tribal religions, therefore, have a sacred center at a particular place, be it a river, a mountain, a plateau, valley, or other natural feature. This center enables the people to look out along the four dimensions and locate their lands, to relate all historical events within the confines of this particular land, and to accept responsibility for it.

[45] For information on traditional ecological knowledge, see LANDEEN & PINKHAM, supra note 27, at ix; Robin Wall Kimmerer, Weaving Traditional Ecological Knowledge into

a vast quantity of traditional knowledge of local ecosystems. One Native commentator explains the monitoring process as follows:

> Fisher families go to fishing places and clear debris, check water temperatures, and observe the health of the adjacent environment. Gathering families monitor the health of the meadow, vitality of the trees, and look of the root grounds. They also communicate with others about access and development intrusions. Hunter families monitor animal populations, looking for stresses that may limit vitality of a certain herd or jeopardize families who depend on meat to live. Those living near the ocean monitor the health of seaweed, shellfish, and other sea life as indicators of the season ahead. At the tribal community level, the entire ecoregion is monitored to predict possible droughts, fires, water shortages, and subsistence needs.[46]

Much of the traditional knowledge accumulated through this intense process of observation exists only in oral form and is passed down through generations of families that have responsibility for a certain place.[47] Because Western science traditionally has viewed oral transmission as neither credible nor substantive, much traditional wisdom has been historically shunned. Consequently, Western conservation management has largely excluded the wealth of knowledge still available with respect to American landscapes and resources.[48] Fortunately, this trend is beginning to change. Robin Kimmerer writes:

> Traditional ecological knowledge is increasingly being sought by academics, agency scientists, and policymakers as a potential source of ideas for emerging models of ecosystem management, conservation biology, and ecological restoration. It has been recognized as complementary and equivalent to scientific knowledge . . . [and] has value not only for the wealth of biological information it contains but for the cultural framework of respect, reciprocity, and responsibility in which it is embedded.[49]

Traditional ecological knowledge ("TEK") is particularly valuable for reclaiming faltering ecosystems. Whereas Western science tends to rely on short-term data from many sites, TEK is the product of long-term observations from a single site.[50] This difference is critically important in solving local ecological problems. Native peoples' assessment of local conditions tends to be highly accurate, for traditionally survival depended on their

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Biological Education: A Call to Action, 52 BIOSCIENCE 432 (May 2002), available at http://www.esf.edu/nativepeoples/weaving.pdf.

[46] Hillary Renick, Remarks at the Wayne Morse Center Symposium on Tribes as Trustees Again (Apr. 6, 2007) (on file with the Harvard Environmental Law Review).

[47] See, e.g., LANDEEN & PINKHAM, supra note 27, at ix.

[48] Id.

[49] Kimmerer, supra note 45, at 432 (citations omitted).

[50] Id. at 433.

depth of understanding of associative relationships in the local environment. For example, the swallows would signify the return of salmon, certain flowers would signify healthy root crops, and acorns would fall and open the deer season.[51]

TEK's emphasis on the interconnectedness of all living things is yet another reason it is uniquely suited to reclaiming ecosystems.[52] Author Dan Landeen characterizes this approach to the natural world as follows:

> Systems thinking is a discipline for seeing wholes, recognizing patterns and interrelationships, and learning how to structure human actions accordingly. The objective of traditional wisdom is to harmonize human existence with nature — acknowledging both what is known and what is unknown. In the Native American worldview, everything in nature has a purpose, whether or not humans understand the purpose.[53]

A clear application of Native "systems thinking" is the tribal approach to recovering imperiled salmon runs in the Columbia River Basin. For many years, non-Indian management had been compartmentalized into distinct components such as harvest, hydrosystems, water temperatures, and toxins. The Columbia River tribes were the first to present a holistic "gravel-to-gravel" approach to fish recovery that incorporated and integrated all stages of the salmon life-cycle.[54]

Although conservation biology now utilizes a similar holistic approach to natural resources management,[55] TEK remains unique in the way it weaves humanity into the equation. Instead of insisting on the exclusive use of objective science, traditional wisdom "includes an ethic of reciprocal respect and obligations between humans and the nonhuman world."[56] By

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[51] See TIMOTHY SILVER, A NEW FACE ON THE COUNTRYSIDE: INDIANS, COLONISTS, AND SLAVES IN SOUTH ATLANTIC FORESTS, 1500-1800, at 94 (1990); Ivy Anderson, Protecting the Salmon: An Implied Right of Habitat Protection in the Stevens Treaties, and its Impact on the Columbia River Basin, 24 VT. L. REV. 143, 143 (1999).

[52] For example, oral histories of Pacific Northwest Indians corroborate the important roles that bees, spiders, fireflies, coyotes, bear, fox, salmon, and many other creatures played in enabling human survival. See Alan G. Marshall, Fish, Water, and Nez Perce Life, 42 IDAHO L. REV. 763 (2006). Navajo tradition even emphasizes the role of pollen. See generally Robert Yazzie, Air, Light/Fire, Water and Earth/Pollen: Sacred Elements that Sustain Life, 18 J. ENVTL. L. & LITIG. 191 (2003).

[53] LANDEEN & PINKHAM, supra note 27, at 111.

[54] Id. at 109-11. "Gravel-to-gravel management acknowledges the relationship between the biology of the fish, the degree of human pressure on them, and the condition of their physical environment throughout all stages of their life histories. Gravel-to-gravel management is an ecologically sound approach that is at the same time sacred and regulatory." This method of salmon management is part of Wy-Kan-Ush-Mi-Wa-Kish-Wit (Spirit of the Salmon), an ambitious fish recovery plan created by the four Columbia River treaty tribes. Federal and state biologists now emulate this life-cycle approach. To be clear, tribes and biologists alike also employ Western scientific tools and techniques to further the aims of the tribes' holistic approach to salmon recovery. Id.

[55] See generally GARY K. MEFFE & C. RONALD CARROLL, PRINCIPLES OF CONSERVATION BIOLOGY (2d ed. 1997).

[56] Kimmerer, supra note 45, at 434.

viewing Nature as subject instead of object, "TEK offers . . . a cultural framework for environmental problem solving that incorporates human values."[57]

4. Affirmative Manipulation of Nature

A distinct feature of traditional tribal management is the affirmative manipulation of natural conditions to produce resource abundance. For thousands of years, Northwest Indian basket-maker families have traveled to certain meadows, hamlets, and springs to prune the willow, sedge, grasses, or other materials for which they were responsible.[58] Nisqually families engaged in controlled burns on prairies to foster growth of potatoes, onions, and carrots.[59] Indians of the Bad River Indian Reservation traveled to the confluence of the Bad and White Rivers to cultivate gardens.[60]

Today, much of tribes' affirmative manipulation of the environment is restorative. One prime example is in the InterTribal Sinkyone Wilderness.[61] The Council that manages this tribal wilderness area plans to restore and manage its significant stands of redwoods and tan oaks and to reduce the possibility of future catastrophic fires by thinning uniform, dense stands of trees now growing in the aftermath of industrial logging.[62] The Council has also worked to improve the health and integrity of adjacent Sinkyone Wilderness State Park lands by assisting with the decommissioning of nearly fifty miles of abandoned logging roads and stream crossings, monitoring and protecting sensitive cultural sights, and restoring salmon habitat in Sinkyone coastal streams.[63] In decommissioning the abandoned logging roads, crews composed of tribal members, from the Council's member tribes and other

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[57] Id.

[58] See, e.g., Michelle L. LeBeau, Federal Land Management Agencies and California Indians: A Proposal to Protect Native Plant Species, 21 ENVIRONS ENVTL. L. & POL'Y J. 27, 29 (1998) (describing traditional gathering practices of various California tribes).

[59] CHARLES WILKINSON, MESSAGES FROM FRANK'S LANDING: A STORY OF SALMON, TREATIES, AND THE INDIAN WAY 22-23 (2000).

[60] LADUKE, supra note 3, at 207-08.

[61] The InterTribal Sinkyone Wilderness Park is discussed in more detail infra Part IV.B.2.a.

[62] In September 1997, the Council banned industrial logging and reaffirmed its right to conduct restoration forestry by granting a conservation easement to a local land trust known as Sanctuary Forest. Interview with Hawk Rosales, Executive Director, InterTribal Sinkyone Wilderness Council, in Eugene, Or. (Mar. 8, 2008) [hereinafter Rosales Interview].

[63] Id. According to Mr. Rosales:

> In Native peoples' belief systems, natural and cultural "resources" are inextricably linked and consistently have been viewed as indistinguishable from each other. Due to a deep and ancient understanding of Natural Law, Native peoples treated nature and all forms of life with great reverence and adopted countless stewardship practices that profoundly influenced the land's abundance and biological diversity. Native peoples' cosmologies and sustenance patterns show that culturally significant landscapes, including sacred places and habitation and gathering areas, are integrally tied to ecologically significant places like springs, basket-plant communities, seaweed rocks, acorn groves, old-growth redwood forests, and fish habitats. Thus, conserving areas of ecological value involves simultaneously addressing conservation of

neighboring tribes, used heavy equipment to transform areas containing road cuts and blocked stream channels back into their original gradients.[64]

This active management approach was foreign to mainstream conservation for years. For instance, non-Indian land managers only recently began to appreciate the enormous ecological value of prescribed burns, a practice originally developed by Native cultures.[65] In Western society, conservation strategies nearly always "fenced off" places as wilderness to protect them, leaving no role for affirmative management.[66] This practice was necessary because management discretion on the part of public trustees nearly always resulted in exploitation of the public resource.

5. Natural Law, Tribal Trusteeship, and Covenants of Restraint

A final characteristic distinguishing Native and Western management is the role of law itself. Tribal regulation and stewardship of resources are interwoven with religious teachings, interfamilial covenants, and family place within society. Tribal leaders also speak of natural law, which designates them as stewards of plants, animals, water, and air.[67] Natural law is premised on the attainment of balance in nature,[68] as practiced through ancient stewardship covenants with Mother Earth.[69] This legal structure has maintained a remarkable rhythm of life for generations.

Traditional Native sovereignty is inextricably connected to this spiritual conservation mandate. In effect, tribes use their sovereignty to exercise their spiritual duty to protect the interests of beneficiaries in distant generations. The Seventh Generation principle, manifested by representation of a future generation at council meetings,[70] epitomizes the Native obligation to safe-

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the multitude of cultural components from which the land's ecology cannot be separated.

[64] Id.

[65] Allison M. Dussias, Squaw Drudges, Farm Wives, and the Dann Sisters' Last Stand: American Indian Women's Resistance to Domestication and the Denial of Their Property Rights, 77 N.C. L. REV. 637, 666 (1999) (recounting how the first colonists witnessed the Virginia Algonquians using fire to prepare their fields for planting); U.S. FOREST SERV., POSITION PAPER: FIRE & FUELS 1, http://www.fs.fed.us/publications/policy-analysis/fire-and-fuels-position-paper.pdf (on file with the Harvard Environmental Law Review) (explaining that tribes have used fire to thin trees and clear land for over 10,000 years).

[66] See infra Part VI.B.

[67] NMFS Northwest Region Hearings Before the Subcomm. on Fisheries Conservation, Wildlife and Oceans of the H. Comm. on Resources, 105th Cong. (1997) [hereinafter Hearings] (statement of Samuel N. Penney, Chairman, Nez Perce Tribal Exec. Comm.), available at 1997 WL 458335; see also id. at 110 ("The Columbia Basin Tribes have always embraced the concept of stewardship.").

[68] Voices from White Earth, supra note 33, at 536.

[69] Renick, supra note 46.

[70] See, e.g., ALASKA NATIVE SCIENCE COMM'N & EPA, FINAL REPORT: NATIONAL SUBSISTENCE TECHNICAL PLANNING MEETING FOR THE PROTECTION OF TRADITIONAL & TRIBAL LIFEWAYS 25 (2003), available at http://www.nativescience.org/pubs/NatSubTechPlanWRKSHP.pdf ("As a tribal leader the sacred oath is to remember the ancestors and enhance the life of the living and prepare for the seventh generation into the future.").

guard the sacred relationship between people and the land.[71] Former Nez Perce chairman Sam Penny states: "For generations our ancestors were the caretakers of the Pacific Northwest's salmon runs and treated them as part of the world that our creator had entrusted to us."[72] His term "entrusted" implies a passing of an endowment down to future generations. Though tribes may not have used the Western concept of trustee, historic management reflected a trusteeship that was legally and morally bound to protect natural assets for use by future generations. This responsibility parallels an ancient principle in Western tradition that vital resources are held in trust by government to be protected for future generations.[73]

Because of its strong spiritual underpinnings, some Western thinkers may have trouble characterizing tribal "natural law" as a legal mandate. In traditional Native governing systems, however, there is no gap between law and religion. The duty to protect resources for coming generations is concurrently both a principle of religion and governance.[74] This singular dimension produces profound differences between Native governance and state and federal management of natural resources. Covenants of restraint are religiously engrained into tribal leadership.[75] Ceremonies continually fortify the will to reject the type of indulgence that satisfies only present generations.[76] Historically, this dimension created an enduring commitment to manage resources sustainably.[77]

B. Conquest Regime and the New Trustees

Modern tribal efforts to reclaim environmental sovereignty must be understood against a history of attempted conquest, which intended to separate tribes from their ages-old trusteeship over aboriginal territory and superimpose on it the jurisdiction of new trustees, state and federal governments. The federal process of "extinguishing" Indian title was accomplished through the use of treaties, statutes, and executive orders.[78] Within Western property law, these documents "represent the foundational 'deeds' to land in most areas within the lower 48 states."[79] They were devised with the intention of eliminating the Native right of occupancy across lands ceded to the

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[71] Tsosie, supra note 16, at 228, 275 (describing the Seventh Generation principle as a central tenet of Iroquois governance as well as one of the four pillars of "traditional Indian world views").

[72] Hearings, supra note 67, at 4 (emphasis added).

[73] For discussion of the public trust doctrine, see Charles F. Wilkinson, The Headwaters of the Public Trust: Some of the Traditional Doctrine, 19 ENVTL. L. 425, 425-26 (1988-89).

[74] See, e.g., Wood, Politics of Abundance, supra note 38, at 1336.

[75] See, e.g., id.

[76] See, e.g., id.

[77] See, e.g., id.; infra text accompanying notes 121-22.

[78] See LAITOS ET AL., supra note 10, at 319.

[79] Id. Native claims in Hawaii and Alaska were not extinguished within the treaty framework because the treaty practice had ended by the time those states entered the Union. See id. at 325.

federal government (called "ceded lands") and in "exchange," secured vastly reduced areas of land (called "reservations") for tribal homelands.[80]

1. Reserved Rights and the Trust Responsibility

Tribal leaders realized that reduced reservation lands could not adequately support the level of subsistence hunting and fishing necessary to maintain their peoples' way of life, so many insisted on continued access to traditional fishing sites and hunting grounds located off the reservation in ceded lands.[81] For example, the Stevens treaties of the Pacific Northwest explicitly "secured" the right of signatory tribes to take fish at "usual and accustomed" fishing grounds and stations located off the reservation.[82] Treaties with tribes of the Great Lakes also contained promises of continued hunting and fishing.[83] Courts are required to interpret treaties as the Indians themselves would have understood them, and ambiguities are to be resolved in their favor.[84] In 1905, the Supreme Court interpreted the Stevens treaties' language as reserving "easements" underlying later-acquired title.[85] That opinion "plays a key role in establishing the legal property regime in the ceded areas of the Pacific Northwest."[86] The Court has also interpreted Indian treaties as incorporating implied water rights, which gives tribes considerable leverage in basin-wide water adjudications.[87]

Since its inception, federal Indian policy recognized tribes as governments with inherent sovereignty pre-existing that of the federal government or any state.[88] This principle has endured for the two centuries since the United States' founding and underlies all federal relationships with tribes today. A cornerstone of this relationship is the trust obligation, which arose from promises made by the federal government when it forced cessions of aboriginal land.[89] The United States promised tribes that they would be secure on reservations and that the federal government would protect Native

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[80] "In some cases the established reservation was part of the original aboriginal territory of the tribe, but in other cases the tribe was removed — often with tragic consequences — to lands far away from its ancestral homeland." Id. at 319-20.

[81] See Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 666-67 (1979).

[82] See Confederated Tribes of the Umatilla Indian Reservation, http://www.umatilla.nsn.us (follow "Our History & Culture" hyperlink; then follow "Turmoil & Treaties" hyperlink) (last visited Apr. 3, 2008) (on file with the Harvard Environmental Law Review); LAITOS ET AL., supra note 10, at 323.

[83] See Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999).

[84] See, e.g., id. at 200; see also Charles F. Wilkinson & John M. Volkman, Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth" — How Long a Time is That?, 63 CAL. L. REV. 601, 617 (1975).

[85] United States v. Winans, 198 U.S. 371 (1905).

[86] See LAITOS ET AL., supra note 10, at 324.

[87] Winters v. United States, 207 U.S. 564 (1908).

[88] Worcester v. Georgia, 31 U.S. 515 (1832).

[89] See generally Mary Christina Wood, Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited, 1994 UTAH L. REV. 1471 [hereinafter Wood, Trust Doctrine Revisited].

ways of life and autonomy.[90] This promise remains at the core of federal Indian relations nationwide[91] and has increasing importance as tribal lands and resources face mounting ecological threats from the majority society.[92] In recent decades, federal agencies have developed a myriad of "government to government" relationships with tribes and have created policies to carry out their trust obligation.[93] Such policies, however, have generally failed to ensure protection of tribal interests.[94]

2. The Role of Aboriginal Lands

Charles Wilkinson writes that the historic task of tribes is to preserve "workable islands of Indianness within the larger society."[95] While the small reservations of today serve as anchors for tribal life, ceded lands continue to play a critical role. This broader landscape supports Native ways of life in many respects. First, Native people continue to hunt, fish, and gather roots, berries, and medicines on ceded lands in the manner of their ancestors.[96] Some of these uses are explicitly protected by treaty, but others are not.[97] Second, tribal people access sacred sites or special areas for cultural and spiritual purposes.[98] Places of worship and sites of creation stories are often located on non-reservation lands. Third, aboriginal lands contain burial sites of many tribes.[99] Fourth, ceded lands contain important parts of the

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[90] Id. at 1496-98.

[91] The Northwest Ordinance, passed on July 13, 1787, states: "The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, unless in justified and lawful wars authorized by Congress." 2 THE FEDERAL AND STATE CONSTITUTIONS 961 (F. N. Thorpe ed., 1909).

[92] Wood, Trust Doctrine Revisited, supra note 89, at 1474.

[93] Mary Christina Wood, Fulfilling the Executive's Trust Responsibility Toward the Native Nations on Environmental Issues: A Partial Critique of the Clinton Administration's Promises and Performance, 25 ENVTL. L. 733, 737 (1995).

[94] Mary Christina Wood, The Indian Trust Responsibility: Protecting Tribal Lands and Resources through Claims of Injunctive Relief against Federal Agencies, 39 TULSA L. REV. 355, 356-59 (2003) [hereinafter Wood, Indian Trust Responsibility].

[95] CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 122 (1987).

[96] Wood, Indian Trust Responsibility, supra note 94, at 356.

[97] Protected uses vary among treaties. Compare United States v. Winans, 198 U.S. 371 (1905) (protecting the Yakima Indians' treaty right to access and fish at traditional off-reservation sites), with Or. Dep't of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753, 755 (1985) (explaining that the United States' 1864 treaty with the Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians did not reserve the Tribes' right to fish outside their treaty-created reservation).

[98] For discussion regarding the protection of sacred sites on public lands, see Sandra B. Zellmer, Sustaining Geographies of Hope: Cultural Resources on Public Lands, 73 U. COLO. L. REV. 413, 417-18 (2002). See also DELORIA, supra note 13, at 66 (noted: "Regardless of what subsequently happens to the people, the sacred lands remain as permanent fixtures in their cultural or religious understanding. . . . [S]mall groups travel to obscure locations in secret to continue tribal ceremonial life.").

[99] See, e.g., Yankton Sioux Tribe v. U.S. Army Corps of Eng'rs, 83 F. Supp. 2d 1047 (D.S.D. 2000) (dealing with lakeside grave sites); Wana the Bear v. Cmty. Constr., 128 Cal. App. 3d 536 (1982) (regarding the desecration of a Miwok burial ground); Kim Dayton, "Tres-

watersheds and airsheds that sustain reservations.[100] Fifth, lands across an entire region may provide habitat for a harvestable species.[101] These important resources located outside reservation boundaries remain a crucial link to the islands of Indianness.

3. The Rise of Industrial Thinking

Even before tribes were forced onto reservations, industrial thinking began sweeping across their aboriginal territories. In contrast to Native perspectives, industrial thinking is premised on consumption and rewards through accumulation.[102] Nature's components are not accorded "standing on their own" but rather are "mere objects and commodities of society."[103] "When things are inanimate, 'man' can view them as his God-given right. He can take them, commodify them, and manipulate them in society."[104] Indeed, the profit incentive knows no bounds from overuse or waste and much activity in the private sector reflects little or no concern for coming generations. Instead, the market drives resource consumption and short-term profits. Such activity overwhelmingly tends to deplete natural assets at the expense of future generations. Industrial behavior routinely causes natural imbalance resulting in extinctions, pollution, deforestation, and global climate change.

4. Depleting the Aboriginal Trust Through Environmental Law

Despite two separate trust obligations to protect natural resources — one lodged in the ancient public trust doctrine and the other rooted in promises surrounding Indian land cessions — federal and state trustees have rarely exerted the will to prevent the raiding of Native peoples' lands for singular profit.[105] This problem is not due to a dearth of environmental law. The environmental movement of three decades ago inspired Congress to enact a multitude of laws designed to control a broad array of problems.[106]

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passers, Beware!": Lyda Burton Conley and the Battle for Huron Place Cemetery, 8 YALE J. L. & FEMINISM 1, 3 (1996) (involving a tribal cemetery in the middle of Kansas City).

[100] Wood, Trust Doctrine Revisited, supra note 89, at 1489-95.

[101] See, e.g., id. at 1489-90; Wood, Wildlife Capital I, supra note 8, at 8-12 (describing the regional habitat required by salmon).

[102] Voices from White Earth, supra note 33, at 536-37.

[103] LaDuke notes that "the capitalist's method is always to take more than is needed. Therefore, from an indigenous point of view capitalism is inherently out of harmony with natural law." Id. at 537.

[104] Id.

[105] In fact, federal trustees have actually facilitated the exploitation of tribal lands. See, e.g., United States v. Navajo Nation, 537 U.S. 488, 495-500 (2003) (locking the Navajo Nation into a below-market value mineral lease due to the Secretary of Interior's interference in the negotiation at the behest of Peabody Coal Company. The mineral lease was entered into pursuant to the Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396a (2000)).

[106] These statutes included the National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified in scattered sections of 42 U.S.C.); Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified at 16 U.S.C. §§ 1531-44

State and local governments also have their own voluminous sets of environmental laws.

These laws create an enormous bureaucracy, but on nearly every scale, they fail to prevent degradation of natural systems.[107] Agencies often use permitting systems authorized in these laws to allow, rather than prohibit, environmental destruction.[108] Instead of being bastions of scientific reason as they are supposed to be, agencies all too frequently use their discretion to further political ends.[109] This problem is especially prolific with respect to regulation of private lands, which comprise more than sixty percent of the United States.[110]

While courts are supposed to ensure that agencies carry out the law, judicial review is weakened by the agency deference doctrine. This doctrine prompts judges to defer to agency interpretation of statutes.[111] When courts do find statutory violations, the relief they offer is often procedural and provides no enduring protection.[112] Collapsed fisheries, dammed rivers, razed forests, paved farmlands, polluted air, urban sprawl, extinct species, toxic

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(2000)); Toxic Substances Control Act, Pub. L. No. 94-469, 90 Stat. 2003 (1976) (codified at 15 U.S.C. §§ 2601-92 (2000)); Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (1977) (codified as amended in scattered sections of 42 U.S.C.); and Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (1977) (codified at 33 U.S.C. §§ 1294-97, 1281(a) (2000)).

[107] See generally PETULLA, supra note 4.

[108] See ROBERT F. KENNEDY, JR., CRIMES AGAINST NATURE 32-34 (2004) (explaining how federal agencies in the George W. Bush administration have granted permits that exempt polluters/campaign contributors from federal pollution regulations). One of the most striking examples of the federal regulatory process gone awry is EPA's issuance of water pollution permits under the Clean Water Act. See Wood, Reclaiming an Environmental Discourse, supra note 42, at 253-54. The U.S. Army Corps of Engineers nearly always grants permits sought under section 404 of the Clean Water Act. LAITOS ET AL., supra note 10, at 815 (noting that less than 0.2 percent of permit applications are denied).

[109] See Mary Christina Wood, Reclaiming the Natural Rivers: The Endangered Species Act as Applied to Endangered River Ecosystems, 40 ARIZ. L. REV. 197, 256 (1998) [hereinafter Wood, Reclaiming Natural Rivers] (noting that the central tenet of the agency-deference doctrine is "faith in nonbiased administrative expertise"); see also Wood, Reclaiming an Environmental Discourse, supra note 42, at 252 n.29 (describing the politicization of the decision-making process within EPA as well as agencies in the Departments of Interior and Commerce).

[110] USDA, MAJOR USES OF LAND IN THE UNITED STATES, 2002, at 35 (2006), available at http://www.ers.usda.gov/publications/EIB14/eib14.pdf. "The large numbers and geographic dispersion of private landowners, as well as the concealed nature of activities on these lands, make proscriptive regulation difficult to implement and enforce . . . . Moreover, penalizing individuals is expensive, politically unpopular, and creates negative attitudes towards environmental protection." Stephanie Stern, Encouraging Conservation on Private Lands: A Behavioral Analysis of Financial Incentives, 48 ARIZ. L. REV. 541, 542 (2006).

[111] See Chevron U.S.A. v. NRDC, 467 U.S. 837, 843-44 (1984) (holding that an agency's interpretation of a statutory gap or ambiguity should be afforded deference where reasonable); United States v. Mead Corp., 533 U.S. 218, 229 (2001) (narrowing the applicability of Chevron deference to those instances when Congress has expressly or implicitly delegated an agency the authority to fill in statutory gaps or resolve statutory ambiguities); Wood, Reclaiming Natural Rivers, supra note 109, at 255-67 (discussing the agency deference doctrine in depth).

[112] See, e.g., Wood, Reclaiming Natural Rivers, supra note 109, at 253-55 (regarding the ineffectiveness of judicial relief for Endangered Species Act violations in the context of river basin adjudications).

wastelands, dry riverbeds, drained wetlands, and dead zones in the ocean are all indicia of a management orientation that lacks essential covenants of restraint.

This systemic dysfunction in environmental law creates enormous hardship and losses for tribes. Logging, road building, and development routinely destroy or despoil sacred sites and archaeological remains.[113] Hard rock mining contaminates entire stretches of river and sends toxic waste onto reservations.[114] Pollution from nuclear facilities threatens nearby reservations and traditional harvest resources.[115] Harvest practices that have endured for millennia are shutting down due to the extinction or imperilment of species.[116] Moreover, toxic contamination of traditional foods now creates health risks for nearly every tribe throughout the Pacific Northwest and Alaska.[117] Consumption of contaminated fish is a major route of exposure to PCBs, mercury, chlordane, dioxins, DDT,[118] and at least forty other contaminants.[119] Indian people who ingest these toxins risk cancer, neurological damage, birth defects, and developmental problems.[120]

5. Pacific Salmon: A Case in Contrast

One of the most dramatic examples of contrasting trustee management involves the Pacific salmon, the traditional lifeblood of tribes across the Northwest. Tribal trustees perfected a system, refined over thousands of years, of managing the fishery so that the salmon would return in abundance. The harvest was carefully calibrated to allow sufficient fish to escape to spawning grounds in order to perpetuate the species. According to oral his-

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[113] See Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 442-43 (1988).

[114] See, e.g., Coeur d'Alene Tribe v. Asarco, 280 F. Supp. 2d 1094, 1105 n.10, 1135 (D. Idaho 2003) (finding defendant mining companies liable for natural resource damages based on historic practices that resulted in the deposit of 73 million tons of toxic sediment in the bed of Lake Coeur d'Alene); U.S. Geological Survey, Lake Roosevelt/Upper Columbia River: Project Summaries, http://wa.water.usgs.gov/projects/roosevelt/summary.htm (last visited Apr. 3, 2008) (on file with the Harvard Environmental Law Review) (describing how toxic metals from mining and industry have accumulated in Lake Roosevelt to the point of biological impairment). For more information on hard rock mining contamination, see generally Bart Lounsbury, Digging Out of the Holes We've Made: Hardrock Mining, Good Samaritans, and the Need for Comprehensive Action, 32 HARV. ENVTL. L. REV. 149 (2008).

[115] Wood, Trust Doctrine Revisited, supra note 89, at 1491-92 (explaining how the Hanford Nuclear Reservation and Umatilla Weapons Depot threaten tribal health and harvest).

[116] See Wood, Wildlife Capital I, supra note 8, at 9 (discussing the imperilment of salmon runs).

[117] See Mary Christina Wood, EPA's Protection of Tribal Harvests: Braiding the Agency's Mission, 34 ECOLOGY L.Q. 175, 176-77 (2007).

[118] See EPA, PERSISTENT BIOACCUMULATIVE AND TOXIC (PBT) CHEMICAL PROGRAM: DDT, http://www.epa.gov/pbt/pubs/ddt.htm (last visited Apr. 3, 2008) (on file with the Harvard Environmental Law Review).

[119] NAT'L ENVTL. JUSTICE ADVISORY COUNCIL, FISH CONSUMPTION AND ENVIRONMENTAL JUSTICE: A REPORT DEVELOPED FROM THE NEJAC MEETING OF DECEMBER 3-6, 2001, at 13 (rev. ed. Nov. 2002); see also id. at 10-11 ("Contamination now renders . . . [tribal] ways of living — a source of exposure to . . . substances toxic to humans and other living things . . . ")

[120] Id. at 18, 73.

tories from the Columbia River region, a headman and council of chiefs stationed at Celilo Falls during fish runs would calculate the runs and allocate harvest among various tribal groups, including those upriver in the present states of Idaho and Montana.[121] At the core of this governance was a powerful covenant of self-restraint. Tribal leaders would not allow more harvest than the resource could sustain.[122]

After the Pacific Northwest tribes relinquished 64 million acres of their land to the federal government, the states of Washington and Oregon assumed control of the salmon harvest. Gill net fishing began, canneries opened, and new forms of transportation accessed an insatiable export market.[123] A huge non-Indian fishery grew across the region, and the states allowed massive resource depletion.[124] Not surprisingly, the runs began to collapse.

In the 1950s and 1960s, a surge of industrialization and urbanization arrived in the Pacific Northwest, reaching virtually every watershed used by salmon.[125] Clear-cuts replaced forests, industries polluted waters, developers tore up wetlands, cities dumped sewage into rivers, and the federal government constructed a hydropower and reclamation system on the Columbia, Snake, Klamath, and other major rivers. As a result of this unchecked development, the seemingly inexhaustible salmon resource that tribal trustees managed sustainably for thousands of years is now on the brink of extinction. "Half of the historic range of Pacific Salmon has been extirpated."[126] Endangered Species Act listings pervade the rivers of the Pacific Northwest as well as the entire Pacific coast from California to the Canadian border.[127]

Despite these listings, runs continue to collapse. In the Columbia River Basin, historic populations of ten to sixteen million fish have plummeted over ninety percent.[128] Klamath River Coho salmon, once in the range of 50,000 to 125,000 fish, fell to 6000 fish by 1996.[129] Chinook salmon in Puget Sound are now at ten percent of historic levels.[130] At least fifteen other Chinook runs are extinct.[131] Dams continue to kill over ninety percent of migrating juveniles of some species.[132]

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[121] See LANDEEN & PINKHAM, supra note 27, at 66-67; Wood, Politics of Abundance, supra note 38, at 1336.

[122] Id. at 66-67.

[123] FAY G. COHEN, TREATIES ON TRIAL: THE CONTINUING CONTROVERSY OVER NORTHWEST INDIAN FISHING RIGHTS 187-92 (1986).

[124] WILKINSON, BLOOD STRUGGLE, supra note 11, at 151.

[125] Wood, Politics of Abundance, supra note 38, at 1337.

[126] Id.

[127] See generally Wood, Abundant Trust, supra note 10.

[128] Wood, Reclaiming Natural Rivers, supra note 109, at 212.

[129] See Pacific Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation, 426 F.3d 1082, 1086 (9th Cir. 2005).

[130] SHARED STRATEGY FOR PUGET SOUND, DRAFT PUGET SOUND SALMON RECOVERY PLAN, EXECUTIVE SUMMARY 3 (2005).

[131] Id. For more information on declines in Puget Sound salmon, see Shared Strategy for Puget Sound, http://www.sharedsalmonstrategy.org.

[132] Wood, Politics of Abundance, supra note 38, at 1337.

This loss of natural wealth gravely threatens traditional tribal fishing economies. Tribal harvest in the Columbia Basin today is less than one percent of what it was in aboriginal times.[133] Salmon consumption by the Karuk people of the Klamath Basin has decreased by ninety percent since historic times.[134] In the Puget Sound region, tribal harvest is only ten percent of what it was in the mid-1980s.[135] The ecocide reflected by these collapsing assets has unfathomable consequences for tribes. As one Umatilla leader said in 1994, "[o]ur economic base has been devastated, and my people are suffering . . . . It is almost impossible to describe in words the pain and suffering this has caused my people. We have been fishermen for thousands of years. It is our life, not just our economy."[136]

C. Tribal Efforts to Gain a Co-Management Role off the Reservations

Thus far, tribes have been unable to exert substantial influence over environmental decisions of state and federal trustees. While environmental laws such as the National Environmental Policy Act offer a procedural avenue to influence agency decisions,[137] tribal interests are routinely disregarded. The federal government has ignored its trust obligation time and time again and actively resists any judicial enforcement of the trust in pending court cases.[138] Litigation to protect harvest resources has failed largely due to the deference courts give to agencies.[139] Moreover, most environmental laws are not designed to protect unique Native interests such as sustaining harvestable populations of wildlife or safeguarding sacred sites.[140]

Consequently, tribes today find themselves in a predicament. Their way of life depends on land and resources extending far beyond reservation boundaries, but tribal jurisdiction is confined to their respective reservations. In light of this problem, tribes are searching for new ways to extend their environmental prerogatives outside reservation boundaries. Tribes may develop land restoration proposals. However, these proposals often require immense private funding or congressional legislation and appropriations, and the process for putting land into trust ownership is quite cumbersome

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[133] Id. at 1338.

[134] Kari Marie Norgaard, Karuk Tribe of California, The Effects of Altered Diet in the Health of the Karuk People 5, 12 (2005).

[135] Andrew Engelson, Tribes Fight to Clear the Roads for Salmon, High Country News, July 2, 2001.

[136] Water Spreading: Hearing on Water Use Practice on Bureau of Reclamation Projects Before the Subcomm. on Oversight and Investigations of the H. Comm. on Natural Res., 103d Cong. (1994) (statement of Antone Minthorn, Chairman, Confederated Tribes of the Umatilla Indian Reservation), available at 1994 WL 14190354, quoted in Wood, Politics of Abundance, supra note 38, at 1338.

[137] 42 U.S.C. § 4332 (2000); see also Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989) (explaining that NEPA "provides a springboard for public comment").

[138] For discussion, see Wood, Abundant Trust, supra note 10.

[139] See Wood, Reclaiming Natural Rivers, supra note 109, at 255-57.

[140] See generally Wood, Wildlife Capital I, supra note 8, at 18-31.

and time consuming.[141] Some tribes are developing initiatives to manage federal lands under the Tribal Self-Governance Act of 1994,[142] but few tribes have received the requisite federal approval. Even a fully launched program does not guarantee a tribe that it will substantively influence management. Many tribes have also successfully contracted with state and federal agencies to develop cooperative projects on lands outside their boundaries.[143] In addition, tribes may assert their treaty rights to obtain a co-management role by consent decree.[144]

These efforts, while scattered, are evidence of a growing Native environmental sovereignty movement. Some tribes are in a good position to regain management responsibility across much of their aboriginal land. Of these tribes, many now have their own natural resource departments,[145] cultural resource departments, and codified tribal laws.[146] Many also have developed regional approaches to natural resource issues by forming intertribal consortia or agencies. The Inter-Tribal Bison Cooperative, Columbia River Inter-Tribal Fish Commission, Great Lakes Indian Fish and Wildlife Commission, and the Northwest Indian Fisheries Commission all regularly collaborate with federal, state, and county agencies on resource issues throughout their aboriginal territory.[147] In some cases, tribes have taken the lead in developing coherent and ambitious regional plans for recovering species of concern.[148] These plans showcase tribal expertise and administrative

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[141] See LAITOS ET AL., supra note 10, at 534-35.

[142] See 25 U.S.C. § 458cc(c) (2000) (Funding agreements with tribes may "include other programs, services, functions, and activities, or portions thereof, administered by the Secretary of the Interior which are of special geographic, historical, or cultural significance to the participating Indian tribe requesting a compact."). For discussion, see LAITOS ET AL., supra note 10, at 597-99; Mary Ann King, Co-Management or Contracting? Agreements between Native American Tribes and the U.S. National Park Service Pursuant to the 1994 Tribal Self-Governance Act, 31 HARV. ENVTL. L. REV. 475, 494-506 (2007).

[143] STEVE NADEAU, WOLF CONSERVATION AND MANAGEMENT IN IDAHO: PROGRESS REPORT 2006 (2007), available at http://www.nezperce.org/Wolf/Idaho_2006_annual_report-1.pdf (on file with the Harvard Environmental Law Review) (describing cooperative wolf management effort involving the Nez Perce Tribe, State of Idaho, and federal agencies); Cooperative Conservation America, Olympia Oyster Restoration Project, http://www.cooperativeconservationamerica.org/viewproject.asp?pid= 725 (last visited Apr. 3, 2008) (on file with the Harvard Environmental Law Review) (describing a tribal partnership with the State of Washington, federal government agencies, and private parties); U.S. Dep't of Energy, Environmental Management: Tribal Programs, http://www.em.doe.gov/tribalpages/initiatives.aspx (last visited Apr. 3, 2008) (on file with the Harvard Environmental Law Review) (describing tribal partnerships with the Department of Energy).

[144] See United States v. Oregon, 699 F. Supp. 1456, 1459 (D. Or. 1988), aff'd, 913 F.2d 576 (9th Cir. 1990) (approving co-management of Columbia River fishery).

[145] At least 70 out of the 560 federally recognized tribes have established natural resource programs. LAITOS ET AL., supra note 10, at 600.

[146] Some of these programs have been authorized under "Treatment as State" ("TAS") provisions in federal statutes such as the Clean Water Act and Clean Air Act. See 33 U.S.C. § 1377(e) (2000); 42 U.S.C. § 7601(d) (2000). Tribes obtaining TAS status are permitted to develop programs to implement these federal statutes within their reservation. For discussion, see LAITOS ET AL., supra note 10, at 563.

[147] See generally LAITOS ET AL., supra note 10, at 596-600.

[148] See supra note 54 (describing the Columbia River Treaty tribes' development of the Wy-Kan-Ush-Mi-Wa-Kish-Wit salmon recovery plan).

capacity and map out ways to incorporate a traditional worldview into existing legal structures. Tribes can also share their unique perspectives by taking on a co-management role in the administration of federal land management programs. For instance, the Oglala Sioux Tribe is able to reach thousands of people by managing one of the visitor centers at Badlands National Park.[149] Through these efforts, many tribes have gained legitimacy with local, state, and federal agencies.[150]

Despite these advances, tribes are limited by the confining structure of Western statutory law. The next leap in the Native environmental sovereignty movement will be a growth of Native property interests across aboriginal territory through the invocation of conservation trust tools.

III. The Conservation Trust Movement

The growing conservation trust movement has recruited private property transactional mechanisms to safeguard land and resources. In the temporal sense, it has dovetailed with the Native environmental sovereignty effort. This private conservation movement represents a "second generation" of environmental law following the first generation's "command and control" statutes and regulations.[151] Parcels placed in private conservation include farms, forests, historical sites and buildings, wildlife habitats, and scenic landscapes.[152] Conservation land and interests are typically held by either a government agency or a land trust. Land trusts are a relatively new breed of private, nonprofit organizations created for the primary or sole purpose of protecting land through direct acquisitions.[153]

Through the use of property rights, private conservation obviates some first-generation pitfalls. Private conservation decisions are inherently voluntary and consensual, so they do not usually rankle private property enthusiasts (with the exception of a few contrarians who bemoan the idea of lands

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[149] See King, supra note 142, at 490.

[150] See Charles F. Wilkinson, To Feel the Summer in the Spring: The Treaty Rights of the Wisconsin Chippewa, 1991 Wis. L. Rev. 375, 403-12 (1991).

[151] See Laitos et al., supra note 10, at 706.

[152] Nancy A. McLauglin, The Role of Land Trusts in Biodiversity Conservation on Private Lands, 38 Idaho L. Rev. 453, 453 (2002).

[153] Richard Brewer, Conservancy: The Land Trust Movement in America 5 (2003). There are three levels of land trusts. Nationwide trusts include the Nature Conservancy, the Trust for Public Land ("TPL"), and the American Farmland Trust. See John A. McVickar, Land Trusts: A Growing Conservation Institution, 21 Vt. B.J & L. Dig. 33, 33 (1995). Regional and statewide land trusts include entities such as the Vermont Land Trust, the Pacific Forest Trust, and the Society for the Protection of New Hampshire Forests. Smaller, highly localized versions include the Deschutes Basin Land Trust in Oregon, the Great Rivers Land Trust in Illinois, the Androscoggin Land Trust in Maine, and the Desert Foothills Land Trust in Arizona. Land trusts often provide corollary environmental amenities by offering programs in environmental education, ecological restoration, biological monitoring and research, or management activities for rare species. Dominic P. Parker, Land Trusts and the Choice to Conserve Land with Full Ownership or Conservation Easements, 44 Nat. Resources J. 483, 488 (2004).

being taken out of "productive" use in perpetuity).[154] While no substitute for public regulation, private conservation adds a safety net for regulatory deficiencies. Where land is privately conserved, the landowner is legally bound by bargained-for conservation mandates despite the absence of any regulatory action.

Two basic options exist for creating private conservation land.[155] One approach puts fee title to land in new ownership by a government agency or private land trust. The new owner of the property must manage the land for the purpose of conservation. The other approach relies on a conservation easement to protect the property in perpetuity. In this case, the owner of the property (usually a private land owner) keeps the property but conveys an easement to an agency or land trust. The owner must manage the land subject to the terms of the easement. The holder of the easement typically has rights to access the property, monitor its use, and defend it against harmful uses.

Conservation easements may provide more, or less, protection than regulation. They operate as a transactional overlay on the property and do not affect regulation in any way. In some cases, they may be entirely superfluous to existing regulation, but they are nevertheless valuable because they vest enforcement prerogatives in the holder of the easement. Moreover, they provide enduring obligations, whereas the regulatory process is inherently vulnerable to political instability. The actual strength or weakness of an easement lies in its enforcement.[156]

The popularity of easements has fueled a dramatic growth in the land trust movement over the past three decades.[157] This expansion has resulted in a tremendous increase both in the use of conservation easements as a private land conservation tool and in the number of land trusts that acquire easements. The first conservation land trust "was the Trustees of Reservations, founded in the Boston area in the late nineteenth century."[158] Land trust growth boomed in the 1980s and continued through the 1990s at an unprecedented rate. From 1990 to 1994, the number of land trusts in the United States increased by 23.3 percent, an average of one new land trust per week.[159] According to a recent census, there are more than 1600 land trusts

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[154] See generally Julia D. Mahoney, Perpetual Restrictions on Land and the Problem of the Future, 88 VA. L. REV. 739 (2002).

[155] These approaches are discussed in more detail infra Part IV.B.1.

[156] For information on enforcement, see ELIZABETH BYERS & KARIN MARCHETTI PONTE, THE CONSERVATION EASEMENT HANDBOOK 156-68 (2d ed. 2005).

[157] See, e.g., Mary Ann King & Sally K. Fairfax, Public Accountability and Conservation Easements: Learning from the Uniform Conservation Easement Act Debates, 46 NAT. RESOURCES J. 65, 114-15 (2006).

[158] McVickar, supra note 153, at 33.

[159] Julie Ann Gustanski, Protecting the Land: Conservation Easements, Voluntary Actions, and Private Lands, in PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE 9, 18 (Julie Ann Gustanski & Roderick H. Squires eds., 2000).

nationwide.[160] The West is the fastest growing area for both conserved acreage and new land trusts.[161] Land trusts have saved more than 37 million acres in the lower forty-eight states.[162]

The explosion of land trusts and conservation easements in recent decades is attributable to three factors. First, states have enacted new legislation to provide for conservation easements.[163] In 1981, the National Conference on Uniform State Laws adopted the Uniform Conservation Easement Act ("UCEA") in order to stimulate conservation easement-enabling legislation at the state level.[164] Under the UCEA, a conservation easement can be granted for the following purposes: "retaining or protecting natural, scenic, or open-space values;" "assuring availability of agricultural, forest, recreational, or open-space use;" "protecting natural resources;" "maintaining or enhancing air or water quality;" or "preserving the historical, architectural, archaeological, or cultural aspects of real property."[165] By 2003, twenty-three states had adopted some version of the UCEA.[166] At present, Wyoming is the only state lacking conservation easement legislation.[167]

Second, Congress has helped create a favorable culture for land conservation by offering significant tax incentives for "qualified conservation contributions."[168] To be a qualified conservation contribution, an easement donation must satisfy statutory requirements.[169] If it meets these requirements, the value of the donation is generally based on an appraisal of the fair market value of the property at the time of contribution.[170] In addition to offering even higher deductions for qualified farmers or ranchers,[171] the Internal Revenue Code offers substantial estate and gift tax incentives for qual-

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[160] LAND TRUST ALLIANCE, 2005 NATIONAL LAND TRUST CENSUS REPORT 3 (2005), available at http://www.lta.org/census/2005_report.pdf.

[161] Id.

[162] Id.

[163] The common law did not recognize negative easements such as view easements and conservation easements. See Federico Cheever, Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future, 73 DENV. U. L. REV. 1077, 1080-81 (1996).

[164] See LAITOS ET AL., supra note 10, at 708.

[165] UNIF. CONSERVATION EASEMENT ACT § 1(1), 12 U.L.A. 170 (1996).

[166] BYERS & PONTE, supra note 156, at 12.

[167] Id.

[168] Internal Revenue Code, 26 U.S.C. § 170(h) (2000).

[169] The statutory requirements include contribution of (1) "a qualified real property interest," (2) "to a qualified organization," (3) "exclusively for conservation purposes." Id. § 170(h)(1)(A-C).

[170] Id. § 170(e). If this contribution exceeds the maximum annual deduction currently allowed by the Internal Revenue Code, the remaining value may be carried over for up to fifteen years. Id. § 170(b)(1)(E)(i-ii) (West 2007). Congress recently enhanced conservation incentives dramatically by adding this section to the Internal Revenue Code. See Pension Protection Act of 2006, Pub. L. No. 109-280, § 1206, 120 Stat. 780, 1068-69 (2006). The Act now allows taxpayers to deduct up to fifty percent (formerly thirty percent) of their adjusted gross income ("AGI") based on the value of their qualified conservation contribution. 26 U.S.C. § 170(b)(1)(E)(i) (West 2007). The fifteen-year carryover period replaces what used to be a five-year period.

[171] Id. §§ 2031(c); 2055(f) (2000).

ifying easements.[172] Based on these generous tax provisions, many landowners who are experiencing financial hardship or who want to help their heirs avoid excessive estate tax choose to donate some or all of their land as an easement rather than sell it outright. As knowledge of these tax savings has grown among private landowners, more and more land trusts have formed to respond to their needs.

Third, the Land Trust Alliance ("LTA"), a national organization based in Washington D.C., has greatly stimulated the movement. LTA operates as an umbrella organization that provides technical and educational support to over 1000 land trusts.[173] This support covers a myriad of concerns, from fundraising to training opportunities to lobbying.[174] The information that LTA dispenses empowers the nation's land trusts to be strategic and successful players in the land conservation effort. LTA is also in the process of establishing the Land Trust Accreditation Commission, an independent group that verifies "a land trust's ability to operate in an ethical, legal and technically sound manner and ensure the long-term protection of land in the public interest."[175] Native peoples' land conservation issues have not yet been widely included in the vision of America's land trust movement.

IV. The Convergence of Two Movements: Envisioning a Tribal Trust Role

For the most part, tribes have neither participated in, nor benefited from, the proliferation of conservation easements and land trusts. This trend is changing as an increasing number of tribes and Native organizations realize that conservation easements and other private tools present a ripe opportunity to regain access to cultural resources and apply management expertise to lands from which tribes have been excluded for generations.

The path-breaking projects described in Part B below demonstrate the various opportunities for tribes to reassert environmental sovereignty over aboriginal lands and resources through trust tools. This new tribal role places Native nations once again in the position of being trustees, or partners with other trustees, of aboriginal lands and natural resources. As these initiatives become even more established, they will develop into an important

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[172] § 2055(f); § 2031(c) (2000).

[173] Land Trust Alliance, Our History, http://www.lta.org/aboutus/history.htm (last visited Apr. 3, 2008).

[174] See id.

[175] Accreditation will be based on compliance with forty-two indicator practices outlined in Land Trust Standards and Practices, a set of guidelines that the LTA believes demonstrate a land trust's ability to operate effectively and responsibly. Through the accreditation process, LTA seeks to inspire continued excellence in the land trust movement. Land Trust Alliance, Standard Practices, http://www.lta.org/accreditation (last visited Apr. 3, 2008) (on file with the Harvard Environmental Law Review).

subfield of Native natural resources law.[176] Moreover, as the conservation trust movement becomes global, these initiatives and strategies may be exported to indigenous contexts abroad.

Some may find it ironic that tribes are invoking Western property tools to reassert a management role over aboriginal lands, for these tools have never favored Indians. Nearly the entire aboriginal land base was taken — many say stolen — under color of Western property law, which marginalized the tribal property right.[177] The Western concept of full dominion over property has been the root of environmental destruction that threatens nearly every tribe today.

Despite this apparent paradox, the conservation trust movement has tapped a separate vein of property law and put it to important use. Trust ownership of property is far different from unrestricted fee ownership. A trustee has the inherent duty to protect assets and manage them for long-term abundance.[178] This form of ownership invokes the same tenet of stewardship obligation that formed the basis of tribal aboriginal management.

This commonality provides an opportunity for tribes to use property law mechanisms as a means of reviving aboriginal land management, but this time as trustees recognized by the majority society. This would not be the first time tribes have successfully injected Native ways into a Western institutional structure. For example, many tribes are developing legal systems that, while incorporating a Western administrative structure, invoke traditional modes of Native justice and dispute resolution.[179] Tribes are rewriting tribal codes to incorporate traditional mandates.[180] Some tribes developing pollution control programs are also writing their environmental standards to protect traditional values.[181] In the same way, tribes will use Western trust tools to further their unique style of environmental management.

Part A below describes the dynamics that form an impetus for Native conservation trust initiatives. Part B draws upon examples of existing tribal conservation projects to describe four templates for tribal engagement in the private conservation movement. Part C highlights some ways in which the tribal trust role in the private conservation movement may differ from the role of a traditional land trust.

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[176] For treatment of this field, see JUDITH V. ROYSTER & MICHAEL C. BLUMM, NATIVE AMERICAN NATURAL RESOURCES LAW, CASES AND MATERIALS (2002).

[177] Johnson v. McIntosh, 21 U.S. 543, 574 (1823) (holding that Indian ownership over their lands was akin to a right of occupancy rather than fee simple).

[178] Wood, Reclaiming an Environmental Discourse, supra note 42, at 448-52.

[179] For discussion, see GETCHES ET AL., supra note 23, at 418-55.

[180] See id. at 421-43. The Navajo Nation, for example, wrote its spiritual laws into the Navajo Code.

[181] See, e.g., Jane Marx et. al, Tribal Jurisdiction over Reservation Water Quality and Quantity, 43 S.D. L. REV. 315, 366 (1998).

A. Dynamics Prompting Native Conservation Trust Initiatives: From Discrete Projects to a Movement

While each instance of private Native conservation is unique, common dynamics propel most initiatives. An understanding of these factors is necessary to evaluate the potential growth of a tribal trust movement.

1. Fences of Conquest

Tribal initiatives nearly always arise out of a threat to aboriginal resources or lands. For example, a private landowner may propose a subdivision on a Native gravesite that carries profound spiritual and cultural significance to a tribe. A federal agency may plan to clear-cut a forest that provides habitat for deer harvested by a tribe. A rancher may run cattle on a sensitive meadow that provides the last spawning grounds for a treaty fishery. These types of threats proliferate across aboriginal lands. It may be no exaggeration to say that nearly every onslaught on a natural resource or landscape involves some aboriginal interest.

These infringements are the direct result of one property regime abruptly and completely supplanting another. Though carried out under color of law, treaties (or their equivalents) were not actually products of consensual negotiation for the mutual advancement of tribes and the federal government.[182] Tribes ceded their homelands in a context of coercion, often under the threat of punishment.[183] However, this formal conveyance of property rights through treaty did not sever tribes' spiritual, familial, and sustenance ties to their homelands. Instead, the new boundaries have caused profound, continuing anguish and loss to Native America. Having failed to extinguish the Native interest in aboriginal lands, the fences of attempted conquest are in many ways illusory.

Conflicts inevitably result from the basic tenet of property law giving current owners nearly unlimited ability to put the property to use in any way they deem beneficial (within the confines of regulatory law). The exertion of these new property rights affects lingering treaty rights and ancient Native interests in aboriginal territory. In essence, private title creates a kingdom that excludes all prior owners. While this mechanism operates efficiently with the typical suburban or urban plot of land, it does not sufficiently protect Native peoples' interests in their aboriginal lands. Underlying most Native conservation initiatives is the potential for an aboriginal resource to suffer irreversible damage at the hands of current owners.

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[182] See Wilkinson & Volkman, supra note 84, at 609-12.
[183] Id. at 609-10.

2. Coercive Forces as Catalysts for Native Conservation Deals

Conservation deals do not often spring forth simply because a private landowner, or set of landowners, recognizes the continuing aboriginal interest in the privately owned land. Typically, the Native interest is wholly disregarded because it does not fit within the paradigm of private property ownership. Nearly every pioneering Native conservation deal requires a coercive force to draw the owner of the threatened land or resource to the table. A coercive force is any circumstance that both limits the landowner's choices with respect to the land and creates a promising outcome through tribal participation.

In many cases, the coercive force is the potential legal power tribes hold to thwart the landowner's desired use of land. Numerous tribes retain powerful treaty rights to water, fish, and wildlife.[184] Judicial decisions affirming these rights may significantly curtail private or federal uses of land.[185] These legal rights become coercive forces that impel landowners to explore alternatives other than their preferred use. Later, these same forces can shape the negotiation of a deal. The greater the power a tribe or Native group holds to veto the landowner's land-use preference, the stronger its bargaining position will be.

Some coercive forces, however, do not involve the tribe's legal standing in any measure, but rather arise from sheer economic pressures confronting the private landowner. Many family owners of large tracts of land cannot afford to pay taxes on the land. They may grant conservation easements to gain tax deductions, or they may sell a conservation easement to gain crucial revenue. Moreover, some landowners are prompted to negotiate with tribes for permanent conservation of their land out of a sheer desire to leave a legacy for future generations. The tribe may be the only player that can bring that desire to fruition.

3. Footholds and Handshakes

While coercive forces may catalyze pioneer projects in particular regions, a second wave of projects is likely to grow from neighborly relationships. Because all private conservation projects spring from consent rather than conquest, they become footholds for growing relationships between landowners that have been culturally fenced off from each other since treaty times. Many of the pioneer projects studied in this research work are now

[184] See Washington v. Wash. State Comm. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 685 (1979) (preserving a quantitative right to salmon for tribes as a class based on their "fair share of the available fish"); United States v. Washington, No. CV 9213RSM (W.D. Wa. Aug. 22, 2007) (declaring that the "right of taking fish, secured to the Tribes in the Stevens Treaties, imposes a duty upon the State [of Washington] to refrain from building or operating culverts under State-maintained roads that hinder fish passage and thereby diminish the number of fish that would otherwise be available for Tribal harvest").

[185] See generally Wood, Abundant Trust, supra note 10.

serving as footholds for tribes or Native groups to extend conservation beyond reservation boundaries.

Native conservation managers, whether tribal employees or traditional tribal people, use the anchored parcel as a natural base from which to build relationships and trust in the community. Ownership of fee title or a conservation easement on a parcel provides a venue for demonstrating sound management and neighborly policies over a period of years. Eventually, the tribal van parked in the field becomes a familiar, accepted sight among neighbors and a symbol of goodwill in the community. Tribal conservation managers begin to negotiate informal "handshake" conservation or access agreements with their neighbors. Though legally revocable, such agreements are held in place by trust, friendship, and respect. When the parties mutually feel the time has come to formalize relationships, the handshake agreements develop into binding conservation transactions.[186] Having been seeded with successful projects, the movement grows on from that point.

B. Four Models of Native Engagement in the Private Conservation Movement

Native conservation projects completed so far suggest four basic templates of Native engagement in the private conservation movement. These four models are derived from experience to date and are in no way rigid. Moreover, they do not represent the entire universe of applied situations, but merely seek to highlight four avenues for participation in a new movement. The discussion below incorporates case studies illustrating use of these models. Such case studies were selected for their advanced use of trust tools.[187] The essence of private conservation is its flexibility to respond to unique circumstances. The four models are presented as an organizational tool for mapping this emerging field; however, legal cartography must keep pace with change.

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[186] Group discussion at the Wayne Morse Center Symposium on Tribes as Trustees Again (Apr. 6, 2007) (on file with the Harvard Environmental Law Review). For more information see supra note *.

[187] The case studies in no way represent the full inventory of examples. For instance, the methodology used in this project chose case studies that reflected natural resource management, rather than historical artifacts management, which gives rise to many additional examples. In choosing the case studies, the authors consulted with a number of professionals in the conservation trust field. A full-day workshop was held to discuss the suitability of many of these case studies and to draw conclusions to guide future projects. Because most of the largest aboriginal territories are located throughout the West and the Pacific Northwest, the case studies are disproportionately representative of these regions. Pacific Northwest Tribes are particularly advanced in their use of conservation trust tools due to the fact that they have been involved in extensive litigation that often serves as a catalyst for negotiated outcomes. See discussion supra Part IV.A.2.

1. The Tribal Holder

The first model involves tribes as holders of conservation title. Such title could be either full fee title or a conservation easement. The two possibilities have very different ramifications. Where a tribe gains a conservation easement over private property, the fee title remains with the private property owner. The tribe has no sovereign jurisdiction over the land but does have a "stick in the bundle" as a result of the easement.

The other possibility, acquiring fee title for purposes of conservation, is different than other fee acquisitions a tribe may make. It is well settled that tribes can hold property in fee.[188] Many tribes are trying to regain title to lands through the private market or through congressional transfer.[189] These efforts are part of a broad land restoration effort driven largely by a desire to restore the reservation land base. Tribes typically seek to exercise jurisdiction over such lands, but whether they can do so is a complicated question of federal Indian law.[190] For purposes of this Article, however, the "Tribal Holder Model" focuses exclusively on acquisition of conservation lands that have some external legal mechanism imposed on the transaction to assure that the tribe manages the land for conservation over the long term. For example, the acquired land may be encumbered by a conservation easement or covenant held by a third party (federal or state government, or a private land trust). Such easement or covenant is typically placed on the land before it is transferred to the tribe. It is binding in perpetuity and is enforceable against the tribe (subject to sovereign immunity concerns examined in Part II of this Work[191]).

The presence of such external restrictions characterizes the property as "conservation property" rather than property primarily sought for restoration of a tribe's land base. Of course, tribes may often acquire unencumbered lands for the singular purpose of conservation. This Article, however, only considers the arrangement of encumbered property, as unencumbered property does not make use of conservation trust tools.

One might question why a tribe would seek to acquire a parcel encumbered with a conservation easement. There may be several reasons. First, the funding of the purchase may be facilitated by such an arrangement. An intermediate broker such as the Trust for Public Land ("TPL") might acquire a parcel, sell a conservation easement on it to a third party (such as a federal agency), and then offer the encumbered land for a much reduced price to the tribe. This funding structure effectively splits the purchase price between

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[188] See FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 15.04[5] (Lexis-Nexis 2005).
[189] Id. § 15.04[3][b].
[190] Id. § 6.05[1][a].
[191] Wood, Tribes as Trustees II, supra note 15, at Parts II.A.1 and II.F.2.

the conservation easement holder and the tribe.[192] It is also possible that public funds may be contingent on a required covenant or easement on the land held by the funding agency.[193] Second, the non-tribal parties to the transaction may lack confidence in tribal management for conservation over the long term. This concern may or may not be well received by tribal leadership. Nevertheless, a third-party easement or covenant does not directly infringe on sovereignty because it is merely a component of a private transaction and does not involve tribal jurisdiction. Finally, the tribal leadership accepting land into tribal ownership may wish to ensure long-term conservation through transactional encumbrances enforceable by outside parties. Tribal governments are subject to political influence as are other sovereign governments. A conservation easement helps protect against any potential inclination of a future tribal council to use the land as a market asset and thereby defeat the purpose of the acquisition.

When a tribe acquires either a conservation easement or fee title to land, one question that arises is whether that interest will be held by the Bureau of Indian Affairs ("BIA") on behalf of the tribe. It need not be, as tribes may hold interests without the involvement of BIA. Traditionally, however, BIA has been the designated federal trustee of tribal property.[194] The Secretary of the Interior has discretionary authority to take land or easements into trust for Indian tribes and Indian individuals, though the process is quite cumbersome and time consuming.[195] Restoration lands are often placed in BIA ownership to provide immunity from state taxes.[196] When BIA takes land or conservation easements into trust ownership for a tribe, it must manage those property interests exclusively for tribal benefit.[197] Because BIA's trust ownership of Indian property derives from federal Indian law, BIA ownership on behalf of tribes is distinct from other federal agencies' use of property interests to protect tribal values, a scenario explored in Model 3 (Public Agency Holder).[198]

Because the main advantage of BIA trust ownership is that it insulates tribes from state taxes, the decision of whether to convey conservation interests to BIA may turn primarily on the taxes expected in connection with the

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[192] See infra notes 292-96 and accompanying text (describing TPL's sale of an easement to The Pacific Forest Trust prior to the sale of fee title to the InterTribal Sinkyone Wilderness Council).

[193] See infra note 259 and accompanying text (referencing a memorandum of agreement between the Bureau of Indian Affairs and the Confederated Tribes of Warm Springs requiring the Tribes to manage Pine Creek Ranch for fish and wildlife purposes).

[194] See COHEN, supra note 188, at § 503[2].

[195] This authority permits the Secretary to acquire interests in off-reservation lands — including water and surface rights — for the purpose of providing land for federally recognized tribes. Indian Reorganization Act of 1934, 25 U.S.C. § 465 (2000); City of Sault Ste. Marie v. Andrus, 532 F. Supp. 157, 159-61 (D.D.C. 1980); 25 C.F.R. § 151 (2006). The process requires a tribe or individual Indian to submit an application to the Secretary and gives the state and local governments in which the land is located an opportunity to comment before the Secretary makes his final decision. See 25 C.F.R. § 151.9-13.

[196] See COHEN, supra note 188, at § 8.02[2][b].

[197] In many instances, the tribe manages BIA-held property subject to BIA oversight.

[198] See infra Section IV.B.3.

property. A conservation easement will carry no state tax liability. A fee parcel encumbered with a conservation easement held by another entity will, in theory, have much less market value than an unencumbered fee title, and thus may carry reduced tax liability. In either case, the primary advantage of BIA ownership is diminished. However, if the tribe opts to convey lands or an easement to BIA to hold it in trust, a tribe can accomplish the transaction either by purchasing or accepting the easement and then transferring it to BIA[199] or by asking BIA to purchase or accept a conservation easement directly on the tribe's behalf.

In practice, there have been very few, if any, instances of BIA acquisition of conservation easements or conservation fee interests on behalf of tribes.[200] This is likely due to the cumbersome process imposed by BIA when taking property in trust.[201] The examples below illustrate the various possibilities inherent in the Tribal Holder Model.

a. The Nez Perce Example — Tribal/Non-Tribal Partnership Holder of Conservation Easement

Thirty miles north of McCall, Idaho, in Nez Perce aboriginal territory, sits Burgdorf Meadows, an open, alpine meadow with springs holding significant cultural, historical, and environmental value.[202] The South Fork of the Salmon River runs through the property, and the meadow provides critical habitat for one of the last native runs of salmon remaining in the watershed.[203] The property also provides important winter habitat and calving grounds for elk.[204] Historically, Nez Perce Indians engaged in salmon harvests on the property and used it for hunting and gathering purposes.[205]

Scott and Connie Harris, who have continued its historic use as a rustic hot springs destination for locals and tourists, own the property.[206] The springs adjacent to the meadow are minimally developed to provide a mod-

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[199] See Sault Ste. Marie, 532 F. Supp. at 162 (rejecting the argument "that the [Indian Reorganization Act of 1934] prohibits the Secretary [of the Interior] from holding lands in trust for the persons from whom the land was acquired"); City of Tacoma v. Andrus, 457 F. Supp. 342, 346 (D.D.C. 1978) (rejecting the same argument and emphasizing that both the legislative history of the Act and the inclusion of the term "relinquishment" in the list of means of acquisition support the argument that tribes themselves as beneficial owners can provide the trust lands).

[200] To be clear, however, BIA often takes title to restoration lands on behalf of tribes.

[201] See supra note 195.

[202] See The Trust for Public Land, Tribal Partnerships, http://www.tpl.org/tier3_cdl.cfm?content_item_id= 13226 (last visited Apr. 3, 2008) [hereinafter Tribal Partnerships].

[203] Interview with Scott Harris and Connie Harris, in McCall, Idaho (Dec. 30, 2006) [hereinafter Harris Interview]; see also PAUL A. KUCERA & DAVE FAUROT, BONNEVILLE POWER ADMINISTRATION, ADULT CHINOOK SALMON ABUNDANCE MONITORING IN LAKE CREEK, IDAHO, 2001 ANNUAL REPORT (2002), available at http://pisces.bpa.gov/release/documents/documentviewer.aspx?pub= U00004600-2.pdf (describing recovery effort of wild Chinook salmon in a watershed feeding the South Fork of the Salmon River).

[204] Harris Interview, supra note 203.

[205] Tribal Partnerships, supra note 202.

[206] Harris Interview, supra note 203.

est swimming pool, lodge, and bathhouse facilities.[207] The property was in Scott's family for generations, and Scott and Connie have felt a long-standing obligation toward the fish that spawn on their land.[208] Over the years, they made considerable financial sacrifices to prevent development.[209] Out of a desire that their property be protected forever and remain in the family, they opted to pay a debt hovering over their land by selling a portion of their property as an easement rather than maximizing their profit by selling to developers.[210]

The negotiations for the easement began in the early 1990s, when Scott contacted the Idaho Department of Fish and Game ("IDFG") about purchasing an easement to protect fish habitat.[211] IDFG was interested and received funding through Bonneville Power Administration ("BPA") mitigation funds.[212] Unfortunately, the deal fell through when the person staffing the project left IDFG.[213] Scott then solicited assistance from TPL to help "broker" a conservation easement.[214] TPL negotiated the easement using the prior draft agreement with IDFG as a starting point.[215]

The key to the deal was TPL's decision to involve the Nez Perce Tribe. The Tribe was interested in protecting salmon spawning grounds in its aboriginal territory and received $400,000 in funding from BPA to purchase the easement.[216] Without the Tribe's financial involvement, the easement would likely not have been purchased, and the Harrises would have been forced to sell their property.[217]

The final agreement created an easement protecting over ninety acres in perpetuity.[218] The holders consist of five agencies acting as partners: the Nez Perce Tribe, BPA, IDFG, the Rocky Mountain Elk Foundation, and the United States Forest Service ("USFS").[219] The five partners are grouped as a management board, which is vested with complete authority over the easement.[220] Each entity has one representative on the board.[221] The easement prohibits development of the meadow, including any structures.[222] It allows access for monitoring, but other access is not permitted.[223] Grazing is still a

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[207] Id.
[208] Id.
[209] Id.
[210] Id.
[211] Id.
[212] Id.
[213] Id.
[214] Id.
[215] Id.
[216] Id.
[217] Id.
[218] Tribal Partnerships, supra note 202.
[219] Harris Interview, supra note 203.
[220] Id.
[221] Id.
[222] Id.
[223] Id.

permissible use, but it must comply with rotation parameters specified in the easement.[224]

b. The Klamath Example — Tribal Holder of Conservation Easement

The Yainix Ranch is a 788-acre parcel located in the Upper Klamath Basin of Southern Oregon.[225] It sits near the confluence of the Sprague and Sycan Rivers, both of which once held thriving populations of native redband trout as well as (now endangered) Lost River and shortnose suckers.[226] The land on which the ranch is located was originally part of the Klamath Indian Reservation.[227] Following allotment to an individual Indian family, the land was sold to a series of non-Indian ranchers.[228] In recent years, owners of the land stocked far more cattle than was environmentally feasible in order to keep up with payments that substantially exceeded "ag value."[229] Years of overgrazing degraded the ranch to such an extent that it was little more than dirt and thistles by 2002.[230] Riparian erosion filled the river with sediment and contributed to the Sprague River becoming the primary source of low water quality in Upper Klamath Lake.[231]

Dozens of other severely degraded rangelands in the Klamath area helped create the ecological catastrophe giving rise to the Klamath water wars.[232] The Klamath Tribes obtained the senior water right in the region following their restoration from termination in 1986,[233] yet the ranchers held tremendous political clout with the federal water agencies. The controversy pitting the economic survival of ranchers against the biological survival of endangered fish exploded from year to year because of ever more inadequate quantities to meet the region's water needs. In the legal battles that ensued, the community became deeply divided.[234]

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[224] Id.

[225] Duncan M. Greene, Comment, Dynamic Conservation Easements: Facing the Problem of Perpetuity in Land Conservation, 28 SEATTLE U. L. REV. 883, 920 (2005); see also 1000 FRIENDS OF OREGON, TOO MANY HOMES ON THE RANGE: THE IMPACT OF RURAL SPRAWL ON RANCHING AND HABITAT 19 (2004) (on file with the Harvard Environmental Law Review).

[226] Cooperative Conservation America, A Cooperative Conservation Story: The Yainix Ranch, http://www.cooperativeconservationamerica.org/story.shtm (last visited Apr. 3, 2008) (on file with the Harvard Environmental Law Review).

[227] James Honey, Remarks at the Wayne Morse Center Symposium on Tribes as Trustees Again (Apr. 6, 2007) (on file with the Harvard Environmental Law Review).

[228] Id.

[229] Id.

[230] Cooperative Conservation America, supra note 226.

[231] 1000 FRIENDS OF OREGON, supra note 225.

[232] For background, see generally Reed D. Benson, Giving Suckers (and Salmon) an Even Break: Klamath Basin Water and the Endangered Species Act, 15 TUL. ENVTL. L.J. 197 (2002); Holly Doremus & A. Dan Tarlock, Fish, Farms and Clash of Cultures in the Klamath Basin, 30 ECOLOGY L.Q. 279 (2003).

[233] See United States v. Adair, 723 F.2d 1394, 1414 (9th Cir. 1984).

[234] Cooperative Conservation America, supra note 226.

Becky and Taylor Hyde come from conservation-minded ranching families that settled the Klamath Falls area a century ago.[235] After personally witnessing the conflict surrounding water cutbacks to farmers in the middle of growing season, the Hydes decided to embark on a different approach to resolving the Klamath water wars.[236] In 2002, they purchased the most devastated piece of land they could find, the Yainix Ranch,[237] intending to demonstrate how cooperation could restore the ranch to productivity in a way that was good for ranchers, tribes, and fish.[238]

To facilitate such cooperation, the Hydes worked with Sustainable Northwest, a Portland-based nonprofit organization, to create an innovative agricultural conservation easement.[239] The Klamath Tribes hold the easement and are solely responsible for monitoring the ranch's ecological health in order to restore riparian vegetation and provide the conditions for restoration of water quality, habitat, and fisheries.[240] The Hydes retain title to the ranch and live and pay taxes on the property,[241] but they must manage the land in accordance with an outcome-based ecological restoration plan designed by a collaboration of state, tribal, environmental, and neighboring agricultural partners.[242]

c. The Quinault Example — Tribal Holders of Conservation Fee Land

The Quinault Indian Reservation is located on Washington's Olympic Peninsula. The area contains the best remaining low-elevation old-growth habitat in the Pacific Northwest and is home to several species listed under the Endangered Species Act, including the northern spotted owl, marbled murrelet, and bull trout.[243]

In 1988, Congress enacted Public Law 100-638 to redress the exclusion of thousands of acres of land from the original Reservation boundary due to a "surveying error."[244] This law expanded the Reservation to include nearly 12,000 additional acres of land, commonly referred to as the North Bound-

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[235] Id.
[236] Id.
[237] Id.
[238] Id.
[239] Id. For more information on Sustainable Northwest, see http://www.sustainablenorthwest.org.
[240] Honey, supra note 227.
[241] Id.
[242] Cooperative Conservation America, supra note 226.
[243] THE TRUST FOR PUBLIC LAND, A CONSERVATION STRATEGY FOR THE QUINAULT 4, http://www.tpl.org/content_documents/Quinault_letter_size_a.pdf available at William Poole, The Quinault's Quest, LAND & PEOPLE, Fall 2007, available at http://www.tpl.org/tier3_cd.cfm?content_item_id= 21966&folder_id= 3409; Bruce Jones, Remarks at the Wayne Morse Center Symposium on Tribes as Trustees Again (Apr. 6, 2007) (on file with the Harvard Environmental Law Review).
[244] Pub. L. No. 100-638, 102 Stat. 3327 (1988); see also Poole, supra note 243 (explaining how a 15,000-acre parcel was left out of an 1873 reservation enlargement).

ary Expansion Area ("North Boundary").[245] Due to concerns about old growth timber and the presence of sensitive species in the area, the Quinault Indian Nation ("QIN") developed a comprehensive forest management plan for the North Boundary in 1995.[246] In January 1998, the U.S. Fish & Wildlife Service issued a biological opinion finding that timber harvest included in the plan would jeopardize marbled murrelets.[247] QIN filed a lawsuit in response.[248]

In March 1999, QIN requested help from TPL to negotiate the sale of conservation easements to the U.S. Department of Interior.[249] The development of this agreement took nearly nine years, and the conservation easements cost about $32 million.[250] The parties negotiated the purchase of perpetual conservation easements over two areas of land within the North Boundary. One conservation area included 2925 acres of land with old-growth timber; the other consisted of 1282 acres of land with second-growth timber.[251] QIN continues to hold fee to and manage the land subject to restrictions contained in the easement.[252] Federal payments help fund QIN's land consultation and reforestation efforts and set a foundation for ecologically viable planning.[253] TPL provides additional assistance by helping QIN to inventory and value available lands and manage an effective land-acquisition program.[254]

d. The Warm Springs Example — Tribal Holders of Conservation Fee Land

Located in Oregon's Columbia River Basin, Pine Creek Ranch provides important wintering habitat for mule deer and Rocky Mountain elk, as well as habitat for over 250 other species of amphibians, reptiles, mammals, and birds.[255] The land was ceded by the Confederated Tribes of Warm Springs as part of the Stevens treaties of 1855.[256] Within the ranch, the Tribes maintain treaty rights for hunting, fishing, and gathering roots.[257]

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[245] Pub. L. No. 100-638, 102 Stat. 3327 (1988).
[246] Endangered and Threatened Wildlife and Plants, 71 Fed. Reg. 53,837, 53,853 (Sept. 12, 2006) (to be codified at 50 C.F.R. pt. 17).
[247] Id.
[248] Id.
[249] Poole, supra note 243.
[250] Id.
[251] Endangered and Threatened Wildlife and Plants, 71 Fed. Reg. 53,853 (Sept. 12, 2006) (to be codified at 50 C.F.R. pt. 17).
[252] Jones, supra note 243.
[253] Id.
[254] Poole, supra note 243.
[255] Northwest Power and Conservation Council, Success Stories — Pine Creek Ranch, http://www.nwcouncil.org/fw/stories/pinecreek.htm (last visited Apr. 3, 2008); Interview with Mark Berry, Former Pine Creek Conservation Area Manager, The Confederated Tribes of Warm Springs (July 10, 2007).
[256] Christina Crockett, Pine Creek Helps Mitigate for Hydropower, Madras Pioneer, Apr. 14, 2004; Berry, supra note 255.
[257] Berry, supra note 255.

The Tribes acquired fee simple to Pine Creek Ranch through the Northwest Power and Conservation Council's Columbia River Basin Fish and Wildlife Program.[258] Based on the Tribes' commitment to stewardship of the land, the ranch is a partial mitigation for the impacts of hydropower dams on fish and wildlife.[259] A memorandum of agreement between BPA and the Tribes requires the Tribes to manage the property for fish and wildlife, and requires BPA to continue to provide a reasonable level of funding.[260] Tribal acquisition has led to public access benefits, including youth education, hiking, and hunting on land that was previously closed to public use.[261]

2. The Native Land Trust Holder

A second model involves tribes or Native groups forming their own land trusts to acquire conservation title. The nonprofit vehicle of a land trust can be structured to meet Native needs through a variety of mechanisms. A Native focus may be accomplished by creating specific selection requirements for the board of directors, by crafting the mission of the land trust to reflect Native values, by creating procedures designed to incorporate Native decision-making through a board of advisors, or by other means.

The flexibility of a nonprofit model allows molding the organization in a number of ways. These possibilities span a spectrum of tribal sovereign control. On one end are tribal land trusts, land-holding organizations created by tribes or by consortia of tribes. These organizations are independent from the tribes they represent despite their close affiliation. An example of this model is the InterTribal Sinkyone Wilderness Council described below. At the other end of the spectrum are Native land trusts, organizations created by and for Native people but having no formal affiliation with a tribe. An example is the Native Conservancy Land Trust described below. For purposes of this Article, both tribal and Native land trusts are considered as variations of the Native Land Trust Model.

To date, there are few examples of Native land trusts. Seeding an entire generation of Native land trusts will require the same degree of administrative and funding support that spawned the first-generation trusts. Initial steps to forming these trusts include developing a mission statement and goals, securing funding, and obtaining legal assistance to ensure compliance with local, state, and federal requirements.[262] While few exist today, the program director of TPL's Tribal & Native Lands Program envisions Native

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[258] Id.
[259] Id.
[260] Id.
[261] Id.
[262] See BYERS & PONTE, supra note 156, at 27-31. For a summary of the drawbacks of forming a nonprofit corporation in the land trust context, see SALLY K. FAIRFAX & DARLA GUENZLER, CONSERVATION TRUSTS 16-17 (2001).

land trusts proliferating across the country with service areas ultimately covering two billion acres of aboriginal territory.[263]

a. InterTribal Sinkyone Wilderness Council

The Sinkyone region of California is located two hundred miles north of San Francisco in the Coast Ranges of Mendocino and Humboldt Counties. Historically, Sinkyone's temperate redwood forests provided habitat for a staggering array of plants and animals.[264] For thousands of years, the Sinkyone Indian people thrived by taking their sustenance from the land's abundant biodiversity.[265] In the mid-1800s, however, volunteer armies of colonizers massacred the majority of Sinkyone people.[266] The invaders wanted to settle in this region and exploit its abundant resources.[267] Some Sinkyone survivors eventually moved to reservations established in neighboring tribal territories adjacent to the Sinkyone lands.[268] Large-scale logging of the redwoods soon followed.[269] In just over one century, most of the ancient forests were clear-cut.[270] A network of roads crisscrossing steep slopes, eroded hillsides, and degraded streams punctuates their absence.[271] Damage from logging activities to Sinkyone cultural areas, including sacred sites, has been extensive.[272]

In 1983, the California Department of Forestry ("CDF") approved a Timber Harvest Plan ("THP") filed by Georgia-Pacific Corporation ("G-P") for a portion of its Sinkyone property.[273] The seventy-five-acre THP encompassed a grove of redwoods located a few miles south of the Sinkyone Wilderness State Park, which had been established in the mid-1970s.[274] Activists referred to this land as the "Sally Bell Grove," named for a Sinkyone Indian survivor who witnessed the massacre of her family when she was

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[263] Chuck Sams, Remarks at the Wayne Morse Center Symposium on Tribes as Trustees Again (Apr. 6, 2007) (on file with the Harvard Environmental Law Review). According to Mr. Sams, land trusts on reservations and in Indian Country are particularly helpful when private, non-Indian landowners will not otherwise sell directly to a tribe. Id.

[264] Trees Foundation, InterTribal Sinkyone Wilderness Council, http://www.treesfoundation.org/affiliates/specific-22 (last visited Apr. 2, 2008).

[265] Id.

[266] Hunters and loggers, along with soldiers and vigilantes, killed entire Sinkyone families. See Gordy Slack, Sinkyone InterTribal Park, CAL. WILD, Fall 1995, available at http://www.calacademy.org/calwild/1995fall/stories/habitats.html.

[267] Id.

[268] Hawk Rosales, Remarks at the Wayne Morse Center Symposium on Tribes as Trustees Again (Apr. 6, 2007) (on file with the Harvard Environmental Law Review); Rosales Interview, supra note 62.

[269] Rosales Interview, supra note 62.

[270] Id.

[271] Id.

[272] Id.

[273] Envtl. Prot. Info. Ctr. v. Johnson, 170 Cal. App. 3d 604, 609, 612 (1985) [hereinafter EPIC].

[274] Id. at 608.

a child.[275] The Environmental Protection Information Center ("EPIC") and the International Indian Treaty Council challenged the THP in a case known as EPIC v. Johnson, in which the plaintiffs sued G-P, CDF, and the State Board of Forestry.[276] In July of 1985, the California Court of Appeals ruled that G-P's THP violated the California Environmental Quality Act.[277] The court found that both G-P and CDF had failed to adequately consult with Native Americans and to protect Native American cultural resources.[278] The court also ruled that G-P and CDF had not provided adequate public notice for the THP or adequately considered cumulative environmental impacts.[279] Because of the lawsuit, the State Board of Forestry later significantly revised the State's THP approval process.[280]

In 1986, G-P sold 7100 acres of its Sinkyone coastal property to a consortium of buyers including the California State Coastal Conservancy ("SCC"), Save-the-Redwoods League, TPL, and the California Department of Parks and Recreation.[281] Almost half of this land (3255 acres, including the Sally Bell Grove) was used to enlarge the southern end of the oceanfront Sinkyone State Park.[282] TPL acquired title to the remaining approximately 3900 adjacent acres (the Sinkyone Remainder Upland Parcel).[283]

SCC, a state agency, loaned TPL public bond measure money to purchase the 3900 acres.[284] Because of its public obligations, SCC initially felt that the Sinkyone Remainder Upland Parcel should be dedicated to industrial logging for local economic purposes.[285] Seven federally recognized Northern California Indian tribes with ancestral ties to the land disagreed.[286] They wanted the Upland Parcel protected to save Sinkyone's few remaining old-growth redwoods as well as important areas containing cultural resources.[287] They proposed that the land be returned to traditional stewardship through cultural conservation.[288]

To become a transactional player in the fate of the Sinkyone land, local Indian tribes founded a unique organization established specifically to acquire and conserve the 3900 acres.[289] In December 1986, these tribes formed the InterTribal Sinkyone Wilderness Council ("Council"), a nonprofit

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[275] Rosales Interview, supra note 62; see also InterTribal Sinkyone Wilderness Council, The Vision and the Work, 12 CAL. COAST & OCEAN (1996), available at http://www.scc.ca.gov/coast&ocean/archive/VISION.HTM.

[276] EPIC, 170 Cal. App. 3d at 608, 609.

[277] Id. at 608.

[278] Id. at 626-27.

[279] Id. at 623-25.

[280] Rosales Interview, supra note 62.

[281] Id.

[282] Id.

[283] See TREES FOUNDATION, supra note 264.

[284] Id.

[285] Rosales Interview, supra note 62.

[286] Id.

[287] Id.

[288] Id.

[289] TREES FOUNDATION, supra note 264.

501(c)(3) organization.[290] Each of the Council's seven founding tribes appointed a representative to sit on the Council's board of directors.[291] The Council embarked on what turned out to be a ten-year campaign to convince the State to approve the property's sale and to raise the $1.4 million required for its purchase.[292]

In 1996, TPL sold an easement on the property to the Pacific Forest Trust ("PFT").[293] Because TPL and the SCC understood the Council would soon purchase the property, the Council played a central negotiating role in the easement transaction process.[294] The easement's restrictions lowered the value of the property without conflicting with the Council's long-term cultural management goals.[295] The PFT easement allows, but does not compel, the landowner to engage in industrial timber harvesting, although such activity is heavily restricted to protect the property's cultural and ecological values.[296] The Council purchased the property in late August 1997, thereby creating the first inter-tribal wilderness area in North America.[297]

Based on a condition required by SCC when it first loaned the money to TPL to purchase the property, an irrevocable offer to dedicate also encumbered the property.[298] The terms of the offer require the underlying landowner to provide limited public trail access to the property.[299] In essence, this transactional tool allowed SCC to record an open offer of an easement for limited public access on the deed.[300] The offer stays dormant as long as the owner of the encumbered property remains in compliance, but if the terms of the offer are violated, SCC can accept the offer — much as one would exercise an option — and become the holder of the public access easement.[301]

Now comprised of ten federally recognized tribes,[302] the Council is carrying out the terms of the offer through the construction of three trails that will provide public access through the InterTribal Sinkyone Wilderness.[303]

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[290] Id.
[291] Rosales Interview, supra note 62.
[292] TREES FOUNDATION, supra note 264.
[293] Rosales Interview, supra note 62.
[294] Id.
[295] Id.
[296] Id.
[297] TREES FOUNDATION, supra note 264.
[298] Rosales Interview, supra note 62.
[299] Id.
[300] Id.
[301] Id.
[302] The Council's ten member tribes, and their appointed representatives on the Council, include: Cahto Tribe of Laytonville Rancheria (Atta Stevenson), Coyote Valley Band of Pomo Indians, Hopland Band of Pomo Indians (Randolph Feliz), Pinoleville Indian Reservation (Martha Knight), Potter Valley Little Lake Pomo Tribe, Redwood Valley Little River Band of Pomo Indians (Elizabeth Hansen), Robinson Rancheria (Luwana Quitiquit), Round Valley Indian Tribes (Paul Anderson), Scotts Valley Band of Pomo Indians (Crista Ray), and Sherwood Valley Band of Pomo Indians (Daniel Rockey, Sr.). Priscilla Hunter, a founder and the chairperson of the Council as well as an instrumental force in leading the fight to save Sinkyone following EPIC, is a member of the Coyote Valley Band of Pomo Indians. Id.
[303] Id.

The Council anticipates it will construct the trails in 2009. By carefully designing the location of the trails, the Council will be complying with the terms of the offer without compromising cultural or natural resources.[304] In negotiating the PFT easement and other encumbrances, the Council memorialized certain rights aimed at improving life for the tribal families with ties to the land.[305] It also reserved its right to gather and hunt traditional sources of foods and medicines, to construct villages on the land using traditional construction methods, and to allow local tribal members to camp in the villages on a rotating basis.[306]

The Council is currently engaged in the development of other conservation easements that will ensure expanded protection for cultural and ecological values on other lands within the ancestral Sinkyone Indian territory.[307]

b. Native Conservancy Land Trust

In the Copper River Delta and Prince William Sound regions of Alaska, natural resource extraction interests threaten thousands of acres of wild salmon habitat.[308] Habitat loss in these regions has cultural as well as biological ramifications.[309] Subsistence-based harvest of fish, animals, and plants continues to form the cultural backbone for the Eyak and other Native people in Alaska.[310] The Eyak have had tremendous difficulty conserving their ancestral lands, and what little preservation has occurred has involved selling Native lands in fee simple.[311] In order to create a different alternative for land conservation, two individuals from the Eyak's Eagle clan founded the Native Conservancy ("Conservancy").[312]

The Conservancy is a nonprofit organization that has a Native executive director and a board of directors comprised of some Native members.[313] Its mission is to "support Indigenous people's efforts to preserve, restore, and repatriate ancestral lands through the establishment of Indigenous land conservation trusts on sacred lands and waters that are inherent to the protection and perseverance of sovereignty, subsistence, spirituality and culture."[314] The Conservancy employs a bio-cultural approach to land conservation that integrates the protection of cultural resources and ancestral lands with the conservation of wildlife habitat.[315] Though the Conservancy has not pro-

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[304] Id.
[305] Id.
[306] Id.
[307] Id.
[308] Letter from the Native Conservancy to the Titcomb Foundation (Nov. 23, 2002) (on file with the Harvard Environmental Law Review).
[309] Id.
[310] Id.
[311] Id.
[312] E-mail from Dune Lankard, Interim Executive Director, Native Conservancy Land Trust, to Zach Welcker (Mar. 17, 2008, 09:04 PST) (on file with the Harvard Environmental Law Review).
[313] Id.
[314] Letter from the Native Conservancy, supra note 308.
[315] Id.

tected any lands to date, it is working on obtaining a subsurface easement over the mining rights on the Bering River coalfield.[316] If successful, this effort would end mining on over 12,000 acres of land.[317] The Conservancy also hopes to help establish a global network of local Native land trusts to acquire other critical lands.[318]

c. White Earth Land Recovery Project

In the 1800s and early 1900s, the Annishinaabeg people of the White Earth Indian Reservation in Minnesota lost title to nearly ninety percent of their land base through a series of "unethical tax foreclosures, treaty abrogations, and property thefts."[319] In order to help recover her people's homelands, Winona LaDuke founded the White Earth Land Recovery Project ("WELRP"), an independent nonprofit organization.[320] WELRP regains portions of the Reservation's original land base by purchasing land from non-Native owners and by receiving donations of land from people leaving the Reservation.[321] As LaDuke explains, "acre by acre, we will restore our land base, protect our ancestor's graves and create a wider sustainable, traditional harvest-based economic foundation for members of our community."[322]

3. The Public Agency Holder

A third model involves a public agency holding conservation fee or an easement for purposes that support Native interests. Public agencies at the state and federal level have become major players in the land trust movement in order to curb sprawl, protect agricultural landscapes, and secure buffers for public lands.[323] Most agencies with environmental missions are authorized to acquire fee title and conservation easements to further their programs, though a minority of states do not recognize governments as holders of conservation easements.[324] A few environmental laws explicitly mandate the agency to search for acquisition opportunities.[325] Hundreds of

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[316] Lankard, supra note 312.
[317] Id.
[318] Id.
[319] See The Onaway Trust, White Earth Land Recovery Project, http://www.onaway.org/indig/ojibwe.htm (last visited Apr. 3, 2008).
[320] Id.
[321] Id.; White Earth Land Recovery Project & Native Harvest Online Catalog, Land, http://nativeharvest.com/node/10 (last visited Apr. 3, 2008).
[322] The Onaway Trust, supra note 319.
[323] BYERS & PONTE, supra note 156, at 241-43.
[324] Id. at 18-19 (noting, for example, that New Mexico omits government entities from its list of eligible holders).
[325] See, e.g., National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. §§ 668dd(a)(4)(C),(G) (2000) (requiring the Secretary to plan and direct the continued growth of the system, including acquiring water rights needed to fulfill refuge purposes).

federal, state, and local agencies hold conservation easements across the country.[326]

Not uncommonly, public acquisition is the only feasible way to protect a parcel facing an imminent threat. Many tribes would rather have their aboriginal lands brought into public ownership than have them destroyed altogether by private parties. Moreover, public ownership preserves the opportunity to transfer the parcel to a Native land trust holder at a later date. This model may decrease in use as Native land trusts become more powerful players, but it is an important stopgap measure to prevent destruction of resources in the interim.

The Public Agency Model is particularly useful where the threatened resource falls under protections provided in public lands statutes. For example, federal laws protect against damage to archeological resources found on federal lands. This legal mechanism alone creates a vast amount of protection that does not exist on private lands. Other laws offer some protection (though notoriously deficient) for fish and wildlife on federal lands.[327] If the resource involves a harvestable plant or animal species, treaty rights or aboriginal gathering rights might form the basis for a co-management or access agreement between a tribe and a federal agency.[328] Finally, if the landscape value is of sacred or religious significance, executive orders may offer some protection.[329]

a. Office of Hawaiian Affairs — Wao Kele o Puna

Wao Kele o Puna, the largest lowland native rainforest in Hawai'i, is a place of tremendous significance for Native Hawaiians.[330] For centuries, they have used the area for traditional sustenance and religious purposes.[331] The forest provides habitat for more than 200 native Hawaiian plant and animal species, houses a critical seed bank for the re-growth of native forests

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[326] See BYERS & PONTE, supra note 156, at 8 (noting that "the National Park Service, just one of the federal easement-holding agencies, held easements on 253,348 acres" as of 2004); Federico Cheever, Property Rights and the Maintenance of Wildlife Habitat: The Case for Conservation Land Transactions, 38 IDAHO L. REV. 431, 443 (2002) ("The nation's largest holder of conservation easements is almost certainly the federal government.") (citing U.S. GEN. ACCOUNTING OFFICE, FEDERAL LANDS: INFORMATION ON THE ACREAGE, MANAGEMENT, AND USE OF FEDERAL AND OTHER LANDS 7 (1996) (indicating more than 2.1 million acres of federally held easements)).

[327] See National Forest Management Act, 16 U.S.C. § 1600 (2000); Endangered Species Act of 1973 § 7, 16 U.S.C. § 1536 (2000); see also LAITOS ET AL., supra note 10, at 400-40, for a detailed discussion on the topic.

[328] For general discussion, see LAITOS ET AL., supra note 10, at 596-97.

[329] See Exec. Order No. 13,007 (1996).

[330] Kimo Campbell, From Pilikia to Pono: The Journey of Wao Kele o Puna, HAWAI'I NEWSLETTER (The Trust for Public Land), Winter 2006, available at http://www.tpl.org/tier3_cd.cfm?content_item_id= 21070&folder_id= 269.

[331] Press Release, The Trust for Public Land, 25,000 Acre Wao Kele o Puna Forest Protected (HI) (July 19, 2006) [hereinafter TPL Press Release], available at http://www.tpl.org/tier3_cd.cfm?content_item_id= 20765&folder_id= 269.

that have been covered by lava flows, and covers one-fifth of the area above the aquifer holding the Big Island's single largest source of drinking water.[332]

In the 1980s, a fierce political battle arose when the State of Hawai'i targeted Wao Kele o Puna for geothermal exploration.[333] After twenty years of community opposition, the owner of the property decided to forego energy development and put Wao Kele o Puna up for sale.[334] The Pele Defense Fund (named after the Hawaiian volcano goddess) asked TPL to help figure out a way to purchase the nearly 26,000-acre parcel.[335] In turn, TPL enlisted assistance from a coalition of partners including USFS, the Office of Hawaiian Affairs ("OHA"), the State Department of Land and Natural Resources ("DLNR"), the United States Department of Agriculture, and the Hawaiian congressional delegation.[336] TPL purchased the property for $3.65 million and then conveyed it to OHA.[337] Senator Daniel Inouye played a pivotal role in securing $3.4 million from a congressional appropriation through USFS's Forest Legacy Program.[338] OHA, the Pele Defense Fund, and DLNR currently jointly manage the land as a conservation area.[339]

b. United States Forest Service — Miller Island

Miller Island is located in the Columbia River near its confluence with the Deschutes River. Ancestors of the Columbia River Tribes once lived on this 777-acre island, and their pictographs still remain on the basalt cliffs rising from the island's southeastern shore.[340] In 1989, TPL purchased Miller Island to protect its land and pictographs from additional damage by cattle grazing and gravel mining.[341] TPL then conveyed the property to the USFS in order to protect it permanently.[342] The Nez Perce, Umatilla, Yakama, and Warm Springs tribes are helping the USFS design a cultural and natural resource management plan for the island.[343] The island is also being used as a site for the re-internment of ancestral remains recovered under the Native American Graves and Repatriation Act.[344]

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[332] Id.
[333] Campbell, supra note 330.
[334] Id.
[335] Id.
[336] Id.
[337] TPL Press Release, supra note 331.
[338] Id.
[339] Id.
[340] The Trust for Public Land, Tribal & Native Lands Project Highlights, http://www.tpl.org/tier3_cdl.cfm?content_item_id= 1182&folder_id= 217 (last visited Apr. 3, 2008) (on file with the Harvard Environmental Law Review).
[341] Id.
[342] Id.
[343] Id.
[344] The Trust for Public Land, Tribal & Native Lands Restoration, http://www.tpl.org/tier3_cdl.cfm?content_item_id= 13225&folder_id= 217 (last visited Apr. 3, 2008) (on file with the Harvard Environmental Law Review); Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013, 18 U.S.C. § 1170 (2000).

4. The Non-Native Land Trust Holder

A final model involves existing non-Native land trusts that adopt programs or projects that protect tribal interests. Because all non-Native land trusts operate within what was once aboriginal territory, many acquisitions provide an opportunity to protect tribal values. A growing number of these land trusts are attentive to such values and are searching for opportunities to partner with tribes to protect Native resources. Accordingly, these land trusts have considerable potential to help encourage development of a new Native land trust movement.

The extent to which a non-Native land trust formalizes Native resource protection varies considerably. Some land trusts may be more strategically inclined to develop an entire program geared toward protection of tribal resources and may seek projects to bring that program to fruition. Other land trusts may develop experience on the project, rather than program level, making acquisitions that protect property with substantial Native value. The case studies below offer examples of various possibilities.

a. The Trust for Public Land — Program Level

TPL is a national land trust that was formed in 1972. It established a Tribal & Native Lands Program in 1999,[345] drawing upon its established role in the conservation trust movement.[346] The mission of the Tribal & Native Lands Program is to partner with tribes in order to help them use private mechanisms to meet their conservation and cultural heritage objectives within ancestral territory.[347] TPL has worked with fifty-five tribes in sixteen states to acquire or protect 126,535 acres for tribal benefit.[348] As of 2007, TPL has acquired over 32,000 acres — a value of over $27 million — for tribes in the Pacific Northwest alone.[349] TPL has served as a major player in many of the tribal conservation projects to date by brokering deals, securing funding, and holding title on a temporary basis.

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[345] E-mail from Laura Baxter, Former Tribal & Native Lands Program Coordinator, Trust for Public Land, to Zach Welcker (July 2, 2007, 15:42 PDT) (on file with the Harvard Environmental Law Review).

[346] With offices around the country, TPL has completed more than 3500 land conservation projects in 47 states, protecting more than two million acres. The Trust for Public Land, About TPL, http://www.tpl.org/tier2_sa.cfm?folder_id= 170 (last visited Apr. 3, 2008) (on file with the Harvard Environmental Law Review).

[347] The Trust for Public Land, Tribal & Native Lands Program Mission, http://www.tpl.org/tier3_cdl.cfm?content_item_id= 13224 (last visited Apr. 3, 2008) (on file with the Harvard Environmental Law Review).

[348] Press Release, The Trust for Public Land, Lyle Point Returns to Yakama Nation (WA/OR) (May 15, 2007), http://www.tpl.org/tier3_cd.cfm?content_item_id= 21435 (on file with the Harvard Environmental Law Review).

[349] Tribal Partnerships, supra note 202.

b. Capitol Land Trust — Project Level

In 2006, the Capitol Land Trust ("CLT") in Washington purchased a 203-acre conservation easement on Triple Creek Farm from Ralph and Karen Monroe.[350] The farm is located on lower Eld Inlet's Mud Bay and contains nearly four miles of marine shoreline.[351] The property is also an archaeological site of national significance, with traditional fishing grounds and artifacts of a 1000 year-old Squaxin Village.[352] To purchase this easement, CLT relied on both grant support and partnerships with the Washington Department of Ecology, TPL, U.S. Fish & Wildlife Service, and the Monroes.[353]

The easement itself does not grant access or rights to the Squaxin Island Tribe, but the Monroes grant access to the Tribe for archaeological research and other cultural reasons.[354] Though not recorded in the easement, the landowners and the Tribe also have an agreement that allows the Tribe to remove artifacts from the site.[355] Those artifacts form a substantial portion of the core collection of the Squaxin Island Tribal Museum.[356] The easement provides for future archaeological research as well.[357]

c. Deschutes Basin Land Trust — Project Level

For thousands of years, runs of summer steelhead and spring Chinook salmon swam up the Deschutes River to spawn in Central Oregon.[358] These fish provided sustenance for the Indian peoples of the region.[359] Tribal leaders reserved fishing rights in the treaties, but since 1968, dams operated by Portland General Electric ("PGE") have prevented the native fish runs from reaching their spawning grounds in the Upper Deschutes, Metolius, and Crooked rivers.[360] However, a historic agreement forged by the Confederated Tribes of Warm Springs will reopen traditional spawning habitat to both steelhead and salmon.[361]

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[350] Capitol Land Trust, Munro (Triple Creek Farm) Conservation Easement: Acquired in 2006, http://www.capitollandtrust.org/ (follow "Conserved Lands" hyperlink; then "Munro Creek Farm) Conservation Easement" hyperlink) (last visited Apr. 3, 2008) (on file with the Harvard Environmental Law Review).

[351] Id.

[352] Id.

[353] E-mail from Kathryn Moore, Conservation Projects Manager, Capital Land Trust, to Matthew Rykels, Research Assistant to Professor Mary Wood (June 14, 2007, 16:50 PDT) (on file with the Harvard Environmental Law Review).

[354] Id.

[355] Id.

[356] Id.

[357] Id.

[358] Rachel Odell, Tribes 'Buy In' to Restore Their River, HIGH COUNTRY NEWS, Sept. 27, 2004, available at http://www.hcn.org/servlets/hcn.Article?article_id= 15016.

[359] Id.

[360] Press Release, Department of Interior, Secretary Norton Lauds Settlement Agreement for Oregon Hydroelectric Project (July 13, 2004), http://www.doi.gov/news/040713a (on file with the Harvard Environmental Law Review).

[361] Id.

PGE's dams were authorized in 1951 pursuant to a fifty-year license granted by the Federal Energy Regulatory Commission ("FERC").[362] As the fifty-year license period drew toward a close, the impending license expiration provided leverage for the Tribe to force an agreement with PGE that would result in restored fish runs.[363] The Tribe had designed fish passage that would mitigate the blockage caused by the dam. When the PGE license came up for renewal, the Tribe filed a competing application with FERC to operate the dams.[364] The tension created by the dueling applications ultimately resulted in PGE entering into an agreement with the Tribe giving the Tribe one-third ownership interest in the dams immediately, with an option to eventually become the majority owner.[365] Based on this agreement, the parties filed a joint license renewal application with FERC.[366] In 2005, FERC granted PGE and the Tribe a fifty year license to operate the Pelton Round Butte Hydroelectric project.[367] The license requires the reintroduction of salmon and steelhead upriver of the dams,[368] installation of new fish passage facilities on the dams themselves,[369] and creation of the Pelton Round Butte Fund to help finance restoration of fish habitat.[370]

Having established the means of returning fisheries to their historic grounds through fish passage technology, the Tribe needed a land trust partner to ensure that the recovery habitat would be secure from environmental threats. To help support the reintroduction effort, the Deschutes Basin Land Trust ("DBLT") launched a new program called "Back to Home Waters."[371] This program works collaboratively with a variety of interest-holders to identify, protect, and restore salmon and steelhead habitat that will receive reintroduced runs of salmon pursuant to the relicensing agreement.[372] To date, about 2500 acres of critical lands have been secured through conservation easements and purchase of fee.[373] DBLT's commitment to rehabilitation of riparian lands helps the Tribe meet its duties under the license and, more importantly, helps restore the lifeblood of tribal ancestors and their descendants.

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[362] Portland Gen. Elec. Co., 111 F.E.R.C. 61,450, P. 2 (June 21, 2005).
[363] Odell, supra note 358.
[364] Id.
[365] Id.
[366] Portland Gen. Elec. Co., 111 F.E.R.C. at P. 1.
[367] Id. at P.1-2.
[368] Id. at P.81.
[369] Id. at app. C.
[370] Id. at P.103.
[371] Deschutes Basin Land Trust, Back to Home Waters, http://www.deschuteslandtrust.org/BTHW.htm (last visited Apr. 3, 2008) (on file with the Harvard Environmental Law Review).
[372] Id.
[373] E-mail from Brad Nye, Conservation Project Manager, Deschutes Basin Land Trust, to Zach Welcker (Aug. 15, 2007, 16:15 PDT) (on file with the Harvard Environmental Law Review).

C. Unique Aspects of the Tribal Trustee Role

Tribal use of private conservation trust tools will likely differ in some significant ways from the approach taken by non-Native land trusts. The projects described above suggest several unique aspects of the emerging Native trust role.

1. The Tribal Role in Land-Use Conflicts

One difference involves background land-use conflicts. Quite often, the incentive for private conservation comes from a land-use dispute in which a private developer faces tremendous anti-development pressure from the public. The threat of litigation by environmental groups as well as significant, negative press attention usually creates a specter of uncertainty around development plans. This dynamic often creates an incentive to sell the land, perhaps even at a reduced price. Many developers feel that some market gain through private conservation is better than no market gain — the result if the opposition has its way.[374]

Most land trusts take special care to avoid becoming embroiled in these land-use conflicts. These organizations often refuse to take any public position against development proposals. The reason is purely practical. Naturally, developers often feel personal hostility to citizens or groups opposing their plans. They may intensely resent the regulatory process and the leverage it gives citizens. If land trusts were a visible player in such disputes, developers might refuse to deal with them. Therefore, land trusts prefer to be the neutral players that come in with a mutually beneficial solution when the parties are in conflict. Of course, land trusts benefit greatly from a regulatory system that constrains developers and brings them to the table, but land trusts do not advertise that fact. Instead, they try to cultivate good relationships with both the development industry and environmental groups. This neutrality is a central part of the style most land trusts employ as part of everyday business.

Because Native use of land extends back thousands of years, encompasses spiritual dimensions, and is tied to family identity, tribes will not likely view threats to land in the detached manner that characterizes the typical land trust approach. Unlike most land trusts, tribes may not stay on the sidelines of such disputes. Rather, tribes will often engage the regulatory system, using their sovereign standing, applicable treaty rights, and other legal means to prevent the threat in the first place. Tribes cannot be expected to forsake their sovereign involvement in off-reservation land development conflicts simply to maintain a neutral presence that will not offend developers.

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[374] Group discussion at the Wayne Morse Center Symposium on Tribes as Trustees Again, supra note 186.

The repercussions of this role are complex. For instance, a prospective seller of property near Oregon's Wallowa Lake reportedly refused to sell his land if regional tribes participated in its post-sale management.[375] The seller "blamed" the president of the local land trust for what the seller "perceived to be environmental activism that was detrimental to the local timber industry."[376] Nevertheless, the tribes' financial contributions ultimately enabled the Oregon State Parks Trust to purchase the property for permanent protection.[377] This complicated set of events should encourage conservation professionals to recognize the different positions in which tribes and non-Indian land trusts may find themselves.

2. Beneficial Use of Land

Another distinction of the tribal role in the land trust movement relates to use of conservation property. Whereas many standard conservation easements prohibit any sort of active property use by the easement holder, tribal trust instruments may increasingly provide for beneficial use that reflects aboriginal presence on the land.[378] In the Native tradition, people have a continuing, reciprocal relationship with Nature through sustenance harvest, ceremony, and practices affirming family history and stewardship of the place.[379] This active, beneficial use by humans is far different and more multi-faceted than the singular conservation of land. While conservation fee offers the most potential for restoring the stewardship of families to the land, the flexibility and versatility of a conservation easement can also secure such beneficial uses if the granting landowners are receptive to them.[380]

3. Restorative Management

Few conservation easements today have restoration provisions. Public lands managers have only recently focused on restoration management, and many land trusts find restoration beyond the scope of their administrative abilities.[381] Tribes and Native land trusts, however, are likely to negotiate easements with provisions that reflect the Native emphasis on active man-

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[375] Billie Jo Jannen, Marr Ranch Sale 'On Again', WALLOWA COUNTY CHIEFTAIN, May 10, 2007, available at http://www.wallowacountychieftain.info/main.asp?SectionID= 9&SubSectionID= 61&ArticleID= 13009&.

[376] Corey Wicks, Krieger Backs out of Land Deal with State, WALLOWA COUNTY CHIEFTAIN, Mar. 22, 2007, available at http://www.wallowacountychieftain.info/print.asp?ArticleID= 12597.

[377] Press Release, Oregon State Parks Trust, Oregon State Parks Trust Helps State Purchase Marr Ranch Property (Aug. 15, 2007), http://oregonstateparkstrust.org/newsUpdates/News/marrranchpressreleast1 (on file with the Harvard Environmental Law Review).

[378] Group discussion at the Wayne Morse Center Symposium on Tribes as Trustees Again, supra note 186.

[379] See Kimmerer, supra note 45, at 432-37.

[380] Group discussion at the Wayne Morse Center Symposium on Tribes as Trustees Again, supra note 186.

[381] Id.

agement.[382] Easements may provide for replanting native species, engaging in prescribed burns, removing silt from rivers, reintroducing species, and conducting a host of other restorative actions.[383] Such management may tie into a tribal restoration plan that reaches far beyond the protected property.[384] This new breed of tribal easement may lead the way in establishing models for non-Native land trusts as they too move into restoration.[385]

4. Spiritual Presence on the Land

For many tribes, the use of private conservation mechanisms will allow a revitalization of their spiritual connection with the landscape. Emotionally and culturally, the conservation transaction does not occur on a blank slate but rather represents a continuation of a story dating back to time immemorial. The land itself is likely to have deep familiarity and resonance with tribal people. This degree of attachment generally contrasts with the non-Native land trust context. While Western conservation is certainly grounded in an ethic of stewardship, it lacks the spiritual and religious dimension that characterizes traditional Native management. Land trust professionals frequently become familiar with the land for the first time during the conservation transaction. A sterile, scientific approach often characterizes their land management style. In contrast, Native cultures have been organized for thousands of years around Creation stories that tie their emergence to the land itself, so their collective knowledge of its caretaking can be thought of as being encoded in their cultural DNA.

Tribes are likely to express their religious and spiritual values in practices on the land itself. Passing of conservation deeds might be memorialized in a ceremony. Tribal elders might go to the land and give songs or prayers to call back the animals or fish.[386] Families might practice religious rites to honor their ancestors or awaken the spirits of the place.[387] In all of these ways, the land becomes the context for Native religious expressions. The extent to which these practices are made transparent to the public may vary considerably between tribes or Native groups, but this dimension makes the tribal role in private conservation much different from the general land trust approach.

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[382] Id.
[383] Id.
[384] Id.
[385] Id.
[386] See Wood, Politics of Abundance, supra note 38, at 1336.
[387] The Yakama Nation for example, held a ceremony prior to resuming exercise of their treaty rights to fish at Willamette Falls on the Willamette River in Oregon. After a prayer of thanks in honor of their ancestors and a salmon feast (which was open to Indians and non-Indians alike), tribal fisherman walked out on traditional wooden scaffolding to place their dipnets in the falls, John Laatz, Awakening the Spirits, THE OREGONIAN, May 2, 1994, at A1.

V. Strengthening Native Environmental Sovereignty Through Trust Mechanisms

Tribal use of conservation trust mechanisms may greatly advance Native environmental sovereignty beyond what tribes have been able to achieve through co-management initiatives off their reservations. The unique nature of trust mechanisms as flexible, transactional property tools gives tribes the ability to restructure relationships that were disrupted by the attempted conquest of Indian nations. As tribes reconnect with their aboriginal lands, their culture expands beyond reservation limits. Trust concepts therefore help to provide tribes with two essential tools of traditional Native self-determination: access to sacred lands and the ability to sustainably use the natural resources on those lands. These were, and remain today, vital tools of nation-building.

A. Rectifying the Fragmentation Caused by Western Property Systems

As noted in Section II, the need for tribes to assert environmental prerogatives on their aboriginal lands is a pressing one. These lands frequently provide vital habitat for harvest species and also contain cultural grounds and sacred sites. The federal government conveyed these lands to states, corporations, and settlers, leaving tribes with "islands of Indianness" separated from aboriginal grounds. Trust mechanisms create an opportunity for tribes to reconnect their reserved homelands with important corollary sites. By using these mechanisms, tribes can negotiate with landowners across ceded territory and begin to piece together some of the important landscapes fragmented by Western property systems. This renewed presence will serve to educate the majority society of the continuing, irreplaceable role of aboriginal lands.

In the past, many tribes have placed restored aboriginal lands in BIA trust ownership. It has long been assumed that without such BIA involvement, restored lands would be vulnerable to future sale by tribal councils in need of additional revenue. In that sense, the paternalistic federal trust role has afforded long-term security. However, trust mechanisms offer many potential advantages over BIA ownership. First, the bureaucracy involved with BIA acquisition makes the trust approach more expedient and practical where there is a short time frame for acquisition. Second, a tribe may be able to gain conservation easements over a larger portion of aboriginal territory than can be secured through BIA's traditional land restoration process. Third, private trust mechanisms enable tribes to move beyond federal paternalism by repositioning them as trustees of aboriginal lands. Fourth, trust mechanisms may neutralize state tax concerns that prompt tribes to place

land with BIA.[388] Fifth, trust tools assure that land is protected in perpetuity, thereby obviating the need for BIA to hold the land in order to preclude alienation. In all of these ways, trust devices represent an approach to nation-building that circumvents a seemingly chafing federal trustee role.

B. Creating a Cultural Bridge

For decades, tribes have tried to protect off-reservation sacred sites, burial grounds, and other cultural areas through litigation, legislative initiatives, and executive orders. The results of these efforts have been disappointing.[389] Passed in 1978, the American Indian Religious Freedom Act acknowledges the importance of Native religious traditions but fails to provide any meaningful protection from federal land-use decisions that threaten sacred sites.[390] The U.S. Supreme Court has found that Indian sites on federal public lands deserve no special protection under constitutional law.[391] Many sites are open to destruction without any legal recourse whatsoever.

Legislation and executive orders often generate widespread resistance on the part of property owners and resource users. Perhaps because of this backlash, the political climate has not yielded any generalized protection of Indian sacred sites. Trust tools, on the other hand, may provide a usefully narrow means for tribes to secure cultural sites. Because they are used in a site-specific manner and are consensual in nature, trust tools do not generate massive resistance. Moreover, they bring the tribe or its representatives directly in contact with property owners, thereby circumventing federal or state politics. Easements may be particularly suitable for resistant landowners. A tribe might successfully negotiate for increased protection and access over time through a series of transactions (in effect, overlay easements) as the landowner gains trust toward the tribe. Tribes might also operate proactively by monitoring the status of land and capitalizing on opportunities when land becomes available on the market. Ultimately, as tribes secure anchored cultural properties, such lands become platforms for social change that may have positive, reverberating effects throughout a community.[392]

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[388] State taxes are not an issue for conservation easement holders because the underlying owner is responsible for paying property taxes unless the parties have bargained otherwise. See BYERS & PONTE, supra note 156, at 98-99. Since some states provide income and property tax deductions to landowners who grant a conservation easement over their property, id. at 93, 98-99, state tax laws may actually encourage the conveyance of an easement to qualifying tribal holders.

[389] See GETCHES ET AL., supra note 23, at 738-39.

[390] American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996 (2000). For discussion, see GETCHES ET AL., supra note 23, at 221, 749-51; LADUKE, supra note 3, at 13-14; Mary Christina Wood, Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources, 1995 UTAH L. REV. 205, 205-06.

[391] Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (permitting timber harvest and road construction on lands traditionally used for religious purposes by members of three American Indian tribes).

[392] For example, TPL's work in northeastern Oregon helped catalyze a movement in Enterprise, Oregon that resulted in the high school mascot being changed from the "Savages" to the

C. Reconnecting People with the Land

Tribal co-management efforts on ceded lands generally take form through contracts or partnerships with other governments. Because the overriding focus of such inter-sovereign efforts is restoration, beneficial use at the family level rarely finds its way into the arrangement. By contrast, trust tools offer a means of reconnecting Native families with their aboriginal lands.[393] Conservation transactions incorporate a property dimension that can promote beneficial use, and a Native land trust may tailor a level of access to the comfort level of the underlying owner. As trust between the owner and the land trust builds, the parties may enter into subsequent agreements to expand the envelope of beneficial use consistent with the initial easement.

D. Reassembling Tribal Sovereign Relationships

One of the most promising aspects of a Native trust approach is its ability to use transactional arrangements to reassemble tribal property relationships that were scrambled during attempted conquest. In many cases, current tribal sovereignty configurations do not reflect the historic political structure of tribes. In treaty times, the federal government found it expedient to move many separate tribes — even known enemies — onto one reservation and create a confederated tribal structure to govern and represent the distinct bands.[394]

This arrangement has resulted in a serious disconnect between historical sovereign relationships and modern tribal representation. The problem carries forth in land relationships. For example, Chief Joseph's Band of Nez Perce Indians lived in the Wallowa Valley of Oregon, but the federal government exiled the band to the Colville Indian Reservation in Washington where they remain today with eleven other various Washington bands.[395] The Nez Perce Nation maintains its seat of government on its reservation in Lapwai, Idaho and is the formal sovereign representative for Nez Perce treaty claims. The Wallowa Band is not qualified to receive treaty or other privileges that the Nez Perce Tribe gains. As a result, Nez Perce land restoration efforts in the Wallowa Mountains may directly benefit some, but cer-

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"Outlaws." Bowen Blair, Jr., Northwest Regional Director, Trust for Public Land, Remarks at the Wayne Morse Center Symposium on Tribes as Trustees Again (Apr. 6, 2007) (on file with the Harvard Environmental Law Review); see also Enterprise School Votes to Scrap Controversial Mascot, http://www.kgw.com/education/localeducation/stories/kgw_050505_edu_savage_mascot.244c5d17d.html (last visited Apr. 3, 2008) (on file with the Harvard Environmental Law Review).

[393] See supra note 306 and accompanying text (describing the reserved right of certain tribal members to camp in a traditional village in the InterTribal Sinkyone Wilderness).

[394] For a description of the process, see generally GETCHES ET AL., supra note 23, at 93-127.

[395] Confederated Tribes of the Colville Reservation, Demographics, http://www.colvilletribes.com/demograph.htm (last visited Apr. 3, 2008) (on file with the Harvard Environmental Law Review).

tainly not all, descendants of families native to that area. In a similar vein, where many tribes historically shared a landscape, one tribe's success in reclaiming the land through traditional restoration methods may exclude other tribes from using it.

Transactional tools can provide useful devices for reconstituting these fractured relationships. A Native land trust can create a structure for representing all of the tribes with historic aboriginal ties to a particular land. For example, the governing structure of the InterTribal Sinkyone Wilderness Council[396] allows its member tribes (all of which retain important historic and/or ancestral ties to the area protected) to engage in inter-tribal cooperation and diplomacy regarding use of shared aboriginal land outside of the artificial constraints imposed by Western concepts of conquest. At the same time, the Council's autonomy from the participating tribes creates a sense of detachment that allows each tribal representative to "leave politics at home."[397] Thus, each tribal representative has the liberty and the responsibility to make decisions that will benefit the land and the Indian people overall rather than promote the exclusive interests of his or her own tribe.

VI. Strengthening the Western Conservation Movement Through Tribal Trust Initiatives

A tribal trust role may also fortify the national conservation movement in general. Since its inception thirty years ago, the movement has lost ground in a number of areas.[398] Trust mechanisms provide a structure that will allow tribes to bring to bear their unique strengths in land and resource management. Their involvement could not come at a more crucial time, for the biological systems across this nation are deteriorating, placing the future of all people in jeopardy.

A. Spreading an Ethic of Conservation

As noted earlier, tribes tend to give voice to conservation values in a spiritual and deep-rooted way. Their approach to land management is characterized by natural law mandates that have guided generations for millennia. The reverence with which traditional tribal people view all aspects of the natural world vests them with the will to abide by natural covenants of self-restraint and preserve assets for future generations.

While many leading environmental thinkers have urged a new ethic in land use,[399] this ethic has simply not emerged as a dominant strain within the

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[396] For a description of the membership of the Council see supra note 302.

[397] Rosales Interview, supra note 62.

[398] Eric T. Freyfogle, Why Conservation Is Failing and How It Can Regain Ground (2006).

[399] See, e.g., Aldo Leopold, A Sand County Almanac 204 (1949) ("The land ethic simply enlarges the boundaries of the community to include soils, waters, plants, and animals, or collectively, the land.").

majority society. The common approach to land is still very much characterized by an exploitative philosophy engrained in a private property approach that sanctions full dominion over Nature. Despite the passage of thousands of regulations and statutes designed to steer society toward sustainability, natural resource destruction continues with no end in sight.

The land trust movement represents the first time, perhaps, that a conservation ethic manifests itself in private property law. But though land trusts have become established in many communities across the country, their ability to promote a general ethic that reaches beyond the boundaries of their protected landholdings is limited. Land trusts often lack a cultural and historical relationship to the lands they conserve, and their management does not encompass any religious or spiritual approach to Nature. Moreover, their market approach to conservation, combined with their neutral demeanor toward the development industry, reinforces the social acceptability of viewing land as a market asset and exploiting it for profit.

While tribes are similarly constrained by the market structure of the land trust movement, they are positioned to spread their own land ethic when they return as trustees of aboriginal lands. According to Vine Deloria Jr., "[w]ithin the traditions, beliefs, and customs of the American Indian people are the guidelines for society's future."[400] The consistent expression of intergenerational responsibility and stewardship obligations towards Nature, grounded in timeless cultural practices, has the potential to proliferate a type of respect that is still foreign to the majority society. Actual examples of land management accomplished through Native land trust holdings may provide illustrative strength to a more generalized cultural message conveyed through tribal media, public relations, and educational outreach. Because Native religion and spirituality is embedded in aboriginal land, the manifested ethic is organic to the landscape, not imposed or exported from somewhere else. An ethic that is connected in a tangible way to a particular locale has the ability to harness the accumulated human affections for the natural resources in that community.[401] Accordingly, the ethic may have greater potential to take root in those communities, whereas a generalized land ethic of the kind Aldo Leopold espoused is often not enough to overcome a community's entrenched outlook on private property rights. By bringing spiritual, cultural, and historical context to threatened resources through a uniquely Native worldview, tribal trustees may be able to spread a reverence for Nature, a will for conservation, and a penchant for natural abundance that the mainstream environmental movement has not yet been able to accomplish.

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[400] DELORIA, supra note 13, at 295.

[401] See id. at 296 ("Religion cannot be kept within the bounds of sermons and scriptures. It is a force in and of itself and it calls for the integration of lands and peoples in harmonious unity.").

B. Weaving Humans Back Into Landscape

The Western conservation movement has achieved its greatest preservation success by excluding non-Indians from Nature. The most pristine areas in the country are those that are off limits to human economic or commercial activity. Wilderness areas, for example, are managed as places where humans may visit but may not remain.[402]

The problem with this fencing-off approach to conservation, however, is that it has been perceived by many as shallow and impractical, giving rise to shrill criticism on the part of private property rights groups who charge that wilderness areas and national monument designations "lock up" the land to the detriment of humans. Forest protection is lambasted as "jobs versus owls." Environmental goals are "bad for business." Until the conservation movement is able to present a cohesive and workable paradigm for human interaction with the environment, its objectives may be challenged as "extreme." The movement will remain superficial if it does not somehow blend humans with the land they are dependant on for survival.[403] Despite the overwhelming political necessity of fencing off some places, the conservation movement needs to move beyond its first generation strategies to develop a more encompassing vision at the grassroots level.[404]

Conservation easements present a flexible means by which to memorialize commitments of natural protection while at the same time allowing economic use. Tribal trustees are positioned to add depth to the conservation trust movement by showcasing sustainable economic practices that have evolved from thousands of years of experience living in a symbiotic relationship with the land. Despite a handful of "working" conservation easements in some ranching and forest communities, there are not many other examples in the majority society of humans living off the land in a sustainable way.

In a broader sense, by integrating humans back into conserved landscapes, the tribal trust movement will draw attention to the role of land in the pursuit of social justice and human rights. This dimension has been much ignored by the conservation movement. Many of the most ecologically protected lands in this country, such as Yosemite and Yellowstone National Parks, encompass an ugly history of attempted conquest. When the federal government wrested lands from the tribes, it drove off Native people who had lived there for millennia.[405] By using private trust mechanisms to return the stewardship of Native families to their homelands, the tribal trust movement may broaden and strengthen a conservation movement that has been singular in purpose.

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[402] Wilderness Act of 1964, 16 U.S.C. § 1131(c) (2000) ("A wilderness . . . is hereby recognized as an area where . . . man himself is a visitor who does not remain.").

[403] Group discussion at the Wayne Morse Center Symposium on Tribes as Trustees Again, supra note 186.

[404] Id.

[405] John Schelhas, Race, Ethnicity, and Natural Resources in the United States: A Review, 42 NAT. RESOURCES J. 723, 729 (2002).

C. Adding Durability to Conservation

While modern environmental laws were intended to bring resolution to natural resources disputes, quite the opposite has resulted. A constant tug-of-war over water, forests, and land embroils many parts of the American West and Alaska.[406] The legal system has thus far proved incapable of producing a stable regime, as evidenced by the Klamath water wars and the Northwest timber wars.[407] The predominant strategy used by conservation groups has been litigation. Rather than bringing stability, litigation has created a "one step forward, two steps back" phenomenon. The pattern is one of constant upheaval through changes in presidential administrations, court rulings, and appropriation riders. This political and legal volatility creates uncertainty and tension for all parties with a stake in natural resources. Even more seriously, it puts to political chance the resources needed by future generations.

It would be naïve and simplistic to suggest that tribal use of conservation trust mechanisms offers a ready panacea for such intractable situations, but it may offer a glimmer of hope. Trust tools have the potential to bring enduring resolutions to natural resource conflicts because they create property relationships among parties. Conservation easements offer a structure for negotiating a sustainable future among parties that have been on opposite sides of litigation. Of course, litigation is often a necessary backdrop to conservation trust efforts, as the threat of adverse rulings brings parties to the table and provides powerful negotiating chips to tribes and environmental interests.

Tribes are uniquely equipped to make use of such tools in some basins mired in conflict between resource users and environmental interests. Tribes have a unique set of interests that are both economic and environmental. Fishing tribes, for example, rely on fish for commercial gain, sustenance, and cultural necessity. Their economic use of fisheries sets them apart from environmental groups that are often accused of having little or no economic stake in an outcome of a natural resource conflict. Economic interests cannot easily dismiss the tribal voice, for traditional economies are more long-standing than virtually any Western economic enterprise. Moreover, apart from their resource use, tribes are economic players in the communities in which they are located. Many tribes have businesses that employ non-Indians. Economic vitality is a key concern to tribes just as it is to any sovereign government.

In some basins, tribes have already demonstrated that they pursue natural resource recovery with the economic interests of the entire basin in mind. For example, the Umatilla Tribe developed a project to recover salmon that

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[406] See generally Michael C. Blumm, The Bush Administration's Sweetheart Settlement Policy: A Trojan Horse Strategy for Advancing Commodity Production on Public Lands, 34 ENVTL. L. REP. 10,397 (2004).

[407] See LAITOS ET AL., supra note 10, at 388.

had been extirpated for seventy years in the Umatilla River due to over-appropriation of water by farmers.[408] The river ran dry for a stretch before entering the Columbia.[409] In crafting a plan, the Tribe "searched for common goals and a strategy that would not harm its farming neighbors."[410] "The Tribe spearheaded a project that pumps Columbia River water to the Umatilla to re-water the dry section."[411] This approach to recovery resulted in the return of fish and did not harm farmers' interests.[412] In 2002, returns of salmon hit a record of 15,000 fish.[413]

In similar fashion, the Klamath Tribes are exploring conservation easements on ranching lands in the Klamath Basin in response to one of the most politically explosive natural resource conflicts in the country. The limited water in the basin is not nearly enough to supply all of the competing needs of farmers, tribal fishermen, wildlife refuges, and hydro-system operators.[414] Flip-flopping change in federal environmental policy has eroded progress toward any sustainable vision for the Basin. Against this context, the Klamath Tribes have made modest inroads toward a collaborative outcome through their participation in the Yainix Ranch project.[415] It is fitting that tribes, which have "staying power" on the landscape,[416] are leaders in the effort to infuse the conservation movement with more durability.

D. Restoring Landscapes and Ecosystems in a Time of Climate Uncertainty

Finally, the tribal trust movement is bound to play a key role in restoring natural landscapes that have been devastated by actions authorized under state and federal management. Tribes characteristically approach natural resource issues with restoration in mind, and their success is impressive. For example, the Nez Perce Tribe recovered wolves to their historic range in Idaho in a stunningly short period of three years.[417] The Colorado River tribes restored habitat for the endangered Yuma clapper rail, southwestern willow flycatchers, and razorback suckers on the lower Colorado River.[418] The Pyramid Lake Band of Paiute Indians is engaged in recovery of endan-

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[408] See Wood, Politics of Abundance, supra note 38, at 1343.
[409] Id.
[410] Id.
[411] Id.
[412] See generally Janet C. Neuman, Run, River, Run: Mediation of a Water-Rights Dispute Keeps Fish and Farmers Happy – For a Time, 67 U. COLO. L. REV. 259 (1996).
[413] The Harvard Project on American Indian Economic Development, http://www.ksg.harvard.edu/hpaied/hn/hn_2002_salmon.htm (last visited Apr. 3, 2008) (on file with the Harvard Environmental Law Review).
[414] See Benson, supra note 232.
[415] See supra Part IV.B.1.b.
[416] WILKINSON, BLOOD STRUGGLE, supra note 11, at 383.
[417] See Curt Mack, Restoring the Gray Wolf in Idaho, ENDANGERED SPECIES BULL., July 1999, available at http://findarticles.com/p/articles/mi_m0ASV/is_4_24/ai_58505407.
[418] See Michelle Nijhuis, Wildlife Management Blossoms on the Reservations, HIGH COUNTRY NEWS, Feb. 26, 2001.

gered cui-ui fish in Nevada's Pyramid Lake.[419] The Gros Ventre and Assiniboine Tribes reintroduced endangered black-footed ferrets to the bison range on the Fort Belknap Reservation.[420] The Chippewa have embarked on an ambitious program to re-seed off-reservation areas with wild rice, a mainstay of their diet and a sacred part of their culture.[421]

While any government agency or nonprofit organization could choose to prioritize restoration as a policy matter, none are as seemingly well positioned as tribes to draw upon historical conditions as a template of knowledge. Through generations of local observation and experience, tribes have developed traditional ecological knowledge that may offer restoration strategies where Western knowledge falls short. Invasive species and accelerating climate change are bound to bring an entirely new set of conditions to all landscapes. In some cases, only tribes will have knowledge of an ecosystem's capacity to recover from drought, flood, landslides, pests, and other natural harms. The enduring presence of Native people at specific places provides hope that tribes will be able to harness such knowledge and, through trust tools, apply traditional management techniques to those lands that have largely been suppressed since the arrival of the first Europeans.

VII. Conclusion

At this critical time of unprecedented ecological threats, tribes have an opportunity to reclaim a presence on their aboriginal lands by invoking conservation trust tools. A tribal trust movement could both strengthen the conservation trust movement and advance the Native environmental sovereignty effort. The wisdom, spiritual will, and traditional ecological knowledge of Native trustees may indeed be necessary to guide this country during a time of climate crisis. This Article has mapped out a tribal trust movement by setting forth four broad templates of tribal engagement. Part II of this Work evaluates these models according to criteria important both for tribes and the conservation movement as a whole.

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[419] Id.
[420] Id.
[421] Wild Rice Management at Bois Forte Indian Reservation, History and Current Perspectives (2001), available at http://www.boisfortednr.com/wildrice/report.pdf.