

The Fordham Environmental Law Review Symposium



Protecting Tribal Land, Water and Resources

Wednesday,
April 3, 2019

12:15 - 1 p.m. | **registration**

1 - 5 p.m. | **program**

Costantino Room
(Second Floor)

CLE Course Materials



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Environmental Law Review Symposium Speaker Bios

Shathna Alonso, Shantha has served as Executive Director for Creation Justice Ministries since 2015. She did her undergraduate work at the University of Notre Dame, where she developed a strong interest in the role of faith communities in creating social change. She worked for the National Council of Churches from 2008-2013 doing young adult, anti-poverty, and eco-justice ministries. She also served as vice chair of the World Student Christian Federation from 2008-2015. Shantha holds a Master of Social Work and a Master of Pastoral Studies from Washington University in St. Louis and Eden Theological Seminary.

Reid Chambers is a founding partner at Sonosky, Chambers, Sachse, Endreson & Perry, LLP. He specializes in litigation, tribal reserved water rights and issues arising out of the federal trust responsibility. He has represented tribes and Alaska Native interests with respect to land claims, water rights, hunting and fishing rights, reservation boundary issues, Alaska tribal rights and immunities, gaming law, tribal court jurisdiction, state and tribal taxation and coal development. Mr. Chambers has also codified tribal laws and engaged in advocacy on behalf of a variety of tribal interests before state and federal agencies and Congress. Mr. Chambers practiced privately in Washington, D.C. from 1967 to 1970. From 1973 until joining the firm, Mr. Chambers served as Associate Solicitor for Indian Affairs of the U.S. Department of the Interior, the Department's chief legal officer with responsibility over Indian and Alaska Native matters. Mr. Chambers has published two oft-cited articles in the *Stanford Law Review* on federal Indian law issues, as well as a number of articles on Indian reserved water rights. He has testified on Indian issues at the invitation of committees of Congress and frequently been invited to speak at the Federal Bar Association's Indian Law meetings and conferences sponsored by other entities such as the Rocky Mountain Mineral Law Foundation. Mr. Chambers has argued numerous cases before federal district and courts of appeals, and before state tribal courts and appellate courts. In 2003, Mr. Chambers represented the Bishop Paiute Tribe before the U.S. Supreme Court in *Inyo County v. Paiute-Shoshone Indians of the Bishop Community*, 538 U.S. 701 (2003). For over thirty years, Mr. Chambers has taught a seminar on federal Indian law at Georgetown University Law School. He has also taught this seminar several times at Yale Law School, and in 1988, served as the Chapman Distinguished Visiting Professor at Tulsa University Law School.

Paolo Galizzi is a Clinical Professor of Law and Director of the Sustainable Development Legal Initiative (SDLI) at the Leitner Center for International Law and Justice at Fordham Law School. He joined Fordham from Imperial College, University of London, where he was Lecturer in Environmental Law and later Marie Curie Fellow in Law. He previously held academic positions at the University of Nottingham, at the University of Verona and at the University of Milan. He graduated from the Faculty of Law of the University of Milan in 1993 and continued his legal education at the School of Oriental and African Studies, University of London, where he obtained an LLM in Public International Law in 1995. He later started his doctoral programme at the University of Milan, where he obtained a PhD in International Environmental Law in 1998 with a thesis on "Compliance with International Environmental Obligations". His research interests lie in international law, environmental law and law of sustainable development and he has published extensively in these areas. His most recent publications include the forthcoming "People and the Environment: The Role of Environment in Poverty Alleviation" to be published by Fordham University Press, the second edition of "Documents in International Environmental Law" and of "Documents in EC Environmental Law", coedited with Philippe Sands and published by Cambridge University Press.

Cynthia Harris joined ELI's Research & Policy team as a staff attorney in November 2016. Cynthia's background prior to ELI includes several years working in San Diego local government, where she advised on water, wastewater, and infrastructure policy—spearheading the City Council's successful

development of California's toughest requirement mandating water submetering as a proven water conservation feature in multi-family developments—and served as community liaison to some of the city's most diverse neighborhoods. Cynthia holds a J.D. from New York University School of Law, where she clerked at the U.S. Environmental Protection Agency's Office of General Counsel, engaged in clinical studies with the Natural Resources Defense Council, and served on the NYU Law Review. She received her B.A. in Communication from the University of California, San Diego, graduating cum laude and Phi Beta Kappa.

Betty Lyons, President & Executive Director of the American Indian Law Alliance, is an Indigenous and environmental activist and citizen of the Onondaga Nation. Her native name, Gaen hia uh, meaning 'small sky,' was given to her by her Snipe Clan mother and has developed her love for the earth from her deep connection to her culture. Ms. Lyons worked together with the NOON organization (Neighbors of the Onondaga Nation) to educate and teach local communities about the culture of the Onondaga Nation to further a better understanding and to bridge the gap between the communities. Ms. Lyons has participated and organized rallies and demonstrations pushing for a ban on fracking in New York State, until a ban was achieved in December 2014. Betty Lyons has worked for the Onondaga Nation for over seventeen years as a Public Relations Representative, Manager of the Onondaga Nation Arena, and as Executive Assistant to Tadodaho Sidney Hill. She has been an active participant at the annual United Nations Permanent Forum on Indigenous Issues (UNPFII) since the first session in 2001 and has coordinated the opening ceremonies. For over 10 years, Ms. Lyons was the President of Onondaga Minor Athletic Club where she organized and managed over 15 youth sports team programs. Betty Lyons graduated from Cazenovia College ALA (2013), Bryant Stratton College Graduate of Paralegal Program Magna Cum Laude.

Steven McSloy is a partner at Carter, Ledyard & Milburn in New York City. He was previously general counsel of the Oneida Indian Nation of New York and its Turning Stone Casino Resort. McSloy has also taught American Indian law at New York University, Fordham, Cardozo, St. John's, and Syracuse Law Schools. Specializing in American Indian law, McSloy has worked on some of the largest and most complex financial transactions in Indian country. He has published eight law review articles on sovereignty issues. He is a member of the bars of the United States Supreme Court, the Oneida Indian Nation Courts and the New York State courts. He has spoken on Indian law issues at the law schools of Harvard, Columbia, Yale, Cornell, the University of Pennsylvania, and New York University, as well as at numerous bar association and other conferences. McSloy received his J.D. from Harvard Law School and his B.A. from New York University., where he was a member of Phi Beta Kappa.

Darren Modzelewski currently serves as Policy Counsel for NCAI. His portfolio at NCAI includes environmental, natural resources, energy development, and cultural heritage law. Before coming to NCAI Darren clerked for the Karuk Tribe and the California Native American Heritage Commission. He earned his Ph.D and J.D. from the University of California Berkeley and his LL.M in the Indigenous Peoples Law and Policy Program and the James E. Rogers College of Law at the University of Arizona.

Andrew Needham is an associate professor of history at New York University. He specializes in recent United States history, with teaching and research emphases in environmental, American Indian, and urban and suburban history as well as the history of the American West. He received his Ph.D. from the University of Michigan.

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**"Because the Bible Tells Me So":
Manifest Destiny and American Indians**

Steven Paul McSloy

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“BECAUSE THE BIBLE TELLS ME SO”: MANIFEST DESTINY AND AMERICAN INDIANS*

STEVEN PAUL MCSLOY**

The conquest of the earth, which mostly means the taking it away from those who have a different complexion or slightly flatter noses than ourselves, is not a pretty thing when you look into it too much. What redeems it is the idea only. An idea at the back of it; not a sentimental pretense but an idea; and an unselfish belief in the idea—something you can set up, and bow down before.¹

Why were American Indian lands taken? The easy answer, of course, is that the Europeans wanted land and the Indians had it. But why did the Europeans think they could take it? We are told that the first settlers of America were moral and religious people. Why then did even the first poor and hungry Pilgrims, pious people with no military power whatsoever, believe that they were entitled to dominion over Indians and their lands?

In thinking about the encounter between Amer-Indians and Euro-Americans, the question is one of means: How were American Indian

* This Article was originally presented at the 1994 Mid-Year Conference of the National Congress of American Indians. A later version was presented at the First Annual Academic Symposium entitled “Tribal Sovereignty: Back to the Future?” held at St. Thomas University School of Law, Miami, Florida, in January 1995. The author would like to thank the NCAI, its Executive Director JoAnn K. Chase and Oneida Indian Nation Representative Ray Halbritter for the opportunity to speak before the NCAI, and Professor Siegfried Wiessner and the *St. Thomas Law Review* for the opportunity to present and publish this article. Helpful comments were provided by David Gregory and Phil Weinberg of St. John’s Law School, my student Jacqueline Bouchard, and my father Paul McSloy. My interest in this subject was deepened after reading Steven T. Newcomb’s excellent article “The Evidence of Christian Nationalism in Federal Indian Law: The Doctrine of Discovery, *Johnson v. McIntosh*, and Plenary Power,” which appeared next to an article of mine in volume 20 of the *N.Y.U. Review of Law and Social Change* (1993).

This Article is dedicated to the memory of my brother Christopher Michael McSloy, who inspired many of my thoughts on the myths of America.

** General Counsel, Oneida Indian Nation; Adjunct Assistant Professor of Law, New York University School of Law; Adjunct Professor of Law, Syracuse University School of Law; Adjunct Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University. B.A., New York University, 1985; J.D., Harvard Law School, 1988.

1. JOSEPH CONRAD, *HEART OF DARKNESS* 69-70 (1950). For another work by a great author concerned with a similar theme, see HERMAN MELVILLE, *On the Metaphysics of Indian-Hating*, in *THE CONFIDENCE-MAN: HIS MASQUERADE* 124 (Hershel Parker ed., Norton Press 1971).

lands taken? The answer is not, as it turns out, by military force. The wars, massacres, Geronimo and Sitting Bull—all that was really just cleanup. The real conquest was on paper, on maps and in laws. What those maps showed and those laws said was that Indians had been “conquered” merely by being “discovered.” As put by Supreme Court Chief Justice John Marshall in the famous case of *Johnson v. McIntosh*,² “[h]owever extravagant the pretention of converting the discovery of an inhabited country into conquest may appear, if the principle has been asserted in the first instance . . . if a country has been acquired and held under it; . . . it becomes the law of the land, and cannot be questioned.”³ This “Discovery Doctrine” was the “idea of it,” as Conrad put it, and it is appropriate that Conrad also spoke of “bowing down before” the idea.⁴ For though *Johnson v. McIntosh* was a judicial decision made by the government of a secular republic committed to the separation of church and state, the Supreme Court’s adoption of the Discovery Doctrine was merely the latest invocation of a concept that had been born at the very beginning of the Judeo-Christian tradition, on the first page of the Bible, in the Book of Genesis.⁵ This concept had, long before John Marshall, been used by the Jews, the Catholics and the Protestants to justify the dispossession of indigenous peoples.

But before getting into the deeper roots of the Discovery Doctrine, what exactly is it that *Johnson v. McIntosh* says? The *Johnson* case is the foundation of all United States law regarding Indians, and what it says is that by virtue of discovery, the Europeans (and by succession, the Americans) have dominion and sovereignty over native peoples, lands, and governments.⁶ The New World, on paper, was legally “vacant”—*terra nullius* or *vacuum domicilium* in Latin.⁷ Title to

2. *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823).

3. *Id.* at 591.

4. See CONRAD, *supra* note 1, at 69-70.

5. See *Johnson*, 21 U.S. at 572-77; see also Steven T. Newcomb, *The Evidence of Christian Nationalism in Federal Indian Law: The Doctrine of Discovery, Johnson v. McIntosh, and Plenary Power*, 20 N.Y.U. REV. L. & SOC. CHANGE 303, 325 (1993). Newcomb makes explicit the Christian doctrines and the emphasis on Christian civilization’s general superiority and superior rights to land in Marshall’s opinion. *Id.* at 326. Though Marshall occasionally expressly mentioned Christianity in the *Johnson* opinion, he usually employed the term “European” to avoid entanglement of church and state, and to embed the principle in American law as a secular, legal doctrine. *Id.* at 324-27 (relying, in part, on FRANCIS JENNINGS, *THE INVASION OF AMERICA: INDIANS, COLONIALISM, AND THE CANT OF CONQUEST* 60 (1975)).

6. *Johnson*, 21 U.S. at 573. For detailed examinations of the *Johnson* opinion, see Newcomb, *supra* note 5; Robert A. Williams, Jr., *Jefferson, The Norman Yoke, and American Indian Lands*, 29 ARIZ. L. REV. 165 (1987); Howard R. Berman, *The Concept of Aboriginal Rights in the Early Legal History of the United States*, 27 BUFF. L. REV. 637 (1978).

7. See generally *Johnson*, 21 U.S. 543. For modern reconsiderations of *terra nullius*, see

all Indian land is thus held by the discoverer, and Indian people are subject to the overriding political sovereignty of the discoverer.⁸ How was this justified? In Chief Justice Marshall's words:

[T]he character and religion of [the New World's] inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. To leave them in possession of their country was to leave the country a wilderness.

. . . .
[A]griculturalists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from [their] territory

. . . .
[E]xcuse, if not justification, [could be found] in the character and habits of the people whose rights ha[d] been wrested from them.

. . . .
The potentates of the Old World . . . made ample compensation to the inhabitants of the new, by bestowing upon them civilization and Christianity⁹

How is it that in 1823 when *Johnson v. McIntosh* was written, a time when less than one-quarter to one-third of the United States was settled and hundreds of Indian nations lived free and independent,¹⁰ that the Discovery Doctrine was already so firmly entrenched in the western legal tradition that Marshall was merely applying it, not inventing it?

The answer is because the land of Canaan was inhabited.

When Abraham began the long march of civilization ever westward, leaving Ur of the Chaldees to go west across the River Jordan to Canaan,¹¹ he, like Marshall, needed a reason for dispossessing the Canaanites who lived there. The reason, according to the Bible, was that God had given the land to Abraham's people, the Canaanites notwithstanding. As God, said through Joshua, "I gave you a land on which you had not labored, and cities which you had not built, and you dwell therein."¹²

Western Sahara Advisory Opinion, 1975 I.C.J. 12 (Oct. 16); *Mabo v. Queensland* (1992) 107 A.L.R. 1 (Austl.).

8. See *Johnson*, 21 U.S. at 568.

9. *Id.* at 573-90.

10. *Id.* at 568; see also Steven Paul McSloy, *Back to the Future: Native American Sovereignty in the 21st Century*, 20 N.Y.U. REV. L. & SOC. CHANGE 217, 219-20, 223 (1993).

11. *Genesis* 12:1; ROBERT L. WILKEN, *THE LAND CALLED HOLY: PALESTINE IN CHRISTIAN HISTORY AND THOUGHT* 2 (1992).

12. See *Joshua* 24:13; see also *Psalms* 135:12 ("It was [God] who smote many nations . . . and all the kingdoms of Canaan, and gave *their* land as a heritage, a heritage to

In the Bible, wars of extermination were sanctioned against local inhabitants who stood in the way of the "chosen people." Speaking of Joshua's war with the city of Hazor, the Bible tells us: "They smote all the souls that were therein with the edge of the sword utterly destroying them. There was not any left to breathe and he burnt Hazor with fire."¹³

The Lord's gift, and the actions taken by the Hebrews to realize it, were justified on the grounds that the indigenous inhabitants were idolaters, cannibals, and human sacrificers, neither civilized nor of the true faith.¹⁴ Some ancient Hebrew apologists also advanced *terra nullius* arguments, claiming that Canaan was uninhabited; that is, that the land of Canaan had no Canaanites.¹⁵ Others claimed that the Canaanites had stolen the land from ancestors of the Hebrews, and thus that the Hebrews were the original occupants.¹⁶

All of this was by way of legalistic apologetic, for as a matter of faith, according to the Bible, the Jews believed that Canaan was their destiny and, in fact, it was a manifest one. They were the "chosen people," the inheritor's of God's covenant with Abraham,¹⁷ who had himself inherited God's promise to Adam, made on the first page of the first Book of the Bible, where God said, "Let us make man . . . and let them have dominion over the . . . earth Be fruitful and multiply, and fill the earth and subdue it; and have dominion . . . over every living thing."¹⁸

This promise was renewed to Noah after the Deluge, with the further provision that: "[t]he fear of you and the dread of you shall be upon every beast of the earth . . . upon everything that creeps on the ground . . . into your hand they are delivered."¹⁹ Man was given

people Israel."); WILKEN, *supra* note 11, at 5.

13. *Joshua* 11:11. See also the story of Joshua's conquest of the city of Ai. *Joshua* 8:10-29. "The defeat and displacement of the inhabitants of the land, the Canaanites, Hittites, Amorites, Perizites, Jebusites, is an integral part of the biblical narrative." WILKEN, *supra* note 11, at 5.

14. WILKEN, *supra* note 11, at 5, 31-32. See also G. B. Bowersock, *The Heavenly Country*, N.Y. TIMES, Jan. 10, 1993, at 12 (reviewing ROBERT L. WILKEN, *THE LAND CALLED HOLY: PALESTINE IN CHRISTIAN HISTORY AND THOUGHT* (1992)). According to Wilken, contrary to being an "idolatrous enemy," the Canaanites "possessed a mature culture." WILKEN, *supra* note 11, at 5.

15. See WILKEN, *supra* note 11, at 30-31.

16. *Id.* at 30-31.

17. "The Hebrew Bible is a book about Abraham's descendants and the land given to them by God." *Id.* at 2.

18. *Genesis* 1:26, 28.

19. *Genesis* 9:2.

power over God's creation, and also the right to name God's creatures: "[O]ut of the ground the Lord God formed every beast of the field and every bird of the air . . . and whatever [Adam] called every living creature, that *was* its name."²⁰ Man was thus given the power of the Word, and it is a straight line from Adam's naming of the animals to Christopher Columbus' mistakenly naming all the indigenous peoples of two continents as "Indians."

The people of Abraham were the "chosen people."²¹ The colonizing religions of the Old World—Judaism, Christianity, and Islam—all trace back to Abraham, and through him to Noah and to Adam, in order to inherit this "chosen" status and thus to inherit the earth and dominion over it.²² As it is written in the Book of Psalms, God said, "Ask of me, and I will make the nations your heritage, and the ends of the earth your possession."²³

20. *Genesis* 2:19 (emphasis in original).

21. See *Genesis* 12:2, 17:4-8.

22. HUSTON SMITH, *THE RELIGIONS OF MAN* 437-50 (1958). Judaism and Christianity trace to Isaac, Abraham's son by his wife Sarah, whereas Islam traces to Ishmael, Abraham's son by his servant Hagar. *Id.* at 194. On the links in the chain from Abraham to Jesus, see WILKEN, *supra* note 11, at 2, 52-55.

23. *Psalms* 2:1-11. In the Book of Psalms, God tells his chosen people:

Why do the nations conspire and the peoples plot in vain?

The kings of the earth set themselves, and the rulers take counsel together, against the Lord and his anointed, saying,

"Let us burst their bonds asunder, and cast their cords from us."

He who sits in the heavens laughs; the Lord has them in derision.

Then he will speak to them in his wrath, and terrify them in his fury, saying,

"I have set my king on Zion, my holy hill."

I will tell of the decree of the Lord:

He said to me, "You are my son, today I have begotten you.

Ask of me, and I will make the nations your heritage, and the ends of the earth your possession.

You shall break them with a rod of iron, and dash them in pieces like a potter's vessel."

Now therefore, O kings, be wise; be warned, O rulers of the earth.

Serve the Lord with fear, with trembling kiss his feet, lest he be angry, and you perish in the way; for his wrath is quickly kindled.

Blessed are all who take refuge in him.

Jesus Christ brought forth a new Covenant, but it was with the old "chosen people," who needed to accept Christ as the Messiah to remain "chosen."²⁴ The early Christian writer Justin Martyr made this clear when he was confronted by a Rabbi who asked, "What is this? Are you Israel?" The Martyr answered, "yes."²⁵ On the basis of Christ's Covenant, the medieval Popes formalized and legalized the Church's jurisdiction over the entire world, Christian and heathen alike. They further undertook to grant and take heathen lands notwithstanding their inhabitation. Various Papal Bulls were issued to Catholic sovereigns, the most notorious being the 1493 *Inter Cetera* bull dividing the world between Spain and Portugal and sanctioning their actions to "subdue the said mainlands and islands and their natives and inhabitants, with God's grace and to bring them to the Catholic faith."²⁶

The Protestant translation of the Discovery Doctrine was simply that, a translation of the basic doctrine into the language of the Reformation, meaning the repudiation of Papal supremacy. Protestant kings, therefore, ruling by divine right, were in their own minds as free as the Pope to grant and charter new lands, and all Christian nations had a destiny to fulfill God's covenant and undertake the continuing move westward begun by Abraham.

In 1492, therefore, when the Christian kings of Europe "conducted some of [their] adventurous sons into this western world,"²⁷ they believed, as a religious matter, that whatever they found belonged to them as the "chosen people." The entire Western Hemisphere was *terra nullius*—"vacant land." If beings were found there who seemed human, but were not Christian, then they were, in the words of one colonial writer, "little superior, in point of Civilization, to the Beasts of the Field,"²⁸ a formulation neatly tied to the mandate in the Book of Genesis that the sons of Adam shall have dominion over "every beast of the field."²⁹

Id.

24. See WILKEN, *supra* note 11, at 59-62.

25. *Id.* at 58. See also *id.* at 47-48, 55-59.

26. Newcomb, *supra* note 5, at 310, 328. See also Catherine Walsh, *Native Americans call for an end to 500-year-old papal bull*, NAT'L CATH. REP., Oct. 22, 1993, at 3; Valerie Taliman, *Revoke the Inter Cetera Bull*, TURTLE Q., Fall-Winter 1994, at 7.

27. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 543 (1832).

28. J. SMITH, APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS 434-35 n.109 (1965) (quoting William Samuel Johnson) reprinted in ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW 16 (3d ed. 1991).

29. *Genesis* 2:19. Chief Justice Marshall rationalized such views in *Johnson*, writing that "the character and religion of [the New World's] inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim ascendancy."

Being practical men, as they could not realize upon their "extravagant and absurd"³⁰ claims for fear of military defeat,³¹ and, in their own way, perhaps even concerned for native people, the Europeans recognized that native people had some rights to occupy and use their land.³² But it was nonetheless clear to the Europeans that native people did not own their land and thus that the Indians had no power to sell it or otherwise to convey title.³³ The land was owned, and title was held, by the Christian king whose explorers "discovered" it.³⁴

The English Crown's charters to Cabot, Gilbert, and Raleigh³⁵ were nearly identical to the Pope's Bulls in commissioning expeditions to "heathen and barbarious lands." Pilgrim and Puritan sermons were replete with references to God's covenant with them, and their divine mission, their "errand into the wilderness,"³⁶ their "manifest desti-

Johnson, 21 U.S. at 573. While he "[did] not mean to engage in the defense of those principles which Europeans have applied to Indian title, they may, we think, find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them." *Id.* at 589.

30. Chief Justice Marshall, discussing European claims to the "New World," stated that "[t]he extravagant and absurd idea, that the feeble settlements made on the sea coast . . . acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man." *Worcester*, 31 U.S. at 544-45. Marshall did, however, recognize dominion in the European kings over Indian lands based on Biblical notions. See *Johnson*, 21 U.S. at 543, 572-77.

31. See STEPHEN CORNELL, *THE RETURN OF THE NATIVE: AMERICAN INDIAN POLITICAL RESURGENCE* 26 (1988). According to Cornell:

Most of the major tribes of the eastern interior managed to resist substantial encroachment on their lands during much of [the colonial] period The Iroquois and certain of the southern nations—Creeks, Choctaws, Chickasaws, and Cherokees—were potent military powers, and were recognized and respected as such by the Europeans, who could not afford, during much of this period, to confront them directly.

Id.

32. In a virtuoso synthesis of Christian doctrine and feigned magnanimity, Chief Justice Marshall wrote:

[T]he rights of the original inhabitants were, in no instance, entirely disregarded; but were, necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil, at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

Johnson, 21 U.S. at 574. Although allegedly diminished, the Indian nations' actual right of occupancy, as distinguished from the full ownership, was held by Marshall to be "as sacred as the fee simple of the whites." *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 746 (1835).

33. *Johnson*, 21 U.S. at 574.

34. *Id.* See also Newcomb, *supra* note 5, at 325-26.

35. Newcomb, *supra* note 5, at 326.

36. See generally PERRY MILLER, *ERRAND INTO THE WILDERNESS* 5 (1956). As stated by William Bradford, governor of Plymouth Colony, and chronicled by Nathaniel Morton, keeper

ny."³⁷ The Puritans called America "Canaan,"³⁸ meaning the land of promise—God's promise.³⁹ Civilization moved west, and with it the Cross, even going out into the Pacific as Hawaii was subdued by the United States Marines.⁴⁰ A year later, President McKinley told the nation of how it was revealed to him in prayer that it was America's responsibility to bring Christianity to the "little brown brothers" of the Philippines.⁴¹

Chief Justice Marshall was thus heir to an ancient religious tradition. This theory of a God-given dominion over native peoples' lands, held by a divine king tracing himself back to Adam, however, sounds a little old-fashioned, even medieval, and by 1823, the United States had overthrown a king and put "We the People" on the throne.⁴² But the principle remained: the sovereign federal government, as successor

of the records at Plymouth Colony: "Besides, what could they see but a hideous and desolate wilderness, full of wilde beasts and wilde men?" Editorial, *The Desolate Wilderness*, WALL ST. J., Nov. 21, 1984, at A12. President Bush invoked the "errand in the wilderness" and quoted the Bradford passage above in his 1990 Thanksgiving Day Declaration. Speech of President Bush for Thanksgiving Day Declaration (Nov. 18, 1990), in N.Y. TIMES, Nov. 18, 1990, at 34.

37. See generally CHARLES M. SEGAL & DAVID C. STINEBACK, *PURITANS, INDIANS AND MANIFEST DESTINY* (1977). Such a belief is all the more remarkable given the Pilgrims' famous dependence upon Indian peoples for food and the means to farm, celebrated today as Thanksgiving. This was rationalized by the Pilgrims through the belief that Indian hospitality was due not to the Indians but to the workings of the Pilgrims' God. As Wilcomb Washburn noted, "[w]e read frequently such statements as 'God caused the Indians to help us with fish at very cheap rates.'" Wilcomb E. Washburn, *The Moral and Legal Justification for Dispossessing the Indians*, in SEVENTEENTH CENTURY AMERICA: ESSAYS IN COLONIAL HISTORY 19 (James Morton Smith ed., 1959) (quoting Roger Clap, "Memoirs" [London, 1731], in CHRONICLES OF THE FIRST PLANTERS OF THE COLONY OF MASSACHUSETTS: FROM 1623 TO 1636, 350 (Alexander Young ed., 1846)).

38. The classic example being Thomas Morton's *NEW ENGLISH CANAAN* (1637) discussed in RICHARD DRINNON, *FACING WEST: THE METAPHYSICS OF INDIAN HATING & EMPIRE BUILDING* 9-20, 470-71 (1990). See also David Rieff, *The Prodigal Daughter*, NEWSDAY, Apr. 24, 1994, at 34 (reviewing JOHN DEMOS, *THE UNREDEEMED CAPTIVE: A FAMILY STORY FROM EARLY AMERICA* (1994)).

39. As stated by United States President Bush in his 1992 Thanksgiving Day Proclamation: Recognizing their quest for freedom as an enterprise no less historic than the ancient Israelites' exodus from Egypt, John Winthrop reminded his fellow pilgrims in 1630: "Now if the Lord shall please to hear us, and bring us in peace to the place that we desire, then hath he ratified this covenant and sealed our commission."

President's Declaration (Nov. 22, 1992), in N.Y. TIMES, Nov. 22, 1992, at 32.

40. SYVESTER K. STEVENS, *AMERICAN EXPANSION IN HAWAII: 1842-1898, 190-91* (1945).

41. See Leon Wolff, *Little Brown Brother: How the United States Purchased and Pacified the Philippine Islands at the Century's Turn*, in 2 *GREAT EVENTS FROM HISTORY 1293-94* (Frank N. Magill ed., 1975); Gary Eisenberg, *Pagan Drums at Dawn Draw Sooty Faces to an Early Mass*, NEWSDAY, Feb. 16, 1992, at 40.

42. *Johnson*, 21 U.S. at 584-85. "The power now possessed by the government of the United States [over Indian] lands, resided, while we were colonies, in the crown." *Id.* at 587.

to the English Crown, held dominion over, and title to, all Indian lands.⁴³ Marshall, writing as a secular judge, was careful in enshrining the Discovery Doctrine as the basis for United States Indian law to avoid explicitly endorsing its religious and covenantal roots. But that was all he left out. All the other ideas about vacant land, savagery, lack of civilization, heathenism, nomadic hunters without a conception of property, all were deployed to strip Indians of their rights.⁴⁴ Americans were the new "chosen people,"⁴⁵ with a "Manifest Destiny" to own the continent.⁴⁶

Later Supreme Court decisions were not nearly as careful to hide the roots of federal power over Indians. For example, in *Beecher v. Wetherby*,⁴⁷ the Court stated that when dealing with Indians, "[i]t is to be presumed that . . . the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race."⁴⁸

Federal Indian Law, therefore, rests on ancient religious ideas about the rights and powers of the chosen people, which principles are so deeply embedded that no one even questions "why" anymore. Congress' plenary power over Indian people and the United States' ownership of Indian lands are just seen as givens,⁴⁹ and the laws af-

43. See *Oneida Indian Nation v. New York*, 860 F.2d 1145, 1161 (2d Cir. 1988), cert. denied, 493 U.S. 871 (1989). Technically, upon the overthrow of King George III, the thirteen rebellious colonies succeeded to his sovereignty. Federal sovereignty did not attach until the thirteen colonies joined together under the Constitution. Title to Indian lands, therefore, is held by the state governments in the original thirteen colonies, though subject to positive federal law, and by the federal government elsewhere in the United States. *Id.* at 1162.

44. *Johnson*, 21 U.S. at 576-77.

45. On the long-held myths of American exceptionalism, see JAMES OLIVER ROBERTSON, *AMERICAN MYTH, AMERICAN REALITY* (1980); SEGAL & STINEBACK, *supra* note 37.

46. On "Manifest Destiny," see William T. Hagan, *Justifying Dispossession of the Indian: The Land Utilization Argument*, in *AMERICAN INDIAN ENVIRONMENTS: ECOLOGICAL ISSUES IN NATIVE AMERICAN HISTORY* 65-66 (Christopher Vecsey & Robert W. Venables eds., 1980); ROBERTSON, *supra* note 45; SEGAL & STINEBACK, *supra* note 37.

47. 95 U.S. 517 (1877).

48. *Id.* at 525.

49. See generally *McSloy*, *supra* note 10. For example, consider the post-World War II policy of the federal government, unbelievably named "termination," whereby certain Indian nations were stripped of federal recognition and eligibility for federal services and had their lands made into counties within the states and their people made subject to state law. See generally DONALD FIXICO, *TERMINATION AND RELOCATION: FEDERAL INDIAN POLICY 1945-1960* (1986); Michael C. Walsh, Comment, *Terminating the Indian Termination Policy*, 35 *STAN. L. REV.* 1181 (1982-1983). Fortunately, the Termination Policy was officially repudiated by President Nixon in 1970. President's Message to Congress Transmitting Recommendations for Indian Policy, H.R. Doc. No. 91-363, at 2 (1970).

fecting Indians are made without constitutional or judicial restraint.⁵⁰

The Catholic Church, on the other hand, has done much in the modern era to recognize and apologize for the abuses of the past, and to reconsider its conception of Native peoples.⁵¹ Both Pope John Paul II⁵² and the National Conference of Catholic Bishops have recognized that evangelization, the spreading of the Faith, is not and should not have been synonymous with colonization, and that European Christians "[o]ften . . . failed to distinguish between what was crucial to the gospel and what were matters of cultural preference."⁵³

There still lurk, however, some signs of the "chosen people" and the inherent superiority of the Christian tradition in the Church's teachings regarding Native Americans. For example, in its Pastoral Letter on the Fifth Centenary of Evangelization in the Americas, the Bishops' Conference states that the "Leyenda Negra,"⁵⁴ the "Black Legend" of Spanish-Catholic cruelty and abuse of indigenous peoples, is "simply untrue."⁵⁵ While there is a good deal of historical evidence that the British and other Protestant nations propagandized the Black Legend to discredit Spain and the Pope,⁵⁶ the Bishops do not cite this as evidence of the Legend's falsehood. Rather, in refutation of the charge of genocide and cultural destruction, the Bishops note only that the Spanish monarchs made extensive monetary contributions to support the Church's efforts in spreading the Gospel.⁵⁷ This is a clear echo of Chief Justice Marshall's statement that "[t]he potentates of the old world found no difficulty in convincing themselves that they made ample compensation to [the Indians] by bestowing on them civilization and Christianity."⁵⁸

50. See McSloy, *supra* note 10, at 219-20.

51. See Alan Cowell, *Pope Asks Pardon of Brazil's Indians*, N.Y. TIMES, Oct. 16, 1991, at A3; Philip Pullella, *Pope Urges Indians to Forgive White Man for Injustices*, THE REUTER LIBRARY REPORT, Oct. 13, 1992, available in LEXIS, News Library.

52. Pope John Paul II, *Meeting with Native Americans*, in UNITY IN THE WORK OF SERVICE 106-112 (United States Catholic Conference 1987).

53. National Conference of Catholic Bishops, *1992 A Time for Remembering, Reconciling and Recommitting Ourselves as People: Pastoral Reflections on the Fifth Centenary and Native American People* (1992); National Conference of Catholic Bishops, *Heritage and Hope: Evangelization in the United States: Pastoral Letter on the Fifth Centenary of Evangelization in the Americas* (1991) [hereinafter EVANGELIZATION]; United States Catholic Conference, *Statement of the United States Catholic Bishops on American Indians* (May 4, 1977).

54. For an interesting reading on the Black Legend, see David Ewing Duncan, *Spain: The Black Legend*, ATLANTIC MONTHLY, Aug. 1991, at 30.

55. EVANGELIZATION, *supra* note 53, at 6.

56. See Duncan, *supra* note 54, at 30.

57. EVANGELIZATION, *supra* note 53, at 6.

58. *Johnson*, 21 U.S. at 573.

In another example, the Pope, while in Mexico in 1993, called on the nations of the Americas to improve the social welfare of Indians, but stated that the reason for doing so is that it would enable the Indians to have lives "worthy of workers, citizens, and sons of God."⁵⁹ In speaking of "workers, citizens and sons of God" in the same breath, however, the Pope tied together and upheld Lockean notions about labor as the basis for property and civil society, assimilative notions about participation in western-style political structures, and religious notions of the Christian God as the model life for indigenous peoples. It was the original lack of these things that lead the Church to formulate the Discovery Doctrine and justify its assumed dominion over native peoples in the first place.

A final observation about the Bishop's Pastoral Letter on the Fifth Centenary of Evangelization in the Americas is in order. The Bishops cite the appearance of Our Lady of Guadalupe as an example of how Christianity becomes "not [only] the religion of the invader but [also] the prized possession of the native peoples."⁶⁰ Our Lady of Guadalupe appeared to Indian peasant Juan Diego in 1531 in New Spain (Mexico).⁶¹ The Bishop's Letter speaks of how the Virgin Mary appeared to Diego on the site of the shrine to the virgin mother Goddess Tonantzin, who was venerated by the native peoples.⁶² According to the Bishops, "[a]s one greater than the sun god, Mary appeared to hide the sun whose rays shone around her. As one greater than the moon goddess, she seemed to stand on the moon itself."⁶³ It is important to contemplate the fact that, unlike other visions of the Virgin Mary at Lourdes, Fatima or elsewhere, when the Virgin Mary appeared in the New World, she not only appeared, but it was necessary that she was seen to have outshone both the indigenous goddess and the native god.

59. *Pope Calls for Easing Indians' Plight*, AGENCE FRANCE PRESSE, Aug. 11, 1993, at 2.

60. EVANGELIZATION, *supra* note 53, at 13.

61. See Sam Dillon, *Doubting Keeper of Mexico's Guadalupe Shrine Is Stepping Down*, N.Y. TIMES, Sept. 8, 1996, at 19; see generally STAFFORD POOLE, C.M., OUR LADY OF GUADALUPE: THE ORIGINS AND SOURCES OF A MEXICAN NATIONAL SYMBOL 1531-1797 (1995).

62. EVANGELIZATION, *supra* note 53, at 13.

63. *Id.* at 13-14.



Environmental Justice in Indian Country

BY BETHANY SULLIVAN

The term “environmental justice” is evocative but elusive, subject to a broad array of interpretations and rallying cries. The U.S. Environmental Protection Agency defines environmental justice as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.” In plain English, it means that the negative environmental impacts of our industrialized world should not fall disproportionately on low-income or minority communities. Moreover, it requires that these vulnerable communities have a seat at the table, giving them a voice in the siting of projects—such as coal power plants, toxic waste facilities, and oil and gas pipelines—and in the development of environmentally significant policy and regulations.

Environmental justice in Indian country presents unique factors, both in the nature of legal claims and the types of harm incurred. As a baseline principle, tribes are sovereign nations. Their sovereignty predates the formation of the United States government and the Constitution, and, while circumscribed by subsequent legislation and caselaw, remain fundamentally intact today. Accordingly, tribal environmen-

tal justice is grounded not only in the civil rights of individual members, but also in the tribe’s inherent sovereign right to make decisions over its land and resources.

Relatedly, while tribes are considered “independent political communities,” they are simultaneously “domestic dependent nations” or “wards” subject to the guardianship of the United States, at least in the paternalistic and racially imbued words of 19th Century Supreme Court Justice, John Marshall. Accordingly, the federal government owes a duty of guardianship—or trust responsibility—to tribal governments. The trust relationship is expansive, but at a minimum it means that federal actors must consult with tribes on decisions that affect tribal member health, as well as tribal cultural and environmental resources, and must meaningfully consider these harms prior to reaching decisions.

Unlike other types of environmental justice cases, the categories of harm in tribal environmental justice extend beyond harm to human health. Tribal nations have historically been subsistence, land-based economies. As such, tribal economic practices, culture and religion have been and continue to be a direct outgrowth of the physical place where tribal members reside. Therefore, when environmental damage occurs, it harms not only the physical well-being of tribal members, but also their culture, religion



and economy. One cannot gather medicinal plants or wild foods where extractive industries have destroyed the landscape. Nor can one raise sheep, grow corn or drink well water if the water supply has been depleted or contaminated by industrial activity. And the answer for most tribes is not and cannot be to simply uproot and move to a new neighborhood.

Several tribal environmental justice cases have recently garnered attention on the national and international stage. These include the notorious Dakota Access Pipeline and Keystone XL Pipeline cases. Both concern the validity of federal actions approving the construction and use of oil and gas pipelines that brush alongside reservation boundaries

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The views in this article are the author’s own and do not reflect the views of the Natural Resource Use & Management Clinic or the University of Arizona.



and treaty resources. Plaintiff tribes, along with environmental organizations, alleged that the federal government failed to properly consider the potential impact of pipeline spills on tribal members' drinking water supply, fish and wildlife populations (linked to treaty guaranteed subsistence rights), and sacred sites. In late 2018, a federal district court judge in Montana temporarily enjoined the Keystone XL Pipeline while the U.S. State Department reconsiders its approval decision on remand. The Dakota Access Pipeline is currently before the United States District Court for the District of Columbia, where parties dispute the sufficiency of the Army Corps of Engineers' latest environmental assessment, as well as the scope

of its consultation with affected tribes under the National Historic Preservation Act.

More locally, there are a number of active environmental justice cases involving Arizona tribes. One highly controversial example concerns the proposed Rosemont Copper Mine in the Santa Rita Mountains near Tucson. The Tohono O'Odham Nation, Pascua Yaqui Tribe and Hopi Tribe, among others, have challenged the U.S. Forest Service approval of a plan by Hudbay Minerals Inc. to develop an open-pit copper mine on 3,653 acres of public land. Although the site is not within or adjacent to the three tribes' reservations, it lies within their ancestral territory and contains numerous archeological and sacred sites, as well as

burial grounds. It is also home to the endangered ocelot and jaguar. The Tribes argue that development of the mine will permanently impair ancestral praying grounds, wild grasses for basket weaving, and other traditional practices. The Tribes are also deeply concerned that mining operations will consume and contaminate groundwater, particularly the Tohono O'Odham Nation, which has already experienced the groundwater impacts of two copper mines situated on its reservation.

In turn, the Forest Service argues it lacks discretion to deny Hudbay Minerals' use and occupation of public lands to develop the mine because these legal rights accrued to the company under the General Mining Act of 1872. Proponents of the mine further argue that it will provide a boon to the local economy, creating millions in tax revenue and hundreds of jobs. The litigants have nearly concluded briefing the merits in the United States District Court for the District of Arizona.

In northern Arizona, the Havasupai Tribe, alongside conservation groups, has contested the resumed operation of a 17.4 acre uranium mine located near the Grand Canyon. The site, known as Canyon Mine, was originally authorized by the U.S. Forest Service in 1988. In 2012, however, the Secretary of the Interior withdrew roughly 1 million acres of public land surrounding the Canyon Mine site from mineral exploration. Fol-

lowing the withdrawal, the Forest Service determined that the mine operator, Energy Fuels Resources (USA), Inc., holds a "valid existing right" to the Canyon Mine and therefore its mining operations were grandfathered in.

The Tribe challenged this finding as a matter of law, and argued that operation of the Canyon Mine—located within its aboriginal territory—would contaminate the nearby water supply, as well as poison the wildlife and tribal members. The Tribe further alleged that the mining operations would harm its members' ability to perform traditional ceremonies and gather native plants in the area. In October 2018, the Ninth Circuit rejected most of the Tribe's and co-



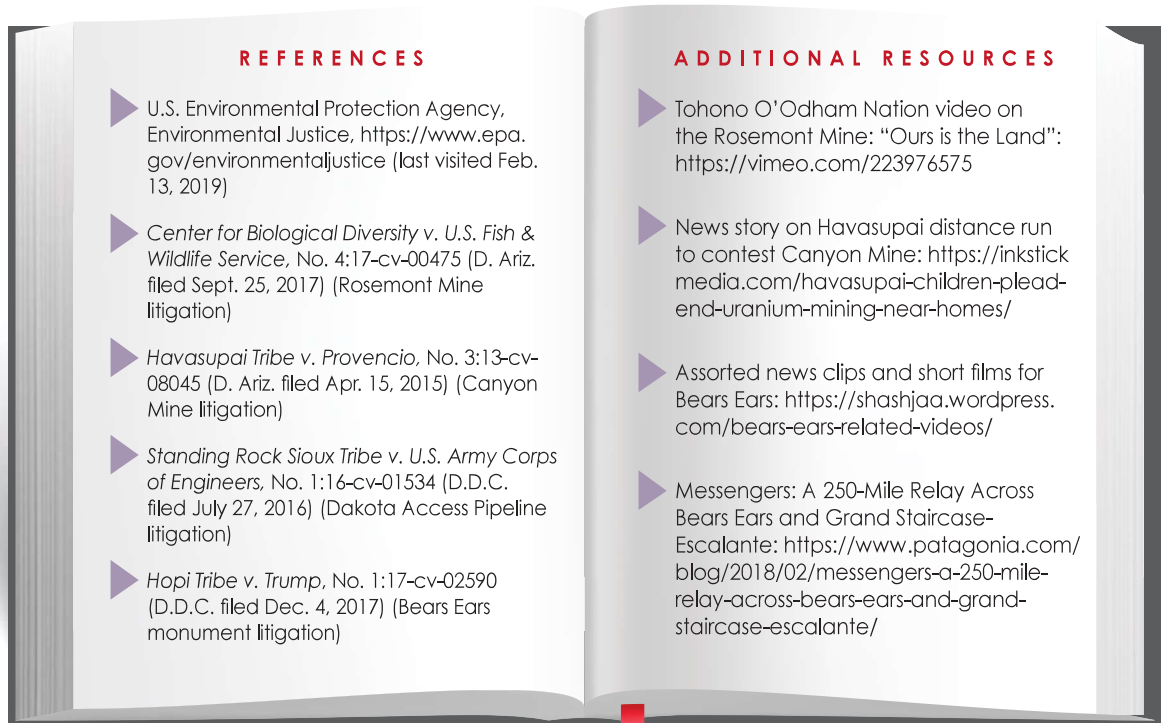
plaintiffs' claims, yet remanded to the district court a single question concerning the applicability of the Federal Land Policy and Management Act. Although mining operations at Canyon Mine remain authorized, Energy Fuels Resources has indicated it will not begin ore production until the uranium market is more favorable.

Another regional tribal environmental

justice case that has grabbed the national spotlight involves the Bears Ears National Monument in southeastern Utah. The mon-

ument's birth is unusual. For those who may not know, the national park and monument system have a rather reprehensible his-

tory when it comes to indigenous communities. The federal government carved out many of these "unoccupied" bastions of na-



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- ▶ *Havasupai Tribe v. Provencio*, No. 3:13-cv-08045 (D. Ariz. filed Apr. 15, 2015) (Canyon Mine litigation)
- ▶ *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, No. 1:16-cv-01534 (D.D.C. filed July 27, 2016) (Dakota Access Pipeline litigation)
- ▶ *Hopi Tribe v. Trump*, No. 1:17-cv-02590 (D.D.C. filed Dec. 4, 2017) (Bears Ears monument litigation)

ADDITIONAL RESOURCES

- ▶ Tohono O'Odham Nation video on the Rosemont Mine: "Ours is the Land": <https://vimeo.com/223976575>
- ▶ News story on Havasupai distance run to contest Canyon Mine: <https://inkstickmedia.com/havasupai-children-plead-end-uranium-mining-near-homes/>
- ▶ Assorted news clips and short films for Bears Ears: <https://shashjaa.wordpress.com/bears-ears-related-videos/>
- ▶ Messengers: A 250-Mile Relay Across Bears Ears and Grand Staircase-Escalante: <https://www.patagonia.com/blog/2018/02/messengers-a-250-mile-relay-across-bears-ears-and-grand-staircase-escalante/>



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ture by forcibly evicting local indigenous groups from their homelands, all in the name of preservation and public enjoyment. It is rather extraordinary, then, that five tribes—the Navajo Nation, the Hopi Tribe, the Pueblo of Zuni, the Ute Indian Tribe, and the Ute Mountain Ute Tribe—expressly sought the national monument designation.

Why would they choose to do so? To start, more than 100,000 archaeological sites, including rock art and cliff dwellings, dot the landscape. These sites reflect the thousands of years that tribal ancestors have lived in the area, giving rise to traditional, cultural and economic practices that tribal members continue to employ, and earnestly desire to protect, today. After years of tribal lobbying, former President Barack Obama designated Bears Ears National Monument in December 2016. The 2016 executive order not only established special protections for 1.35 million acres of public land, but also created a first-of-its-kind intertribal Bears Ears Commission to provide guidance and recommendations to federal agen-

cies on monument management.

Following the change of administration, however, President Donald Trump dramatically reduced the size of Bears Ears National Monument to 200,000 acres, citing language in the 1906 Antiquities Act requiring that monument reservations “be confined to the smallest area compatible with the proper care and management of the objects to be protected.” That re-designation has been challenged in federal district court by a dizzying array of plaintiffs, including the tribal coalition, conservation groups, and the outdoor recreational industry, though the State of Utah, San Juan County and others support the restricted size. Although the litigation is in the early stages, this will continue to be a case worth watching.

As a final takeaway, there are several common themes that permeate tribal environmental justice issues. These cases are not limited to on-reservation harms, but extend to damage to environmental and cultural

Claims are almost always anchored in whether government agencies sufficiently consulted with affected tribal communities.

resources in the greater aboriginal territory. In addition, the claims are almost always anchored in whether government agencies sufficiently consulted with affected tribal communities about proposed federal action. Relatedly, these cases ask whether government actors have genuinely considered and appropriately weighed the full range of potential harms—including physical, cultural and economic harms—to tribal communities.

As a final note, an increasing number of innovative publicity campaigns, spearheaded by tribal communities and allies, have brought contemporary tribal environmental justice issues to the mainstream consciousness. A fraction of these campaigns are referenced on page 24, and are worth taking a look. **AZ**

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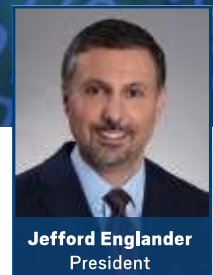
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Tribal Utility Development Energy Development and Services on Tribal Land

BY PILAR M. THOMAS

With over 19 million acres of reservation trust lands in the state of Arizona, and approximately 40 percent of the renewable energy resources in the state,¹ the 22 federally recognized Indian tribes are uniquely positioned to take advantage of their energy resources to promote more energy development—especially clean energy—and improved energy services to tribal communities. Five of those tribes—Navajo, Tohono O’odham, Ak Chin, Gila River Indian Community, and Fort Mojave—have been operating tribal electricity utilities for decades.² More and more tribes in the state have begun evaluating the economic and technical feasibility of operating their own electricity utility.

Benefits of Tribal Electric Utility Ownership

A few of the major economic benefits of tribal electric utility ownership and operation include the following.

Tribal Sovereignty and Control

Many Arizona tribes and tribal members have expressed substantial concern over climate change impacts, clear air issues, greenhouse gas emissions, and rising electricity costs. Through a tribal utility, these tribes can reduce their dependence on fossil fuel

electricity (such as coal and natural gas), increase their use of renewable energy and distributed energy resources, and reduce electricity costs through the acquisition of electricity of their choosing.

Furthermore, a tribal utility can be a vehicle for developing tribal renewable energy resources for both on-reservation and off-reservation use.³ This provides the tribe with a greater degree of control over the development of those energy resources, while maintaining a separation of effort between the tribal government and the tribal utility’s enterprise efforts.

Cost Reduction and Management of Electricity Costs

A tribal utility can control its electricity costs through access to the wholesale electricity market. As the regulated utilities and SRP continue increasing their retail rates, the wholesale costs of power have stayed relatively flat.⁴ Furthermore, tribes that are serviced by incumbent utilities—whether investor-owned like APS, rural electric cooperative, or a public power company like SRP—lack control over both the source of power and the price they pay for it. A tribal utility can directly access the wholesale market, or negotiate for long-term electricity contracts, that will most likely result in lower power costs for the tribal government, enterprises, and tribal members who live on the reservation.



Revenue Generation and Job Creation

Instead of making payments to outside utilities, the tribal government, enterprises and members will make payments instead to the tribal utility. These revenues would go directly to a tribal entity that is more responsive to the tribal community. The revenues would also go toward electricity procurement, operations and maintenance of the electricity system. In addition to energy choice, the tribal utility will have more flexibility in operations and customer service. Lastly, the tribal utility will result in funds remaining in the tribal community.

Tribal utilities can also promote tribal member workforce development and job creation through the operations and maintenance of the utility. Depending on the size of the reservation, the energy system, and the number of facilities to be serviced, there can be dozens of new jobs for tribal members. If the tribal utility makes the determi-

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nation that it can produce its own electricity—such as through distributed energy systems like community solar, wind or small natural gas generation—the construction and operation of those types of projects will result in further job creation.

Legal Issues

As tribes consider the economic benefits of tribal electric utility ownership and operation, there are several additional legal benefits and considerations that should be included in that analysis. For example, tribes should consider the following four things.

Jurisdictional Status of Tribal Utility Authority

The five tribes that operate utilities in Arizona are not subject to state law or Arizona Corporation Commission regulations related to retail electricity service. Under longstanding federal law principles, the state of

Arizona lacks legal jurisdiction over tribal entities operating on tribal lands.⁵ Any other tribe in Arizona also may form a utility under tribal law, and that utility will not be subject to ACC oversight. Instead, the tribe itself would assert jurisdiction and authority under its tribal utility. The tribal government would exercise governmental authority over the tribal utility authority. This authority could include the same type of regulatory authority exercised by the ACC—that is, the tribal government can approve electricity rates, customer service standards, renewable energy requirements, interconnection standards, net metering policies, and other regulatory responsibilities.

It may be prudent to obtain a jurisdictional disclaimer order from the ACC to provide certainty and clarity. In assessing whether the tribal utility would be subject to any ACC oversight, the tribe will need to understand the physical footprint of the

electrical system. If the system serves any non-Indian customers who live within (on non-Indian fee land) or near reservation lands, the tribal utility may be subject to ACC jurisdiction. Of course, a strong argument can be made that the state would still lack jurisdiction over tribal utility services to non-Indians under the test in *White Mountain Apache Tribe v. Bracker*⁶ and that the tribe has jurisdiction under *Montana v. United States*.⁷ But this legal analysis should be thoroughly evaluated if this type of situation exists.

Corporate Form

While every tribe with a utility has created a wholly owned tribal entity, there are still several choices for how to form the tribal utility. Tribes can create for-profit or not-for-profit entities. Tribes also can create a Section 17 corporation or a tribally chartered corporation. The utility can be a sepa-



rate legal entity from the tribe, or a political subdivision of the tribe. Each of these decisions has implications for utility governance, tribal versus state jurisdiction, and financing options.⁸

The primary legal benefits to forming a tribally chartered not-for-profit tribal utility—similar to other public power companies like SRP and L.A. Water and Power—is that it can more likely qualify as a political subdivision of the tribe. This in turn can shroud the tribal utility in the tribe’s sovereign immunity, including immunity from suit, state taxation and regulatory jurisdiction. Furthermore, a political subdivision of the tribe can issue tax-exempt bonds to raise financing for tribal utility capital expenses and obtain other potential benefits of federal funding from programs for which tribes are eligible.

On the other hand, creating a Section 17 for-profit tribal utility—similar to an investor-owned utility like APS—may create other financing opportunities for the tribal utility. Typically a Section 17 corporation is treated as a separate legal entity from the tribe.

Contractual Relations With Incumbent Utility

Whatever form the tribal utility takes, the first major transaction is likely to be an agreement with the incumbent utility to either: (1) negotiate a purchase/sale of the incumbent utility’s electricity infrastructure;

or (2) negotiate a service agreement for the incumbent utility to continue to own and operate the electricity distribution infrastructure. A tribe considering utility formation has to address the question of ownership of the distribution system. In assessing its options, the tribe should approach the incumbent utility to determine whether the utility will enter into a voluntary agreement

from another utility. The easiest way to enter the spot market generally involves hiring an energy trading company, which can both buy power at the purchase hub on behalf of the tribal utility and schedule the delivery of that power. The tribal utility also may enter into bilateral agreements with independent power producers (independent entities that generate power for sale in the wholesale market) and/or other utilities.

In any of these scenarios, in addition to buying power, the tribal utility also will have to enter into wheeling contracts—agreements with the transmission line owners—to move the power from the purchase hub or place of generation. One way to reduce these transmission costs is to develop more distributed energy projects on tribal lands—where the power will be used.

Tribal utilities are a viable vehicle for tribes to reduce energy costs, promote job creation, and exercise more control.

Conclusion

As tribes evaluate the economic and social benefits of tribal utility enterprises, due consideration should be given to the legal benefits—governance and jurisdictional control over energy services and energy development—as well as the key initial legal transactions (corporate formation, utility agreements and energy purchase agreements). While each tribe’s circumstances are different, and tribal leadership goals will vary, on balance tribal utilities are a viable vehicle for tribes to reduce energy costs, promote job creation, and exercise more control over energy services and energy development on tribal lands. AZ

to sell the distribution system, or whether the tribe will need to pursue eminent domain proceedings. Alternatively, the tribe can enter into an agreement with the incumbent utility to continue to operate and maintain the distribution system, subject to the tribe’s jurisdiction.

Power Purchase Contracts

To achieve electricity cost savings, the tribe will have to identify a cheaper source of power. Power can be purchased on the spot market (usually through an energy marketing firm), from an electricity generator, or

endnotes

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2. See, e.g., Schaff & Clark-Deschene, LLC, Tribal Authority Process Case Studies: The Conversion of On-Reservation Electric Utilities to Tribal Ownership and Operation, Sept. 2010.
3. Navajo Tribal Utility Authority (NTUA) has developed almost 50 MW of solar energy, which will be used both on and off the Navajo Reservation. Kayenta Solar Project is Operational, NAVAJO TIMES, June 22, 2017, available at: www.ntua.com/assets/kayenta-solar-project-is-operational---navajo-times-paper---06-22-2017.pdf. NTUA also has a MOU with SRP to develop up to 500 MW of solar power on the Navajo Reservation.
4. According to the Energy Information Administration, the 2017 average residential retail rate for APS was 0.1357/kWh, for SRP was 0.1159/kWh, and for TEP was 0.1205/kWh. On the other hand, the average retail rate for Fort Mojave’s tribal utility was 0.0829/kWh. The average wholesale rate for 2017 was .0329/kWh. See www.eia.gov/electricity/ (last visited Jan. 7, 2019).
5. McClanahan v. Arizona State Tax Comm’n, 411 U.S. 164, 173 (1973) (state law cannot impact tribal authority to regulate internal affairs); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) (establishing balancing test for state jurisdiction over non-Indian activity on tribal lands); Montana v. United States, 450 U.S. 544 (1981) (tribe’s authority over non-Indian activity on non-Indian fee land within the Indian reservation); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) (tribe’s inherent sovereign authority over economic activity on tribal lands)
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7. 450 U.S. at 544.
8. For in-depth discussion of the pros and cons of tribal enterprise structures, see KAREN J. ATKINSON & KATHLEEN M. NILLES, TRIBAL BUSINESS STRUCTURE HANDBOOK (2009).

Some Background on the Keystone XL Pipeline

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I. Background on the Keystone XL Pipeline

The Pipeline as proposed would carry highly toxic tar sands oil from Alberta, Canada to Steele City, Nebraska. The Pipeline requires a “presidential permit” from the State Department because it will cross the international boundary between Canada and the United States. The Pipeline also requires numerous other approvals and permits from various federal and state agencies for the Pipeline’s route through Montana, South Dakota, and Nebraska.

TransCanada first proposed the project in 2008. The proposed Pipeline underwent a lengthy environmental review that resulted in a final supplemental environmental impact statement in 2014 (“2014 SEIS”). President Obama then disapproved TransCanada’s application for a presidential permit in November 2015, which seemingly put an end to the project. But the project was revived by President Trump in January 2017, when he invited TransCanada to submit a new application for a presidential permit. After TransCanada submitted a new application, the State Department issued a presidential permit for the Pipeline in March 2017. In issuing the permit, the State Department relied on its previous 2014 SEIS. As discussed further below, the State Department’s reliance on the 2014 SEIS has proved to be a significant weakness for the federal government in defending the presidential permit in subsequent litigation challenging the permit.

I do not believe the pipeline route crosses any Indian reservations. But it threatens to impact many reservations in the northern Great Plains. As a result, two tribes have already sued to set aside the Pipeline’s approval, and others may do so.

One example of the potential impacts involves the Fort Peck Indian Reservation in Montana. The Reservation is located in northeastern Montana, about twenty miles south of the Canadian border and about thirty miles east of the Montana-North Dakota border. The current route of the Pipeline would cross the Missouri River, which is the southern boundary of the Reservation, just one mile upstream of the boundary of the Reservation – just as the very controversial DAPL pipeline in North Dakota crosses the Missouri River just upstream of the Standing Rock Sioux Reservation. Our law firm represents both Tribes.

At Fort Peck, the Missouri River is the sole source for a 19,000 acre federally funded and operated irrigation project. This project is the only irrigated agriculture on the Reservation. Its two intakes from the Missouri River are ten and fourteen miles respectively downstream of the Pipeline crossing. Roughly 40 miles further downstream is the intake for the Fort Peck Reservation Rural Water System that is the sole source for drinking water for almost 30,000 people residing both on and just outside the Reservation. This project to date has cost about \$200 million to construct – all appropriated by Congress. I attach the Tribes’ position paper setting forth its reasons for opposition to the Pipeline as currently configured.

II. Current litigation regarding the Keystone XL Pipeline

A. Suit by Indigenous Environmental Network and Northern Plains Resource Council

Shortly after the State Department issued TransCanada a presidential permit in March 2017, the Indigenous Environmental Network, Northern Plains Resource Council, and various other environmental groups filed suit in Montana federal district court to challenge the permit. *See Indigenous Environmental Network v. U.S. Dep't of State*, Nos. 17-29, 17-31 (D. Mont.) (“*Indigenous Environmental Network*”). In *Indigenous Environmental Network*, the environmental groups assert violations of the National Environmental Policy Act (“NEPA”), the Endangered Species Act (“ESA”), the Migratory Bird Treaty Act, the Bald Eagle and Golden Eagle Protection Act, and the Administrative Procedure Act (“APA”). On November 8, 2018, the district court vacated the presidential permit and enjoined the federal government and TransCanada from engaging in any activity in furtherance of constructing and operating the Pipeline. The district court ordered a remand to the State Department for it to complete a supplemental environmental review to address certain deficiencies in the 2014 SEIS and the decision supporting the permit.

In its order, the district court upheld the environmental groups’ NEPA claims that the State Department needed to supplement the 2014 SEIS to analyze whether the declines in the market price of oil since 2014 had made the Pipeline financially infeasible, and address the cumulative impacts of greenhouse gas emissions by the Pipeline together with other recent projects. The district court also sustained the environmental groups’ NEPA claims that cultural resources along the route had not been surveyed, and that major oil spills in years since 2014 had not been factored into the SEIS. In addition, the district court upheld a NEPA claim that the changes in policy by the Trump Administration had failed to provide a “reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy” of the Obama Administration. Finally, the district court ordered an updated modeling of potential oil spills and mitigation measures.

The federal government and TransCanada have appealed the district court’s decision to the Ninth Circuit. The environmental groups have also taken a cross-appeal on various claims the district court denied. It is unclear when the Ninth Circuit will hear the appeal and reach a decision, but we think it is unlikely that the appeal will be resolved before the end of the year.

In the meantime, the district court granted TransCanada’s motion, in part, for a stay of its decision pending the appeal. This stay allows TransCanada to engage in some prepare pipe storage and container yards located on private land, and off-load pipe for storage at these yards pre-construction activity while the Ninth Circuit hears and decides the appeal. The district court otherwise denied TransCanada’s request to modify the injunction to allow it to prepare construction camps. In granting TransCanada’s motion for a stay in part, the district court found TransCanada is unlikely to succeed on the merits of its appeal. TransCanada then sought a stay from the Ninth Circuit. On March 15, 2019, the Ninth Circuit denied TransCanada’s motion for a stay, agreeing with the district court that TransCanada is unlikely to succeed on the merits of its appeal.

B. Suit by Rosebud Sioux and Fort Belknap Indian Community

On September 10, 2018, the Rosebud Sioux Tribe and Fort Belknap Indian Community filed a separate lawsuit against the State Department also seeking to vacate the presidential permit and enjoin the project. Rosebud and Fort Belknap have brought claims under NEPA, the APA, and the National Historic Preservation Act (“NHPA”). They claim that the State Department

violated the APA by failing to provide a reasoned explanation for issuing the presidential permit on the exact same record that led President Obama to deny the permit in 2015. The two tribes also claim the State Department violated NEPA and the APA by failing to consider the Pipeline's impacts on their treaty rights and other rights. The two tribes also claim that the State Department failed to initiate the Section 106 consultation process under the NHPA when the Department received TransCanada's renewed application for a presidential permit in 2017. As noted, Rosebud and Fort Belknap are represented by attorneys from NARF.

In February, the federal government and TransCanada moved to dismiss this suit as moot, because the presidential permit has already been vacated as a result of the district court's ruling in *Indigenous Environmental Network*. In the alternative, the federal government and TransCanada argue that the suit should be stayed pending the outcome of the remand to the State Department for the supplemental environmental review ordered in *Indigenous Environmental Network*. These motions are still pending.

Rosebud and Fort Belknap have also moved to intervene in the Ninth Circuit appeal in *Indigenous Environmental Network*. The two tribes seek to intervene in the appeal on their claim that the State Department failed to provide a reasoned explanation for why its 2017 decision to permit the Pipeline contradicts findings that underlie President Obama's 2015 decision denying the permit. This claim overlaps with claims made by the environmental groups in *Indigenous Environmental Network*, and so the two tribes seek to justify intervention on the basis that the courts will otherwise need to hear the same issue twice. If permitted to intervene, the two tribes have proposed to dismiss this one claim from their suit.

C. Suit regarding the Nebraska Public Service Commission's approval of the Pipeline's route in Nebraska

In November 2017, the Nebraska Public Service Commission ("PSC") approved the Pipeline's route through Nebraska. Thereafter, landowners and other interested parties appealed the Nebraska PSC's approval on state law grounds to the Nebraska Supreme Court. The Ponca and Yankton Sioux Tribes have also appealed the PSC's decision. In addition to challenging the PSC's approval of the Pipeline's route, the Ponca and Yankton Sioux Tribes argue that the PSC improperly limited their participation in the administrative proceedings to social and cultural issues affecting the Tribes.

The Nebraska Supreme Court heard oral argument in the appeals on November 1, 2018, and should be issuing a decision soon.

III. Conclusion

For the present, TransCanada is enjoined from constructing the Keystone XL Pipeline. The injunction will continue until the Ninth Circuit decides the appeal in the environmental case. If the Ninth Circuit affirms the district court, the injunction will continue in place until the State Department prepares a proper environmental impact statement.