

# Comments

AMANDA ROGERSON\*

## The Tribal Trust and Government-to-Government Consultation in a New Ecological Age

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\* Amanda Rogerson wrote this Comment as a third-year law student and Bowerman Fellow for the Environmental and Natural Resources Law Center at the University of Oregon School of Law. She wrote it with the guidance and support of Kathy Lynn at the Tribal Climate Change Project, a collaborative project between the University of Oregon and the USDA Forest Service Pacific Northwest Research Station. She is currently clerking for Chief Judge David Mannheimer of the Alaska Court of Appeals.

## INTRODUCTION

Does American law have sufficient vitality to protect and respect the totally different worldviews and aspirations of America's indigenous peoples?<sup>1</sup>

Climate change promises to have a profound effect on communities around the world, but indigenous communities stand to be disproportionately and uniquely affected.<sup>2</sup> The reasons for this follow familiar sociohistorical patterns. In nation-states crisscrossing the globe, indigenous peoples have been displaced and marginalized by nonindigenous, settler cultures and governments. They now exist as minority communities and nations within dominant, nonindigenous nation-states. Although every indigenous community relates to its natural environment differently, practicing traditional ways of life to a lesser or greater degree,<sup>3</sup> many indigenous communities remain rooted in, and uniquely interconnected with, particular lands and habitats.<sup>4</sup> In the United States, numerous indigenous communities retain songs, medicine, spiritual beliefs, and ceremonies as well as names and social forms that are based upon, and derived from, their indigenous habitat.<sup>5</sup> Consequently, as climatic changes alter the ecosystems to which indigenous communities are connected, these changes also threaten to alter, and in some instances end, the traditions and cultural ways of life rooted in those environments.<sup>6</sup> Such changes may also hinder indigenous communities' abilities, as unique cultural collectives, to self-determine their cultural practices and cultural evolution.<sup>7</sup>

Although indigenous communities will be uniquely impacted by climate change, their ability to influence and prioritize climate change adaptation and management strategies for important lands and

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<sup>1</sup> WALTER R. ECHO-HAWK, IN THE COURTS OF THE CONQUEROR: THE 10 WORST INDIAN LAW CASES EVER DECIDED 27 (2010).

<sup>2</sup> Randall S. Abate & Elizabeth Ann Kronk, *Commonality Among Unique Indigenous Communities: An Introduction to Climate Change and Its Impacts on Indigenous Peoples*, in CLIMATE CHANGE AND INDIGENOUS PEOPLES: THE SEARCH FOR LEGAL REMEDIES 3, 3 (Randall S. Abate & Elizabeth Ann Kronk eds., 2013).

<sup>3</sup> Elizabeth Ann Kronk Warner & Randall S. Abate, *International and Domestic Law Dimensions of Climate Justice for Arctic Indigenous Peoples*, 43 OTTAWA L. REV. 113, 131 n.64 (2013).

<sup>4</sup> See Abate & Kronk, *supra* note 2, at 4.

<sup>5</sup> ECHO-HAWK, *supra* note 1, at 457.

<sup>6</sup> Abate & Kronk, *supra* note 2, at 12.

<sup>7</sup> *Id.* at 14.

resources is often extremely limited. Indigenous communities all too often lack the requisite economic and political influence, and legal right, to drive management decisions within the nonindigenous governmental institutions dictating and implementing climate change policy.<sup>8</sup> Indigenous tribal communities in the United States have the potential to be the exception, however.

The U.S. government is legally obligated to protect federally recognized tribes' abilities to maintain a separate existence.<sup>9</sup> This responsibility forms the core of the federal Indian trust doctrine ("trust doctrine" or "trust"), which grew out of tribal land cessions.<sup>10</sup> Through treaties with the U.S. government, tribes ceded vast swaths of their aboriginal land in exchange for promises of protection and aid.<sup>11</sup> While the substance of individual treaties varied, all constituted a guarantee by the federal government that tribes would be able to persist within the borders of the United States as separate peoples.<sup>12</sup>

When the Supreme Court developed the federal Indian trust doctrine from specific treaty promises, its articulation of the federal government's trust responsibilities toward tribes reflected the social and environmental realities of early America. The early nineteenth century was generally a time of natural resource abundance, and many believed that Indians and whites could not live together harmoniously.<sup>13</sup> Accordingly, federal policy was to remove Indians from white settlements and relocate them to isolated Indian lands where they could theoretically persist.<sup>14</sup> It is in this context that the Supreme Court limited the federal trust responsibility to protecting tribes' reserved lands and to other limited, treaty-guaranteed rights,

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<sup>8</sup> *Id.* at 4.

<sup>9</sup> Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1567 (1994).

<sup>10</sup> *Id.*

<sup>11</sup> "As expressed in treaties and elsewhere, the land cessions were conditioned upon an understanding that the federal government would safeguard the autonomy of the native nations by protecting their smaller, retained territories from the intrusions of the majority society and its ambitious entrepreneurs." *Id.*; Rebecca L. Robbins, *Self-Determination and Subordination: The Past, Present, and Future of American Indian Governance*, in NATIVE AMERICAN SOVEREIGNTY 287, 289 (John R. Wunder ed., 1999).

<sup>12</sup> See Wood, *supra* note 9, at 1497. This guarantee has been interpreted as applying to non-treaty tribes as well. See Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 376–80 (1975).

<sup>13</sup> VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 6 (1983).

<sup>14</sup> *Id.* at 6–7.

such as off-reservation hunting, fishing, and gathering.<sup>15</sup> Although this formulation of the trust reflected the historical realities of the time, its conflation of the protective purposes of the trust doctrine with fixed geographic boundaries is problematic in today's fluid ecological context.<sup>16</sup>

In an age in which tribes' land bases have been dramatically reduced and climatic changes are affecting the availability of culturally important species,<sup>17</sup> limiting the federal government's trust responsibility to tribal lands thwarts rather than furthers the protective purpose of the trust doctrine.<sup>18</sup> Tribes in the United States are facing profound impacts to their traditional cultural resources. Culturally important species are less plentiful than they once were, and their ranges are shifting.<sup>19</sup> As climate change impacts manifest, more and more species once found in abundance on-reservation may only be available off-reservation.<sup>20</sup>

Under the current formulation of the trust doctrine, tribes have no legal right to safeguard or manage cultural resources found off-reservation.<sup>21</sup> This legal limitation on the scope of the trust responsibility is reflected in the current operation of government-to-government consultation between tribes and federal executive branch agencies. Although President Clinton introduced mandatory consultation in 2000 in an effort to ensure the federal government fulfills its trust obligations to tribes,<sup>22</sup> he did not expand the federal government's legal obligations to tribes under the trust doctrine.<sup>23</sup>

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<sup>15</sup> Wood, *supra* note 9, at 1496–97, 1497 n.120.

<sup>16</sup> Maxine Burkett contends that the “entire discipline of law . . . may require a re-envisioning of itself to accommodate the unique circumstances of climate-induced human migration in the twenty-first century.” Maxine Burkett, *The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood and the Post-Climate Era*, 2 CLIMATE L. 345, 347 (2011).

<sup>17</sup> Garrit Voggesser et al., *Cultural Impacts to Tribes from Climate Change Influences on Forests*, 120 CLIMATIC CHANGE 615, 616 (2013).

<sup>18</sup> Julie Koppel Maldonado et al., *The Impact of Climate Change on Tribal Communities in the US: Displacement, Relocation, and Human Rights*, 120 CLIMATIC CHANGE 601, 603 (2013).

<sup>19</sup> Voggesser et al., *supra* note 17, at 616.

<sup>20</sup> *See id.* at 619–21.

<sup>21</sup> Wood, *supra* note 9, at 1532 n.290.

<sup>22</sup> Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000) [hereinafter Executive Order 13,175].

<sup>23</sup> *Id.* (“This order is intended only to improve the internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person.”).

Consequently, consultation provides tribes with no substantive legal rights to combat climate impacts to cultural resources that persist off-reservation or to prioritize conservation efforts as climate change impacts manifest.

This Comment argues that the current narrow application of the federal trust responsibility to tribal lands must be abandoned if the federal government is to realize the underlying protective purpose of the trust doctrine.<sup>24</sup> The current formulation of the trust prevents federal agencies from protecting the vital cultural resources tribes rely on to persist as unique, self-determining cultural collectives. Fulfilling the protective purposes of the trust as climatic changes manifest will require ensuring tribes a meaningful say in the design and prioritization of agencies' management plans for lands where tribal cultural resources persist. These reforms can be achieved by decoupling the trust's protective purpose from its historically derived geographic boundaries.<sup>25</sup> This would enable tribes and the federal government to reformulate tribes' consultation rights to encompass off-reservation resources threatened by climate change.

Part I begins by examining the climate change impacts to tribes in the United States. Part II gives a brief history of the evolution of the federal Indian trust doctrine—how this history led to the reaffirmation of tribal sovereignty and the development of tribal consultation. Part III examines how federal agencies consult with tribes today and the inadequacies of current consultation procedures, in light of the trust's protective purpose. Part IV proposes an alternate interpretation of the trust doctrine. Part V suggests how consultation could be reformed, based on an expanding understanding of the trust doctrine. The reforms suggested are intended to further tribes' abilities to safeguard important cultural resources and, by extension, protect and determine their separate cultural identities in a climate change era. This Comment looks to justice theory and, specifically, theories regarding recognition justice to elucidate consultation's current shortcomings and the Comment's proposed reforms.

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<sup>24</sup> The purpose of this Comment is to discuss current consultation practices and how these practices fail to further the protective purposes of the federal Indian trust doctrine. Although this Comment suggests a theoretical framework for reforming government-to-government consultation between tribes and the federal government, as well as limited changes to consultation procedures, discussion of how any of these changes could or should be accomplished is beyond its scope.

<sup>25</sup> See *infra* Part III.

## I

## CLIMATE IMPACTS TO TRIBAL CULTURES

Climate change is impacting indigenous communities throughout the world.<sup>26</sup> Indigenous communities in the Amazon have experienced drought, those on the Pacific Islands are facing a decrease in subsistence food sources as coral reefs die, and rising temperatures are impacting traditional agricultural practices worldwide.<sup>27</sup> Sea level rise, estimated to be between one and two meters this century, is also eroding coastal native communities' land and is sometimes forcing those communities to relocate.<sup>28</sup> In other regions, efforts to preserve forests for carbon offsets have displaced indigenous communities and limited their access to their traditional lands.<sup>29</sup> In the United States, climate change is projected to radically alter some of the landscapes and habitats to which indigenous cultures are connected.<sup>30</sup> Moreover, in many areas of the country, plant and animal ranges are expected to shift.<sup>31</sup> As a result, tribes' lands and limited off-reservation treaty rights may no longer support their ways of life and cultural and spiritual traditions.<sup>32</sup>

Climate impacts to indigenous ways of life are already starkly visible in the American Arctic, offering a foreboding warning of potential future impacts to indigenous communities elsewhere. The Arctic is warming at double, and in some places triple, the rate of the rest of the planet.<sup>33</sup> This is causing Arctic sea ice and permafrost to melt, ocean acidification, rising sea levels, increased storm intensity and frequency, and coastal erosion.<sup>34</sup> As a result, the environmental conditions that Arctic indigenous people have lived with for thousands of years are changing. Melting sea ice and permafrost is hampering indigenous communities' abilities to carry out daily

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<sup>26</sup> Abate & Kronk, *supra* note 2, at 5–6.

<sup>27</sup> *Id.* at 6, 8.

<sup>28</sup> *Id.* at 7–8; Peter Van Tuyn, *America's Arctic: Climate Change Impacts on Indigenous Peoples and Subsistence*, in *CLIMATE CHANGE AND INDIGENOUS PEOPLES: THE SEARCH FOR LEGAL REMEDIES* 263, 267 (Randall S. Abate & Elizabeth Ann Kronk eds., 2013); see Maldonado et al., *supra* note 18, at 602.

<sup>29</sup> Abate & Kronk, *supra* note 2, at 9–11.

<sup>30</sup> Maldonado et al., *supra* note 18, at 602.

<sup>31</sup> Voggesser et al., *supra* note 17, at 616.

<sup>32</sup> See, e.g., Abate & Kronk, *supra* note 2, at 6–7 (noting that climate change is impacting Arctic indigenous groups by leading to a decrease in animal populations).

<sup>33</sup> Van Tuyn, *supra* note 28, at 263.

<sup>34</sup> *Id.*

subsistence activities such as hunting and fishing.<sup>35</sup> Culturally important species such as caribou are changing their migration patterns, and ice-dependent species—such as bowhead, beluga, humpback, and minke whales; the pacific walrus; and bearded, ringed, and ribbon seals—are struggling to survive.<sup>36</sup> In addition to impacting Arctic indigenous communities' traditional food sources, melting ice and permafrost have made travel and hunting for these communities more difficult and dangerous.<sup>37</sup>

The story of Arctic indigenous communities demonstrates the profound and inequitable climate-related impacts some indigenous communities are facing and which others may face in the future.<sup>38</sup> It also illustrates just how difficult it can be for indigenous communities to effectively respond to global climatic changes and to safeguard important cultural resources. Not only have Arctic communities had very little to do with the activities that have brought on climate change, they have very little control over the cultural resources impacted by those changes.<sup>39</sup> However, most of the animals that Arctic indigenous communities rely on persist on public lands and are managed by non-tribal government agencies.<sup>40</sup>

Because Arctic indigenous communities exist within a larger political, ecological, and cultural context, they have a limited ability to protect important cultural resources from climate change impacts or take an active role in managing and adapting to changing conditions. Under the current interpretation of the federal Indian trust doctrine, the federal government has no obligation to give Arctic or other tribal communities in the United States legally binding influence over the management of off-reservation natural resources or to grant them special access.<sup>41</sup> This undermines the protective purpose of the trust doctrine. The trust's promise of cultural protection is necessarily contingent on empowering tribes legally and

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<sup>35</sup> Abate & Kronk, *supra* note 2, at 6–7.

<sup>36</sup> *Id.* at 7; Van Tuyn, *supra* note 28, at 268–69.

<sup>37</sup> Abate & Kronk, *supra* note 2, at 6–7.

<sup>38</sup> See Warner & Abate, *supra* note 3, at 116–18.

<sup>39</sup> *Id.* at 118; see Van Tuyn, *supra* note 28, at 264–65.

<sup>40</sup> Van Tuyn, *supra* note 28, at 264–65.

<sup>41</sup> Wood, *supra* note 9, at 1532 n.290. Even were the federal government to reformulate the trust doctrine, as this Comment suggests, its impact on Arctic tribes would likely be negligible due to the limited amount of trust land in the state of Alaska. See *Frequently Asked Questions*, BUREAU OF INDIAN AFFAIRS, <http://www.bia.gov/FAQs/> (last visited Feb. 15, 2015).

procedurally, through consultation, to safeguard those resources necessary for their persistence as unique cultural collectives, should they so choose.

## II

### THE FEDERAL INDIAN TRUST DOCTRINE

#### A. *Origins*

Tribal autonomy predates the formation of the United States.<sup>42</sup> Tribes<sup>43</sup> remained militarily powerful throughout early American colonial history when European powers regarded them as independent nations.<sup>44</sup> After the Revolutionary War, the United States also regarded tribes as autonomous, sovereign nations, as evidenced by the 371 treaties the United States signed with them.<sup>45</sup> Through these treaties with the United States, tribal nations exchanged vast swaths of their ancestral lands for the U.S. government's promise to protect tribal autonomy on reserved, tribal lands; exclude outsiders; and provide tribes with food, clothing, and other supplies and services.<sup>46</sup> Although these treaties spelled out some specific federal responsibilities, they failed to define tribes' exact role and rights within the U.S. federation.

The Supreme Court first examined this question in 1823 in *Johnson v. McIntosh*.<sup>47</sup> *Johnson* was the Court's first foray into defining the relationship between tribes and the nascent sovereign, the United States of America.<sup>48</sup> In *Johnson*, Justice Marshall asserted that the U.S. government holds title to tribes' aboriginal lands within its borders by virtue of discovery and conquest.<sup>49</sup> Justice Marshall held, however, that the United States' title is subject to a right of occupancy by tribal nations.<sup>50</sup> Although Justice Marshall's decision gave the

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<sup>42</sup> NLRB. v. Pueblo of San Juan, 276 F.3d 1186, 1192 (10th Cir. 2002).

<sup>43</sup> Native "tribes" are a European legal and social construct that was imposed on the American Indian population. Richard Warren Perry, *The Logic of the Modern Nation-State and the Legal Construction of Native American Tribal Identity*, 28 IND. L. REV. 547, 550 n.16 (1995).

<sup>44</sup> STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* 30 (2012).

<sup>45</sup> Robbins, *supra* note 11, at 288.

<sup>46</sup> PEVAR, *supra* note 44, at 30; Wood, *supra* note 9, at 1567.

<sup>47</sup> *Johnson v. McIntosh*, 21 U.S. 543 (1823).

<sup>48</sup> DELORIA & LYTTLE, *supra* note 13, at 26.

<sup>49</sup> *Johnson*, 21 U.S. at 595–96.

<sup>50</sup> *Id.* at 591–92.

U.S. government immense legal authority over tribes,<sup>51</sup> he also asserted that with great power came great responsibility:

Humanity . . . acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed . . . . [H]umanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old . . . .<sup>52</sup>

Justice Marshall's decision in *Johnson* laid the groundwork for the paternalistic guardianship theory he developed in *Cherokee Nation v. Georgia* and *Worcester v. Georgia*, just over a decade later. In *Cherokee Nation*, Chief Justice Marshall declared that the Cherokee constituted a sovereign and domestic dependent nation, and that the Cherokee's "relation to the United States," like that of other Indian nations, "resemble[d] that of a ward to his guardian."<sup>53</sup> Justice Marshall explained, "[Indians] look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the [P]resident as their great father."<sup>54</sup> Justice Marshall also described the federal obligations that came with this guardianship: "The treaties made with this nation purport to secure to it certain rights. These are not gratuitous obligations assumed on the part of the United States. They are obligations founded upon a consideration paid by the Indians by cession of part of their territory."<sup>55</sup>

The following year, in *Worcester*, Justice Marshall emphasized that one of the rights treaty tribes secured was the recognition of their innate political autonomy: "By various treaties, the Cherokees have placed themselves under the protection of the United States: they have agreed to trade with no other people, nor to invoke the protection of any other sovereignty. But such engagements do not divest them of the right of self government . . . ."<sup>56</sup> According to Justice Marshall, the United States was to protect the autonomy of the Cherokees and other tribes alike.<sup>57</sup>

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<sup>51</sup> DELORIA & LYTLER, *supra* note 13, at 26–27.

<sup>52</sup> *Johnson*, 21 U.S. at 589.

<sup>53</sup> *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 58–59.

<sup>56</sup> *Worcester v. Georgia*, 31 U.S. 515, 581–82 (1832).

<sup>57</sup> See ECHO-HAWK, *supra* note 1, at 431; DELORIA & LYTLER, *supra* note 13, at 33.

Although *Johnson*, *Cherokee Nation*, and *Worcester* form the theoretical basis for the modern federal trust responsibility to protect tribal autonomy, the cases couch the trust doctrine within a paternalistic guardian/ward framework.<sup>58</sup> In the decades following *Worcester*, the federal government would seize on the guardian/ward conception of the trust as justification for its efforts to dispossess tribes of all vestiges of separatism—their land, autonomy, and cultural practices.

*B. The Trust as Power over American Indians*<sup>59</sup>

As the nineteenth century progressed, the federal government's interpretation of its trust responsibilities was increasingly informed by the racism and religious righteousness that served to legitimize the military defeat of western tribes and justify the United States colonization of tribal lands in the American West.<sup>60</sup> As a result, the federal government emphasized its responsibility and power as guardian to “civilize” its wards and assimilate them into Euro-American society, rather than protect their separate political and cultural existences.<sup>61</sup>

In the name of “civilization,” the federal government prohibited Indians from engaging in religious practices, encouraged missionary activity on reservations, and sent Indian children to boarding schools.<sup>62</sup> In 1885, Congress also explicitly limited tribes' control over their internal affairs when it passed the Major Crimes Act, which gave the federal government jurisdiction over felonies committed by American Indians against American Indians on tribal land.<sup>63</sup> In 1887, determined to fully assimilate American Indians and American Indian land into European-American society, Congress passed the General Allotment Act.<sup>64</sup> According to Vine Deloria, Jr. and Clifford M.

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<sup>58</sup> DELORIA & LYTLE, *supra* note 13, at 33.

<sup>59</sup> PEVAR, *supra* note 44, at 32 (acknowledging that the trust doctrine was once seen “as a source of federal power over Indians”).

<sup>60</sup> ECHO-HAWK, *supra* note 1, at 436; *see* Robbins, *supra* note 11, at 291–92.

<sup>61</sup> CHARLES WILKINSON & AM. INDIAN RES. INST., *INDIAN TRIBES AS SOVEREIGN GOVERNMENTS* 62 (2d ed. 2004).

<sup>62</sup> *See* WILLIAM T. HAGAN, *AMERICAN INDIANS* 139–43, 152–53 (3d ed. 1993); PEVAR, *supra* note 44, at 7–8.

<sup>63</sup> Robbins, *supra* note 11, at 292–93. The Supreme Court upheld the constitutionality of the Major Crimes Act the following year in *United States v. Kagama* when it asserted that Congress possesses plenary power over Indian affairs. 118 U.S. 375, 384 (1886).

<sup>64</sup> Robbins, *supra* note 11, at 293. The General Allotment Act is also known as the Dawes Act. DELORIA & LYTLE, *supra* note 13, at 9.

Lytle, “[e]veryone could agree that the Indians owned too much land and that holding land in tracts of millions of acres unnecessarily impeded the orderly settlement of the western states.”<sup>65</sup> The General Allotment Act’s solution was to allot tribes’ collectively-held land so that Indians could become “civilized” farmers and, eventually, private property owners.<sup>66</sup> Indians’ “surplus” lands were opened to European-American settlement.<sup>67</sup> As a result of the General Allotment Act and subsequent amendments, tribes were ultimately dispossessed of approximately two-thirds of their remaining land base during the late nineteenth and early twentieth centuries.<sup>68</sup>

By the early 1920s, administrators in Washington were concerned about the tremendous financial cost of supporting American Indian communities during the Allotment Act’s assimilation process.<sup>69</sup> Although some policymakers believed the solution was to accelerate assimilation and the end of federal guardianship,<sup>70</sup> a study conducted by Lewis Meriam at the Institute for Government Research, and published in 1928, catalogued the extremely poor living conditions on reservations and the lack of adequate funds to accomplish federal assimilation policies.<sup>71</sup> The report also argued that the fragmentation of title to tribal land under the allotment policy was precluding the efficient exploitation of mineral resources on remaining tribal land by the U.S. government.<sup>72</sup> The report suggested that these untapped resources on Indian land could offset the cost of supporting American Indian communities if the U.S. government were to administer Indian lands in block form.<sup>73</sup> This would enable the government to efficiently and profitably extract and sell the valuable resources.<sup>74</sup>

In response to the report’s findings, Congress passed the Indian Reorganization Act (IRA) in 1934.<sup>75</sup> The IRA repealed the General Allotment Act and reinforced tribal sovereignty by developing governing structures through which tribes could assert their sovereign

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 9–10.

<sup>67</sup> PEVAR, *supra* note 44, at 9.

<sup>68</sup> HAGAN, *supra* note 62, at 165.

<sup>69</sup> Robbins, *supra* note 11, at 294.

<sup>70</sup> *Id.*

<sup>71</sup> DELORIA & LYTLE, *supra* note 13, at 12–13.

<sup>72</sup> Robbins, *supra* note 11, at 294.

<sup>73</sup> *Id.* at 294–95.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 295.

rights.<sup>76</sup> The Act also served to undermine many tribes' traditional forms of governance.<sup>77</sup> In many instances, "[f]amiliar cultural groupings and methods of choosing leadership gave way to the more abstract principles of American democracy, which viewed people as interchangeable and communities as geographical marks on a map."<sup>78</sup> For some tribes, IRA constitutions or charters, drafted by the U.S. Bureau of Indian Affairs (BIA),<sup>79</sup> were another unwelcome imposition of European-American values and institutions.<sup>80</sup>

Although the IRA's recognition of American Indian communities' political integrity was an important step in enabling tribes to assert their inherent political autonomy, it came at a cultural cost and did not spell the end of the federal government's efforts to assimilate Indians through the termination of tribal nations. In 1947, the Senate Civil Services Committee, intent on reducing federal expenditures, asked Acting Indian Commissioner William Zimmerman for a list of tribes no longer in need of federal assistance.<sup>81</sup> Thereafter, representatives concerned about the discriminatory nature of federal Indian policy joined the effort to terminate federal supervision of some tribes.<sup>82</sup>

In 1953, House Concurrent Resolution 108, known as the "Termination Act,"<sup>83</sup> passed both houses of Congress with little debate and no opposition.<sup>84</sup> Resolution 108 did not initiate any action but rather called for the enactment of specific statutes that would terminate those tribal nations deemed ready to lose their reservations and all federal services.<sup>85</sup> In accordance with Resolution 108,

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<sup>76</sup> DELORIA & LYTLER, *supra* note 13, at 14; *see* PEVAR, *supra* note 44, at 9.

<sup>77</sup> Robbins, *supra* note 11, at 295.

<sup>78</sup> DELORIA & LYTLER, *supra* note 13, at 15.

<sup>79</sup> Robbins, *supra* note 11, at 295.

<sup>80</sup> DELORIA & LYTLER, *supra* note 13, at 15.

<sup>81</sup> *Id.* at 16.

<sup>82</sup> *Id.* at 16–17.

<sup>83</sup> Robbins, *supra* note 11, at 298.

<sup>84</sup> DELORIA & LYTLER, *supra* note 13, at 17–18.

<sup>85</sup> Robbins, *supra* note 11, at 298. The Resolution, in part, stated:

Whereas the Indians within the territorial limits of the United States should assume their full responsibility as American citizens: Now, therefore, be it Resolved by the House of Representatives (the Senate concurring), That . . . all of the Indian tribes and individual members . . . should be freed from Federal supervision and control and from all disabilities and limitations specially applicable to Indians . . . It is further declared . . . that[] upon the release of such tribes and individual members thereof from such disabilities and limitations, all offices of the Bureau of Indian Affairs . . . should be abolished. It is further declared . . . that the Secretary of the Interior should examine all existing legislation dealing with such Indians, and treaties between the Government of the

Congress terminated 109 tribes by 1958.<sup>86</sup> During the termination period Congress also passed Public Law 280—which stripped tribes in some states of civil and criminal jurisdiction within their territories and gave it to the states<sup>87</sup>—and Public Law 959—which encouraged and provided for the relocation of thousands of American Indians from tribal lands to urban centers.<sup>88</sup>

In the 1960s, many American Indians reacted powerfully to the federal assimilation and termination policies of the preceding decades.<sup>89</sup> American Indian activism during the decade brought widespread attention to federal Indian policy. Public calls for, and acts of resistance against, federal assimilation policies included the publication of Vine Deloria, Jr.'s *Custer Died for Your Sins*, the Indians of All Tribes's occupation of Alcatraz Island in San Francisco Bay, the American Indian Movement's demonstrations at Mt. Rushmore National Monument, and the occupation of BIA headquarters by a group of American Indians describing themselves as "The Trail of Broken Treaties."<sup>90</sup> These protests and calls for tribal rights led the federal government to dramatically reassess its trust responsibility toward tribes.<sup>91</sup> The first significant indication of this reassessment, which began in the early 1960s, came in 1968 with the passage of the Indian Civil Rights Act.<sup>92</sup> The Act was, in part, a recognition of tribal autonomy; it required states to obtain a tribe's consent before assuming civil and criminal jurisdiction over a tribe's lands under Public Law 280.<sup>93</sup>

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United States and each such tribe, and report to Congress at the earliest practicable date . . . his recommendations for such legislation as . . . may be necessary to accomplish the purposes of this resolution.

H.R. Con. Res. 108, 83rd Cong., 67 Stat. B132 (1953).

<sup>86</sup> Robbins, *supra* note 11, at 299.

<sup>87</sup> *Id.*; DELORIA & LYTLER, *supra* note 13, at 18–19.

<sup>88</sup> Robbins, *supra* note 11, at 299.

<sup>89</sup> *Id.* at 300.

<sup>90</sup> *Id.* at 301–03.

<sup>91</sup> *Id.* at 301.

<sup>92</sup> DELORIA & LYTLER, *supra* note 13, at 22.

<sup>93</sup> *Id.*

*C. The Trust as Responsibility for Tribes*<sup>94</sup>

President Nixon fully articulated the federal government's evolving approach to federal Indian policy on July 8, 1970.<sup>95</sup> In words evoking the spirit of *Worcester*, President Nixon asserted in a special address to Congress that the federal government continued to be bound by a moral and legal trust responsibility to protect tribal autonomy. He stated:

Termination implies that the Federal government has taken on a trusteeship responsibility for Indian communities as an act of generosity toward a disadvantaged people and that it can therefore discontinue this responsibility on a unilateral basis whenever it sees fit. . . . The special relationship between Indians and the Federal government is the result instead of solemn obligations which have been entered into by the United States Government. Down through the years, through written treaties and through formal and informal agreements, our government has made specific commitments to the Indian people. . . . Self-determination among the Indian people can and must be encouraged without the threat of eventual termination. . . . Indians can become independent of Federal control without being cut off from Federal concern and Federal support."<sup>96</sup>

In order to fulfill the federal government's obligations to tribes, President Nixon further recommended a new, just approach to federal Indian policy, one that "strengthen[ed] the Indian[s'] sense of autonomy without threatening [their] sense of community."<sup>97</sup> In short, Nixon suggested that the federal government fulfill its obligation to protect tribal political and cultural autonomy by enhancing its support and decreasing its control; in this way, Nixon indicated that the government could facilitate "Indian acts and Indian decisions."<sup>98</sup>

President Nixon's special address to Congress, reassessing the federal government's responsibility to protect the autonomy of tribal communities, ushered in what has become known as the era of tribal self-determination in federal Indian policy.<sup>99</sup> For policymakers in the

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<sup>94</sup> PEVAR, *supra* note 44, at 32 (acknowledging that "the trust doctrine today is viewed positively . . . as a source of federal responsibility to Indians.").

<sup>95</sup> Special Message to the Congress on Indian Affairs, 213 PUB. PAPERS 564 (July 8, 1970).

<sup>96</sup> *Id.* at 565–67.

<sup>97</sup> *Id.* at 566.

<sup>98</sup> *Id.* at 565.

<sup>99</sup> Stephen Cornell & Joseph P. Kalt, *American Indian Self-Determination: The Political Economy of a Successful Policy* 16, 18 (Joint Occasional Papers on Native Affairs, Working Paper No. 1, 2010), available at [http://nni.arizona.edu/pubs/jopna-wp1\\_cornell&kalt.pdf](http://nni.arizona.edu/pubs/jopna-wp1_cornell&kalt.pdf).

1970s, tribal self-determination came to mean legal and political self-government as well as increased economic development.<sup>100</sup> Laws such as the Indian Self-Determination and Education Assistance Act of 1975 and the Indian Child Welfare Act of 1978 were early attempts at enabling tribes to administer their own affairs and, to some degree, safeguard their cultural identities within their geographic and political jurisdictions.<sup>101</sup> The Indian Self-Determination and Education Assistance Act empowered tribes to decide what government programs they wished to participate in and gave them the ability to contract with the federal government to deliver services that traditionally had been delivered by the federal government.<sup>102</sup> In the subsequent decades, Congress passed many more statutes aimed at enhancing tribal economies and tribal control over on-reservation life and services.<sup>103</sup>

Although these Acts provided tribal cultures some protection, they are inadequate in the face of climate change because they only ensure tribal control over tribal life and on-reservation resources.<sup>104</sup> Going forward, tribes need control over those cultural resources that happen to shift off-reservation due to climatic changes, as well as additional control over those resources persisting off-reservation that are imperiled by climate change.

### III

#### GOVERNMENT-TO-GOVERNMENT CONSULTATION'S FULFILLMENT OF THE TRUST DOCTRINE TODAY

Presidents have been instrumental in changing the emphasis of federal Indian policy to reflect the modern understanding of the federal trust responsibility to tribes.<sup>105</sup> One of the ways in which they

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<sup>100</sup> Emma R. Gross, *The Origins of Self-Determination Ideology and Constitutional Sovereignty*, in *NATIVE AMERICAN SOVEREIGNTY* 125, 125, 127 (John R. Wunder ed., 1999).

<sup>101</sup> *See id.* at 128, 132–33.

<sup>102</sup> DELORIA & LYTLE, *supra* note 13, at 23.

<sup>103</sup> Other acts included the Indian Mineral Development Act, the Indian Tribal Government Tax Status Act, the Indian Gaming Regulatory Act, the Indian Health Care Improvement Act, and the Indian Arts and Crafts Act. PEVAR, *supra* note 44, at 13.

<sup>104</sup> Acts passed by Congress with the intent of protecting tribal cultural resources have included the American Indian Religious Freedom Act, the Religious Freedom Restoration Act, the Religious Land Use and Institutionalized Persons Act, and the National Historic Preservation Act. *Id.* at 225–29.

<sup>105</sup> PEVAR, *supra* note 44, at 14.

have done this is by acknowledging and promoting the government-to-government relationships that comprise the trust.<sup>106</sup> In 1994, President Clinton reaffirmed the government-to-government relationship in a presidential memorandum in which he called on executive departments and agencies to consult with tribal governments when taking actions that affect those governments.<sup>107</sup> On November 6, 2000, President Clinton went beyond the 1994 memorandum to mandate consultation between agencies and tribes in Executive Order 13,175.<sup>108</sup>

Executive Order 13,175 requires agencies to develop their own procedures for obtaining input from tribal officials regarding the development of “policies that have tribal implications.”<sup>109</sup> The Order explains that “[p]olicies that have tribal implications” are those “policy statements or actions that have substantial direct effects on one or more Indian tribes . . . or on the distribution of power and responsibilities between the Federal Government and Indian tribes.”<sup>110</sup> The Order further declares that agencies, when developing and implementing consultation policies, will be guided by the federal government’s trust relationship with tribes, tribes’ sovereignty over their tribal members and territory, and tribes’ right to self-government and self-determination.<sup>111</sup> In the signing statement that accompanied the Order, President Clinton emphasized the cultural dimension of self-determination stating that “in our Nation’s relations with Indian tribes, our first principle must be to respect . . . Native Americans’ rights to choose for themselves their own way of life on their own lands according to their time honored cultures and traditions.”<sup>112</sup>

Executive Order 13,175 affirmed tribal political and cultural autonomy. It went so far as to call for a redistribution of power and responsibilities between the federal government and Indian tribes in order to enhance tribal self-determination. It also gave tribes a basis to demand that federal officials consult with them before making

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<sup>106</sup> See *Worcester v. Georgia*, 31 U.S. 515, 581–82 (1832).

<sup>107</sup> Memorandum on Government-to-Government Relations with Native American Tribal Governments, 30 WEEKLY COMP. PRES. DOC. 936 (Apr. 29, 1994), available at <http://www.gpo.gov/fdsys/pkg/WCPD-1994-05-02/pdf/WCPD-1994-05-02-Pg936.pdf>.

<sup>108</sup> Executive Order 13,175, *supra* note 22.

<sup>109</sup> *Id.* § 5(a).

<sup>110</sup> *Id.* § 1(a).

<sup>111</sup> *Id.* § 2.

<sup>112</sup> Statement on Signing the Executive Order on Consultation and Coordination with Indian Tribal Governments, 3 Pub. Papers 2487 (Nov. 6, 2000), available at <http://www.gpo.gov/fdsys/pkg/PPP-2000-book3/pdf/PPP-2000-book3-doc-pg2487-2.pdf>.

decisions that directly impact off-reservation tribal resources.<sup>113</sup> Despite these positives, consultation has infrequently fulfilled tribal self-determination by protecting tribal cultural resources.

This is a major stumbling block for tribes in a climate change era. According to Stephen L. Pevar in *The Rights of Indians and Tribes*, “[s]ome tribes report that government officials often contact them only after a decision has been made, do not participate in discussions in good faith, and only pretend to care what the tribe wants.”<sup>114</sup> This reality is likely attributable to the fact that while Executive Order 13,175 requires federal agencies to consult with tribes, it does not require any substantive outcomes. It does not, in short, require agencies to incorporate tribes’ input into their plans or policies.<sup>115</sup>

Specific reports on consultation reveal problems stemming from consultation’s lack of substantive requirements. These reports reveal that current consultation procedures frequently fail to accomplish the narrow goal of effectively communicating with tribes and routinely fail to ensure that tribes’ input is actually incorporated into federal projects impacting tribal lands or cultural resources. Two such reports were completed in compliance with the Northwest Forest Plan (“Plan”).<sup>116</sup> Enacted by Congress in 1994, the Plan governs federal land within the historic range of the northern spotted owl in the United States.<sup>117</sup> It further mandates that federal land management agencies in the region monitor the effects of the Plan’s implementation.<sup>118</sup> In compliance with this mandate, federal agencies contracted with two independent groups to produce reports on federal agency consultation with tribes under the Plan’s implementation.<sup>119</sup>

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<sup>113</sup> See PEVAR, *supra* note 44, at 40, 42.

<sup>114</sup> *Id.* at 41.

<sup>115</sup> *But see id.* (noting that some courts have invalidated decisions by federal agencies that were made without adequate consultation with the affected tribes).

<sup>116</sup> Both reports were compiled into one report. GARY R. HARRIS, EFFECTIVENESS OF THE FEDERAL-TRIBAL RELATIONSHIP, STRENGTHENING THE FEDERAL-TRIBAL RELATIONSHIP: A REPORT ON MONITORING CONSULTATION UNDER THE NORTHWEST FOREST PLAN IN OREGON AND WASHINGTON (2011) [hereinafter REPORT ON MONITORING CONSULTATION].

<sup>117</sup> *Id.* at 72. The northern spotted owl’s historic range is from Northern California to southern British Columbia. *Basic Facts About Northern Spotted Owls*, DEFENDERS OF WILDLIFE I, <http://www.defenders.org/northern-spotted-owl/basic-facts> (last visited Dec. 31, 2014).

<sup>118</sup> REPORT ON MONITORING CONSULTATION, *supra* note 116, at 1.

<sup>119</sup> *Id.* at i. Although the Plan was implemented in 1994 before President Clinton signed Executive Order 13,175, this report documents the effectiveness of consultation under the Plan between 2004 and 2008, which is after the signing of Executive Order 13,175.

One report examined the state of consultation under the Plan by interviewing twenty-two tribes in Oregon and Washington and conducting five in-depth case studies.<sup>120</sup> The other report interviewed fifteen Northern California tribes and conducted two in-depth case studies.<sup>121</sup> Both reports reflect that tribes face substantial barriers when attempting to influence agency policy and self-determine their future as tribes through the consultation process. The barriers reflected in the reports are procedural, structural, and substantive.<sup>122</sup>

On the procedural front, many tribes reported that despite the fact that agencies are mandated to consult with tribes, formal consultation simply did not occur. Some tribes stated that they had never been consulted under the Plan and knew little or nothing about it.<sup>123</sup> Other tribes received notifications regarding agency actions and plans as if they were any other member of the public.<sup>124</sup> One tribe described its formal consultation process as an annual meeting at which national forest representatives informed the tribe about federal plans for the following year.<sup>125</sup> For those tribes for whom consultation consisted of more than notification, some reported that consultation simply occurred too infrequently and unpredictably to ensure the agencies were upholding tribal rights and interests.<sup>126</sup> Others reported that the frequency with which consultation took place depended on the issue and specific agency staff involved in the project.<sup>127</sup> For example, one tribe reported being asked by the U.S. Forest Service (USFS) to comment on individual timber sales but not on other planning decisions.<sup>128</sup> Other tribes indicated that they were not notified of federal policies during the agencies' design and planning stages and therefore were not able to provide meaningful input on the plans.<sup>129</sup>

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Accordingly, the report assesses the adequacy of consultation under the Plan according to the objectives set out in Executive Order 13,175. The Washington and Oregon report was written by the Resource Innovation Group and the Institute for a Sustainable Environment, University of Oregon. *Id.* The Northern California report was prepared by the Intertribal Timber Council and the California Indian Forestry and Fire Management Council. *Id.*

<sup>120</sup> *Id.* at 9.

<sup>121</sup> *Id.* at 92–93.

<sup>122</sup> The names of the tribes and national forests that participated in the reports have been omitted to protect their anonymity.

<sup>123</sup> *Id.* at 101.

<sup>124</sup> *Id.* at 14–15, 100.

<sup>125</sup> *Id.* at 15, 52.

<sup>126</sup> *Id.* at 17.

<sup>127</sup> *Id.* at 98.

<sup>128</sup> *Id.* at 50.

<sup>129</sup> *Id.* at 61.

Many tribes indicated a desire to consult on a broader array of agency projects affecting ceded lands.<sup>130</sup> One tribe expressed a desire to consult on more than timber sales on USFS land.<sup>131</sup> The tribe wanted a wide-ranging discussion with the USFS regarding the Service's total impact on the tribal land, resources, and opportunities for consultation.<sup>132</sup> Eighty percent of the California tribes interviewed indicated that federal agencies' consultation procedures were inadequate to identify agencies' direct and indirect effects on tribal lands and resources.<sup>133</sup> Others indicated a desire to comanage federal lands or the ability to compel agency action in some instances.<sup>134</sup>

Tribes in the Plan region also reported structural barriers to effective consultation with agencies. They mentioned that a lack of agency and tribal funding prevented tribes and agencies from maintaining the staffing numbers necessary to devote time to consultation.<sup>135</sup> One tribe cited funding as a barrier to its ability to consult with agencies.<sup>136</sup> Staff turnover within agencies was another structural barrier mentioned by many tribes; tribes noted again and again that agency staff turnover hindered relationship building between tribes and agencies.<sup>137</sup> Several tribes suggested that agency staff turnover had hindered the development of institutional knowledge, hampering their ability to protect resources important to the tribes.<sup>138</sup> Several other tribes stated that when consultation was meaningful and effective, it was because of the individual agency staff members involved.<sup>139</sup> Another tribe similarly reported that consultation became less effective when agency staff left because new staff did not understand past work and existing relationships and lacked cultural sensitivity.<sup>140</sup> One tribe responded to these problems by developing educational presentations to help agency staff members understand the tribe's treaty rights, intercultural dialogue, and

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<sup>130</sup> *Id.* at 20.

<sup>131</sup> *Id.* at 51.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 98.

<sup>134</sup> *Id.* at 97, 116.

<sup>135</sup> *Id.* at 15, 18.

<sup>136</sup> *Id.* at 114, 116.

<sup>137</sup> *Id.* at 8, 14.

<sup>138</sup> *Id.* at 39, 47.

<sup>139</sup> *Id.* at 17.

<sup>140</sup> *Id.* at 114.

agencies' government-to-government relationships with tribes.<sup>141</sup> Another tribe also compensated for the lack of knowledge transfer within agencies by bringing new federal agency staff members up to speed.<sup>142</sup>

Many tribes reported that when they surmounted the procedural and structural barriers to consultation and actually provided input on agency plans, it was unclear if or how their input was substantively incorporated into agency actions.<sup>143</sup> One tribe reported that its input regarding an adaptive management area in a national forest had not impacted the USFS planning and that the USFS treated the tribe like any other member of the public.<sup>144</sup> Another tribe reported that it did not appear to the tribe as though its input during consultations in the previous five years had been incorporated into any federal agency planning.<sup>145</sup>

Some tribes relayed that Memorandums of Agreement (MOAs) or Memorandums of Understanding (MOUs) strengthened the government-to-government relationship.<sup>146</sup> MOUs identify the objectives of consultation, the agency and tribe's expectations, and consultation procedures.<sup>147</sup> Tribes with MOUs and MOAs in place indicated that these agreements were helpful but alone were insufficient to ensure adequate consultation.<sup>148</sup> One tribe noted that MOUs are only as good as the people enforcing them.<sup>149</sup>

At the 2013 Tribal Environmental Leaders Summit,<sup>150</sup> members of Alaska Native villages<sup>151</sup> reported many problems with the consultation process, some of which were similar to those experienced by Pacific Northwest tribes under the Northwest Forest

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<sup>141</sup> *Id.* at 39.

<sup>142</sup> *Id.* at 110.

<sup>143</sup> *Id.* at 19–20, 99–100.

<sup>144</sup> *Id.* at 55.

<sup>145</sup> *Id.* at 114.

<sup>146</sup> *Id.* at 13–14, 58, 97.

<sup>147</sup> *Id.* at 59.

<sup>148</sup> *Id.* at 14, 58, 97.

<sup>149</sup> *Id.* at 43.

<sup>150</sup> 2013 Tribal Environmental Leaders Summit (Oct. 9–10, 2013). I gathered the following information at several breakout sessions during the 2013 Tribal Environmental Leaders Summit in Spokane, Washington. The breakout sessions were specifically designed by the Summit's organizers to give Alaska Native village members the opportunity to discuss their experiences with government-to-government consultation.

<sup>151</sup> Alaska Native villages are federally recognized Indian tribes. *Frequently Asked Questions*, BUREAU OF INDIAN AFFAIRS, <http://www.bia.gov/FAQs/> (last updated Dec. 31, 2014).

Plan. An overarching problem that Alaska village members brought up was that their tribal councils often fail to understand the consultation process and the council's rights in that process. Members suggested that, even when villages do understand the process, there is still confusion regarding when, in the timeline of a federal project, agencies should initiate consultation with villages.

When consultation is initiated, village members indicated that agencies did not always present them with accessible information. Villages often lack the resources and personnel to prioritize consultation and to understand the highly technical permits regarding which agencies seek their input. As a result, some members indicated that they feel like evaluators of agency decisions rather than decision makers during consultation. Other village members complained that consultation does not necessarily happen face-to-face; teleconferences and webinars are used as surrogates for in-person meetings which members found disrespectful and harmful to the process. In other instances, agencies have failed to take into consideration that some villages make decisions through consensus or may want to speak with other villages before making decisions that have broad environmental, social, or cultural ramifications.

These reports suggest that consultation is not currently furthering Alaska Native villages' self-determination over cultural resources in a respectful or meaningful manner.

#### IV

#### REINTERPRETING THE TRUST DOCTRINE TO PROTECT TRIBAL CULTURES IN A CLIMATE CHANGE ERA

At its most basic level, the federal trust responsibility is the U.S. government's continuing duty to protect tribal cultural autonomy.<sup>152</sup> The trust's key purpose, both today and when it was conceived, is to protect tribes from larger social, political, and environmental forces so that tribes can maintain their autonomous political and cultural ways of life.<sup>153</sup> It is for this reason that modern interpretations of the trust have emphasized the federal government's responsibility to protect tribal lands and resources.<sup>154</sup> Although the protection of tribal

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<sup>152</sup> Wood, *supra* note 9, at 1496, 1567.

<sup>153</sup> Kyle Powys Whyte, *Justice Forward: Tribes, Climate Adaptation and Responsibility*, 120 CLIMATIC CHANGE 517, 526–27 (2013) [hereinafter *Justice Forward*].

<sup>154</sup> Wood, *supra* note 9, at 1496.

lands and the natural resources found on those lands is central to the trust responsibility, limiting the trust responsibility to tribal land does little to protect tribal autonomy in a climate change era.

Fundamentally, the federal trust responsibility toward tribes cannot be delineated by reservation boundaries or even by the boundaries of tribes' ceded lands. As climate changes manifest, crucial cultural resources may persist in new environments, and tribes may need to develop a cultural stake in lands that were previously irrelevant to their cultural practices and traditions. Thus, in order for the trust responsibility to remain relevant, it must be flexible and expansive enough to protect these changing needs.

Tribal governments, as unique cultural collectives, are the only entities that can determine which cultural resources are important to their members and necessary to satisfy their cultural practices. Unfortunately, federal agencies and tribes alike are obstructed by the limited nature of the trust doctrine from truly protecting tribal cultural resources.<sup>155</sup> This can be remedied by giving tribes the legal right to influence agency policy and the procedural ability to communicate their needs to the appropriate federal agencies.

## V

### REIMAGINING GOVERNMENT-TO-GOVERNMENT CONSULTATION TO PROTECT TRIBAL CULTURES IN A CLIMATE CHANGE ERA

It is important to [e]mphasize the vital role of the trust doctrine in the area of administrative law. Agency action, rather than congressional action, now has the greatest impact on native lands and resources. Yet, as creatures of statute, executive agencies often lack any clear mandate to protect native interests in the administration of their programs. While tribes are of course free to draw upon statutes and the Constitution to protect their interests, often these sources of law fail to meet unique native sovereignty and cultural concerns.<sup>156</sup>

In order for federal agencies to fully embody their trust responsibility to protect tribal cultural autonomy in a changing ecological context, the trust—and tribal consultation rights—must be reformed. Devising reforms that prevent or lessen the subordination of tribal values to European-American cultural and environmental priorities will not be easy, however. Accordingly, this Comment looks to theoretical understandings of cultural justice for guidance.

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<sup>155</sup> See *Justice Forward*, *supra* note 153, at 523.

<sup>156</sup> Wood, *supra* note 9, at 1544.

### A. Theorizing Cultural Justice

Traditional theories of justice, premised on liberal egalitarian notions of equality, impliedly theorized culturally homogenous societies.<sup>157</sup> These theories equated justice with strict distributional socioeconomic equity—of resources, political rights, social status, choice, and capabilities—among all individuals within a given society.<sup>158</sup> Although equality is a key component of any academic theory of justice, strict individual equality can work to disadvantage members of particular minority cultural groups.<sup>159</sup> Absolute equality, distributive or otherwise, can lead to injustice when it fails to account for the different needs and values of members of minority groups.<sup>160</sup> Furthermore, political decisions made by majority cultural groups may inhibit minority cultural groups' ability to exercise their values or access important resources.<sup>161</sup> In turn, this can make it difficult, if not impossible, for minority cultures to persist.<sup>162</sup>

Because strict distributional theories have generally failed to accommodate individual difference and the role cultural membership plays in producing that difference,<sup>163</sup> some modern theorists have moved away from strict distributional understandings of justice.<sup>164</sup> Instead, they have partially or fully embraced a recognition approach.<sup>165</sup>

Recognition theorists posit that justice and injustice can be understood in terms of socially-defined groups seeking recognition of their identity and an end to cultural oppression.<sup>166</sup> A recognition approach to justice thus implicitly examines the social practices that prevent a moral or political community from fully recognizing and

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<sup>157</sup> See WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 138, 147 (1995) [hereinafter *MULTICULTURAL CITIZENSHIP*].

<sup>158</sup> DAVID SCHLOSBERG, *DEFINING ENVIRONMENTAL JUSTICE: THEORIES, MOVEMENTS, AND NATURE* 3 (2007); NANCY FRASER, *JUSTICE INTERRUPTUS* 13 (1997); see generally AMARTYA SEN, *THE IDEA OF JUSTICE* (2009).

<sup>159</sup> WILL KYMLICKA, *POLITICS IN THE VERNACULAR: NATIONALISM, MULTICULTURALISM AND CITIZENSHIP* 147 (2001).

<sup>160</sup> See *MULTICULTURAL CITIZENSHIP*, *supra* note 157, at 113.

<sup>161</sup> *Id.* at 109.

<sup>162</sup> *Id.*

<sup>163</sup> See IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 9 (1990).

<sup>164</sup> FRASER, *supra* note 158, at 2.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

supporting an individual or group as an equal member.<sup>167</sup> The approach evaluates whether policies and programs that constitute societies' participatory processes fairly consider, accommodate, and adapt to a given community's particular culture, values, and sociohistorical situation.<sup>168</sup> When society fails to recognize a group, the failure can be understood as an injustice in and of itself because it impairs the group members' positive understanding of self and identity.<sup>169</sup> The lack of recognition has also been understood as an injustice because it is a realization of individual or group social subordination;<sup>170</sup> this lack of recognition operates to unjustly constrain the self-determination of individuals who identify with the group.<sup>171</sup>

Thus, in culturally heterogeneous societies, justice arguably requires society to recognize individual cultural identities and provide individuals with an equal opportunity—within limits—to access and embody the cultural identity of their choosing.<sup>172</sup> This type of equality can only be achieved by deviating from egalitarian ideals of strict individual equality and bestowing on individuals differentiated rights, based on cultural membership. These differential rights serve to accommodate the disparate needs and values of members of varying cultural groups and ensure that those individuals have access to the cultural membership of their choosing, in equal measure to other members of society.<sup>173</sup> However, the means through which society can accommodate and deliver differential group rights depend on the size, identity, and political status of the group in question.

#### *B. Envisioning Culturally Just Government-to-Government Consultation*

Stringent legal protections must be set in place to meaningfully safeguard Native rights. . . . [W]e cannot always count on good faith alone . . . . Good faith is no substitute for the rule of law.<sup>174</sup>

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<sup>167</sup> SCHLOSBERG, *supra* note 158, at 16.

<sup>168</sup> Kyle Powys Whyte, *The Recognition Dimensions of Environmental Justice in Indian Country*, 4 ENVTL. JUST. 199, 200, 202 (2011) [hereinafter *The Recognition Dimensions*].

<sup>169</sup> SCHLOSBERG, *supra* note 158, at 18.

<sup>170</sup> *Id.*

<sup>171</sup> See YOUNG, *supra* note 163, at 37.

<sup>172</sup> MULTICULTURAL CITIZENSHIP, *supra* note 157, at 113.

<sup>173</sup> *Id.* at 113, 125.

<sup>174</sup> *Id.*

Tribes, unlike many other minority cultures in the United States, possess some significant, differentiated group rights. These rights, in their current form, do not guarantee tribal members access to their cultural identities in equal measure to that of nonindigenous Americans. For example, while some tribal members have treaty rights to hunt, fish, and gather off-reservation on ancestral lands, they do not have a right to safeguard or manage the off-reservation resources they depend on for their cultural practices.

In order for tribal members to gain equal access to the cultural identity of their choosing—as impliedly guaranteed by the trust doctrine—their cultural differences must at least be recognized in, and accommodated by, federal consultation policies. Consultation policies must consider and reflect tribes’ diverse values, circumstances, and traditions,<sup>175</sup> and protect their right as distinct peoples to make informed decisions regarding important cultural resources. In order for this to occur, consultation must undergo substantive and procedural reforms.

On the substantive front, agencies must be legally required to incorporate tribal input into their policies and plans. In order to accomplish this, consultation must be reformulated as an ongoing dialogue. This dialogue should begin at the inception of an agency planning processes and extend to its conclusion.<sup>176</sup> Ensuring the incorporation of tribal input could be accomplished by building a presumption into consultation that agencies will incorporate tribal input unless they can present compelling reasons not to.<sup>177</sup> Alternatively, it could also be accomplished by giving tribes the ability to challenge consultation processes as arbitrary in federal court, should an agency fail to incorporate tribal input without good reason.<sup>178</sup> Both legal mechanisms could ensure important tribal

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<sup>175</sup> See *The Recognition Dimensions*, *supra* note 168, at 200.

<sup>176</sup> *Justice Forward*, *supra* note 153, at 523.

<sup>177</sup> PEVAR, *supra* note 44, at 41.

<sup>178</sup> Tribes are not currently able to bring these claims. In order for tribes to be able to, they would have to gain a regulatory or statutory right to have their input incorporated into agency plans. Tribes currently challenge the adequacy of agency consultation, by alleging either that an agency failed to comply with its own consultation regulations or that it failed to comply with statutorily defined consultation duties, such as those contained in the National Historic Preservation Act (NHPA). See, e.g., *Quechan Tribe of the Fort Yuma Indian Reservation v. U.S. Dep’t of Interior*, 755 F. Supp. 2d 1104 (S.D. Cal. 2010) (determining that tribe could prevail under a claim that agency consultation was inadequate under the NHPA).

resources receive more agency attention and are prioritized in agencies' management and adaptation decisions.

Substantive legal fixes must be accompanied by procedural reforms.<sup>179</sup> Agencies must give tribes the assistance and time they request to adequately consider agency plans. This means adjusting agency project timelines to fit tribal needs. Agencies must also document all tribal input and send all participating tribes a detailed explanation of where and how tribal input was used or the reason why it was not incorporated.<sup>180</sup>

Consultation procedures should also strive to facilitate meaningful communication between agencies and tribal governments. To accomplish this, agencies must take steps to eliminate barriers to communication through relationship and institution building by incorporating tribal communication styles and processes into consultation. Agencies must also proactively educate tribes regarding the consultation process and their rights within that process. Additionally, agencies must take steps to reduce staff turnover in key positions, ensure knowledge transfer between outgoing and incoming staff members regarding tribal relationships, and address funding shortfalls for consultation.

Tribes have repeatedly asserted that consultation is largely dependent on specific tribal and agency employees who understand its importance and are dedicated to meaningful outcomes.<sup>181</sup> Thus, agencies and tribes alike must develop procedures that emphasize and support the growth of personal relationships between tribal and agency staff. This will undoubtedly mean initiating practices and policies that emphasize and prioritize consultation vis-à-vis other tribal and agency functions. It will also likely mean reallocating funding to support reinvigorated consultation efforts.

Although the literature on climate change impacts to indigenous resources and government-to-government consultation has shown that the above reforms are necessary, such reforms are not sufficient. Consultation policies must also retain flexibility in order to ensure that consultation processes—and, ultimately, federal agency policies and projects—reflect the diversity of values, circumstances, and cultural needs among tribes.<sup>182</sup> One way to achieve this, while

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<sup>179</sup> See *The Recognition Dimensions*, *supra* note 168, at 202.

<sup>180</sup> See PEVAR, *supra* note 44, at 41.

<sup>181</sup> REPORT ON MONITORING CONSULTATION, *supra* note 116, at 17, 98.

<sup>182</sup> *The Recognition Dimensions*, *supra* note 168, at 201.

maintaining accountability, is through the heightened use of MOUs and MOAs.

MOUs and MOAs can reflect tribal values and needs and serve to educate incoming federal staff members about the tribal/agency relationship. These agreements often effectively reflect the situational particularity of tribes and agencies and ensure that agencies do not simply notify tribes about their plans or treat tribes like any other member of the public.<sup>183</sup> MOUs and MOAs are not a panacea, however. Tribes consult with multiple agencies, and agencies frequently consult with multiple tribes. The MOU/MOA model requires tribes to develop an agreement with each agency with which they consult, and it requires every agency to develop an MOU or MOA with each tribe whose cultural resources may be impacted by its actions. This is an expensive, complex, and time-consuming drain on tribal and agency resources.

The burden MOUs and MOAs place on agencies and tribes could be lessened, however, if the executive branch worked with tribes to develop broad consultation procedures and obligations applicable to all federal agencies.<sup>184</sup> Individual tribes could then determine whether to impose additional procedural consultation requirements or processes on the federal agencies with which they consult. These changes would standardize consultation, saving agency and tribal staff time and resources, while also enabling tribes to insert their unique communication traditions, cultural values, and needs into the process.

All reforms must ultimately be judged by the degree to which the reforms support tribes' ability to determine their fate as unique cultural collectives.<sup>185</sup> Tribes and agencies will be able to at least partially determine this by asking the following questions: (1) to what degree does the proposed reform enable tribes to resist discrimination and the marginalization of their interests, (2) to what degree does the proposed reform enable tribes to continue the cultural practices of their choosing, and (3) to what degree does the proposed reform ensure tribes have the capacity to make the tough decisions necessary

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<sup>183</sup> See, e.g., REPORT ON MONITORING CONSULTATION, *supra* note 116, at 59.

<sup>184</sup> Every agency currently develops its own government-to-government consultation policies and procedures. Executive Order 13,175, *supra* note 22, § 5(a).

<sup>185</sup> See *Justice Forward*, *supra* note 153, at 518–19.

to allow them to choose how to move forward as unique and autonomous cultural collectives?<sup>186</sup>

### CONCLUSION

Throughout the history of the United States, the federal government has, at times, abandoned its trust responsibility to protect tribal cultural autonomy. Since the 1970s, however, the federal government has renewed its commitment to self-determination. This recommitment to the essence of the trust responsibility is laudable but cannot be accomplished without careful planning and consideration.

Climate change poses a unique challenge to indigenous communities around the world. The landscapes and species in which many indigenous communities' cultural practices are rooted are changing, and they are predicted to change further as climatic shifts manifest. Tribes in the United States are uniquely positioned to successfully mitigate and adapt to these changes by virtue of the federal government's obligation to fulfill the federal Indian trust through government-to-government consultation. Both must be reformulated, however, if the federal government is to successfully uphold its trust responsibility to protect tribes' separate political and cultural existences in an ecological age dominated by climate change.

The current formulation of the trust doctrine, under which tribes have no legal right to safeguard or manage their off-reservation cultural resources, no longer furthers the doctrine's protective purpose, as articulated by Justice Marshall in *Cherokee Nation* and *Worcester*.<sup>187</sup> The trust can no longer be understood as applying exclusively to the natural resources found on tribal lands and to limited off-reservation treaty rights. The trust can no longer be limited by the geographic boundaries articulated almost two centuries ago. Instead, the federal government must choose to uphold the bedrock principle of the trust to protect tribal lands and resources.

In order for the federal government to fulfill the trust's underlying promise of protection, tribes must be empowered to protect the cultural resources they deem vital to their cultural continuance, regardless of where those resources persist. Climate change calls for a reassessment of the boundaries of tribal rights and a rethinking of what it means to be truly protective of tribal autonomy. Accordingly, this Comment contends that the government-to-government

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<sup>186</sup> See *id.*

<sup>187</sup> See *supra* Part II.A.

consultation process—premised on the trust relationship between federal agencies and tribal governments and intended to help fulfill the federal trust responsibility—can and must be substantively and procedurally reformed.

Consultation in a climate change era must give tribes the substantive right to co-manage important cultural resources off-reservation and enable tribes to participate in building consultation procedures that reflect and protect their cultural needs and values. By looking to recognition justice theory when devising consultation reforms, agencies and tribes will be better able to honor tribal cultural needs and values in this new ecological age. This, in turn, will better enable agencies to fulfill the federal Indian trust doctrine's foundational protective purpose.

