Arizona State Law Journal
Summer, 1999

*483 THE CULTURAL HERITAGE OF AMERICAN INDIAN TRIBES AND THE **PRESERVATION** OF **BIOLOGICAL DIVERSITY**

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***485** These communities [of indigenous or tribal peoples] are the repositories of vast accumulations of traditional knowledge and experience that links humanity with its ancient origins. . . . It is a terrible irony that as formal development reaches more deeply into rain forests, deserts, and other isolated environments, it tends to destroy the only cultures that have proved able to thrive in these environments. [FN1]

"One must never go against the forces of nature." [FN2]

I. Introduction

The land we now know as North America was formed, according to the oral tradition of nations of the Iroquois or Haudenosaunee Confederacy, when the Sky-Woman fell through a hole in the sky. [FN3] At that time, the earth was covered with water. The creatures living in the water looked up and saw her falling and realized that they needed to make a place for her to land. The great turtle offered his back. The duck said that there must be earth on turtle's back, and dove to the bottom but could not dive deep enough. Loon and beaver both tried, but they could not reach the bottom either. Finally, muskrat was able to reach the bottom and bring back a small piece of earth, which, when he placed it on turtle's back, grew larger until it became the whole world. A pair of swans flew up to catch Sky-Woman and set her down gently on the earth on turtle's back. An indigenous culture which acknowledges that it owes its survival, from the very beginning, to the beneficence of non-human living things might also know something about how human communities can provide for their own needs while being mindful of the needs of other living things.

Half a century after the adoption of the Universal Declaration of Human Rights, the indigenous peoples of the world seek recognition by the international community of their human rights, especially rights associated with living as self-governing communities within their traditional homelands. Meanwhile, scientific communities based in the industrialized countries of ***486** the world have succeeded in drawing the attention of governments to the global crisis of the extinction of species, a crisis caused largely by the kind of human activities that are carried out in the pursuit of economic "growth" and "development." This article explores some of the connections between these two international movements: the movement for the recognition of the human rights of indigenous peoples and the movement for the **preservation** of **biological diversity**.

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People in the industrialized countries who recognize some of these connections are motivated both by self-interest and by principle. Indigenous peoples possess a wealth of traditional cultural knowledge about their homelands, knowledge that may be used to serve the interests of people in the industrialized world. Those who are motivated by principle tend to express support for the human rights of indigenous peoples, including the right to continue to exist as distinct cultures. [FN4] These different kinds of motivations are not necessarily contradictory and may well prove to be complementary. If indigenous peoples can survive the current wave of assaults on their cultures and their homelands, non-indigenous governments and non-governmental organizations could find themselves working in partnerships with indigenous peoples to pursue common environmental conservation objectives for many generations into the future.

This article focuses on the situation of American Indian tribes in the United States of America, rather than on indigenous peoples elsewhere in the world. The emerging international law of the rights of indigenous peoples, while seeking to establish international minimum standards, relies mainly on national law to effectuate these rights. For example, the Draft United Nations Declaration on the Rights of Indigenous Peoples [FN5] includes numerous provisions that would require or encourage states to take effective measures to ensure that indigenous peoples actually benefit from the rights proclaimed in the Declaration. Similarly, Article 8(j) of the Convention on Biological Diversity [FN6] mandates each contracting party to respect and preserve indigenous traditional knowledge within the framework of national legislation. In light of this reliance on domestic law, a focus on the domestic law of the United States should be useful. Readers from other countries can ***487** draw on the United States experience in fashioning their own national legislation, and readers in the United States may find that a human rights perspective yields valuable insights.

The United States has a long tradition of recognizing the right of Indian tribes to live as self-governing, culturally distinct communities, although the adherence of national policy to the principle of tribal self-government has been, to say the least, inconsistent. In fact, in two historical periods the United States carried out policies designed to destroy tribal governments. In addition, throughout much of its history, the United States has supported the "development" of natural resources in ways that have inflicted suffering on tribal cultures, such as the hydroelectric dams in the Pacific Northwest which, as noted later in this article, have caused great damage to the runs of wild salmon that tribal cultures have depended upon for thousands of years. Over the last quarter century, federal policy toward Indian tribes has supported tribal self-government, and tribes have become increasingly prominent in governing their own territories. They also have increasingly made it known that their concerns about the natural world often extend far beyond the boundaries of their reservations.

The cultures of American Indian tribes hold a wealth of knowledge about the natural world, knowledge that reflects the presence of tribal cultures in North America for countless generations and the variety of ways in which these cultures are deeply rooted in the natural world. Prior to contact with Europeans, tribal cultures provided for the material needs of people through agriculture, hunting, fishing and gathering. In many modern tribal cultures, wildlife continues to be essential for meeting subsistence needs. In most modern tribal cultures, some people still know how to use wild plants for healing. In all modern tribal cultures, connections to the natural world remain important aspects of Indian identity. At the core of tribal cultures are tribal religions. Many places in the natural world hold religious and cultural significance for tribal peoples, some because of events that took place there, some because people conduct religious ceremonies and practices there, some for reasons that no outsider has a right to know.

In tribal cultures, places that are regarded as sacred tend to be located in places where the web of life has not yet been disrupted by human activity. The web of life in such places may reflect hundreds or thousands of years of the presence of human cultures, but the web has not been ripped apart by the kinds of activities that industrialized cultures allow to take place under the banner of "development." Many of the non-human kinds of living things that make up the web of life in such places-what human policy-makers now call "biological diversity" or "biodiversity"-hold significance in tribal ***488**

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religions and cultures: eagles, wolves, salmon, ravens, coyotes, buffalo, cedar, sage, sweetgrass, to mention just a few.

Because tribal cultures are rooted in the natural world, protecting the land and its biological communities tends to be a prerequisite for cultural survival. Much has been written about whether or not tribal cultures embody values that can be described as environmental ethics, or, to frame the inquiry in the past tense, whether or not the cultural values and practices of tribal peoples enabled them to provide for human needs and wants without causing irreparable damage to their environments. [FN7] Professor Rebecca Tsosie recently reviewed a substantial amount of the literature on this topic and concluded, after raising the usual cautions about generalizations, that, for most indigenous cultures of North America, traditional Indian world views can be described as having several common aspects:

> a perception of the earth as an animate being; a belief that humans are in a kinship system with other living things; a perception of the land as essential to the identity of the people; a concept of reciprocity and balance that extends to relationships among humans, including future generations, and between humans and the natural world. [FN8]

A basic premise of this article is that the objectives of the movement to preserve biodiversity will be served by recognizing the human rights of indigenous peoples. The most effective way to make use of their traditional ecological knowledge is to recognize the rights of indigenous peoples to govern their own territories. The national and sub-national governments of the world should support these rights by showing the same kind of respect toward indigenous peoples that they show in their interactions with other governmental entities. This premise is based, in part, on the historical experience in the United States, which has shown that tribal self-government is a prerequisite for cultural survival.

Another premise is that recognition of the right of indigenous peoples to govern themselves in their own territories will not be enough, in and of ***489** itself, either to ensure their survival as distinct cultures or to make sure that people who are involved in preserving biodiversity have access to the traditional ecological knowledge of indigenous peoples. This second premise is also based the experience in the United States. In the United States, most tribal governments currently have jurisdiction over only a small fragment of their aboriginal territory. [FN9] Yet, most tribes do have strong economic, cultural and religious interests in places that are located outside the boundaries of their reservations. Federal law provides a variety of mechanisms through which tribal governments can influence the decisions made by other units of government (federal, state, local) that affect such off-reservation places, and this article provides an overview of tribal experiences with two of these mechanisms: the Endangered Species Act [FN10] and the National Historic Preservation Act. [FN11] Assuming that self-governing indigenous peoples in other countries have similar concerns outside their territories, some mechanisms to empower them to make their views known on activities that take place outside of their self-governed territories will be advisable, if the outside world is to benefit from their traditional ecological knowledge.

Part II of this article offers a brief discussion of the basic principles of federal Indian law in the United States, as well as an overview of the history of federal policies relating to Indian tribes and their members. As any lawyer practicing in the field of federal Indian law can attest, this is a subject about which the average American citizen knows very little. [FN12] Indian tribes occupy a vulnerable position in the American system of government, and lack of knowledge on the part of the American public contributes to this vulnerability. Part II concludes by raising the question of whether a human rights analysis is useful in the context of Indian tribes in the United States, either with respect to the survival of tribes as distinct living cultures or with ***490** respect to the ways in which tribal cultures might contribute to the preservation of biodiversity.

Part III briefly examines the emerging international law of the human rights of indigenous peoples, with an emphasis on rights relating to the survival of indigenous peoples as distinct cultures. This part also offers some critical commentary on the role of the United States in shaping the principles of this emerging field of human rights law, calling attention

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to some of the key points on which the United States has made statements in the international arena that are contradicted by the experiences of the United States in its dealings with Indian tribes.

Part IV begins with Article 8(j) of the Convention on Biological Diversity, which includes a mandate for each contracting party to respect and preserve indigenous traditional knowledge within the framework of national legislation. In light of the importance of national legislation, part IV focuses on the national legislation of the United States. The emphasis is on two federal statutes that can be used to bring the traditional knowledge and cultural values of Indian tribes to bear on the preservation of biodiversity. The Endangered Species Act is featured because it is the basic federal statute for preserving biodiversity. The National Historic Preservation Act is featured because it has evolved into the basic federal statute for bringing traditional tribal cultural knowledge and values into the decisions made by federal agencies, when those decisions affect places that hold tribal religious and cultural importance.

The conclusion returns to the question of whether a human rights analysis is useful in the context of Indian tribes in the United States. I give some of the reasons why I believe that a human rights analysis is not only useful but also essential. The conclusion also suggests that we move beyond talking about rights and also talk about, and act upon, the responsibilities that go along with these rights.

II. Tribal Self-Government in the United States

In the United States, the federal government currently maintains government-to-government relations with more than 555 federally-recognized Indian tribes, including more than 226 in Alaska. [FN13] The tribes exhibit a great deal of diversity among themselves, and one should be ***491** cautious about generalizations. Indian reservations exist in thirty-three of the fifty states. Some twenty-four reservations are larger in area than the smallest state (Rhode Island), while some reservations are only a few acres in size. [FN14] Many are located in rural areas; some are adjacent to or surrounded by metropolitan areas. With one exception, tribes in Alaska do not have reservations, although they do provide a wide range of governmental services.

Throughout this article, the terms “Indian” and “Indian tribe” are used, rather than some possible alternatives, because these terms have common meanings in federal law. [FN15] This article also uses the term “Indian country” as that term is used in federal law, a term that includes all lands within the exterior boundaries of any Indian reservation and all “dependent Indian communities.” [FN16]

In the United States, a complex body of law has established that Indian tribes have a special status in our federal system of government. This body of law, generally known as federal Indian law, has evolved over the course of more than two centuries and includes treaties, laws enacted by Congress, decisions of the courts, and various kinds of policies and decisions issued by ***492** the Executive Branch of the federal government. [FN17] Throughout most of American history, the basic principles of federal Indian law have remained remarkably constant, even though federal policies toward Indian tribes have been anything but constant, periodically shifting between supporting the tribal right of self-government and forcing Indian people to become assimilated into the larger society.

A. Foundation Principles

Any attempt to summarize the foundation principles of federal Indian law must necessarily leave out a great deal. There are, perhaps, four key doctrines, each of which is interrelated with the others: inherent tribal sovereignty, reserved tribal rights, the federal trust responsibility, and the plenary power of Congress.

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1. Inherent Tribal Sovereignty

Inherent tribal sovereignty means that the source of a tribe's governmental authority comes from within itself and that its existence predates the founding of the United States. Since the era in which the sovereigns of Europe entered into treaties with them, the tribes have been recognized as possessing their own sovereignty. In 1941, the first edition of Felix S. Cohen's treatise on federal Indian law summarized the doctrine of inherent tribal sovereignty as follows:

> The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, i.e., its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested ***493** in the Indian tribes and in their duly constituted organs of government. [FN18]

Over the past two decades, the U.S. Supreme Court has changed this third principle, by holding that the power of Congress to take away (or divest) certain aspects of inherent tribal sovereignty need not be done through express legislation, but, rather, can be done by implication. [FN19] The doctrine of inherent tribal sovereignty, however, remains a cornerstone of federal Indian law.

2. Reserved Tribal Rights

The doctrine of reserved tribal rights has its roots in treaties, transactions in which tribes gave up their rights to large areas of land, in exchange, in part, for promises from the federal government to protect the tribes in their right to govern themselves in the lands that they reserved to themselves. [FN20] In this sense, a “treaty was not a grant of rights to the Indians, but a grant of rights from them-a reservation of those not granted.” [FN21] The land that a tribe did not give up became known as its “reservation.” Within its reservation, a tribe was assumed to retain all the rights that it had not specifically given up in its treaty. In a number of treaties, tribes also reserved certain kinds of rights outside the boundaries of their reservations, such as the right to harvest fish. The term “reserved rights” is also used to describe rights reserved by the federal government for the benefit of tribes, especially rights to the use of water which might otherwise be allocated among non-Indians pursuant to state law. [FN22] After 1871, when Congress ended the practice of entering into treaties with Indian tribes, many reservations were established through executive orders issued by the President and by other means. The establishment of such executive order reservations has been held to include reserved water rights for the benefit of ***494** the Indians. [FN23] Thus, while the concept of reserved rights has its roots in treaties, a tribe need not have a treaty to have reserved rights.

3. Trust Responsibility

The trust responsibility doctrine has its roots in cessions of land from tribes to the United States and the promise to protect the rights of tribes to govern themselves in the lands they had reserved. [FN24] The trust responsibility doctrine can also be traced to the doctrine of discovery, under which the European sovereign that claimed to have discovered a particular part of the New World acquired legal title to the land. Title acquired by discovery was exclusive with respect to other European sovereigns but nevertheless did not include the right to possess the land-the right of possession still belonged to the Indians. [FN25] What the sovereign acquired was the exclusive right to persuade the Indians to give up their right of possession. Thereafter, all titles to land had to be traced back to the sovereign. In 1790, the first United

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States Congress enacted a law that reflects this principle, requiring congressional authorization for any transaction through which an interest in Indian land was acquired. [FN26]

Under the trust doctrine, the federal government holds legal title to most Indian land and has fiduciary obligations like those of a trustee. The federal government's trust responsibilities to the tribes are not limited to the management of land. Rather, the protection of the land base is, and always has been, instrumental to the tribal right to maintain a separate existence as a self-governing community. Accordingly, Congress has explicitly acknowledged that "the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government . . . ." [FN27] As explained by Professor Mary Christina Wood, "the core principle of the trust doctrine remains a duty to protect a viable native separatism and tribal sovereignty." [FN28] She identifies four "attributes of sovereignty" which warrant protection under the trust doctrine because they ***495** are necessary for native separatism: "(1) a stable, separate land base; (2) a viable tribal economy; (3) self-government; and (4) cultural vitality." [FN29]

4. Plenary Power of Congress

The plenary power of Congress is a double-edged sword. Under the Constitution, the federal government is vested with authority over relations with Indian tribes, authority which is exclusive, i.e., not shared with the states. [FN30] Under the plenary power doctrine, the power of Congress exceeds the scope of its constitutional underpinnings, but has nevertheless been upheld by the Supreme Court based on the duty of protection arising from the dependency relationship with the tribes. [FN31] Congress often has used this plenary power to divest Indian tribes of rights and powers, and the Supreme Court has never invalidated such an act of Congress. [FN32] On the other hand, the plenary power of Congress has been used to prevent state governments from interfering with tribal self-government. In the American federal system, most of the conflicts over which government has authority in Indian country are conflicts between the tribes and the states. The Supreme Court has relied upon the plenary power doctrine in fashioning a principle that tribal law, carried out in a framework of federal law, can preempt the field, leaving no room for the exercise of state authority. [FN33]

B. Vacillations in Federal Policy

While the basic principles of federal Indian law have remained fairly constant, federal policy has vacillated between supporting the tribal right to carry on as culturally distinct self-governing communities and trying to destroy tribal cultures and force individual Indians to become assimilated into the larger society. Scholars have described the history of federal Indian law as comprised of five distinct eras: the formative years, from the founding of the United States until about 1871; the allotment era, until about 1928; the Indian reorganization era, until about 1942; the termination era, until about 1961; and the self-determination era, which is the current federal ***496** policy. [FN34] During the formative years, the establishment of reservations was the basic mechanism for maintaining separation between tribal cultures and the expanding American population. Most tribes managed to keep small portions of their aboriginal territories, but many other tribes were forced to move to reservations away from their homelands. Under both scenarios, the basic policy supported a "measured separatism" [FN35] for the tribes.

The allotment era takes its name from the General Allotment Act of 1887. [FN36] During this era, the federal government tried to force Indians to give up their tribal cultures and become assimilated into the larger American society. The principal mechanism for accomplishing this objective was to take tribal lands, which were held in common, and divide these lands into allotments for individual tribal members; the remaining so-called "surplus" lands were then made available to non-Indians. [FN37] The results of allotment included the loss of possession of about two-thirds of the Indian land base [FN38] and the contemporary presence of a substantial number of non-Indians living within the boundaries

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of many Indian reservations.

With the enactment of the Indian Reorganization Act (IRA) of 1934, [FN39] Congress repudiated the allotment policy. The IRA returned to the policy of supporting a measured separatism, although the degree of tribal autonomy was limited both by the structure of the IRA and the way in which it was carried out by the Federal Bureau of Indian Affairs (BIA). [FN40] The IRA encouraged tribes to adopt constitutions, but the standard constitution promoted by the BIA did not reflect tribal customs and provided the BIA with much discretionary power. By 1940, more than two-thirds of the tribes had elected to organize under the IRA, although some did so under heavy ***497** pressure from the BIA. [FN41] Since then, many tribes have amended their IRA constitutions in a variety of ways, for example, by creating independent judicial systems, by proclaiming constitutional rights of individuals subject to tribal law, and by removing language giving the BIA unwarranted power.

In the 1940s, Congress retreated from the policy of the IRA and in 1953 officially adopted a policy of terminating the federal government's role in Indian affairs and forcing Indians to become assimilated into the larger society. [FN42] During this era, Congress unilaterally terminated the federally-recognized status of more than 100 tribes, including several with relatively large reservations and many of the smallest. [FN43] Quite a few of these tribes have since succeeded in regaining federal recognition, generally through acts of Congress enacted after long campaigns and generally with a greatly reduced land base. In addition to statutes that terminated specific tribes, during this era Congress also enacted statutes that authorized state governments to exercise some kinds of jurisdiction within Indian reservations in certain states. [FN44] In the termination era a variety of social programs were pursued in the effort to force Indians to become assimilated, such as the relocation program, which sought to place Indians in permanent jobs in urban centers away from their reservations and tribal communities.

C. The Self-Determination Era

In the late 1950s, the negative consequences of termination began to become apparent, and Congress gradually moved away from the policy of forced assimilation and back toward support for a measured separatism. [FN45] In the 1960s, Indian people became more assertive in demanding more control over their communities along with recognition of their rights to remain culturally distinct. In the 1970s, Congress enacted a number of statutes ***498** which established a framework for tribal governments to become effective modern governments, including the Indian Self-Determination and Education Assistance Act of 1975 (“Self-Determination Act”), [FN46] the statute from which the current era takes its name. Under the Self-Determination Act, Indian tribes have the right to take over programs that would otherwise be administered for their benefit by the BIA or the Indian Health Service (IHS). On many reservations today, the tribal government is very much in charge, and there are very few employees of BIA and IHS.

During the first quarter century of the self-determination era, the Supreme Court decided a number of cases that upheld the authority of tribal governments over Indian country and limited the authority of the states. These decisions, which reaffirmed the foundation principles, provided tribes with a measure of assurance that many needed in taking control of their own destinies by using their powers of self-government to improve their social and economic conditions-managing natural resources development, selling hunting and fishing licenses, taxing economic activities, promoting tourism, operating gaming facilities. [FN47]

As tribes have asserted their governmental powers, they have met resistance from state and local governments, and from non-Indians who object to the very idea that tribal governments should have authority over them. The resistance that tribes have encountered shows that many people in the American society simply do not understand, or do not care to understand, the position that tribal governments occupy in our federal system. As Professor David Getches has shown, in

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many of the cases that have reached the Supreme Court in the last two decades, the Court has disregarded the foundation principles and has instead issued decisions based on its subjective view of what the law ought to be, showing great deference to the interests of non-Indians. [FN48] The Court's new "implicit divestiture" rule [FN49] has been a key factor in most of these decisions.

***499** D. Is a Human Rights Analysis Relevant?

As we approach the beginning of the twenty-first century, Indian tribes are determined to survive as distinct self-governing communities. They carry out this determination in a position of vulnerability. The structure of American federalism provides no commitment to the permanence of tribal governments as part of that structure. Given the widespread lack of understanding in the American public about the status of Indian tribes, tribal leaders have little reason for believing that the will of the people would rise up in support of the Indian cause if Congress were to reverse course again and disavow the policy of supporting tribal sovereignty.

Would a human rights analysis be useful in dealing with such a possible reversal of federal policy? Would such an analysis be useful in dealing with current issues relating to the status and rights of tribes, issues that may be addressed by Congress or the Executive Branch of the federal government? Before attempting to answer these questions, indeed, before such questions can be properly framed, we must first examine the content of some of the human rights principles that appear to be relevant.

III. The Emerging International Law of the Human Rights of Indigenous Peoples

This part looks at the Draft United Nations Declaration on the Rights of Indigenous Peoples (Draft U.N. Declaration) [FN50] with an emphasis on some of the provisions that are designed to ensure the survival of indigenous peoples as distinct cultures. This part also offers a critique of some of the ways in which the United States has called for changes in the Draft U.N. Declaration.

A. The Draft U.N. Declaration

The development of standards under international law to protect the human rights of indigenous individuals and groups has been unfolding for more than a quarter century. [FN51] In 1971, the U.N. Sub-Commission on the Prevention of Discrimination and the Protection of Minorities appointed a Special Rapporteur to study the problem of discrimination against indigenous ***500** peoples. [FN52] In 1977, representatives of indigenous peoples gathered in Geneva for the International Nongovernmental Organization Conference on Discrimination Against Indigenous Populations in the Americas. In 1982, the parent body of the human rights organs in the United Nations, the Economic and Social Council (ECOSOC), established the Working Group on Indigenous Populations (WGIP). ECOSOC gave the WGIP a two-part mandate: to review developments affecting indigenous peoples and to develop standards for protecting the rights of indigenous peoples.

The work product of the standard-setting part of its mandate is the Draft U.N. Declaration. In 1993, WGIP completed its work on the Draft U.N. Declaration and reported the document on to the next level in the United Nations hierarchy, the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities. [FN53] In 1994, the Sub-Commission approved the Draft U.N. Declaration and reported it out to the next level, the Human Rights Commission. [FN54] In 1995, the Commission established its own working group (HRC Working Group) and established procedures by which indigenous organizations and representatives could apply for participation at these meetings. [FN55] The HRC

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Working Group meets annually in Geneva.

In her presentation of the Draft U.N. Declaration to the Sub-Commission in 1994, WGIP Chairperson-Rapporteur Dr. Erica-Irene Daes described the substance of the Draft U.N. Declaration including three main elements "which distinguish it from all other human rights instruments . . ." [FN56] She referred to these elements as "legal personality, territorial security and international responsibility." [FN57] Briefly, by these concepts Dr. Daes means that indigenous peoples must be recognized as "peoples," each of which ***501** possesses a collective legal character; that each indigenous people needs security within its own territory in order to maintain its distinctive identity; and that, while indigenous peoples generally do not aspire to attain independent statehood, they do seek to live as distinct communities that will never be completely integrated into the states of the world, and so, to protect the integrity of their relationships with states, they need access to international legal fora. [FN58]

While acknowledging that the text of the Draft U.N. Declaration no doubt could be further refined, Dr. Daes advocated its adoption without substantive change as soon as possible, saying:

> In many parts of the world, indigenous peoples are still suffering from physical, ecological and cultural destruction. It is imperative, in my mind, that the United Nations system as a whole begin to act firmly and formally in defense of these peoples while they still have hope of survival. The Draft Declaration would provide the mandate for a concerted United Nations program in defense of indigenous peoples. I do not see how textual refinements or other abstract and unjustified pretexts could justify delaying such a mandate any further. [FN59]

Despite this admonition, many of the nations of the world that have sent delegates to the HRC Working Group have shown that they are intent on making some changes in the wording of the Declaration. In the meetings of the HRC Working Group, the United States has been one of the states which has argued for changes of a fundamental nature.

B. Collective Rights and Self-Determination

The Draft U.N. Declaration addresses the rights of indigenous individuals and the collective or group rights of indigenous peoples. Numerous articles in the Draft U.N. Declaration expressly speak of collective rights, and other articles use the term "peoples" in a way that indicates that a right is collective in nature. Much of the opposition of the United States has focused on the concept of collective rights. The United States also has joined with many other states in expressing opposition to the right of indigenous peoples to self-determination. Article 3 of the Draft U.N. Declaration proclaims: "Indigenous peoples have the right of self-determination. By virtue of that right they freely pursue their economic, social and cultural development." [FN60]

***502** 1. The Opposition of the United States

In one of its "Preliminary Statements" submitted to the HRC Working Group in 1995, the U.S. said: "As other delegations have noted, international instruments generally speak of individual, not collective, rights." [FN61] Although this is generally true, the generalization ignores the right of all peoples to self-determination, a collective right enshrined in numerous international documents. [FN62] This, of course, is the collective right that many of the delegations of national governments now seek to deny indigenous peoples. One way of revising the Draft U.N. Declaration so that it does not recognize this right is by deleting the letter "s" from the term "indigenous peoples." Quite a number of states have expressed support for such a change. [FN63]

Anticipating opposition of states, WGIP Chairperson-Rapporteur, Dr. Erica-Irene Daes spoke on this upon delivery

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of thedraft U.N. Declaration to the Sub-Commission. She asserted that:

> the historical distinction between indigenous and other peoples is doomed to join racism, colonialism, and totalitarianism among the pretexts for inhumanity and greed that our era has struggled to eliminate forever. A compromise on this issue would be as ***503** backward-looking a step today, as a compromise on freedom of speech and dissent a decade ago. [FN64]

The United States and others did not respond favorably to Dr. Daes' call to higher ground. The United States initially resisted the use of the term “peoples” in the Draft U.N. Declaration, both because of its implied recognition of collective rights [FN65] and because of its association with the right to self-determination which some say carries the right to independent statehood and secession under international law. [FN66] In its attempt to legitimize the denial of collective rights for indigenous peoples, the United States has said:

> Making clear that the rights guaranteed are those of individuals prevents governments or groups from violating or interfering with them in the name of the greater good of a group or state.
>
> Of course, individuals may and often will exercise their rights in community with others. The United States recognizes that in certain cases, it may be entirely appropriate or necessary to refer to indigenous communities or groups, in order to reinforce their individual civil and political rights on the basis of full equality and nondiscrimination. But characterizing a right as belonging to a community, or collective, rather than an individual, can be and often is construed to limit the exercise of that right (since only the group can invoke it), and thus may open the door to the denial of the right to the individual.
>
> This approach is consistent with the general view of the United States, as developed by its domestic experience, that the rights of all people are best assured when the rights of each person are effectively protected. [FN67]

***504** This “general view of the United States” is contradicted by more than two centuries of U.S. “domestic experience” in dealing with Indian tribes and nations, as discussed in Part I of this paper. From the earliest days of the Union, federal law has recognized collective rights of Indian tribes to continue to exist as distinct, self-governing communities. [FN68] If the history of federal Indian policy teaches nothing else, the larger American society should have learned by now that Indian people insist on continuing to be Indian, and that their sovereign right to self-governance within a recognized territory is essential to their survival as distinct cultures.

The United States has a long tradition of recognizing and upholding the rights of individual citizens. Acknowledging this tradition, however, does not require policy-makers to overlook the fact that the United States also has a long tradition of recognizing the collective rights of Indian tribes to exist. The right of a tribe to continue to exist is essentially a collective right. If the tribe itself ceases to exist, the rights that individuals might have had as members of the group no longer have much meaning. This is a critical point where the United States should take a leadership role in support of the rights of indigenous peoples.

In its 1996 “Preliminary Statements” the United States took the position that the term “self-determination” is so politically charged that it might prove counter-productive to use it, in that the nations of the world may not support the Declaration if the term is not removed or qualified. Following up on this position, in its 1997 offerings, the United States proposed some specific language to qualify the use of the term “peoples” throughout the Declaration. [FN69] The U.S. proposed revisions would eliminate the use of the ***505** term “peoples” in some articles and would qualify it in others by inserting an asterisk in the text of the article, which would have the effect of making the following language part of the Declaration: “The use of the term ‘peoples' in the declaration has no implications regarding the right of self-determination or any other rights which may attach to the term under international law.” [FN70]

In other words, the United States has taken the position that it is acceptable to use the “s” on the word “peoples” if

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we can agree that it doesn't mean anything-or, more specifically, if we can agree that indigenous peoples do not have the right of self-determination.

2. An Alternative Way to Resolve the Self-Determination Issue

Rather than bemoan the possibility that the states of the world might dig in their heels in opposition to self-determination for indigenous peoples, the United States could choose to provide leadership by example and stake out a position on the moral high ground. As used in international law, the term self-determination means something more than it does in U.S. domestic law. In international law the term describes a principle which is enshrined in the United Nations Charter [FN71] and other international legal instruments. [FN72] For example, the International Covenant on Civil and Political Rights proclaims that "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." [FN73]

Although self-determination is widely acknowledged to be a "principle of the highest order within the contemporary international system," [FN74] no consensus exists on what it means or on which groups are entitled to exercise it-that is, which groups are "peoples." As described by Professor James Anaya, self-determination is "a universe of human rights precepts concerned broadly with peoples, including indigenous peoples, and grounded in the idea that all are equally entitled to control their own destinies." [FN75]

Many of the national governments of the world have resisted the recognition of a human rights norm explicitly stating that indigenous peoples ***506** have the right to self-determination, especially if self-determination is understood to include the right to become an independent country. As Professor Anaya has explained, however, the right of self-determination does not necessarily include the right to become an independent country. [FN76] As he sees it, self-determination has both substantive aspects and remedial aspects, and the substantive aspects can be further broken down into two component parts:

> First, in what may be called its constitutive aspect, self-determination requires that the governing institutional order be substantially the creation of processes guided by the will of the people, or peoples, governed. Second, in what may be called its ongoing aspect, self-determination requires that the governing institutional order, independently of the processes leading to its creation or alteration, be one under which people may live and develop freely on a continuous basis. [FN77]

When a people has been deprived of the substantive aspects of self-determination, that gives rise to the need for a remedy. In the context of decolonization, the remedy provided by the international community generally has included the right to become an independent country, but this may not be the most appropriate remedy in the context of indigenous peoples. Rather, in the context of indigenous peoples, a people might choose from a variety of arrangements other than independent statehood and, if the ongoing aspects of the arrangement work, that would be meaningful self-determination. There may well be cases in which independent statehood would be an appropriate remedy, but it is not a generally available right. [FN78] It would be more productive for the states of the world to focus on the substantive aspects of self-determination for indigenous peoples than to try to stop the discussion by raising their fear of secession. [FN79]

3. Derogation of the Rights of Individuals

In its campaign to weaken the Draft U.N. Declaration, the United States has used the argument that recognition of rights in a collective entity results ***507** in the derogation of rights of individual members of the collective entity. As quoted earlier, in its "Preliminary Statement" on Article I of the Draft U.N. Declaration, the United States said that

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"characterizing a right as belonging to a community, or collective, rather than an individual, can be and often is construed to limit the exercise of that right (since only the group can invoke it), and thus may open the door to the denial of the right to the individual." [FN80]

Is this preemptive strike against possible abuses of collective rights really necessary? Article 33 of the Draft U.N. Declaration already provides that, in exercising their rights to "promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices," indigenous peoples must do so "in accordance with internationally recognized human rights standards." [FN81] If there are other specific points in the Draft U.N. Declaration which raise concerns regarding potential abuse, states could suggest appropriate qualifying language rather than mount a broadside attack on the concept of collective human rights.

C.The Human Rights Norm of Cultural Integrity

Every ethnic or cultural group has a right to exist. This is the necessary implication of several human rights instruments, including the Convention on the Prevention and Punishment of the Crime of Genocide. [FN82] Professor Anaya has referred to the basic principle as the norm of "cultural integrity." [FN83] This norm is also reflected in Article 27 of the International Covenant on Civil and Political Rights [FN84] and the U.N. Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities. [FN85] This human rights norm only makes sense as a collective right. An individual cannot be a part of a group if the group no longer exists. The Draft U.N. Declaration reflects this principle in several of its Articles. [FN86]

***508** 1. Cultural Heritage in the Draft U.N. Declaration

The Draft U.N. Declaration includes a number of articles that address various aspects of cultural heritage, especially articles 12, 13 and 14 (which together comprise part III of the Declaration) and article 25. These four articles are reproduced below:

> Article 12
>
> Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.
>
> Article 13
>
> Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of ceremonial objects; and the right to the repatriation of human remains.
>
> States shall take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, be preserved, respected and protected.
>
> Article 14
>
> Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.
>
> States shall take effective measures, whenever any rights of indigenous peoples may be threatened, to ensure

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this right is protected and also to ensure that they can understand and be understood in political, legal and administrative proceedings, where ***509** necessary through the provision of interpretation or by other appropriate means.

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard. [FN87]

These articles convey a sense of understanding and appreciation of the many ways in which the cultures of indigenous peoples in general, and Indian tribes in particular, are connected to the natural world. Tribal cultural knowledge, practices, and values exist in this context. It makes little sense to speak of rights to carry on these aspects of culture except in the context of connectedness to the natural world.

2. Critique of U.S. Proposed Revisions

In the 1997 session of the HRC Working Group, the United States proposed to substantially rewrite these and other articles dealing with cultural heritage so that the rights proclaimed would be individual in nature rather than collective. [FN88] In support of these suggested revisions, the United States offered a few sentences for each Article: explanatory comments which struck me, as an Indian lawyer with some background in the subject matter, as embarrassingly uninformed. A few examples may serve to support this observation.

In Article 12 the United States would replace the sentence stating that “Indigenous peoples have the right to practice and revitalize their cultural traditions and customs” with a statement about not denying indigenous individuals the right to “enjoy their own culture.” [FN89] In Article 13 the United States would replace the collective right of indigenous peoples to “practice, develop and teach their spiritual and religious traditions, customs, and ceremonies” with the individual right to “freedom of thought, conscience and religion,” including the right to “adopt a religion or belief of his or her own choice.” [FN90] The United States says that these changes are based on Articles 27 and 18 of the International Covenant on Civil and Political ***510** Rights, respectively. [FN91] In the context of Article 13 of the Draft U.N. Declaration, the United States says that its proposed revisions “are intended to harmonize the draft declaration with existing international law.” [FN92] In its comment on Article 14, the United States says, “The fundamental goal of preserving indigenous history, language, and tradition can best be achieved by protecting the right of individuals to take the necessary steps by themselves and in community with others (such as tribes, associations, groups, etc.).” [FN93]

The United States' emphasis on the rights of individuals misses the point. Articles 12, 13 and 14 are needed because indigenous cultures are threatened-their very existence is at risk. Carrying on traditional tribal religions is more than the freedom to choose, more than the right to “enjoy” one's culture. As the U.S. Congress recognized in the American Indian Religious Freedom Act of 1978, “the religious practices of the American Indian (as well as Native Alaskan and Hawaiian) are an integral part of their culture, tradition and heritage, because such practices form the basis of Indian identity and value systems.” [FN94] The culture and religion must be passed down through the generations or the culture and religion cannot survive, and this means that some people in each generation are obligated to perform certain roles. The survival of indigenous cultures and religions requires more than the freedom of individuals to choose to believe; it also requires some individuals to act out of responsibility to their cultures, their peoples. If some people do not accept responsibility for carrying on the culture and religion, others will not have the freedom to choose the tribal religion because it will no longer exist.

The U.S. comment on Article 13 deserves special scrutiny. This comment contains the statement: “The rights at issue are fully protected as individual rights that can be exercised in community with others.” [FN95] The rights at issue, as

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stated in the language that the United States proposes to strike, include "the right to maintain, protect, and have access in privacy to their religious and cultural sites." [FN96] It would be more accurate for the State Department to acknowledge that, under U.S. constitutional law, the freedom of religion protected by the Free Exercise Clause of the First Amendment does not prevent the federal government from carrying out activities on ***511** federal lands that would "virtually destroy" a tribal religion. [FN97] If the protection of Indian religious freedom as individuals under the U.S. Constitution allows for the virtual destruction of the tribal religion, how can this be described as full protection?

Yet another example of a misleading statement by the State Department can be found in the U.S. comment on Article 29, which concerns intellectual property. The U.S. statement on its suggested changes to this Article states:

> Many States have very developed intellectual property laws which provide significant protections for indigenous property interests. The U.S. agrees that States must accord indigenous individuals the same rights as other citizens to utilize these national systems for protection of their own intellectual and cultural property. States, however, must retain the authority to determine whether and under what circumstances additional protections should be accorded to indigenous property interests. [FN98]

The U.S. comment simply overlooks a substantial body of literature which demonstrates that the existing legal regimes for the protection of intellectual property just do not work very well for many of the kinds of interests for which indigenous peoples seek protection. This literature includes numerous works produced under the auspices of the U.N. Sub-Commission on the Protection of Minorities and the Prevention of Discrimination. [FN99] A basic reason for the inadequacy of the existing legal ***512** regimes is that the knowledge for which indigenous peoples seek protection is the communal knowledge that has been handed down through the generations. Intellectual property law protects the creative works of individuals for a limited period of time. Thus, while traditional cultural knowledge is similar to intellectual property, many people who have studied this subject, including Dr. Daes, have concluded that intellectual property law just does not work very well and some other form of legal protection needs to be developed. [FN100]

For some reason, the U.S. comment ignores this literature, and the United States proposes to rewrite the Article so that it only speaks of intellectual property and not of cultural property. Ignoring this body of literature cannot be attributed to simple ignorance on the part of the State Department. [FN101]

If the United States is serious in its expression ofsupport for the adoption of a strong U.N. Declaration, it needs to find a way to transcend its objections to the concept of collective human rights. One logical way would be to embrace the norm of cultural integrity as a collective right in existing human rights law, and to recognize that the collective rights standards in the Draft U.N. Declaration have been determined to be necessary to effectuate the right of cultural integrity for indigenous peoples. Some of the articles in the Declaration might then be revised to clarify that the exercise of collective rights must be done in ways that are consistent with the existing human rights law protecting the rights of individuals.

The United States could take a step toward developing an appreciation of the need for some collective rights by seriously engaging in consultation with tribes in the formulation of positions to be presented in the international arena. Through serious consultation, federal officials might learn to understand what tribal representatives mean when they speak of the responsibilities of individuals to their communities, and their responsibilities for the natural world. The federal officials who represent the United States in Geneva [FN102] might come to understand that traditional ecological and cultural ***513** knowledge tends to be the collective knowledge of the community. If this knowledge is to be brought to bear in helping to preserve biodiversity, the collective entity which holds the knowledge must find the terms of sharing acceptable.

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IV. **Preservation** of **Biological Diversity**

The web of life on Earth is being torn apart by the activities of human populations. In 1992, the eminent ecologist Edward O. Wilson predicted that a fifth or more of all species could become extinct, or doomed to extinction, by the year 2020, and said that the primary cause is the loss of habitat due to human actions. [FN103]

The international community has begun to respond to this problem. At the U.N. Conference on Environment and Development (or Earth Summit) in 1992, the community of nations adopted the Convention on Biological Diversity. [FN104] Article 8 of the Biodiversity Convention includes a mandate for states to specifically address the roles of indigenous peoples in conserving biodiversity. This Article provides:

> Each Contracting Party shall, as far as possible and as appropriate:
>
> . . . .
>
> (j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices. [FN105]

Pursuant to this and related provisions of the Convention, the United States has begun to conduct consultations with tribal representatives. The lead agency for this consultation is the Office of American Indian Trust in ***514** the Department of the Interior. [FN106] This article does not report on these consultations.

Rather, this part of the article focuses on two programs created by federal law that can be used to ensure that federal agency officials are informed by tribal cultural practices, knowledge and values when making decisions that will affect biodiversity. The two programs selected are the Endangered Species Act (ESA) [FN107] and the National Historic Preservation Act (NHPA). [FN108] If these two statutes are carried out in ways that respect the cultural rights of Indian tribes, they might contribute to the survival of tribes as distinct cultures by helping to preserve species and habitats that are of critical importance to tribal cultural practices. These statutes might also contribute to tribal cultural survival by helping federal officials and staff, and non-Indians in general, develop respect for and understanding of tribal cultural values.

These are not the only federal statutory programs that can be used to bring tribal cultural values into federal agency decisions. [FN109] For purposes of ***515** this paper, however, I think the ESA and the NHPA are the two best examples.

A. The Endangered Species Act

In the U.S., many of the legal controversies regarding biological diversity have been fought within the framework of the Endangered Species Act (ESA). [FN110] The ESA is administered by the U.S. Fish and Wildlife Service (FWS) in the Department of the Interior, and, with respect to marine species, the National Marine Fisheries Service (NMFS) in the Department of Commerce. The ESA has drawn much criticism, some of which has focused on its species-specific orientation. Indian tribes have joined in this criticism, calling for an ecosystem approach that recognizes the relationships among different kinds of life forms. [FN111] On the other hand, in many cases when a species has been pushed to the brink of extinction, the ESA has worked to keep people from pushing it over the edge. [FN112]

The ESA does not expressly address issues such as the significance of endangered or threatened species for tribal cultures. In fact, unlike many federal environmental statutes, the ESA does not even mention Indian tribes. [FN113] A num-

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ber of controversies have arisen involving Indian tribes and the ESA. For purposes of this article, two cases should be particularly instructive: the wild salmon runs in the Pacific Northwest [FN114] and the reintroduction of wolves in the northern Rocky Mountains.

***516** 1. The Wild Salmon Controversy

Salmon are anadromous fish that hatch in fresh water, migrate to sea as juveniles, and return as adults to the same fresh waters wherethey began life to spawn and die. Tribes in the Pacific Northwest have depended upon salmon for subsistence, ceremonial and commercial needs since time immemorial. When they entered into treaties ceding vast tracts of land, tribes in this region reserved for themselves the right to continue to fish at their usual and accustomed places. This treaty right has been upheld by the Supreme Court as a right to harvest up to half of the harvestable fish. [FN115]

For most of the time since time immemorial, salmon have been extraordinarily abundant. Before the arrival of white settlers, as many as sixteen million salmon returned from the Pacific Ocean every year to spawn in the tributaries of the Columbia River. [FN116] Since the construction of hydropower dams on the Columbia and many of its tributaries, some runs of wild salmon have become extinct and several others have been listed as endangered under the ESA. This means that, under section 7 of the ESA, [FN117] federal agencies must consult with NMFS [FN118] and obtain a biological opinion on whether or not a proposed federal action would jeopardize the survival of a listed species.

In 1994, after issuing “no jeopardy” opinions for the continued operation of the hydropower system, NMFS proposed to issue the first “jeopardy” opinion it had ever issued for the listed salmon runs to limit treaty fishing by four tribes in the Columbia River basin. [FN119] Thus, having failed to use the ESA to regulate the main source of salmon mortality, the politically powerful hydropower system, the NMFS instead chose to regulate the tribal fishery in order to keep the salmon runs from the brink of extinction. [FN120] The tribes sued, and the federal government negotiated a settlement. [FN121]

This controversy continues. The tribes have made their case based on treaty rights and the trust responsibility doctrine. Among other things, the tribes believe that the implementation of the ESA in this case, coupled with ***517** the federal trust responsibility, should seek to restore the wild salmon runs to levels that will support a sustained tribal treaty harvest.

2. Reintroduction of Wolves in Central Idaho

The gray wolf is native to most of North America, except for the southeastern United States. In the late nineteenth and early twentieth centuries, human beings almost completely eradicated gray wolves, through the elimination of native ungulates (hooved mammals), conversion of wildland into agricultural lands, and extensive predator control efforts by private, state and federal agencies. The wolf was considered a nuisance and a threat to humans. Today, however, the gray wolf's role as an important and necessary part of natural ecosystems is better appreciated.

In 1978, the federal government listed the gray wolf as an endangered species. [FN122] Nine years later, the U.S. Fish and Wildlife Service produced and approved the Northern Rocky Mountain Wolf Recovery Plan for wolves in the Rocky Mountains. [FN123] The plan called for three new populations of wolves: one each in northwestern Montana, Central Idaho and Yellowstone National Park. [FN124]

In 1994, Secretary Bruce Babbitt signed a plan to bring gray wolves from Canada to Yellowstone and Central Idaho. The plan called for state agencies to manage the released wolves. [FN125] The Idaho Legislature, however, specifically

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prohibited the Idaho Department of Fish and Game from managing the wolves. Fortunately for the wolves, the FWS plan also had held out the option of Indian tribes entering into cooperative agreements to mange the wolves and their habitat. [FN126]

When Idaho declined management responsibility, the Nez Perce Tribe stepped forward and offered to accept such responsibility. [FN127] The Nez Perce Tribe had reservation lands in the area and treaty rights on federal lands in central Idaho where the wolves were to be reintroduced. [FN128] In addition, unlike the federal officials, the Tribe was able to bring important attributes to the table as they "lived in the area and understood [the] local sensitivities" ***518** regarding the reintroduction of wolves. [FN129] In addition, like most Indian tribes, wolves hold cultural and religious importance for the Nez Perce. Therefore, the Tribe believed they could play a major role in the reintroduction of the wolves.

The Nez Perce Tribe developed a wolf management plan for approval by FWS. [FN130] This marked the first time that the federal government had contracted with an Indian tribe to manage the recovery of an endangered species. [FN131] The FWS retains oversight over the project, but the FWS and Nez Perce Tribe are carrying out this project in a partnership.

The Nez Perce Tribe's wildlife management blends traditional wisdom with modern science. [FN132] When the wolves were first brought to central Idaho, a tribal elder sang a religious song to welcome them, and later said that the experience had been "like meeting an old friend." [FN133] Unfortunately, although the Tribe's program has been described as on its way to becoming one of the great success stories in wildlife conservation, its prospects for success are now in jeopardy as a result of a lawsuit filed by opponents of the project. [FN134]

3. The Secretarial Order

In 1995, representatives of a number of tribes that had experiences with the ESA, experiences similar to that of the Columbia River tribes in the wild salmon controversy, formed an ad hoc group to consider options for dealing with the ESA. [FN135] This led to a workshop convened by tribal representatives in early 1996, which issued a report with findings and authorized a working group to pursue follow up activities. [FN136] Among the findings of the tribal workshop were that the ESA "does not and should not apply to Indian tribes"; that "Tribal rights to manage their resources in accordance with their own beliefs and values must be protected"; and that Tribes should not be asked to bear an unfair responsibility for conservation "to make up for ***519** past and continuing degradation of the environment resulting from non-Indian development." [FN137] The tribal workshop's finding that the ESA does not apply to tribes is based on the application of the federal Indian law principle that, while Congress does have the power to abrogate Indian treaty rights, legislation effecting an abrogation must clearly express congressional intent to do so. [FN138]

The tribal working group considered a variety of options, including litigation and legislation. [FN139] The option they chose to pursue was the issuance of a joint Secretarial Order by the Secretaries of the Interior and Commerce. [FN140] Their vision was that such a Secretarial Order could establish a framework for relations between the tribes and the two federal agencies, FWS and NMFS, that would be based on respect for tribal sovereignty and commitment to the federal trust responsibility. The tribes presented their case to Interior Secretary Bruce Babbitt in September 1996, who agreed to pursue the matter. [FN141] Working with the Department of Commerce, Secretary Babbitt appointed federal representatives to a negotiating team, which met with tribal representatives over the next several months. [FN142] These negotiations culminated, in June 1997, in the issuance of a joint Secretarial Order captioned "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act." [FN143]

The process used to negotiate the Secretarial Order was bilateral in nature, which makes it a successful example of

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carrying out the federal-tribal relationship on a government-to-government basis. [FN144] Substantively, the Order seeks to harmonize the ESA with federal Indian law. [FN145] The Order is neutral on the issue of whether the ESA applies to tribes. Rather, it emphasizes the sovereign authority of tribes over their lands and commits the two federal departments to working with the tribes to promote healthy ecosystems. The essence of the Order is set out in five principles, each of which is followed with explanatory text. The five principles are:

> ***520** Principle 1. The Departments shall work directly with Indian tribes on a government-to-government basis to promote healthy ecosystems.
>
> Principle 2. The Departments shall recognize that Indian lands are not subject to the same controls as federal public lands.
>
> Principle 3. The Departments shall assist Indian tribes in developing and expanding tribal programs so that healthy ecosystems are promoted and conservation restrictions are unnecessary.
>
> Principle 4. The Departments shall be sensitive to Indian culture, religion and spirituality.
>
> Principle 5. The Departments shall make available to Indian tribes information related to tribal trust resources and Indian lands, and, to facilitate the mutual exchange of information, shall strive to protect sensitive tribal information from disclosure. [FN146]

Although the Secretarial Order emphasizes lands under tribal jurisdiction, the implications of the Order extend well beyond reservation boundaries. For example, carrying out the third principle will provide the tribe with opportunities to influence the decisions of the two departments regarding threatened or endangered species that exist both within and beyond reservation boundaries. In addition, an appendix to the Order provides detailed guidance to FWS and NMFS on consultation with tribes when considering a species as a candidate for protection under the ESA if such protection could affect the exercise of tribal rights or the use of trust resources.

It is too soon to assess the implementation of the Secretarial Order. For purposes of this article, however, it does serve as an example of how bilateral negotiations between the tribes and the federal government can yield a national policy which harmonizes the rights and interests of tribes with the policies of national legislation. If carried out faithfully, the Secretarial Order can be expected to lead to the resolution of many controversies over the preservation of threatened species in which federal decisions are informed by tribal cultural knowledge and values. The Order should also yield numerous examples in which ecosystem management by tribes will avoid the perceived need for FWS or NMFS to make policy decisions.

***521** B. The National Historic Preservation Act

Perhaps the best example of national legislation in the United States that lends itself to the preservation of traditional cultural knowledge and the application of this knowledge to the conservation of biological diversity is the National Historic Preservation Act (NHPA), as amended. [FN147] This article does not discuss the NHPA in any detail, but rather briefly summarizes the relevant statutory provisions and the regulatory framework.

The NHPA established a rather complex regulatory framework for protecting places that are significant in the history or prehistory of the United States. This regulatory framework assigns a variety of roles to variety of governmental entities. Leading roles are performed by two federal agencies, the National Park Service (acting for the Secretary of the Interior) and the Advisory Council on Historic Preservation (ACHP or Advisory Council), an independent regulatory agency comprised of certain officials who serve by virtue of their office and others appointed by the President. In addition, the NHPA assigns responsibilities to all federal agencies to ensure that their actions do not cause adverse effects on historic properties, at least not without considering ways to avoid or mitigate the impacts. The NHPA also provides a ma-

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jor role for state officials known as State Historic Preservation Officers (SHPOs). The 1992 Amendments established statutory roles for Indian tribes and Native Hawaiian organizations (NHOs).

Under the authority of the NHPA, the National Park Service (NPS) has established the National Register of Historic Places. NPS also oversees the process through which criteria of eligibility are applied to places that may be eligible and determinations of eligibility are made. Section 106 of the NHPA [FN148] requires each federal agency to consider the impacts of its actions on places that are either listed on the National Register or are eligible for listing. Section 106 also requires each federal agency to give the Advisory Council the opportunity to comment on any proposed undertaking that may affect a National Register property (listed or eligible). The Advisory Council carries out this Section 106 consultation process through regulations that, in essence, delegate much of its authority to the SHPOs. [FN149]

***522** 1. Traditional Cultural Properties

Places that hold religious and cultural significance for tribes and NHOs may be eligible for the National Register. Tribes may prefer to refer to such places as "sacred sites" or "sacred places," but it is the historic significance of such places that may make them eligible for the National Register, and Section 106 applies only if a place is eligible. NPS has issued a guidance document for use in documenting the existence of such places and evaluating their eligibility for the National Register. [FN150] NPS coined the term "traditional cultural properties" (or TCPs) for such places, and this term has come into common usage by tribal officials and staff who are involved in historic preservation and cultural resources programs. [FN151]

Many TCPs are places in the natural world that are relatively undisturbed by human activity. Such places may hold religious and cultural significance for tribes or NHOs because of the kinds of plants and animals that live there and the ways in which such plants and animals are used in tribal cultures. In some cases in which cultural traditions are not as widely practiced now as they were a few generations in the past, certain individuals may still possess a great deal of knowledge. This knowledge may be enough to determine that a place is eligible for the National Register. In this way, the NHPA can help to preserve places in the natural world that are important for the revitalization of cultural traditions.

In most tribal cultures, information about religious and cultural practices may be kept confidential, both for religious reasons and to protect against vandalism and invasions of privacy. As noted earlier, the Secretarial Order on endangered species recognizes the sensitivity of certain kinds of information. [FN152] The NHPA includes a statutory mandate to keep information about traditional cultural properties confidential if disclosure may result in an "invasion of privacy," "risk harm to the historic" property, or "impede the use of a traditional religious site." [FN153] Thus, when federal agencies consult with tribes regarding endangered species, if the information that tribes share ***523** relates to traditional cultural properties, the NHPA provides a basis for honoring tribal requests to maintain information as confidential.

2. The 1992 NHPA Amendments

The 1992 NHPA Amendments enacted substantial changes throughout the statute. [FN154] With respect to Indian tribes, the 1992 Amendments can be summarized as doing two things. First, tribes now have the option of taking over the role of the state historic preservation officer for "tribal lands." [FN155] As defined in the 1992 Amendments, this term means all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities. [FN156] Second, tribes (and NHOs) now have the statutory right to be consulted by the federal agency in the section 106 consultation process when a proposed federal undertaking would affect a historic property (a place that is eligible for or listed on the National Register) that holds religious and cultural significance for a tribe (i.e., a TCP). This right exists regardless of

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where such places are located-that is, even outside reservation boundaries. [FN157]

The change relating to tribal programs on tribal lands renders the NHPA consistent with basic principles of tribal sovereignty and the government-to-government relationship between tribes and the United States. This change is generally consistent with amendments to other federal environmental laws enacted in recent years authorizing tribes to perform roles like those of state governments. NPS is the lead agency for carrying out this change in the statute, [FN158] and some seventeen tribes have assumed this role. [FN159]

The change in the statute relating to off-reservation TCPs recognizes that tribes have important religious and cultural interests in places that, for a variety of reasons, are no longer within their territorial jurisdiction, and that federal actions that affect such places must be informed by what tribes have to say. With respect to the potential eligibility of such places, this change confirms the existing practice of NPS. The statutory right of tribes to be notified and participate in consultation when such places may be affected by ***524** federal actions represents a significant enhancement of the ability of tribes to influence federal decisions. This right, however, only gets tribes to the table. Once engaged in the process, the outcome may turn on the power of the stories that tribal spokespersons have to tell.

With respect to the new (as of 1992) statutory right to be consulted in the section 106 process, this right will be implemented through revisions to the Advisory Council's regulations. Just what the language of the 1992 Amendments means regarding the right of a tribe to be consulted when a proposed federal undertaking may affect an off-reservation TCP depends on the Advisory Council's interpretation as expressed in its regulations.

3. The Advisory Council's Revised Regulations

On two occasions, the Advisory Council published proposed rules to carry out the 1992 Amendments, once in October 1994 and again in September 1996. [FN160] In June 1997, the Advisory Council determined that its staff had not adequately consulted with tribes in developing the revised regulations and directed the staff to engage in immediate and serious consultation with tribes. The Council's staff then held a series of consultation meetings with tribal representatives. A revised draft of the regulations, dated October 9, was then circulated to tribal representatives who had participated in the consultation meetings or had otherwise expressed interest. In November 1997, the Council sent its final revised regulations to the Office of Management and Budget (OMB), in the Executive Office of the President for review by federal agencies prior to publication as final rules. [FN161]

Tribal representatives were not satisfied with the November 1997 draft. Tribal concerns focused on two issues, both of which arose in the context of the review of proposed federal undertakings that may have effects on TCPs that are located outside reservation boundaries. Tribal representatives had taken the position that, since the statute uses the word “consult” to describe both the role of tribes and the role of SHPOs in the review of such undertakings, the role of tribes and SHPOs ought to be essentially the same. [FN162] More specifically, tribal representatives sought treatment ***525** comparable to the SHPOs at two points in the section 106 consultation process. [FN163] First, when determining whether the effects of an undertaking on an historic property would be not be adverse, tribes argued that if the historic property is a TCP, then the concerned tribe is better qualified than any other party to make this determination and the tribe should have the authority to make the process move on to the next step. Second, the tribes argued that they should be required signatories on any memorandum of agreement that concludes the section 106 process when an off-reservation TCP is at issue. The SHPOs have this power for all undertakings, except those within a reservation where the tribe has assumed the role of the SHPO.

The State Historic Preservation Officers and several federal agencies objected to tribes having such a prominent role

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regarding off-reservation TCPs. One argument for rejecting the tribal position was that it is consistent with notions of federalism for the SHPOs to have a more prominent role outside reservation boundaries than the tribes do because states have sovereignty outside reservation boundaries and tribes do not. Accordingly, under this analysis it is logical for the Advisory Council to establish a more prominent role for SHPOs than for tribes because this is, in essence, a delegation of a measure of federal power to a state agency.

The tribes countered that vesting the tribes with signatory power would not be a delegation to the tribes but would rather grant the tribes authority to make the Advisory Council rescind its delegation to the SHPO in particular cases. The tribes argued that this would be appropriate because the section 106 process is the only federal regulatory process that can be used to protect sacred places outside reservation boundaries. Moreover, tribes argued that providing them with signatory status would not give them power to block undertakings, since an undertaking can proceed without a memorandum of agreement; rather, it would give tribes the power to make the federal agency treat the decision to proceed as a political issue, since the decision to proceed in the absence of an agreement can only be made by the head of an agency. [FN164] The tribes also argued that a decision not to give tribes mandatory signatory power would indicate that President Clinton's Executive ***526** Order on Indian Sacred Sites [FN165] is just another empty promise to Indian people.

The November 1997 draft struck a compromise on these two issues. The basic approach that the Council took was not to vest tribes with the power they had sought at these two points in the process but rather to vest tribes with the power to bring the Advisory Council into the process at these two points. This approach runs counter to the general approach taken by the Council throughout the regulations, in that one of the Council's professed purposes in revising its regulations was to streamline the process. Accordingly, the basic approach is for the Council to stand back and let the federal agency with authority over a proposed undertaking and the SHPO run the consultation process and bring it to a conclusion among themselves. Tribes were not satisfied with this compromise, however, and secured a series of meetings with OMB officials to voice their concerns.

A number of federal agencies also raised objections, and in some of these objections they argued that the Advisory Council had gone too far in accommodating tribal concerns. The rule-making process hit an impasse, and in November 1998 the Advisory Council announced that it was withdrawing from the rule-making process and that, rather than issuing revised rules, it would issue guidelines to carry out the 1992 NHPA amendments. [FN166]

In January 1999, however, the impasse was overcome, [FN167] and in February the Advisory Council again approved a version of final regulations to be sent to OMB, [FN168] this time for publication as final rules. On the two points that tribes sought treatment comparable to the SHPOs for off-reservation TCPs, the final rules retreat from the approach of the November 1997 version. Most significant is the fact that the tribes no longer have the power to make the Advisory Council become directly involved in the resolution of adverse effects on an off-reservation TCP. [FN169] This outcome of the rule-making ***527** process presents questions, such as how effective an advocate the Advisory Council will be in its role as defender of off-reservation TCPs and whether tribes should seek legislative amendments to try to achieve what they did not through the rule-making process.

C. Weaving Together the ESA and the NHPA

The ESA and the NHPA tend to be treated as two entirely separate environmental review statutes. When the focus of review under the NHPA is the built environment, e.g., historic buildings, treating these two statutes as entirely separate is probably reasonable. When the focus of NHPA review is a TCP, however, it would seem to make more sense to consider ***528** possible connections between the two requirements. A few observations are offered below.

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1. Landscape Conservation

In a recent article on the law of biodiversity and ecosystem management, Professor Oliver Houck observed that the Endangered Species Act has worked fairly well in certain cases to protect some of the habitat of species that are on the brink of extinction, but that the circles of restraint drawn under the ESA are really not enough. [FN170] He said that what we need to do now is to muster the will to draw "larger concentric rings around keystone, flagship, indicator species for the natural systems of the earth-and adhere to them. Not to wall ourselves out of them, but to limit our conduct within them by the predicted needs of the species and their support systems." [FN171] He called for us to "work collaboratively towards landscape conservation on the largest possible scale." [FN172]

The NHPA section 106 process can be a key part of the collaborative process to draw lines on the ground to designate areas where certain kinds of "development" are not permitted. Where these lines are drawn will reflect the cultural and religious concerns of Indian tribes and NHOs, but in large measure they will also converge with the needs of biologically important species. The rules for use of the species within these areas will be fashioned to reflect the religious and cultural norms-the traditional ecological knowledge-of the tribal peoples for whom the protected places hold religious and cultural significance.

2. Traditional Cultural Properties in Indian Country

When a TCP within a reservation is also a place where threatened or endangered species are found, a jurisdictional issue arises that should be noted. Within Indian reservations, the applicability of the Secretarial Order is limited to Indian lands that are held in trust (or subject to trust restrictions on alienation). [FN173] The Secretarial Order expressly stated that it did not change tribal sovereignty, [FN174] and it made no assertions about tribal sovereignty on lands within reservations other than "Indian lands." This ***529** limitation means, of course, that the Secretarial Order did not affirm tribal authority, as an aspect of inherent tribal sovereignty, to regulate wildlife habitat on fee lands with reservation boundaries. Accordingly, the Secretarial Order states that the Departments "shall give deference" to tribal conservation and management plans, but only for Indian lands (and tribally-owned fee lands). [FN175] Similarly, the Appendix to the Secretarial Order provided that, in the context of consultation under section 7 of the ESA, FWS or NMFS will notify the tribe when it becomes aware that a proposed federal action "may affect tribal rights or tribal trust resources," not when the proposed action may affect the tribe's reservation. [FN176]

If a tribe has taken over the duties of an SHPO under the NHPA, however, the tribal historic preservation program will have statutorily recognized authority over all lands within reservation boundaries. [FN177] Accordingly, a tribe may be more inclined to use the NHPA process to provide protection to TCPs that provide habitat for culturally important animal and plant species than to use the mechanisms of the ESA-simply because the NHPA recognizes tribal sovereignty over all lands within reservation boundaries. Moreover, even if a tribe has not taken over the functions of an SHPO for its reservation, the Advisory Council's revised regulations require that any federal agency considering a proposed undertaking within a reservation consult with the tribe "in addition to and on the same basis as the consultation with the SHPO." [FN178]

In some ways the NHPA approach will be less than adequate, in part because ultimately it has no teeth to stop a federal agency action. In other ways the NHPA approach may be preferable, in that it allows a tribe to focus on plant and animal species and communities that are culturally important without having to determine whether or not any given species is threatened or endangered. In any event, it appears that there are several issues that have yet to be given serious consideration by federal policy-makers.

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3. Federal Lands

The NHPA imposes responsibilities on land-managing federal agencies in the event that TCPs on federal land provide habitat for culturally important ***530** plants and animals. As previously discussed, if a proposed federal undertaking may affect a historic property that a tribe regards as holding religious and cultural importance, the federal agency has a statutory duty to consult with the tribe, regardless of the who owns the land. [FN179] Thus, for example, if FWS or NMFS is engaged in consultation with a land managing federal agency under section 7 of the ESA, the federal agency also has a duty to consult with the tribe. If the tribe's concerns include the cultural use of plants or animals at the TCP, then it seems to make sense for the NHPA section 106 process and the ESA section 7 process to be integrated into each other. In such a case, the statutory requirements of the NHPA override the cautious provisions of the Secretarial Order, under which FWS or NMFS would "encourage the action agency to invite the affected tribe(s) and the BIA to participate in the consultation process." [FN180] The action agency could choose to do ESA section 7 consultation separately from NHPA section 106 consultation, but the action agency cannot refuse to consult with the tribe.

Section 106 consultation for actions affecting federal lands are governed, of course, by the Advisory Council's regulations. In addition to the Advisory Council's regulations, the National Park Service (NPS) has issued guidance to help agencies carry out their responsibilities under the 1992 NHPA Amendments, including the duty to consult with tribes when a proposed federal undertaking may affect a TCP. [FN181] The NPS guidance stresses that consultation should be undertaken early in the planning stage and should continue "until agreement is reached or until it becomes clear to the agency that agreement cannot be reached." [FN182] Genuine consultation between federal agencies and tribal representatives could lead to cooperative agreements such as the one with the Nez Perce Tribe becoming a much more common practice.

Consultation between tribes and federal agencies, whether in the framework of NHPA section 106 or ESA section 7 or some other legal authority, can be a trying experience for people on both sides of the interaction. Tribal people frequently feel that their concerns are not taken seriously; federal officials sometimes do not appreciate the depth of tribal concerns; and tribal people sometimes do not appreciate the constraints within which federal officials make decisions. There is a need for both sides to work at making consultation work better. One key is to develop on-going ***531** consultative relationships, and to build reciprocity in these relationships. [FN183] If both sides in such a relationship actually realize benefits, they will want the relationship to continue. In specific cases, one side or the other may be willing to give more than it otherwise might if it becomes apparent that the other side attaches extraordinary significance to a particular issue.

4. Private Lands Outside Reservation Boundaries

Many places that tribes regard as holding religious and cultural importance are located on private lands outside reservation boundaries. Tribes face major challenges in trying to prevent damage to these kinds of places. If such a place can be shown to be a TCP (eligible for the National Register), and if the threat to such a place is triggered by a federal or federally-assisted undertaking, then the tribe has a right to be involved in the section 106 consultation process. The federal undertaking may be one proposed by FWS or NMFS under the ESA. For example, if such a TCP would be affected by the implementation of a habitat conservation plan under the ESA, then the negotiation and approval of the HCP by FWS or NMFS would be a federal undertaking, and the tribe would have a right to be consulted. Of course, this only gets the tribe to the table.

If there is no federal agency action, getting to the table is much more of a challenge. If the place that the tribe is seeking to protect happens to include Indian graves, then a state Indian graves protection statute might provide nominal pro-

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tection. Unfortunately, the experiences of tribes with state Indian graves protection statutes have been not been very encouraging. [FN184] My experience relating to instances involving damage to tribal sacred places on private lands reinforces my opinion that many people in the dominant American society have very little understanding of or respect for tribal religious beliefs and practices. But, of course, I do not expect anyone to find this observation surprising.

V. Conclusion

In the latter part of the nineteenth century and during much of the twentieth, the American people, acting through their federal government, tried to force Indian people to reject tribal cultural values and practices and ***532** to learn to live like white people. [FN185] But Indian people resisted, persisted, insisted on continuing to be Indians, even as American society proceeded with changing the natural environment on which tribal cultures depended for subsistence, for religion and for commerce. American society killed wildlife with such reckless abandon that many species were driven to the edge of extinction and many other species were driven over the edge. In the case of the buffalo, federal policy makers intended to deprive Plains Indian tribes of their major source of food. [FN186] In the case of the salmon and other migratory kinds of fish, the dam builders just seemed to be ignorant and arrogant. [FN187]

Whether we attribute the decline of any particular species to ignorance or arrogance or something else, we should understand and acknowledge the nature of the transformation that was being attempted. American society was changing wildlife habitat into agricultural land: farmland where water was available and where it could be made available through subsidized public works projects; grazing where irrigation was not possible. Tribal cultures that depended on wildlife habitat were seen as not making effective use of the land, and so American society used the law to take land away from tribal cultures so that non-Indians could convert wildlife habitat into agricultural land. [FN188]

As explained by the gorilla Ishmael in the novels of Daniel Quinn, American society was part of a “taker” culture that first appeared about 10,000 years ago in the Fertile Crescent and has been expanding ever since, destroying “leaver” cultures in the process. [FN189] People in the taker culture think of themselves as taking their welfare into their own hands. [FN190] They try to take control of the environments in which they live, and they take things from the environment, as resources, without concern for the needs of the communities of other living things in the environment or other peoples. Tribal cultures were “leaver” cultures, in which people took what they ***533** needed but were mindful of leaving enough for the needs of other living things. They thought of themselves as leaving their welfare in the hands of the gods. [FN191] While there was territorial warfare, each tribal culture also pretty much left its neighbor tribes to live as they chose to. [FN192] In contrast, taker culture was convinced that it had found the one right way to live, and it tried to force leaver cultures to convert to the taker way. [FN193]

Although Ishmael's explanation may be a little too simple, I believe that it does hold a large measure of truth. I also think that it might be useful in shedding light on some of the conflicts that arise in present day America between people of the dominant culture and people of the surviving tribal cultures. True, people in American society are now converting agricultural land into strip malls, suburban sprawl and pavement, but the taker attitude still seems to be at work. Many people seem to regard land as a commodity that should be converted into streams of money, and that a landowner has an absolute right to take anything of value that a piece of land can be made to yield. Many Indian people still insist that there are places that really should be left as they are, because of the graves of ancestors, because of the stories (including religious beliefs) that are tied to certain places, because of the plants and animals that need certain places for their survival. From an Indian perspective, a person who owns the land at such a place cannot hold an absolute right to take anything from the land that can be converted into financial gain; rather, the rights of such a landowner must be tempered by responsibilities to care for such places.

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In present day America, of course, people do not have absolute rights to take any value that land can be made to yield, even though some people seem to believe that they do. People may be constrained by federal laws such as the Endangered Species Act, the National Historic Preservation Act and other environmental laws. People may also be constrained by laws enacted by state, local and tribal governments. These laws are administered by government officials who are often called upon to weigh competing interests when they make decisions.

In cases in which the interests of tribal peoples are at stake, it may serve tribes to present their interests in a human rights framework, perhaps along the lines outlined in Part III of this article. Tribal cultures need biodiversity. All human societies need biodiversity, but for indigenous cultures the need tends to be greater. Indian people as individuals might have survived if the ***534** eagles had been driven into extinction, but a core aspect of tribal cultures would be missing if there were no eagle feathers for religious ceremonies. Tribes of the Pacific Northwest need the wild salmon to recover, not just enough to be safe from extinction but enough to be a central part of tribal life. The tribes of the Great Plains need the great herds of buffalo. When a tribe is engaged in a conflict over activities that threaten the tribe's ability to use a culturally important animal or plant species, the collective human right of the tribe to maintain its cultural integrity should operate to put a halt to actions that destroy biodiversity, and that halt should come well before the culturally important species-or another species close to it in the web of life-is pushed to the brink of extinction. By using a human rights analysis, a tribe can argue that the decision-maker should move beyond an interest-balancing approach in responding to the tribe's concerns, and that, instead, the tribe has rights that the decision-maker must seek a way to accommodate. [FN194]

Perhaps it is too much to expect that government decision-makers will respond enthusiastically to tribal efforts to protect certain areas for reasons grounded in international human rights law. After all, federal officials have, at best, a mixed record in responding to tribal claims based on religious freedom, [FN195]-a freedom which is a core value for American society. Nevertheless, I believe that tribal officials and advocates should bring human rights principles into federal and state decision-making processes.

Human rights concepts might also prove useful in the public dialogue surrounding policy-making in Congress and the Executive Branch of the federal government. I believe that a human rights analysis could be useful in building a base of support in the dominant American society for a long-term commitment to the principle of tribal self-government, which, as we should know from the U.S. experience, is essential for cultural survival. I also believe that a human rights analysis could be useful in defining limits on the ***535** power of the federal government over tribes, limits that should be consistent with tribal self-determination and cultural integrity. A human rights analysis could be useful as well in delineating limits on the sovereign powers of tribal governments in their dealings with individuals, including non-Indians, limits that may be acceptable to tribal officials because they are based on international human rights law rather than on the national law of the United States.

Regardless of whether it is ultimately persuasive before the Congress, I believe that a human rights analysis must be part of the reasoning employed by tribes and their advocates in seeking to undo some of the legacy of the allotment era. The federal laws of the allotment era, after all, constituted an attempt to carry out cultural genocide against Indian peoples; [FN196] the allotment of a reservation over the objections of a tribe [FN197] deprived that tribe of the right of self-determination. [FN198] When policy makers and courts consider the rights of non-Indians within Indian country, I believe they should also consider the human rights violations that led to the presence of non-Indians in Indian country in the first place.

But perhaps such arguments are too subtle, too complex. Perhaps to an average American such arguments just sound like rationalizations for “special” rights for Indians, and perhaps the average American is opposed to, or just uncomfortable with, the notion of “special” rights for any group, including Indians.

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For tribal leaders and their advocates, I suggest that we try to change the terms of the debate. I suggest that we talk more about the special responsibilities that go along with special rights. I suggest that, in the preservation of biodiversity, Indian people assume responsibility for being the conscience of America. The cases of the reintroduction of wolves in Idaho and the fight to save the wild salmon populations show that this is in fact happening. I suggest that we become more aware of the need in present day America for conscience, and that we become more determined to bring the wisdom of tribal elders into efforts to preserve and restore biodiversity throughout this land.

Eminent ecologist Edward O. Wilson has said, "Only in the last moment of human history has the delusion arisen that people can flourish apart from the rest of the living world." [FN199] Physicist Fritjof Capra has observed, "The power of abstract thinking has led us to treat the natural environment-the ***536** web of life-as if it consisted of separate parts, to be exploited by different interest groups." [FN200] Ecologist David Suzuki has said, "Our world is being radically transformed by our muscular technologies," and "[w]e know so little about the biological and physical properties of the planet that we cannot predict the long-term impact of our technology." [FN201] To this the gorilla Ishmael has added, "What you're experiencing is tantamount to cultural collapse. For ten thousand years you've believed that you have the one right way to live. But for the last three decades or so, that belief has become more and more untenable with every passing year." [FN202]

Thinking about the predicament that we face calls to mind an episode from the founding of the Iroquois, or Haudenosaunee, Confederacy, also known as the League of Peace. [FN203] Having begun this article with the Haudenosaunee version of the beginning of human life on Earth, an episode from the founding of the Confederacy seems an appropriate way to end it. The Peacemaker's partner in founding the League was Hiawatha, but before he joined forces with the Peacemaker and was given the name Hiawatha, this man had been a cannibal. The Peacemaker brought about a fundamental change in Hiawatha's behavior by helping him see himself in his victim and also by helping him see the potential for beauty and goodness in himself. [FN204] The Peacemaker did this by climbing onto the roof of Hiawatha's house and looking down the smokehole into the pot in which Hiawatha was preparing to boil his victim.

> At that moment the man [Hiawatha] bent over the kettle. Seeing a face looking up at him, he was amazed. It was [the Peacemaker's] face he saw reflected in the water, but the man thought it was his own. There was in it such wisdom and strength as he had never seen before nor ever dreamed that he possessed.
>
> The man moved back into a corner of this house, and sat down and began to think.
>
> "This is a most wonderful thing," he said. "Such a thing has never happened before as long as I have lived in this house. I did not know I was like that. It was a great man who looked at me out ***537** of the kettle. I shall look again and make sure that what I have seen is true."
>
> He went over to the kettle, and there again was the face of a great man looking up at him.
>
> "It is true," he said. "It is my own face in which I see wisdom and righteousness and strength. But it is not the face of a man who eats humans. I see that it is not like me to do that."
>
> He took the kettle out of the house and emptied it by the roots of an upturned tree.
>
> "Now I have changed my habits," he said. "I no longer kill humans and eat their flesh. But that is not enough. The mind is more difficult to change. I cannot forget the suffering I have caused, and I am become miserable."
>
> Then the man felt his loneliness and said, "Perhaps someone will come here, some stranger it may be, who will tell me what I must do to make amends for all the human beings I have made to suffer."
>
> When he returned to the house, he met [the Peacemaker], who had climbed down from the roof, and they entered and sat down across the fire from each other.
>
> "Today I have seen a strange thing," said the man. "I saw a face looking at me out of the kettle in this house where I live. It was my own face, but it was not the face of the man who has lived here. It was the face of a great man, but I am become miserable."

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> "Truly," said [the Peacemaker], "what has happened this day makes a wonderful story. Thou hast changed the very pattern of thy life. The New Mind has come to thee, namely Righteousness and Health and Power. And thou art miserable because the New Mind does not live at ease with old memories. Heal thy memories by working to make justice prevail. Bring peace to those places where thou hast done injury to man. Thou shalt work with me in advancing the Good News of Peace and Power."
>
> "That is a good message," said the man. "I take hold, I grasp it. Now what work is there for us both to do?"
>
> ***538** "First, let us eat together," said [the Peacemaker]. "I will go into the woods for our food. Do thou go to the stream and fetch water for the kettle. But be careful. Dip with the current. One must never go against the forces of nature."
>
> When [the Peacemaker] came back from the woods, he bore on his shoulders a deer with large antlers.
>
> "It is on the flesh of the deer," said [the Peacemaker], "that the Holder of the Heavens meant men to feed themselves, and the deer's antlers shall be placed on their heads. Great men shall wear the antlers of authority, and by these emblems all men shall know those who administer the new order of Peace and Power which I am come to establish." [FN205]

The societies of the industrialized world have become like the cannibal in this story. Edward O. Wilson said, "In the world as a whole, extinction rates are already hundreds or thousands of times higher than before the coming of man. They cannot be balanced by new evolution in any period of time that has meaning for the human race." [FN206] As noted earlier, in 1992, Professor Wilson predicted that a fifth or more of all species could become extinct, or doomed to extinction, by the year 2020, and said that the primary cause is the loss of habitat due to human actions. [FN207] Existing patterns of human behavior must change, and change quickly.

Indian peoples can help bring about the needed change. We can do it in a variety of ways, including using the courts to seek protection and restoration of places where wildlife habitat is essential for the exercise of tribal rights. We can do it by bringing the wisdom of tribal elders into federal decision-making processes. We can do it by sharing our stories with the larger American society through television and movies and children's books. But we need to do it. Like the Peacemaker and the cannibal, we need to convert the takers by helping them find wisdom and righteousness and strength within themselves. We need to help them find the wisdom and righteousness and strength to leave room for the other living things with whom we share this Mother Earth.

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This article is a revised and expanded version of an article originally written for a book published by the United Nations Education, Scientific and Cultural Organization (UNESCO) in commemoration of the 50th anniversary of the adoption of the Universal Declaration of Human Rights. See Dean B. **Suagee**, Cultural Rights, Biodiversity and the Indigenous Heritage of Indian Tribes in the United States, in Cultural Rights and Wrongs 81 (Halina Niec ed., UNESCO Publishing, Paris, 1998). Portions of that article, and this one, were previously published in Dean B. **Suagee**, Human Rights of Indigenous Peoples: Will the United States Rise to the Occasion?, 21 Am. Indian L. Rev. 365 (1997).

[FN1]. World Commission on Environment and Development, Our Common Future 114-15 (1987).

[FN2]. Paul A.W. Wallace, The Iroquois Book of Life: White Roots of Peace 44 (1994) (quoting the Peacemaker, during the founding of the Haudenosaunee Confederacy).

[FN3]. See Joseph Bruchac, Iroquois Stories: Heroes and Heroines, Monsters and Magic 15-17 (1985).

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[FN4]. See S. James Anaya, Indigenous Peoples in International Law 98-104 (1996) (explaining the norm of cultural integrity); infra notes 81-85 and accompanying text.

[FN5]. Report of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, 46th Sess., Annex., at 115, U.N. Doc. E/CN.4/2 (1995), E/CN.4/Sub.2/56 (1994) [hereinafter Draft U.N. Declaration]. The text of the Draft U.N. Declaration is reprinted in Anaya, supra note 4, at 207.

[FN6]. United Nations Conference on Environment and Development, Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818 (1992) (Rio de Janeiro).

[FN7]. See generally J. Baird Callicott, American Indian Land Wisdom, in The Struggle for the Land: Indigenous Insight and Industrial Empire in the Semiarid World 255 (Paul A. Olson ed., 1990) (discussing several works, mainly in the academic literature, arguing that tribal cultures either did or did not practice what might be called environmental conservation).

[FN8]. Rebecca Tsosie, Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge, 21 Vt. L. Rev. 225, 276 (1996) (citing Ronald Trosper, Traditional American Indian Economic Policy, 19 Am. Indian Culture & Res. J. 65, 67 (1995)). See also Dean B. **Suagee**, Tribal Voices in Historic Preservation: Sacred Landscapes, Cross-Cultural Bridges, and Common Ground, 21 Vt. L. Rev. 145, 160-67 (1996) [hereinafter **Suagee**, Tribal Voices].

[FN9]. Although there are quite a number of instances in which tribes have acquired lands outside reservation boundaries and now exercise governmental jurisdiction over those lands, it would be unrealistic to suggest that tribes in the United States will ever regain the full extent of their aboriginal territories.

[FN10]. 16 U.S.C. §§ 1531-43 (1994).

[FN11]. See id. § 470.

[FN12]. As noted at the outset, this article is a revised and expanded version of an article originally written for a book published by the United Nations Education, Scientific and Cultural Organization (UNESCO) in commemoration of the 50th anniversary of the adoption of the Universal Declaration of Human Rights. See Dean B. **Suagee**, Cultural Rights, Biodiversity and the Indigenous Heritage of Indian Tribes in the United States, in Cultural Rights and Wrongs (Halina Niec ed., 1998). Accordingly, Part II of the present article was originally intended for the benefit of readers from other countries. I had intended to delete most of that discussion from this version of the article, but Professor Rebecca Tsosie persuaded me to leave it in.

[FN13]. As of October 1997, the federal government recognized some 555 tribal entities, including 329 in the contiguous states and 226 in Alaska. See Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 62 Fed. Reg. 55,270 (1997).

[FN14]. See U.S. Dept. of Commerce, American Indian Reservations and Trust Areas (Veronica E. Velarde Tiller ed., 1996).

[FN15]. See Felix S. Cohen, Handbook of Federal Indian Law 3-46 (Rennard Strickland et al. eds., 1982). For example, in the Indian Self-Determination and Education Assistance Act of 1975, “Indian” is defined as “a person who is a member of an Indian tribe” and “Indian tribe” is defined as

> any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village

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or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.
25 U.S.C. § 450b(d)-(e) (1994). Some federal definitions of "Indian" include certain categories of people in addition to those that are members of federally recognized tribes. See, for example, the definition of "Indian" in the Indian Reorganization Act of 1934, which includes "all other persons of one-half or more Indian blood" and Alaska Natives regardless of tribal membership. 25 U.S.C. § 479 (1994). See also the definition of "Indian" in the Indian Civil Rights Act, in which the term is defined as "any person who would be subject to the jurisdiction of the United States as an Indian under section 1153 of Title 18 (the Major Crimes Act) if that person were to commit an offense listed in that section in Indian country to which that section applies." 25 U.S.C. § 1301(4) (1994). The Major Crimes Act, in turn, does not expressly define "Indian," but has been held to include people who are not enrolled tribal members. See United States v. Ives, 504 F.2d 935, 953 (9th Cir. 1974); Ex parte Pero, 99 F.2d 28, 30 (7th Cir. 1938).
[FN16]. 18 U.S.C. § 1151(b) (1994). The U.S. Supreme Court recently ruled that lands owned by Alaska Native villages but not held in federal trust or restricted status do not constitute "dependent Indian communities" and are therefore not Indian country. Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520, 527 (1998). See generally Dean B. **Suagee**, Cruel Irony in the Quest of an Alaska Native Village for Self-Determination, 13 Nat. Res. & Env't 495 (1998).

[FN17]. See generally Robert N. Clinton et al., American Indian Law: Cases and Materials (3d ed. 1991); Cohen, supra note 15; David H. Getches et al., Federal Indian Law: Cases and Materials (4th ed. 1998).

[FN18]. Felix S. Cohen, Handbook of Federal Indian Law 123 (1941). As some scholars have pointed out, the assumption in the second principle stated by Cohen, that Indian tribes were conquered, is a historical fiction, at least with respect to most tribes. See Milner S. Ball, Constitution, Court, Indian Tribes, 1987 Am. B. Found. Res. J. 1, 43-46 (1987).

[FN19]. See Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 204-05 (1978); see also David H. Getches, Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law, 84 Cal. L. Rev. 1573, 1595-99 (1996). See generally N. Bruce Duthu, Implicit Divestiture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country, 19 Am. Indian L. Rev. 353 (1994).

[FN20]. See generally Cohen, supra note 15, at 441-56.

[FN21]. United States v. Winans, 198 U.S. 371, 380-82 (1905).

[FN22]. See Winters v. United States, 207 U.S. 564, 577 (1908). See generally Cohen, supra note 15, at 578-581.

[FN23]. See Cohen, supra note 15, at 585.

[FN24]. See generally Mary Christina Wood, Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited, 1994 Utah L. Rev. 1471 (1994) [hereinafter Wood, Trust I].

[FN25]. See Johnson v. M'Intosh, 21 U.S. 543, 573-74 (1823).

[FN26]. See Cohen, supra note 15, at 7-9. This statute, commonly known as the Indian Nonintercourse Act, which was first enacted in 1790 and has been federal law ever since, is currently codified at 25 U.S.C. § 177 (1994). See id.

[FN27]. Indian Tribal Justice Support Act of 1993, 25 U.S.C. §§ 3601-31.

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[FN28]. Mary Christina Wood, Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources, 1995 Utah L. Rev. 109, 113 (1995) [hereinafter Wood, Trust II].

[FN29]. Id.

[FN30]. See Cohen, supra note 15, at 207-12.

[FN31]. See United States v. Kagama, 118 U.S. 375, 378-79, 383-84 (1886) (upholding the constitutionality of the Major Crimes Act); see also Wood, Trust I, supra note 24, at 1502-03, 1506-07.

[FN32]. See Getches, supra note 19, at 1585 n.45.

[FN33]. See id. at 1626-30.

[FN34]. See generally Cohen, supra note 15, at 47-206. Although the dates given above reflect significant events, the shift from one era to another typically occurred over a number of years.

[FN35]. Charles F. Wilkinson, American Indians, Time and the Law 14-19 (1987).

[FN36]. Pub. L. Ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 354, 381 (1994)).

[FN37]. See Cohen, supra note 15, at 129-38; see also **Suagee**, Tribal Voices, supra note 8, at 153-57 (arguing that the allotment policy should be frankly recognized as "cultural genocide"). In addition to the allotment of land, the allotment era featured a variety of other programs designed to force Indians to become assimilated, including taking Indian children away from their families and educating them at distant boarding schools. See id. See generally Judith V. Royster, The Legacy of Allotment, 27 Ariz. St. L.J. 1 (1995).

[FN38]. The Indian land base of 138 million acres in 1887 was reduced to 48 million acres by the time of the enactment of the Indian Reorganization Act of 1934. See Cohen, supra note 15, at 138.

[FN39]. Pub. L. Ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478, 479 (1994)).

[FN40]. See Cohen, supra note 15, at 147-52.

[FN41]. As of 1940, 189 tribes had voted to accept the IRA, and 77 had rejected it. See Cohen, supra note 15, at 150 n.48. The number of federally recognized tribes has increased substantially since then.

[FN42]. See Cohen, supra note 15, at 152-80. The official adoption of this policy was marked by House Concurrent Resolution 108 on August 1, 1953. See H.R. Con. Res. 108, 83d Cong., 1st Sess., 67 Stat. B132 (1953). Although this statement of policy carried no legal effect, it was the dominant statement of federal policy for almost a decade.

[FN43]. See Cohen, supra note 15, at 173-74.

[FN44]. See, e.g., the statute commonly known as Public Law 280, which required some states and authorized others to assume criminal jurisdiction and civil adjudicatory jurisdiction in Indian country. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (1953) (§ 7 repealed and reenacted as amended 1968) (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 28 U.S.C. § 1360 & note (1994)).

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[FN45]. See Cohen, supra note 15, at 180-88.

[FN46]. Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. §§ 450(a)-(n), 458(a)-(hh) (1994)). As tribes have become increasingly involved in contracting with BIA and IHS to run programs, Congress has enacted amendments to this statute on several occasions, most recently in 1994. See Tribal Self-Governance Act of 1994, Pub. L. No. 103-413, 108 Stat. 4270 (amending 25 U.S.C. §§ 450(a)-(n), 458(a)-(hh) (1994)).

[FN47]. See Getches, supra note 19, at 1592.

[FN48]. See id. 1574-76, 1594-1617 (listing seventeen cases in which the Court pursued its notion of good policy rather than following the established rules, at 1594 n.88, and analyzing many of these cases).

[FN49]. See supra note 19 and accompanying text.

[FN50]. See Draft U.N. Declaration, supra note 5.

[FN51]. See generally Anaya, supra note 4, at 45-58; see also Dean B. **Suagee**, Human Rights of Indigenous Peoples: Will the United States Rise to the Occasion?, 21 Am. Indian L. Rev. 365, 368 (1997).

[FN52]. See Anaya, supra note 4, at 51. The appointment of Jose Martinez Cobo as special rapporteur was authorized by a resolution adopted by the Economic and Social Council in 1971. See E.S.C. Res. 1589(L), U.N. ESCOR, 50th Sess., Supp. No. 1, at 16, U.N. Doc. E/5044 (1971).

[FN53]. See Draft U.N. Declaration, supra note 5.

[FN54]. See id. The text of the Draft U.N. Declaration is reprinted in Anaya, supra note 4, at 207.

[FN55]. The participatory process for indigenous peoples and organizations without ECOSOC consultative status was put in place through the Commission on Human Rights Resolution 1995/32 of March 3, 1995. See, e.g., Report of the Working Group, U.N. ESCOR, 52nd Sess., U.N. Doc. E/CN.4/84 (1996).

[FN56]. Dr. Erica-Irene Daes, Equality of Indigenous Peoples Under the Auspices of the United Nations-Draft Declaration on the Rights of Indigenous Peoples, 7 St. Thomas L. Rev. 493, 496 (1995) [hereinafter Daes, Equality of Indigenous Peoples]. The text of this article is an almost verbatim copy of a portion of the speech that Dr. Daes made to the Sub-Commission at its 46th session on August 22, 1994. See Dr. Erica-Irene Daes, Introductory Statement on the United Nations Draft Declaration on the Rights of Indigenous Peoples to the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, 46th Sess., at 7-8, (Aug. 22, 1994) [hereinafter Daes, Statement].

[FN57]. Daes, Equality of Indigenous Peoples, supra note 56, at 496.

[FN58]. See id. at 496-97.

[FN59]. Id. at 498.

[FN60]. Draft U.N. Declaration, supra note 5, at art. 3.

[FN61]. U.S. Dep't of State, Draft United Nations Declaration on the Rights of Indigenous Peoples: United States Preliminary Statements 1 (Nov. 1996) [[[hereinafter U.S. Preliminary Statements]. For a copy of this document, or any other public document authored by the State Department mentioned elsewhere in this paper, contact: Bureau of Democracy,

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Human Rights, and Labor, Room 7802, Department of State, Washington, D.C. 20520.

[FN62]. See, e.g., U.N. Charter art. 1, 55, 56, 73 (recognizing the right of "peoples" to self-determination); International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, art. 1(1) [hereinafter ICCPR] (asserting that "[a]ll peoples have the right of self-determination"); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, art. 1(1) (same as ICCPR); African Charter on Human and Peoples' Rights (Banjul Charter), June 27, 1981, art. 20(1) & 91, Organization for African Unity (O.A.U.) Doc. CAB/LEG/67/3 rev. 5, reprinted in 21 I.L.M. 58, 62 (1982) (stating that "[a]ll peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen."); Vienna Convention on the Law of International Treaties, preambular, ¶ 5, U.N. Doc. A/CONF.39/27 (1969) ("Recalling the determination of the peoples of the United Nations to establish conditions under which justice and respect for the obligations arising from treaties can be maintained . . . .").

[FN63]. Commission on Human Rights, Report of the Working Group established in accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995, at 9, ¶ 38, U.N.Doc. E/CN.4/1996/84 (1996).

[FN64]. Daes, Statement, supra note 56. The language quoted above is from pages 7-8 of the statement to the Sub-Commission, in a portion of that speech that is not included among those portions published in the St. Thomas Law Review.

[FN65]. See Paul Sieghart, The International Law of Human Rights 367 (1983) (discussing in his chapter on "collective rights" those rights that are "very largely, expressed to attach to 'peoples,' rather than to 'persons' or 'individuals"').

[FN66]. Compare id. (describing that when a group is entitled to call itself a "people" it can "claim the right of 'self-determination' as a legitimate ground for seceding from the State."), with Steven M. Tullberg, Indigenous Peoples and the Unfounded Fear of Secession, Indigenous Affairs, Jan./Feb./Mar. 1995, at 11, 13 (declaring that after a "careful reading of international law . . . there is no foundation for either the notion that the right of self-determination promises independence or the notion that the exercise of self-determination necessarily results in secession"). See also infra text accompanying notes 76-79.

[FN67]. U.S. Preliminary Statements, supra note 61, at 1.

[FN68]. See, e.g., Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) (describing Indian tribes as "domestic dependent nations."); see also supra notes 18-29 and accompanying text. In the self-determination era of federal Indian policy, Congress has enacted several statutes that establish rights for tribes that are collective in nature. See, e.g., Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. §§ 450(a)-(n), 458(a)-(hh) (1994)) (recognizing that tribes have a right to take over government services and programs that would otherwise be administered by the Bureau of Indian Affairs and the Indian Health Service); Indian Child Welfare Act, Pub. L. No. 95-608, 92 Stat. 3069 (1978) (codified at 25 U.S.C. §§ 1901-1902, 1911-1923, 1931-1934, 1951-1952, 1961-1963 (1994)) (recognizing a right of tribes to exercise jurisdiction over child custody and adoption matters, and, in cases in which a tribe's judicial institutions do not decide such cases, a right of the tribe to participate in such proceedings as a party); Native American Graves Protection and Repatriation Act of 1990, 25 U.S.C. §§ 3001-3013 (recognizing a right in tribes to the repatriation of the remains of ancestors, as well as funerary objects and certain other kinds of cultural items, when such human remains and cultural items are in the possession of federal agencies and institutions that receive federal funding).

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[FN69]. A set of proposed revisions to Articles 1, 2, 12, 13, 14, 24, 29, 42, 43, 44 and 45 was distributed to persons who attended the State Department's “consultation” meeting with tribal representatives in Washington, D.C., on October 20, 1997 (revisions on file with author) [hereinafter 1997 Proposed Revisions].

[FN70]. Id.

[FN71]. See U.N. Charter art. 1, ¶ 3.

[FN72]. See generally Anaya, supra note 4.

[FN73]. International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, 173, reprinted in 6 I.L.M. 368 (1967) [hereinafter Civil and Political Rights Covenant], adopted by G.A. Res. 2200, 21 GAOR, Supp. No. 16, at 52, U.N. Doc. a/6316 (1966) (entered into force Mar. 23, 1976).

[FN74]. Anaya, supra note 4, at 75.

[FN75]. Id.

[FN76]. See id. at 84-85.

[FN77]. Id. at 81 (emphasis in original).

[FN78]. See id. at 84-85.

[FN79]. In the 1996 HRC Working Group session, Canada took a position on self-determination (markedly different from that of the U.S.) that reflects Professor Anaya's analysis acknowledging that self-determination is a right applicable “equally to all collectivities, indigenous and non-indigenous, which qualify as peoples under international law.” Statement of Canada on Articles 3, 31 & 34, Before the HRC Working Group 1 (Oct. 31, 1996) (on file with author).

[FN80]. U.S. Preliminary Statements, supra note 61, at 1.

[FN81]. Draft U.N. Declaration, supra note 5, art. 33 (emphasis added).

[FN82]. G.A. Res. 2670, U.N. GAOR, 179th plen. mtg, 3d Sess., pt. 1, at 174, U.N. Doc. A/810 (1948).

[FN83]. See Anaya, supra note 4, at 98-104.

[FN84]. Civil and Political Rights Covenant, supra note 73, at 179.

[FN85]. Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities, G.A. Res. 47/135, Dec. 18, 1992, reprinted in Human Rights: A Compilation of International Instruments, at 40, U.N. Doc. ST/HR/1/Rev.4, U.N. Sales No. E.93.XIV.1 (1993).

[FN86]. See Draft U.N. Declaration, supra note 5, art. 6, 7, 8.

[FN87]. Draft U.N. Declaration, supra note 5, art. 12, 13, 14, 25.

[FN88]. See 1997 Proposed Revisions, supra note 69.

[FN89]. Id.

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[FN90]. Id.

[FN91]. See id.

[FN92]. Id.

[FN93]. Id.

[FN94]. Pub. L. No. 95-341 (1981) (codified in part at 42 U.S.C. § 1996) (Supp. II 1996). The language quoted above is from one of the "whereas" clauses, which is not codified.

[FN95]. 1997 Proposed Revisions, supra note 69.

[FN96]. Id.

[FN97]. See Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 472 (1988) (Brennan, J., dissenting) (noting that the premise that the government action would "virtually destroy" the tribal religion was accepted by the majority opinion).

[FN98]. 1997 Proposed Revisions, supra note 69.

[FN99]. See Intellectual Property of Indigenous Peoples: Concise Report of the Secretary-General, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 44th Sess., U.N. Doc: E/CN.4/Sub.2/30 (1992); Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples, by Erica-Irene Daes, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and Chairperson of the Working Group on Indigenous Populations, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 45th Sess., U.N. Doc. E/CN.4/Sub.2/28 (1993); Protection of the Heritage of Indigenous People, Preliminary Report of the Special Rapporteur, Mrs. Erica-Irene Daes, submitted in conformity with Sub-Commission Resolution 1993/44 and decision 1994/105 of the Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 46th Sess., U.N. Doc. E/CN.4/Sub.2/31 (1994); Protection of the Heritage of Indigenous People, Final Report of the Special Rapporteur, Mrs. Erica-Irene Daes, in conformity with Sub-Commission resolution 1993/44 and decision 1994/105 of the Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 47th Sess., U.N. Doc. E/CN.4/Sub.2/26 (1995) [hereinafter Final Report]; Protection of the Heritage of Indigenous People, Supplementary Report of the Special-Rapporteur, Mrs. Erica-Irene Daes, submitted pursuant to Sub-Commission resolution 1995/40 and Commission on Human Rights resolution 1996/63, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 48th Sess., U.N. Doc. E/CN.4/Sub.2/22 (1996).

[FN100]. See Final Report, supra note 99, at 9-15 (including a set of Principles and Guidelines for the protection of the cultural heritage of indigenous peoples).

[FN101]. If it is ignorance, that means that the State Department paid no attention to a comment memorandum filed by the Metlakatla Indian Community following the July 1996 "consultation," which raised this issue and provided citations to some of the relevant literature.

[FN102]. From personal experience I know that quite a few of the people in the federal government who have been involved with the Draft U.N. Declaration do have an appreciation for traditional ecological and cultural knowledge as something that is collective in nature, particularly people in the Department of the Interior and Department of Justice. In my view, the State Department should show greater deference to those in other departments who have more expertise in

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federal Indian law and policy.

[FN103]. See Edward O. Wilson, The Diversity of Life 346 (1992).

[FN104]. See United Nations Conference on Environment and Development: Convention on Biological Diversity, June, 5, 1992, 31 I.L.M. 818 (1992). The United States did not sign the Convention at the Earth Summit, but has since done so, although the Senate has not yet ratified it.

[FN105]. Id. at 825-26 (emphasis added).

[FN106]. The address for the Office of American Indian Trust, U.S. Department of the Interior, is 1849 C Street, N.W., MS-2472-MIB, Washington, D.C., 20240; phone: (202) 208-3338; fax: (202) 208-7503; web site: www.doi.gov/oait.

[FN107]. 16 U.S.C. §§ 1531-1544 (1994).

[FN108]. 16 U.S.C. §§ 470 to 470x-6 (1994 & Supp. 1999).

[FN109]. Another leading example is the National Environmental Policy Act (NEPA). 42 U.S.C. §§ 4321-4347 (1994). NEPA is implemented through regulations issued by the Council on Environmental Quality (CEQ). See 40 C.F.R. pts. 1500-08 (1978). The decision-making process established by the CEQ regulations establishes a federal decision-making process that provides several points of entry for Indian tribes. In January 1993, CEQ published a guidance document on incorporating biodiversity considerations into NEPA. See Council on Environmental Quality, Incorporating Biodiversity Considerations into Environmental Impact Analysis Under the National Environmental Policy Act (1993). Curiously, this guidance document does not even mention Indian tribal governments.

In addition, the federal environmental statutes that authorize tribal governments to perform roles like those done by state governments provide openings for bringing tribal cultural values into the implementation of federal environmental law. See generally David F. Coursen, Tribes as States: Indian Tribal Authority to Regulate and Enforce Federal Environmental Law and Regulations, 23 Envtl. L. Rep. (Envtl. L. Inst.) 10,579 (1993) (reviewing environmental statutes that treat tribes as states); see also Dean B. **Suagee**, Tribal Self-Determination and Environmental Federalism: Cultural Values as a Force for Sustainability, 3 Widener Symposium L. Rev. 229 (1998) [hereinafter **Suagee**, Values]. When tribes administer environmental regulatory programs in the framework of these federal laws, they have many opportunities to incorporate cultural knowledge and values into their programs. For example, consider the setting of water quality standards under the Clean Water Act. See 33 U.S.C. § 1377 (1995). One of the first tribes to set its own water quality standards, Isleta Pueblo, designed its standards, in part, to protect ceremonial uses of the Rio Grande. See City of Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1996), cert. denied, 118 S. Ct. 410 (1997) (upholding Environmental Protection Agency approval of water quality standards adopted by Isleta Pueblo).

[FN110]. 16 U.S.C. §§ 1531-1544 (1994). See also Oliver A. Houck, The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce, 64 U. Colo. L. Rev. 277 (1993).

[FN111]. See Charles Wilkinson, The Role of Bilateralism in Fulfilling the Federal-Tribal Relationship: The Tribal Rights-Endangered Species Secretarial Order, 72 Wash. L. Rev. 1063, 1068 (1997).

[FN112]. See Oliver A. Houck, On the Law of Biodiversity and Ecosystem Management, 81 Minn. L. Rev. 869, 974-78 (1997).

[FN113]. Although the Endangered Species Act itself never mentions Indian tribes, the Code of Federal Regulations does refer to tribal management plans in its regulations concerning experimental populations of endangered and threatened

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wildlife. See 50 C.F.R. § 17.84(I)(3) (1997). See generally, Sandi B. Zellmer, Indian Lands as Critical Habitat for Indian Nations and Endangered Species: Tribal Survival and Sovereignty Come First, 43 San Diego L. Rev. 381 (1998).

[FN114]. For a more detailed analysis of the wild salmon controversy, see Mary Christina Wood, Fulfilling the Executive's Trust Responsibility Toward the Native Nations on Environmental Issues: A Partial Critique of the Clinton Administration's Promises and Performance, 25 Envtl. L. 733 (1995) [hereinafter Wood, Trust III].

[FN115]. See Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 685-87, modified, 444 U.S. 816 (1979).

[FN116]. See Wood, Trust III, supra note 114, at 762.

[FN117]. 16 U.S.C. § 1536 (1994).

[FN118]. NMFS has jurisdiction over salmon because it is considered a marine species. The Fish and Wildlife Service in the Department of the Interior has jurisdiction for section 7 consultation with respect to non-marine species.

[FN119]. See Wood, Trust III, supra note 114, at 771-73.

[FN120]. See id.

[FN121]. See id. at 775.

[FN122]. See 43 Fed. Reg. 9607 (1978).

[FN123]. For a detailed discussion on the recovery plan, see 59 Fed. Reg. 42,108-10 (1994).

[FN124]. See id.

[FN125]. See 59 Fed. Reg. 42,123 (1994).

[FN126]. See id.

[FN127]. See Mark Cheater, Wolf Spirit Returns to Idaho: The Nez Perce Indians Bring a Spiritual Dimension to Efforts to Restore Endangered Gray Wolves to Former Habitat, Nat'l Wildlife, Aug.-Sept. 1998, at 32.

[FN128]. See id. at 35.

[FN129]. Id. at 36.

[FN130]. “The Nez Perce Tribe is one of 45 members of the InterTribal Bison Cooperative (ITBC), a group formed in 1990 to help restore bison to Indian lands.” Id. at 39. The Tribe's wolf management recovery program is an outgrowth of the ITBC effort. See id.

[FN131]. See id. at 32.

[FN132]. See id.

[FN133]. Id. at 36.

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[FN134]. See Wyoming Farm Bureau Fed'n v. Babbitt, 987 F. Supp. 1349 (D. Wyo. 1997). The district court has ordered that the reintroduced wolves must be removed, for reasons that will not be discussed in this article. That ruling has been stayed pending appeal.

[FN135]. See Wilkinson, supra note 111, at 1066.

[FN136]. See id. at 1066-74.

[FN137]. Id. at 1072 (citations omitted).

[FN138]. See id. at 1071.

[FN139]. See id. at 1074.

[FN140]. See id. at 1074-75.

[FN141]. See id. at 1075.

[FN142]. See id. at 1076.

[FN143]. Secretary of the Interior and Secretary of Commerce, Secretarial Order 3206, American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act (June 5, 1997) [hereinafter Secretarial Order]. The Secretarial Order, including appendix, has been published on the Fish & Wildlife Service Website. See Fish & Wildlife Serv., Questions & Answers-American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act (visited Feb. 17, 1999) < http://www.fws.gov/r9endspp/esatrqa.html>.

[FN144]. See Wilkinson, supra note 111, at 1077.

[FN145]. See id. at 1081.

[FN146]. Secretarial Order, supra note 143.

[FN147]. 16 U.S.C. §§ 470 to 470x-6 (1994 & Supp. 1999). For a detailed discussion of the NHPA, see **Suagee**, Tribal Voices, supra note 8, at 167-96.

[FN148]. See 16 U.S.C. § 470f.

[FN149]. See 36 C.F.R. pt. 800 (1998).

[FN150]. See Patricia L. Parker & Thomas F. King, National Park Serv., National Register Bulletin 38: Guidelines for Evaluating and Documenting Traditional Cultural Properties (1990) [hereinafter Bulletin 38]. One federal court of appeals has held that failure to follow the guidelines in Bulletin 38 amounted to a violation of the Advisory Council's regulations. See Pueblo of Sandia v. United States, 50 F.3d 856, 859-62 (10th Cir. 1995).

[FN151]. See generally 16 National Park Serv., Cultural Resources Management (1993). This special issue of this NPS publication includes 15 articles on traditional cultural properties.

[FN152]. See Secretarial Order, supra note 143.

[FN153]. NHPA § 304, 16 U.S.C. § 470w-3.

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[FN154]. Pub. L. No. 102-575, 106 Stat. 4753 (codified as amended at 16 U.S.C. §§ 470 to 470x-6 (1994)).

[FN155]. See 16 U.S.C. § 470a(d)(2).

[FN156]. See 16 U.S.C. § 470a(d)(2).

[FN157]. See id. § 470a(d)(6).

[FN158]. For information, see the National Park Service Tribal Preservation Program web page, (visited Mar. 4, 1999) <http:// www2.nps.gov/tribal/thpo4.htm>.

[FN159]. See Telephone Interview with Ron Emery, National Park Service (Feb. 11, 1999) (on file with author).

[FN160]. See 59 Fed. Reg. 50,396 (1994); 61 Fed. Reg. 48,580 (1996).

[FN161]. See Advisory Council on Historic Preservation, Revised Section 106 Regulations/OMB Review Text (Nov. 20, 1997) (copy on file with author) [[[hereinafter November 1997 Draft]. This was not intended to be a public document, but it did become available through a variety of channels.

[FN162]. NHPA § 101(b) sets out the responsibilities of SHPOs, including the responsibility to "consult with the appropriate Federal agencies" on proposed undertakings that may affect historic properties and are thus subject to the section 106 consultation process. 16 U.S.C. § 470a(b)(3)(I) (emphasis added). NHPA § 101(d)(6) provides that, in carrying out its responsibilities under section 106, each federal agency "shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance" to a historic property that is the subject of section 106 consultation. 16 U.S.C. § 470a(d)(6) (emphasis added).

[FN163]. The discussion of issues in this section is based on my representation of three tribes at this stage of the rulemaking process, including participation in meetings held at OMB.

[FN164]. See 16 U.S.C. § 470h-2(l).

[FN165]. Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (1996), reprinted in 42 U.S.C. § 1999 note (Supp. II 1996). This Executive Order establishes a policy that each federal agency that manages federal lands shall "accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners . . . ." 42 U.S.C. § 1996 note, § 1(a)(1) (Supp. II 1996).

[FN166]. See ACHP, Council to Consider Final Revised Section 106 Regulations (visited Feb. 11, 1999) <http://www.achp.gov/newsregs.html>.

[FN167]. See Telephone Interview with John Fowler, Executive Director, Advisory Council on Historic Preservation (Jan. 27, 1999) (on file with author) [hereinafter Fowler Interview].

[FN168]. See ACHP, Advisory Council on Historic Preservation Adopts Proposed Regulations (visited Mar. 5, 1999) <http://www.achp.gov/newsregs.html> [[[hereinafter Jan. 28, 1999 Revised Text].

[FN169]. See Advisory Council on Historic Preservation, Revised Section 106 Regulations (Jan. 28, 1999) (on file with author) [hereinafter January 1999 Draft]. Although it is not yet a public document (and technical revisions are expected before it is published in the Federal Register), this version of the final revised regulations was distributed at a meeting of the United South and Eastern Tribes (USET) on February 3, 1999. With respect to the power of a tribe to make the Ad-

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visory Council participate in the resolution of adverse effects, the November 1997 version would have provided that "the Council will always participate in consultation when requested by an Indian tribe or a Native Hawaiian organization." November 1997 Draft, supra note 161, § 800.6(a)(1)(iii). In contrast, the January 1999 Draft provides that tribe or Native Hawaiian organization may request the council to participate, but the decision will be made by the Council, applying criteria in "Appendix A," an appendix to the regulations. See January 1999 Draft, supra, at § 800.6(a)(1)(iii). Appendix A was not included in the draft that was distributed at the USET meeting. An updated draft of Appendix A (on file with author) lists four criteria in with the Council "is likely to enter the Section 106 process." The fourth criterion describes an undertaking that:

> 4. Presents issues of concern to Indian tribes or Native Hawaiian organizations.
>
> This may include cases where there have been concerns raised about the identification of, evaluation of or assessment of effects on historic properties to which an Indian tribe or Native Hawaiian organization attaches religious and cultural significance; where an Indian tribe or Native Hawaiian organization has requested Council involvement to assist in the resolution of adverse effects; or where there are questions relating to policy, interpretation or precedent under Section 106 or its relation to other authorities, such as the Native American Graves Protection and Repatriation Act.

January 1999 Draft, supra, at app. A.In addition to this change, another change from the November 1997 draft to the January 1999 draft is in § 800.6(c)(2)(i), which would have provided that the federal agency official "should" invite a consulting tribe or Native Hawaiian organization to be a signatory to a Memorandum of Agreement, has been weakened to "may;" tribes wanted it strengthened to "shall."With respect to the provision in the November 1997 Draft which would have vested tribes with the right to make the Council enter the process to review a no adverse effect determination, the January 1999 Draft does retain this provision, although the wording has been changed. Compare November 1997 Draft, supra note 161, at § 800.5(c)(2)(ii), (c)(4), with January 1999 Draft, supra, at § 800.5(c)(2), (c)(3). Under the January 1999 Draft, a tribe or Native Hawaiian organization has this right only if it has formally become a consulting party.The policy decision on the role of tribes in dealing with off-reservation TCPs was reportedly made at the highest levels of the Administration. See Fowler Interview, supra note 167.

[FN170]. See Houck, supra note 110, at 978.

[FN171]. Id.

[FN172]. Id.

[FN173]. See Secretarial Order, supra note 143, § 3.

[FN174]. See id. § 2.

[FN175]. Id. § 5, principle 3(B).

[FN176]. Id. app. § 3(C)(1). In the context of developing habitat conservation plans, which by their nature apply to private lands, if a private landowner objects to the tribe being invited to participate in the consultation leading to the development of an HCP, the FWS will not force the issue but rather will consult with the tribe separately. See id. § 3(D)(2).

[FN177]. See supra note 153 and accompanying text.

[FN178]. Jan. 28, 1999 Revised Text, supra note 168, at § 800.3(d).

[FN179]. See 16 U.S.C. § 470a(d)(6)(B) (1994); see also supra note 157 and accompanying text.

[FN180]. Secretarial Order, supra note 143, app. § 3(C)(3)(c).

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[FN181]. See The Secretary of the Interior's Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to Section 110 of the National Historic Preservation Act, 63 Fed. Reg. 20,496 (1998).

[FN182]. Id. at 20,504.

[FN183]. See **Suagee**, Tribal Voices, supra note 8, at 215-18.

[FN184]. This statement is based on personal experience, including many conversations with tribal personnel, and work on a few cases in which Indian graves have been damaged or destroyed by construction projects.

[FN185]. See supra notes 36-38 and accompanying text; see also Getches et al., supra note 17, at 141-90.

[FN186]. See Getches et al., supra note 17, at 143 (citing S. Lyman Tyler, A History of Indian Policy 71-88 (1973)). See also James Welch, Killing Custer: The Battle of the Little Bighorn and the Fate of the Plains Indians 67 (1994) (noting that General Sherman and General Sheridan both believed that exterminating the buffalo was the most effective way to force the Plains Indians onto reservations and allow civilization to advance); Winona LaDuke, Return of the Buffalo Nation: For Native Peoples of the Plains, Visions of a Buffalo Commons, 15:4 Native Americas 10, 13 (Winter 1998).

[FN187]. See Charles F. Wilkinson, Crossing the Next Meridian: Land, Water, and the Future of the West 9-15, 175-218 (1992).

[FN188]. See Getches et al., supra note 17, at 149-51, 165-82.

[FN189]. See Daniel Quinn, Ishmael 41-42, 151-68 (1992); Daniel Quinn, My Ishmael 47-50, 60-63, 113-115 (1997) [hereinafter Quinn, My Ishmael 1997].

[FN190]. See Quinn, My Ishmael, supra note 189, at 52.

[FN191]. See id. at 52, 98.

[FN192]. See id. at 88-91, 93-94, 216-17 (describing the “erratic retaliator” strategy for territorial defense).

[FN193]. See id. at 97-106, 127.

[FN194]. My colleague Tseming Yang attributes the first use of the terms “interest-balancing” and “rights maximization” to Paul Gewirtz, Remedies and Resistance, 92 Yale L.J. 585 (1983) (examining school desegregation in the wake of Brown v. Board of Educ., 347 U.S. 483 (1954)). See also Ronald Dworkin, Taking Rights Seriously 90-94 (1977) (distinguishing between rights and social goals, acknowledging that rights may be less than absolute, and suggesting that we should use the word “right” to describe a political aim only if it has enough weight to withstand competition from most societal goals).

[FN195]. Compare Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (holding that the Free Exercise Clause of the First Amendment does not protect the right of Indians to conduct religious ceremonies at sacred places in a National Forest), with Bear Lodge Multiple Use Ass'n v. Babbitt, 1998 WL 195624 (D. Wyo. 1998) (holding that the National Park Service's voluntary program to accommodate Indian religious use of Devil's Tower was constitutionally permissible). See generally Sharon L. O'Brien, Freedom of Religion in Indian Country, 56 Mont. L. Rev. 451 (1995).

[FN196]. See **Suagee**, Tribal Voices, supra note 8, at 153-57.

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[FN197]. See Lone Wolf v. Hitchcock, 187 U.S. 553, 556 (1903); Getches, et al., supra note 17, at 175-82.

[FN198]. See **Suagee**, Values, supra note 109, at 243-44.

[FN199]. Wilson, supra note 103, at 349.

[FN200]. Fritjof Capra, The Web of Life 296 (1996).

[FN201]. David Suzuki & Peter Knupson, Wisdom of the Elders: Honoring Sacred Native Visions of Nature at xxx (1992).

[FN202]. Quinn, My Ishmael 1997, supra note 189, at 127.

[FN203]. See generally Christopher Vecsey, Imagine Ourselves Richly: Mythic Narratives of North American Indians 94-117 (1988).

[FN204]. See id. at 111.

[FN205]. Paul A.W. Wallace, The Iroquois Book of Life: White Roots of Peace 42-44 (1994). Although the Wallace version uses the name of the Peacemaker, there are restrictions on saying his name, and he is usually referred to as the Peacemaker. See Vecsey, supra note 203, at 106. Accordingly, in this Article I have followed the convention of referring to him as the Peacemaker.

[FN206]. Wilson, supra note 103, at 346.

[FN207]. See id.
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