

Tribes as Trustees Again: the Emerging Tribal Role in the Global Conservation Trust Movement

Project Summary

Just over two centuries ago, Indian tribes exercised territorial sovereignty over nearly all of the land on this continent. Nature was abundant and, for the most part, in a state of remarkable balance. Many tribes exercised aboriginal management over resources in a manner deliberately aimed towards maintaining a sustainable existence. Indeed, the tribes of the Pacific Northwest managed a sustainable harvest of salmon that lasted for at least 10,000 years prior to the arrival of Lewis and Clark. Their sovereignty was a direct outgrowth of a spiritual mandate to preserve resources for future generations. Essentially, though tribes did not describe their laws in western legal terms, the governing sovereign mandate adhered to by tribes of different cultures was a trust concept of maintaining the resources as a constant natural asset that would be available to humankind in perpetuity. Tribes inherently exercised a trustee form of stewardship through their sovereignty to protect the interests of beneficiaries distant generations.

With conquest, tribal lands were reduced to a fraction of aboriginal territory, and a new set of sovereign trustees governed the landscape. Through regulation and ownership, the federal government and states now control nearly all of the land that tribes once managed. The natural loss at the hands of these new sovereign trustees has been staggering. Pollution, wildlife extinctions, wetland destruction, deforestation, urbanization and a host of other factors has greatly depleted the natural trust that tribes once relied on. Tribes today are fighting a host of environmental threats off the reservation that jeopardize their traditional economies and sacred sites.

The field of environmental and natural resources law emerged to address the loss of natural systems. The first generation of law, premised on statutes and regulations, has failed to arrest the hemorrhage of many, if not most, natural systems. While those laws are still in place, a new generation of tools is emerging in the form of property mechanisms to safeguard lands and resources. The relatively infant field of conservation trust law addresses these new mechanisms, which consist very generally of two approaches to land conservation, both premised on voluntary agreements. One approach puts fee title to land in new ownership by a sovereign (typically a federal or state agency) or private land trust organization created for the express purpose of holding conservation lands. The new conservation owner of property must manage the land for the purpose of conservation. The other approach relies on a conservation easement to protect the property in perpetuity. A conservation easement can be held by a sovereign or a private land trust. In the case of an easement, the owner of the property (usually a private land owner) keeps the property but must manage it subject to the terms of the easement. The easement holder typically has rights to access the property, monitor its use, and protect it against harmful uses.

There are enormous opportunities for tribes to protect their aboriginal lands and resources through tools developed as part of this new field of conservation trust law. Innovative work has emerged from various regions. The Trust for Public Lands created an Indian Lands Program to preserve lands with native resources. In Alaska, the Native Conservancy Land Trust was established to purchase lands crucial to maintaining the Copper River fishery that provides subsistence and commercial fishing for Alaska native people. In southern Oregon, the Klamath Tribe purchased a conservation easement across a privately owned ranch that provides crucial water rights for treaty harvested salmon. In McCall, Idaho, the Nez Perce Tribe (along with the State of Idaho) gained a conservation easement on private land at Bergdorf Meadows to protect salmon habitat. These examples represent the beginning of a new wave of tribal initiatives at the intersection of federal Indian law and natural resources law. As these initiatives become even more established, they will develop into an important part of the subfield of native natural resources law. Moreover, as the conservation trust movement becomes global, these initiatives and strategies will be exported with more frequency to indigenous contexts abroad.

Professor Wood's research will survey the opportunities, identify the challenges, and outline various approaches in this area. The Morse Center's *Tribes as Trustees Again* project will involve inquiry into case studies of tribal conservation trust initiatives and the framework of applicable law. The research will result in a research paper that: 1) provides the theoretical foundation for this emerging tribal role, with a particular focus on tribal values, history of management, and traditional indigenous knowledge; 2) surveys the law that applies from the fields of conservation trust law and federal Indian law; 3) presents a factual foundation and case studies to illuminate this new tribal role; 4) charts out differing models in which the tribal role is evident, and the strengths and drawbacks of each.

This research will provide the focus for a one-day working session to be held on April 6, 2007. Professor Wood will convene tribal leaders, tribal conservation trust professionals, government officials and other land trust professionals. The goal for the working session is to stimulate ideas and discussion for achieving tribal conservation goals in aboriginal territory through tools provided by the field of conservation trust law. Much of the discussion will focus on comparing the various models presented by the paper.

In addition to the campus workshop, Professor Wood will undertake two field workshops to focus inquiry on two imperiled landscapes in which the Nez Perce and other tribes have interests: the Wallowa Valley of eastern Oregon, and Meadows Valley, which provides the headwaters for the Little Salmon River, in Idaho. The one-day, on-site workshops will gather inter-generational owners with individuals from the tribe, educational institutions, county government, the local land trust, the Forest Service, state agencies and local citizen groups to discuss the potential for a common vision of stewardship and conservation. After the workshop concludes, Professor Wood will provide all participants with contact lists and a summary of the discussion so that

community collaboration may move forward if the workshop participants desire. Professor Wood will monitor any community progress in both valleys.

Professor Wood will incorporate the discussion and perspectives gained from the campus workshop and field research in a research paper for publication in a law review. The published article will be distributed to the broader tribal and conservation community. Student research support for this project is provided by the Morse Center fellows, the ENR Program's Native Environmental Sovereignty Project, the ENR Program's Conservation Trust Project, and students from the 2006 federal Indian law class, University of Oregon School of Law.

