Tribes as Essential Partners in Achieving Sustainable Governance

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CHAPTER FIFTEEN

TRIBES AS ESSENTIAL PARTNERS IN ACHIEVING SUSTAINABLE GOVERNANCE

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I. INTRODUCTION

Inclusion of tribal concerns and tribal governance in a sustainability dialogue is a necessity for two related reasons. First, as tribes are significant ecosystem participants, tribes play an invaluable role in environmental policymaking. In addition, addressing jurisdictional uncertainty in a manner that protects individuals and tribal integrity can help Native Americans sustain their communities. Sustainability requires providing fair legal and policy frameworks that are enforced impartially and that are responsive to present and future societal needs in an accountable, effective, transparent, equitable, and inclusive manner.

Indigenous peoples have modeled sustainable development around the world. Tribal representatives and local community leaders gather annually at the Commission on Sustainable Development and climate negotiations. Increasingly mayors and tribes are leading the way in modeling a transition to environmentally sound energy use.¹ Incentivizing the innovation and instillation of wind, solar, and other renewable energy sources can come in the form of public funding, including renewable portfolio standards,
feed in tariffs and green tag programs. For instance, tribal wind initiatives can partner with local governments to bring both distributed and grid tied power to communities. Building upon this kind of cooperation can strengthen intergovernmental relationships between tribal communities and their local neighbors. The following discussion will look at ways in which cooperative good governance can expand at the local level.

II. Sustainable Cooperation and Indigenous Peoples

As Philippa Foot notes, some needs are universal: “[a]ll need affection, the cooperation of others, a place in a community, and help in trouble. It isn’t true to suppose that human beings can flourish without these things. . . . Communities as well as individuals can live wisely or unwisely.” Sustainable governance requires a commitment to supporting the cultural integrity of the myriad of indigenous peoples around the world. Indigenous peoples have gained the status as special subjects of concern in relation to the United Nations. Indigenous communities within states are not members of the United Nations but have been able to voice some concerns by obtaining official consultative status with the UN Economic and Social Council. Indigenous peoples have since advanced historic sovereignty claims, treaty claims, minority claims, self-determination claims, and human rights claims. International human rights based claims have provided indigenous communities the greatest protection to date. The widely ratified UN Convention on the Elimination of All Forms of Racial Discrimination (“CERD”) provides that states promote indigenous cultural identity, freedom from discrimination, sustainable development, and effective participation.

The United States ratified CERD in October 1994. Under its early warning and
urgent action procedure, the United Nations Committee on the Elimination of Racial Discrimination has called upon the United States to freeze any plans to privatize Western Shoshone ancestral lands for transfer to multinational extractive industries and energy developer; and to desist from all activities or plans concerning the ancestral lands of Western Shoshone or in relation to their natural resources, which were being carried out without consultation with and despite protests of the Western Shoshone peoples.\footnote{11}

The message was clear: cultural and environmental resources are fundamentally intertwined. Nevada-based Western Shoshone tribal members and two residents of Utah filed suit to prevent the detonation of a 700-ton ammonium nitrate and fuel oil bomb at the Nevada Test Site.\footnote{12} A mushroom cloud from bunker buster blasts developed to penetrate solid rock would expose people in the region to radioactive fallout remaining after nuclear weapons detonated from 1951 to 1992.\footnote{13} Oxfam reports that this is the first time that a UN committee has issued a full decision against United States federal Indian law and policies.\footnote{14}

The international recognition of the rights of peoples to internal self-determination and cultural integrity\footnote{15} reflects on the rights of “all peoples” to self-determination and to freely pursue economic, social, and cultural development.\footnote{16} A such, the International Labor Organization (“ILO”) Convention No. 169 on Indigenous and Tribal Peoples recognizes the aspirations of indigenous peoples to: “exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they lie.”\footnote{17} Indigenous cultural integrity\footnote{18} is intertwined with land and resource rights.\footnote{19} S. James Anaya points out:

Within the Western liberal frame adopted in the political and juridical culture of
the United States, indigenous peoples’ lands have been treated as fungible with cash.

In contemporary international law, by contrast, modern notions of cultural integrity, non-discrimination, and self-determination join property precepts in the affirmation of sui generis indigenous land and resource rights, as evident in ILO Convention No. 169. This convention calls upon states to recognize the unique value of land and natural resources to cultural integrity. Such spatial references as a place of origin are central to tribal religious practice and identity. Article 15 guarantees indigenous peoples rights “to participate in the use, management and conservation” of their natural resources. Autonomous governance is fundamental to cultural development and stewardship of natural resources, and institutional attention to cultural stewardship may play a crucial role in strengthening consensus regarding indigenous peoples’ rights.

III. WATER RIGHTS AND CIVIL JURISDICTION OVER NON-INDIANS

In Montana v. United States, the Supreme Court clarified that tribes retain authority over internal relations and self-governance. The first Montana exception recognizes that when non-Indians enter into consensual relationships with a tribe or its members, the non-Indians consent to tribal jurisdiction. The second Montana exception recognizes that tribes retain authority over non-members that threaten or directly affect the “political integrity, the economic security, or the health or welfare of the tribe.” Water pollution directly affects tribal health and welfare. In the wake of Supreme Court cases narrowing tribal sovereignty over non-members, the Court and agencies such as the Environmental Protection Agency (EPA) have looked for explicit grants of authority to tribes rather than language that divests tribal authority.
A. The Clean Water Act and Tribal Jurisdiction

Congress passed the Clean Water Act to restore and maintain the quality of the nation’s waters. In 1987 Congress amended the Clean Water Act, authorizing tribes to enforce water quality standards. By enacting Section 518 of the Clean Water Act, the 1987 amendments allowed the EPA to treat tribes as states for such purposes of the Act as establishing and enforcing Water Quality Standards. Jessica Owley states that, “Tribes have the ability to exercise meaningful jurisdiction over their water quality because such jurisdiction fits within the Montana exceptions and because the federal government has specifically delegated authority to tribes.” This view is not universally held. Opposed to an extension of tribal civil and criminal jurisdiction, states have brought legal challenges against recognizing tribal water regulatory authority under the Clean Water Act. Rather than recognizing a delegation of federal authority to tribes based upon the text of the Clean Water Act, the EPA has made a case-by-case decision regarding non-member fee lands. In doing so, the EPA analyzes the impact of water pollution upon each given tribe’s health or welfare. Each tribe must prove that the second Montana exception applies to their tribe in order to obtain “treated in a manner similar to states” status. Prior to the EPA’s recent change in terminology, the status was called “treated as states”; the acronym remains TAS. Once treated in a manner similar to states, the tribe may be able to place regulatory limitations upon water users located upstream from tribal lands.

Ann Tweedy notes that the Lara decision may reinvest tribal sovereignty for tribes seeking TAS status under the Clean Water Act. This would lessen the burden of tribes by no longer requiring tribes to prove that they retained sovereignty over water quality regulation. Prior to Lara, qualified tribes were eligible to regulate as if the tribe were a
state once they showed that their sovereignty had not been divested. Rather than granting environmental regulatory authority to tribes, the tribal amendments to the Clean Water Act acknowledged that tribes already had inherent control over their water quality based on their status as sovereign nations. This federal-tribal partnership to regulate water allows tribes to set water standards that are more stringent than the federal minimum standards.

Ultimately, the EPA seeks to facilitate cooperative water-sharing agreements among tribal, state, and federal entities involving watershed management. The EPA identifies a watershed approach as a coordinated management framework for “hydrologically-defined geographic areas, taking into consideration both ground and surface water flow.”

Watershed management, rather than political or member/non-member classifications, offers the greatest likelihood of balancing human and environmental concerns. While watershed management remains politically elusive, the following cases illustrate a judicial trend towards recognizing a role for tribes in setting water standards.

**B. Wild Rice in Wisconsin**

In *Wisconsin v. Environmental Protection Agency*, the United States Court of Appeals for the Seventh Circuit upheld the EPA’s grant of TAS status to a Chippewa tribe called the Mole Lake Band. The Seventh Circuit concluded that,

> [b]ecause the Band has demonstrated that its water resources are essential to its survival, it was reasonable for the EPA, in line with the purposes of the Clean Water Act and the principles of Montana, to allow the tribe to regulate water quality on the reservation, even though that power entails some authority over off-reservation activities.”

The Seventh Circuit noted that the rule in *Hicks* was not implicated since *Wisconsin*
v. Environmental Protection Agency did not concern tribal control of state law enforcement authorities on the reservation during the investigation of off-reservation crimes. Given plans to construct a zinc-copper sulfide mine on the Wolf River, Wisconsin argued that the tribe lacked jurisdiction since the state owned the underlying lake beds pursuant to the Equal Footing Doctrine. The Seventh Circuit concluded that even if this were the case, Congress’ Commerce Clause power to regulate navigable waters gave the EPA authority to manage Clean Water Act programs on reservations. The Seventh Circuit set a high bar for challenges to a grant of TAS status.

The Mole Lake Band of the Lake Superior Tribe of the Sokaogon Chippewa Community (SCC) state that the purpose of their water quality standards is to “preserve and protect all things within the aquatic ecosystem that support the cultural integrity, health, welfare, economic security, environmental quality, safety, treaty rights and inherent sovereignty of the SCC.” They specify that all tribal waters shall be protected for cultural, subsistence, spiritual, medicinal, ceremonial, and aesthetic purposes. They also note that their water quality standards do not “abrogate independent tribal rights to sufficient quantities and quality of water to support the flora, fauna, and cultural traditions of the SCC.” Similarly, the Fond du Lac Band of the Minnesota Chippewa Tribe lists cultural uses of water. Within this category they explain that a wild rice area is “a stream, reach, lake or impoundment, or portion thereof, presently, historically or with the potential to be vegetated with wild rice.” Their aesthetic use of water “may include but is not limited to primary (direct) contact with water or the preservation of wetlands for the maintenance of traditional medicinal plants.”

The Mole Lake Band relies upon Mole Lake, Bishop Lake, and Rice Lake. The
latter supports one of the only surviving wild rice beds in Wisconsin.\textsuperscript{61} The Seventh Circuit notes that,

the Band is heavily reliant on the availability of the water resources within the reservation for food, fresh water, medicines, and raw materials. In particular, Rice Lake, the largest body of water on the reservation, is a prime source of wild rice, which serves as a significant dietary and economic resource for the Band.\textsuperscript{62}

Since none of the land within the reservation is under the control or ownership of non-tribal members,\textsuperscript{63} the Seventh Circuit did not have to worry about tribal limits upon regulating non-tribal members on fee lands located within the reservation.

\textit{C. Montana v. Environmental Protection Agency}

Jurisdiction over non-Indian fee lands was a factor in \textit{Montana v. Environmental Protection Agency}.\textsuperscript{64} The United States Court of Appeals for the Ninth Circuit upheld the EPA’s grant of TAS status in the face of a challenge by landowners on the reservation who were subject to the tribe’s water quality standards.\textsuperscript{65} An estimated 4,000 natural stream miles and 1,300 miles of irrigation canals and laterals are within the 1.2 million acre reservation.\textsuperscript{66} The water policy of the Confederated Salish & Kootenai Tribes seeks to “preserve, protect and maintain the chemical, physical, and biological integrity of the surface waters and wetlands of the Flathead Reservation.”\textsuperscript{67} The water from Flathead Lake supports agricultural, domestic, and industrial activities within the reservation, a patchwork quilt of land owned by tribal and non-tribal entities.\textsuperscript{68} This mixed use includes state, county, and municipal pollution discharges on the reservation.\textsuperscript{69}

The Ninth Circuit confirmed the EPA decision that the “activities of the non-members posed such serious and substantial threats to tribal health and welfare that tribal regulation was essential.”\textsuperscript{70} The Ninth Circuit drew heavily upon the second exception
established by *Montana v. United States*. When non-Indian activity threatens the health or welfare of the tribe, then tribes retain inherent sovereign power to exercise civil jurisdiction over non-Indians on fee lands.\(^7^1\) The Ninth Circuit distinguished *Montana v. Environmental Protection Agency* from *Brendale* by noting that the latter was a discrete zoning case while the former concerns water pollution that can have broad ramifications.\(^7^2\) The district court noted that Justice White cited TAS status under the Clean Water Act as an express Congressional delegation of tribal regulatory authority over non-Indian lands.\(^7^3\) Given the mobile nature of pollution, it is not feasible to manage water regulation based upon the “member/non-member checkerboard.”\(^7^4\) The district court deferred to this EPA finding and agreed with the EPA’s decision to recognize tribal jurisdiction over trust and fee lands.\(^7^5\) The Ninth Circuit agreed that the tribe had water regulatory jurisdiction over non-Indians pursuant to the Clean Water Act.\(^7^6\)

**D. The Right of the Pueblo to Set High Water Quality Standards**

In *City of Albuquerque v. Browner*, the United States Court of Appeals for the Tenth Circuit held that the EPA correctly interpreted Section 518 of the Clean Water Act to recognize tribal authority to adopt water quality standards more stringent than federal standards and to implement those standards even when upstream point sources are located beyond tribal land.\(^7^7\) The Tenth Circuit recognized the right of the Isleta Pueblo to regulate the City of Albuquerque’s waste treatment plant.\(^7^8\) The plant was located five miles upstream from the reservation.\(^7^9\) The Tenth Circuit determined that the EPA correctly incorporated the Pueblo standards into a National Pollution Discharge Elimination System (NPDES) permit that was issued to the City’s waste treatment facility.\(^8^0\) Water quality standards are a means by which the desired condition of a given
A watercourse can be reached.\textsuperscript{81} Water quality standards focus upon the desired character of the watercourse rather than the pollutants.\textsuperscript{82} In contrast, uniform technology-based standards focus directly upon such acts as curbing chemical concentrations from point sources.\textsuperscript{83}

The Tenth Circuit found that the EPA approval of the Pueblo’s religiously-based “Primary Contact Ceremonial Standard” did not contravene the Establishment Clause.\textsuperscript{84} The Isleta Pueblo’s WQS states, “[p]ursuant to Section 518 of the Clean Water Act, the Tribal Council of the Pueblo of Isleta, a federally-recognized Tribe of Indians, hereby enacts the Pueblo of Isleta Surface Water Quality Standards . . . to promote the social welfare and economic well-being of the Pueblo of Isleta.”\textsuperscript{85} The tribe lists primary contact ceremonial use, as well as fishing, agricultural, and wildlife usage of the Rio Grande.\textsuperscript{86} Primary contact ceremonial use is the use of a stream, reach, lake, or impoundment for religious or traditional purposes by members of the PUEBLO OF ISLETA; such use involves immersion and intentional or incidental ingestion of water, and it requires protection of sensitive and valuable aquatic life and riparian habitat.\textsuperscript{87}

Fleder and Ranco note that “[a]fter a session in the sweathouse, tribal members bathe in the river.”\textsuperscript{88} They go on to explain that, “if a person is hesitant to dance in ceremonies, he may be thrown into the river briefly and then brought back to dance in wet clothes.”\textsuperscript{89} The ceremony of the Corn groups involves chiefs washing their hands and face in the river and praying.\textsuperscript{90} Spiritual practices followed by many Pueblos seek to sustain harmony and bring weather that is favorable to farming.\textsuperscript{91}

The Isleta Pueblo’s town was established in the 1200s by descendants of people who came to America an estimated 30,000 years ago.\textsuperscript{92} The Sandia Mountains are no longer
capped by glaciers and the mammoths are long gone. The people survived, learning to work communally to build sophisticated irrigation systems with which to cultivate the arid land. Individuals and families had rights to use tribal land and waters. By the 1st century A.D., they were growing beans, corn, and squash. The prehistoric Anasazi peoples became the Pueblo. These village-dwelling Indians of the southwestern United States encompass (1) the Rio Grande Pueblos (2) the Hopi of northeastern Arizona, and (3) the Zuni of western New Mexico. Pueblo geographic isolation and a tradition of resistance facilitated greater cultural preservation than was achieved by any other tribe in the United States. The Isleta do not dwell on an island, but their tongue of land does jet out into the Rio Grande River, prompting the Spanish to call them Isleta (little island). While willing to sell blue corn tortilla chips, the Isleta Pueblo remain an “island town,” culturally committed to the Rio Grande Pueblos tradition of resistance to assimilation. Pueblo standards make up nine out of twenty-eight of the EPA-approved tribal water quality standards. The EPA notes that “(t)ribal reservations without approved water quality standards account for as much land area as all of New England plus the State of New Jersey.” There remain roughly 52,000 bodies of water that are polluted beyond their “total maximum daily loads” of pollutants. The EPA has proposed allowing financially strapped rural communities to have lower drinking water standards for toxins such as arsenic vis a vis the rest of the United States.

Based on the designated use of the waterway, the Clean Water Act water quality standards convey the desired state of a given waterway. This gives tribes an opportunity to establish and enforce high water quality standards. A criminal violation of the Clean Water Act may subject non-Indian defendants that are charged with
polluting water that flows through tribal land to fewer due process provisions than are available under the United States Constitution.105

IV. PUBLIC PARTICIPATION: THE MEANS ARE THE ENDS

Without transparency, civil society struggles to hold public and private sectors accountable for preserving the public trust. Without trust, tangible natural resources vanish. Cashing in natural resources alters traditional notions of value and welfare. Sustainable development becomes a term with which people can converse without finding middle ground. Consensus building makes way for political expediency. Hence, Winona LaDuke notes that “[w]e need to recover democracy, and one key element is democratizing power production. . . . [T]ribes live in some of the poorest counties in the country, yet the wind turbines they are putting up could power America—if they had more markets and access to power lines.”106 In local communities across North America, inter-temporal resource misallocations continue to occur when politicians base decisions upon short-term outcomes at high discount rates.107 They place little value on future harms.108 Such environmental debates as where to allow fracking are defused when local governments devolve decision-making to the market. Decreasing the local government’s role in natural resource management takes away an important public forum in which conflicting views can be discussed and policies challenged by local communities.109 Social dimensions of resource distribution are discounted in no small part due to the manner in which industry can control the parameters of the decision-making process. Corporations have greater resources at their disposal to retain persuasive scientific experts, conduct research that supports their position and present findings in an attractive
way. Katrina Smith notes:

Debates over environmental issues usually involve questions of distribution. Problems such as deciding where to site noxious facilities, how to share the costs of cleaning up pollution, and how to allocate natural resources equitably all raise concerns over who will bear the costs of using (or not using) natural resources. While science and economics can outline efficient and effective solutions to technical problems, the ultimate choice between possible solutions can only be made after considering qualitative issues such as power, politics, public opinion, tradition, and fairness.10

Facilitating local political deliberation can inform the public of government decisions and make public opinion known to policy-makers. Actual discourse enables public participation. Political conversation builds skills unattainable by merely instilling political knowledge. Deliberative democracy depends upon a healthy public sphere, which in turn requires public space to facilitate rational discourse. Deliberation legitimizes decisions by exposing the decision-making process to a discussion among equal citizens.11

Discussion regarding equitable distribution loses its public forum when regulatory control is transferred to the private sector. Decision-making becomes de-politicized as dominant interests are promoted as scientific expertise. Devolving environmental regulation to industry moves issues out of the public sphere. This downplays conflict since differences do not come to light through public debate. People have a right to participate in decisions that affect their social and physical environment.12 Increasing the flow of information to and the thoughtful analysis by ordinary citizens at the local level can avert policy stagnation in a rapidly changing world.

One area in which this public participation versus industry experts discussion is being played out is within the growing field of green building standards, which are in flux.
as jurisdictions recognize the need to mitigate climate change. Keith H. Hirokawa notes that:

It is estimated that 40% of raw materials consumed globally are used for buildings. In addition, in the United States, commercial and residential buildings are responsible for approximately 65% of electricity consumption, 30% of greenhouse gas emissions, 12% of potable water use and 136 million tons of construction and demolition waste annually. Also, many indoor building materials release hazardous toxins, impairing indoor air quality and reducing occupant health and productivity.  

Building codes seek to preserve health, safety, and welfare while enabling private development of land. Governance has expanded to encompass water management, construction materials, indoor air quality, and efficiency. The private, voluntary LEED program awards points for a myriad of environmental measures such as sustainable construction materials while the public Energy Star program provides a labeling system with which people can integrate energy use into their purchasing decisions. These two programs seek efficiency gains of at least 15 percent above conventional construction. In contrast, the passive-home construction standard achieves up to 80 percent efficiency over conventional construction. Habitat for Humanity has begun building such passive homes. While there is clearly a continuing role for architects and engineers, tribal and local cooperation can facilitate optimal hybrid public-private measures to transition to sustainable lifestyles.

Stephen Miller analyzes (1) government efforts to green government office use, (2) the leading role of voluntary green building incentives and (3) requirements for private development. In addition to subsidies, loans and fast track permitting, jurisdictions have used LEED and Energy Star programs as a basis upon which to incentivize green building. Updates to the LEED System can complicate leases and
ordinances that have incorporated older provisions. Given the important role that commercial building leases play in addressing climate change, making available clearinghouses of best practices would facilitate increasing efficiency. CalGreen, California’s new green building standards that go into effect in January 2011, can inform this process. While similar to LEED, CalGreen uses both mandatory baselines and voluntary “tiers” of standards that local jurisdictions can establish to address local circumstances. A few local governments have crafted rating systems suited to unique local conditions. Tribal-Municipal cooperation can help establish green building measures such as straw bale construction that are guided by local and tribal expertise.

The Economist notes that straw bale homes can help insulate vulnerable tribal communities throughout the drought stricken west from accelerating energy costs and the increasingly life-threatening weather extremes forecasted for the region. There may also be elegant applications of this technology in Alaska, where the Corps of Engineers has estimated that nearly 200 native villages, on the front line of global warming, will need to be relocated in the coming decade due to ongoing coastal and river erosion and the melting of ancient permafrost.

Bob Gough, Secretary of the Intertribal Council On Utility Policy points out that straw bale construction is earthquake-resilient, is a great insulator and promotes tribal youth jobs – “With a dire housing need for over a quarter of a million new homes in Indian Country generally, this natural building technology is ecologically appropriate but labor-intensive. The Indian word for that is ‘jobs’.” Neighboring communities can partner with Tribes to build sustainable quality homes that save water, reduce energy bills, and help people become resilient to climate extremes while contributing to climate adaptation and mitigation. This can build upon the inaugural initiative of the U.S. Department of Housing and Urban Development (HUD) to provide sustainability grants.
Transboundary forums can help build capacity and strengthen communities. For instance, water basin compacts provide a useful model with which to design such cooperative arrangements to protect natural resources and to facilitate sustainable development in keeping with local values. The Nisqually Watershed’s Stewardship Coalition is beginning to facilitate ongoing sustainability and resource cooperative Nisqually/Olympia decision-making—serving as a model for other regions and issues.\textsuperscript{129} Likewise, energy siting decisions increasingly turn on water access, which in turn impacts tribal and non-tribal rights. Transitioning to environmentally sound energy use is relying upon local cooperative arrangements among tribal renewable energy initiatives that can power surrounding non-tribal communities. Energy/climate inclusive decision-making offers substantial opportunities for sharing and building governance capacity among tribal and non-tribal stakeholders at the local level.

These examples illustrate that local tribal and non-tribal decision-makers can come together to identify and implement best practices that can be incorporated into environmental codes. They demonstrate that listening, observing, learning, remembering, integrating, and sharing are powerful ingredients of community building. When people feel that they are genuinely part of something bigger than themselves, a collective momentum adds innovative capacity to financial resources. Synergistic, sustainable resource pooling can support strong relationships between tribal and neighboring communities.

Moreover, although coalition-building must be cognizant of diverging experiences and interests, an inclusiveness approach can capitalize on differences. Just as the Aarhus Convention\textsuperscript{130} offers jurisdictions beyond the original signatories an opportunity to ratify
protocols, local communities can commit to adhering to tribal provisions and *vise versa*. Where tribal codes are silent on public and private activities that impact the environment, regions can innovate transboundary environmental impact study provisions into new and existing laws. This can be done through shared clearinghouses of successful environmental code language, environmentally sound technologies such as drip irrigation, and robust procedural rights that balance equity and efficiency to achieve environmental justice.

Local efforts to build ties across tribal and non-tribal communities can build capacity through shared experiences in order to respond effectively to increasingly intensifying reliance on natural resources and fragile habitats. Members of tribes can offer crucial traditional dispute resolution wisdom while municipalities can offer conservation easement and zoning language with which to enter into more sustainable arrangements with the private sector, be it to make use of water or energy resources on tribal land or sustain safe residential communities. It is meanwhile crucial to recognize that tribal wisdom in enhancing environmental policymaking can transcend jurisdictionary uncertainty in a manner that protects individuals, tribal integrity, and ecological preservation. Transboundary forums can be as specific as water commissions or as broad as sustainability clearing house institutes. At any scale such innovative gatherings and institutions enhance the capacity of neighboring jurisdictions to coordinate fair legal and policy frameworks that are enforced impartially and that are responsive to present and future societal needs in an accountable, effective, transparent, equitable, and inclusive manner.
V. CONCLUSION

Living sustainably depends upon our ability to find common ground amidst an array of competing interests. The United States has discovered that legislating the assimilation of native communities into a national polity neither reduces administrative complexity nor achieves meaningful governance. Chippewa cultural heritage is interwoven with the harvest of ancient wild rice. Pueblo ceremonial rights to clean water are equally central to retaining cultural heritage. Alaska Natives have been induced to incorporate in order to retain control over traditional natural resources. While the Clean Water Act has succeeded in curbing the disposal of chemicals into North American waterways, non-point source pollution remains difficult to control. Ensuring water quality and water availability remain core public functions, the provision of which governments cannot disregard. An important first step in this process is to address jurisdictional uncertainty. Transparent, legitimate, and accountable governments are the most likely to be able to achieve good governance and cooperate with one another in decision-making forums. Protecting individuals and tribal integrity are not inherently mutually exclusive goals. Cooperation involves time and trust. Governments, nongovernmental organizations, and civil society must remain committed to justice, respecting varying cultural approaches to conflict resolution. Our strength is not in our ability to assimilate. It is in our capacity to transcend co-existence to sustain genuine cooperation.
Professor Elizabeth Burleson has a LL.M. from the London School of Economics and Political Science and a J.D. from the University of Connecticut School of Law. She teaches at Pace Law School and has written reports for the United Nations. This chapter builds upon the author’s article Tribal, State, and Federal Cooperation to Achieve Good Governance, 40 Akron Law Review 207 (2007).

1 See e.g. Four Oklahoma Tribes Receive DOE Grants, THE JOURNAL RECORD, Aug. 27, 2009, at 1, “Thirty-six American Indian tribes and Alaska villages were selected to receive awards to advance renewable-energy technologies and energy-efficiency and conservation projects on tribal lands and rural Alaska villages.”) Id.

2 See Elizabeth Ann Kronk, Alternative Energy Development In Indian Country: Lighting The Way For The Seventh Generation, 46 IDAHO L. REV. 449 (2010) (noting that "Indian tribes are ready for 'nation building at home' by investing, developing, facilitating, and participating in building the infrastructure required to support green energy.") Id. at 458. See also Amy Standen, Tribal Lands Struggle To Bring Clean Power Online, NPR, Aug. 20, 2010 at 1, available at http://www.npr.org/templates/story/story.php?storyId=129303545&ft=1&f=1001

3 e.g. The Nisqually Indian Tribe and city of Olympia are establishing a pioneer water partnership allowing the tribe to transition from its shallow wells to a cleaner water while the city can retire McAllister Springs, Cynthia Iyall, City, Tribe Team Up on Clean Water Project, DAILY JOURNAL OF COMMERCE, June 26, 2008, at 1, available at http://www.djc.com/news/en/11202008.html ("Olympia and the Nisqually Tribe are creating a new regional water source along with a stewardship coalition to fund water-conservation and water-quality protection projects throughout the Nisqually Watershed.") Id.


6 Id. at 96. Indigenous people have also gained special subjects of concern status with the International Labour Organisation (“ILO”), Organization of American States (“OAS”) and other international institutions. Id.

7 The Office of the United Nations High Commissioner for Refugees notes that:

15 organizations of indigenous peoples have consultative status with the United Nations Economic and Social Council (ECOSOC). Consultative status entitles them to attend and contribute to a wide range of international and intergovernmental conferences. These organizations are: Aboriginal and Torres Strait Islander Commission, Asociación Kunas Unidos por Nabguana, Four Directions Council, Grand Council of the Crees (of Quebec), Indian Council of South America, Indian Law Resource Centre, Indigenous World Association, International Indian Treaty Council, International Organization of Indigenous Resource Development, Inuit Circumpolar Conference, National Aboriginal and Islander Legal Services Secretariat, National Indian Youth Council, Saami


(a) Recognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the State’s cultural identity and to promote its preservation;
(b) Ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity;
(c) Provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;
(d) Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent;
(e) Ensure that indigenous communities can exercise their rights to practice and revitalize their cultural traditions and customs and to preserve and to practice their languages.


13. Id.


15. Clinton, supra note, at 115-16.

16. ICCPR, supra note, art. 1. See also Clinton, supra note 7, at 115-16.

17. ILO Convention No. 169, supra note 231, at pmbl., par. 5. Article 7(1) of ILO Convention No. 169 provides that:

The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

Id. art. 7(1). See also Anaya, Multicultural State, supra note at 23-24.

18. E.g., ILO Convention No. 169, supra note 231, art. 5 (“[T]he social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected.”).

19. Id. pt. 2 (land).

20. Anaya, Multicultural State, supra note, at 38.

21. Article 13(1) of ILO Convention No. 169 provides: “[G]overnments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.” ILO Convention No. 169, supra note, art 13(1). See also Martin Wagner, The International Legal Rights of Indigenous Peoples Affected by Natural Resource Exploitation: A Brief Case Study, 24 HASTINGS INT’L & COMP. L. REV. 491, 498 (2001).

22. Tsosie, supra note at 283.

23. ILO Convention No. 169, supra note art. 15(1).


26. The Supreme Court’s first Montana exception states:

Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of
non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.

Montana, 450 U.S. at 565.

27 Id. at 566.

28 See generally Wisconsin v. EPA, 266 F.3d 741, 744 (7th Cir. 2001).

29 See id. (citing Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,878 (Dec. 12, 1991) (codified at 40 C.F.R. pt. 131)).


32 Section 518(e) of the Clean Water Act allows EPA to treat a tribe as a state, authorizing tribes to establish their own water quality standards if:

1. the Indian tribe has a governing body carrying out substantial governmental duties and powers;
2. the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation; and
3. the Indian tribe is reasonably expected to be capable, in the Administrator’s judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and of all applicable regulations.


34 See, e.g., Wisconsin v. EPA, 266 F.3d 741, 745 (7th Cir. 2001).

35 Id. at 744.

36 Id. at 748 (citing Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,878 (Dec. 12, 1991) (codified at 40 C.F.R. pt. 131)).

37 Id.

38 Id. at 749.


40 Tweedy, supra note 32, at 473.

41 Id. at 473.

42 Id. at 475.

43 Tsosie, supra note, at 234-35.


45 See Drucker, supra note 44, at 392.
46 Id. at 392-93.
47 Wisconsin v. EPA, 266 F.3d 741, 741 (7th Cir. 2001).
48 Id. at 750.
49 Id. at 748.
50 Id. at 745.
51 Id. at 746.
52 Id. at 747.
53 Drucker, supra note 44, at 362, 364.
55 Id. § 151.11.
56 Id. § 151.02.
58 Id. § 302(e)(1).
59 Id. § 302(e)(1).
60 Drucker, supra note 44, at 364.
61 Id.
62 Wisconsin v. EPA, 266 F.3d 741, 745 (7th Cir. 2001).
63 Id. at 745.
64 See Montana v. EPA, 137 F.3d 1135 (9th Cir. 1998).
65 Id. at 1141.
68 Montana v. EPA, 137 F.3d at 1139.
69 Id.
70 Id. at 1141.
72 The district court recognized that “zoning impacts are normally discrete and localized, whereas water pollution creates environmental health risks that may affect many people miles from the source.” Montana v. EPA, 941 F.Supp. 945, 953 (D. Mont. 1996).
73 Montana v. EPA, 941 F.Supp. at 957 (citing Brendale v. Confederated Tribes and
Bands of Yakima Nation, 492 U.S. 408, 428 (1989), to clarify that the decision does not overrule the Montana exceptions).

74 Id. at 958.
75 Id.
76 Montana v. EPA, 137 F.3d at 1141.
78 See id. at 423-24.
79 Id. at 419. See also Tweedy, supra note 32, at n.49.
82 Browner, 97 F.3d at 419 n.4.
84 Browner, 97 F.3d at 428-29.
86 Id. at 15. See also Browner, 865 F.Supp. at 740.
88 Fleder & Ranco, supra note 27, at 53.
89 Id.
90 Id.
91 Scholastic, Pueblo (Indian Tribes), http://content.scholastic.com/browse/article.jsp?id=5046 (last visited Jan. 15, 2007).
93 Id.
95 Id.
96 The History of the Pueblo Isleta, supra note 129.
97 “The Eastern Pueblos include the peoples of Acoma and Laguna, in the high plateaus of west central New Mexico, as well as along the Río Grande, including the villages of Taos, Isleta, Jemez, Nambé, Picuris, Pojoaque, Santa Clara, San Ildefonso, San Juan, Sandia, and Tesuque.” Scholastic, supra note 128.
98 The History of the Pueblo of Isleta, supra note 129. See also Scholastic, supra note 128.
100 U.S. ENVIRONMENTAL PROTECTION AGENCY, INTERIM DRAFT 1-29-04, INTERIM DRAFT OUTREACH AND CONSULTATION PLAN, FEDERAL WATER QUALITY STANDARDS FOR WATER IN INDIAN COUNTRY 1 (2004), available at


105 Trachman, *supra* note, at 859.


108 *Id.*


112 Bührs, *supra* note 270, at 98.

113 Keith H. Hirokawa. At Home With Nature: Early Reflections on Green Building Laws and the Transformation of the Built Environment, 39 ENVTL. L. 507, 511 (2009) (noting that “the manner in which these laws introduced green building into the regulatory process governing building construction has allowed the innovative ideas of sustainability to develop in ways that are ethically progressive and market friendly, and as such, appear fundamentally distinct from other environmental laws; and second, that the principles of green building suggest an effective approach to environmental protection that is ethically pluralistic.”) *Id.* at 510.


116 See Generally the Energy Star Program at http://www.energystar.gov/


119 Stephen R. Miller, *Commercial Green Leasing in the Era of Climate Change: Practical Solutions For Balancing Risks, Burdens, And Incentives*, 40 Envtl. L. Rep. News & Analysis 10487, at 10490 (2010) (noting that, “[c]ommercial buildings are also major consumers of resources and have large environmental footprints. Five billion gallons of potable water is used to flush toilets on a daily basis. A typical North American commercial building generates about 1.6 pounds of solid waste per employee per day, which in a building with 1,500 employees can amount to 300 tons of waste per year.”) *Id.* at 10489. See also CAL. AIR RES. BD., CLIMATE CHANGE PROPOSED SCOPING PLAN: A FRAMEWORK FOR CHANGE 58 (2008), http://www.arb.ca.gov/cc/scopingplan/document/psp.pdf.


121 Miller *supra* note 119 at 10493.


124 *Id.* at 25-26. See also Miller, *supra* note 119, at 10493 (noting that concerns include whether “local governments will have the resources to maintain such rating systems over the period of a long-term lease, and whether such local ordinances will be preempted by state or federal regulations.”) *Id.* See also Barbara Schussman et al., *The Rapid Rise of Local Green Building Ordinances--Will They Survive Legal Challenge?*, 2 CLIMATE CHANGE L. & POL’Y REP. 35 (2009).


126 Bob Gough, *Straw Houses I’ll huff and I’ll Puff...An Old Building Material May be Making a Comeback*, ECONOMIST, April, 6, 2010, at 1 (noting that people “living on Indian reservations in the United States are 10 times more likely not to have electricity than anywhere else in America. And if you do have electricity, it is likely to be
predominately coal based and you are paying a far greater portion of your household income for it.”) Id.

127 Id. (noting that, “[m]any American Indian reservations, where Tribes with up to 40,000 years of "green economies" in North America under their belts, are now plagued with a severe shortage of healthy, affordable housing, massive chronic unemployment and extremely young (median age under 19) and rapidly growing populations. These conditions mirror the plight of Third World communities right here in America, where four of the top 5 poorest counties in America are located in South Dakota, and include the Crow Creek, Pine Ridge, Cheyenne River and Rosebud Indian reservations found in the heart of the wheat belt on the northern Great Plains.”) Id.

128 Hud Awards $996,100 to Promote Smarter and Sustainable Planning For Jobs and Economic Growth in South Dakota, US FED NEWS, Oct. 19, 2010 (“For the first time ever, the U.S. Department of Housing and Urban Development (HUD) is awarding $996,100 to support more livable and sustainable communities in RURAL SOUTHWESTERN South Dakota. . . . In awarding these grants we were committed to using insight and innovation from our stakeholders and local partners to develop a 'bottom-up' approach to changing federal policy as opposed to 'top-down.' . . . The grants are awarded through one of two categories. One category of grants will assist regional planning for sus-tainable development where such plans do not currently exist. A second category of funding will support the implemen-tation of existing sustainability plans.”) Id.
