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The Forgotten Sovereigns

Tribes have unique legal authorities and a seat at the table for some of the hardest decisions facing our country, which means that working with them to achieve desired outcomes can be pivotal to success in resources management

Bella Sewall Wolitz
is of counsel at Brownstein Hyatt Farber Schreck. The views expressed are exclusively hers.

WHEN most Americans, even lawyers, are asked about sovereigns under U.S. law, they focus initially on the federal government and the 50 states. Pressed, lawyers would probably observe that U.S. territories and foreign governments are sovereign as well. Yet Indian tribes, the peoples who have been on this continent practicing self-government by right and necessity since time immemorial, and thus the United States' first sovereigns, are all too often forgotten. Tribes are an afterthought — if they are remembered at all. This has to change. It is my hope that after learning about the crucial role tribes play in natural resource governance, environmental professionals will never forget these sovereigns as potential allies.

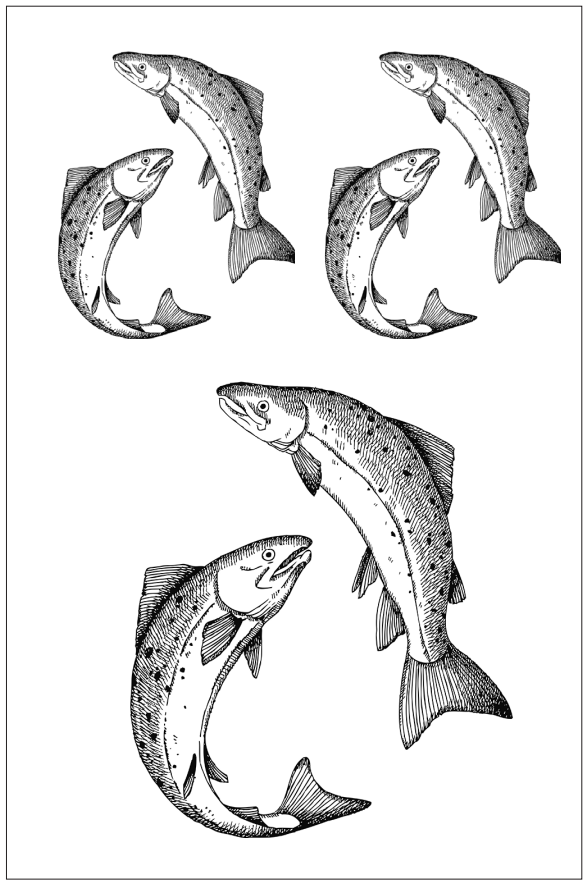
This article discusses the legal authorities, and political capacities, of Indian tribes in the United States to manage natural resources. For lawyers and other professionals who are involved in projects on or near Indian lands, understanding of tribal powers is the first step toward developing the knowledge, skills, and relationships needed to collaborate successfully with Indian tribes on joint projects. Tribes have unique legal authorities and a seat at the table for some of the hardest decisions facing our country, which means that working with them to achieve desired outcomes can be pivotal to success.

If I could make one change in the U.S. law school, forestry school, and general environmental policy curricula, it would be to require every student to take a class on federal Indian law. This course of study looks seriously at questions of sovereign control over natural resources, from hunting and fishing rights to minerals and sites for renewable energy development. While it must be acknowledged that the history of Indians in the United States involves policies of violent removal of many tribal communities from their ancestral homelands, tribes have long demanded and today receive significant recognition as decisionmakers under the law of environmental stewardship. It is good policy as well as smart politics for environmental professionals to consider the potential tribal role, and to collaborate with tribes in advocacy and implementation of projects. Tribes have the capacity to become major players in the natural resource policy of this century. This is the case because of treaties protecting their prerogatives, as well as executive branch policies that are increasingly influenced by effective tribal political advocacy.

The starting point is essential to understand: tribes are sovereigns. American Indian tribes are unique among the United States' many ethnic and racial groups because

they are also sovereign entities that exercise inherent rights to self-government. Tribal claims to stewardship of natural resources may be based in tribal sovereignty, treaties, and property rights, as well as the Indian trust doctrine.

There are now 574 federally recognized tribes in the United States. Many of these have their own sovereign lands, governments, and court systems, and interact on a constant basis with state and federal entities. This article surveys just a few of the legal bases that tribes have for being involved in natural resource management. Their role may exist not just on tribal lands, where their sovereignty is at its most comprehensive, but also in other situations where a land, water, or resource management decision has the potential to impact tribes and their territories.



There are several overarching federal policies that involve tribes in natural resource decisionmaking. To help practitioners understand applicable law, let's start with an overview of important environmental statutes and regulatory programs that recognize protection of lands, as well as the primacy of tribes in enforcing environmental laws in Indian country. There are also different sources for tribal authority over hunting and fishing, because protecting those rights can overlap with the goals of protecting environments to maintain healthy land and water ecosystems.

Under Executive Order 13175, issued in 2000, federal agencies are required to consult with potentially affected federally recognized tribes when developing policies with "tribal implications." This means that agencies must initiate discussions before issuing regulations or making decisions that could impact tribal resources. The executive order also calls for agencies to take tribal viewpoints into account and to avoid taking actions that would impinge on their interests.

One of President Biden's first actions was to express support for this tribal consultation policy and to require federal agencies to shore up implementation. Last January, President Biden issued a presidential memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships. The 2021 P.M. describes the administration's priorities: respecting tribal sovereignty and self-governance, fulfilling federal trust and treaty obligations, and engaging in "regular, meaningful, and robust" consultation with tribes. The P.M. requires agencies to prepare and update plans of action to implement meaningful consultation policies.

Agencies have produced plans to comply with these consultation requirements. The National Congress of American Indians maintains a helpful website with links to pages for agencies that lay out these consultation policies, as well as listing upcoming consultations. This resource is available at ncai.org/resources/consultation-support.

Consultation may sound like a merely procedural step, but it is more than checking a box: if used well it can provide early and important feedback to agencies, helping them to reformulate projects. Note that tribes will not always favor environmental goals; tribes need economic growth and support development projects consistent with their sovereign needs. But sometimes tribal and environmental goals align, such as when tribal cultural and historical knowledge can benefit scientists in determining the health of various ecosystems and the effects of climate change. There are some challenges: a 2019 study by the Government Accountability Office identifies factors that impede effective tribal consultation, such as insufficient tribal resources to participate and lack of staffing to respond to consultation requests.

Yet dialogue can be valuable. If tribes are able to obtain resources for expert advice, these consultations will be more effective at raising concerns at early stages and

in fora where federal agency officials are looking for consensus-based steps forward.

The role of tribes does not end with consultation under E.O. 13175. The National Environmental Policy Act also includes requirements for analysis of environmental justice implications of federal decisions potentially including consideration of tribal concerns. The Biden administration has committed to respecting EJ imperatives of not foisting pollution and other environmental risks on historically disadvantaged communities. This strengthens the important role of tribes when a federal agency is required to issue a permit or right-of-way, or otherwise make a decision with the potential to impact the environment.

NEPA regulations are in flux right now. It is likely that changes introduced in this administration will increase requirements for analysis of tribal impacts. The Trump administration promulgated amended NEPA regulations in 2020. The Biden administration's Council on Environmental Quality has announced that it, in turn, is proposing changes that will at least to some extent roll back the Trump changes. Phase 1 of the Biden administration's NEPA regulatory changes was announced last October. It clarifies the scope of agency review. Broader, Phase 2 regulatory changes are under development. They will aim to meet the nation's environmental, climate change, and environmental justice challenges while providing regulatory certainty to stakeholders. Under NEPA, impacts on tribal resources are analyzed in environmental impact statements and assessments, and new regulations will likely clarify and strengthen this requirement.

Because Indian lands in many places are relatively undeveloped, some of them are rich in endangered species. Tribes thus may play a significant role in Endangered Species Act implementation. Tribes are generally, but not always, subject to federal laws, and ESA enforcement has the potential to cause tension with implementing federal agencies. To defuse this tension, an agreement between the departments of the Interior and Commerce and tribes governs enforcement of the ESA on Indian lands. The secretarial order is titled American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act.

S.O. 32066 allows tribes to be the primary enforcers of the ESA on Indian lands. Environmental practitioners seeking to partner with them might be able to help build capacity in Indian agencies for habitat protection or restoration to help protect the environments on which species depend.

During the mid-1980s, Congress amended a number of environmental laws to expressly provide for a regulatory role for tribes, including the Clean Water Act, the Clean Air Act, the Safe Drinking Water Act, and the Comprehensive Environmental Response, Compensation, and Liability Act. Under these programs, Indian tribes that receive EPA approval are able to either set standards or implement regulatory programs, or both. EPA refers to this as treatment-as-state status, or TAS.

The Clean Water Act provides particularly robust mechanisms for coordinating tribal and national interests. Tribes with Clean Water Act TAS status are able to set water quality standards for tribal waters that can be more stringent than those required by the federal government. A famous 1992 case involved a challenge brought by the city of Albuquerque that resulted in the federal court upholding EPA's authority to grant TAS status to a tribe, the Pueblo of Isleta, and to make Isleta's water quality standards binding upon upstream polluters — in this case, the city of Albuquerque. The city ultimately upgraded its wastewater treatment facilities to ensure compliance with Isleta's strict water quality standards.

Another important Clean Water Act authority for tribes is the Section 401 certification, which prohibits discharges to waters of the United States unless an authorized tribe or state certifies that the discharge is consistent with its water quality requirements or waives certification. The Trump administration promulgated a rule that had placed stringent limits on the timing and potential reach of tribal and state authority under Section 401. The Biden administration has announced its intention to revise the 2020 rule and issued guidance on how agencies will implement the rule in the meantime.

TRIBAL hunting and fishing, which is not subject to state regulation, has been a lightning rod over the last four decades, as tribes increasingly require that these hunting and fishing rights be recognized. Conflicts arise because the nature of game and fish is to ignore political boundaries — fishing and hunting practices, as well as policies that affect the habitat where fish and game live, inevitably impact the health of populations elsewhere. While it is nice to say that a tribe is sovereign and has a fishing right, if the state government is allowing non-Indian fishers to capture all the fish before they get to a tribe's reservation — or the federal government has approved dams that stop the fish from migrating up the river to their spawning places — tribes are going to find themselves having to engage with other sovereigns in order to protect their rights.

It is important to understand that tribal rights can have a few different legal origins. These rights are often subsets of both tribal property rights to control their

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SIDEBAR

Engage Tribes in Managing Public Lands

Kevin Washburn
Dean
University of Iowa College of Law

"With strong Native leadership at Interior and Agriculture, the time is ripe for greater cooperation between tribes and the public land management agencies"

FOR nearly 50 years, Native American tribal nations have been contracted to run federal programs on Indian reservations — primarily the activities of the Bureau of Indian Affairs and the Indian Health Service. These programs, authorized by Congress in an effort to promote "tribal self-determination and self-governance," have been phenomenally successful. In 2021, the initiative amounted to thousands of tribal contracts, cumulatively worth billions of dollars. Through federal contracting, tribes have developed significant capacity to run federal programs and to serve federal public missions.

In 1994, Congress expanded the authority to contract with tribes to public land management agencies, including the National Park Service, the Fish & Wildlife Service, and the Bureau of Land Management. That authority was later added to the U.S. Forest Service. Contracting in the public lands space has a different purpose than supporting tribal self-governance, but it holds great promise as a means to engage tribal governments in public land management. However, despite early hope for this initiative, it has never really gained traction.

Since 1994, tribes have only entered a handful of agreements with Fish & Wildlife, Parks, the BLM, and the Forest Service. These have generally been very successful, but quite modest. None of them have involved the actual management of public lands.

To provide just one example, the Grand Portage Band of Lake Superior Chippewa on the Canadian border in northern Minnesota has a contract to provide services for the Grand Portage National Monument. The Band was heavily involved in establishing the monument in the 1950s, donating much of the land on which the monument sits. Given the remoteness of the area, one can imagine the economies of scale that can be achieved by the federal government working with the tribal government and sharing infrastructure, such as a water treatment system or a snowplow.

In such a remote place, cooperation is economical. However, the Band's annual agreements have fallen short of co-management, with the monument contracting with the Band for a little more than a quarter of the annual operation budget. Although successful, this program is still quite modest.

Each year, the Department of the Interior is required by law to publish notice of the types of activities that can be contracted, and a list of parks and other public land units that are eligible for contracting. That list, published in the Federal Register in March, has not expanded in 20 years.

Tribal nations already control roughly 60 million acres of federal trust land in the United States. These are lands that tribes have managed for centuries. Indeed, this careful stewardship experience has been a significant source of their wisdom and traditional ecological knowledge possessed by tribes and Native people.

Modern tribal governments are well acquainted with federal contracting rules and adept at carefully managing federal property and funds. They can work efficiently and steward resources skillfully to meet federal objectives. They are very familiar with annual government contract audits. With strong engagement, some tribal governments may even be willing to use their own resources to improve facilities and functions.

With strong Native leadership at Interior and Agriculture, the time is ripe for greater cooperation between tribes and the public land management agencies. Interior should identify new activities and public land units that tribes can contract. The department should also conduct tribal consultations nationally and regionally to breathe new life into this program, which continues to have tremendous potential. USDA should do the same with the Forest Service.

The Biden administration has set an ambitious goal of conserving 30 percent of U.S. land by 2030. The federal government will need strong partners in meeting that goal. Engaging tribal nations is one crucial step to success.

lands and inherent sovereignty to regulate activities within their lands. Some tribes have rights under treaties or based on unextinguished aboriginal title to hunt and fish in areas outside of their reservations. Practitioners can understand these different legal theories for tribal fishing or hunting rights broadly as property rights and treaty rights.

Tribes can hold fishing and hunting rights as part of their sovereign control of land. When a tribe has land set aside in trust, often as a reservation, and that land includes access to waters that members use for fishing, then the tribe has a fishing right. Some tribes own land outright subject to restrictions on its sale of this land, so-called restricted fee lands. The establishment of trust or restricted fee land for a reservation is one of the most important actions the federal government can take for tribes. Lands set aside for Indians provide a permanent base, protect the lands against loss, and serve as territory over which tribes exercise their governmental authority. The fundamental purpose of reservation land is to protect and sustain tribal culture and self-determination. For many tribes, hunting and fishing are integral parts of culture and a heritage that goes back thousands of years. There are tribal areas where subsistence hunting and fishing are still crucial parts of the economy and peoples' diets, without which people would go hungry.

Here, questions arise over the applicability of state law, because in general, regulation of hunting and fishing falls to states. Tribal members, however, can exercise their hunting and fishing rights on their reservations without state regulation. This means that Indians can set different seasons for hunting and fishing and allow different amounts of catch.

Tribal hunting and fishing rules can preempt state rules, in all cases for tribal members on tribal trust lands on reservation, and in some cases for non-Indians on tribal lands or for tribal members even off-reservation

The question of non-Indians who want to hunt and fish on tribal territory, and which sovereign, the state or the tribe, should regulate this activity, is a more difficult legal question. The leading case is *New Mexico v. Mescalero Apache Tribe*, a Supreme Court decision from 1983. *Mescalero* demanded a fact-intensive balancing of competing state and tribal/federal interests. The Court recognized the possibility that state interests might be sufficient to justify the assertion of state authority, but acknowledged that federal and tribal interests, reflected in federal law allowing for tribal management of natural resources, justified preempting state law under the facts of the case. The Court found that the Mescalero Apache Tribe's joint program with the federal Bureau of Indian Affairs to develop reservation game and fish resources demonstrated the interest of the tribe and justified preemption of state law as it applied to non-Indians on tribal land.

In light of these facts and the strong federal policy favoring tribal self-determination, in *Mescalero* the Supreme Court held that the state was preempted by federal law from regulating nonmember hunting and fishing on the reservation. But because the Court's preemption analysis involved a fact-specific weighing and balancing of the interests at stake, the possibility exists that other, less comprehensive tribal programs would be unsuccessful in preventing a state from concurrent regulation of nonmember hunting and fishing. Basically, state interests would be much stronger in a situation where the state had substantially contributed to creating and maintaining the fish and game resources at play, and non-Indians might be subject to both tribal jurisdiction (as a person who has come onto tribal land) and state jurisdiction (as an individual who is not covered by the tribal exemption from state law). Practitioners should also be aware that while tribal hunting and fishing rules will apply on lands held in trust for tribes, some reservations include within their boundaries lands owned in fee by non-Indians as allotments. Non-Indians on allotments are more likely to be subject to only state hunting and fishing rules as established by *Montana v. United States.*

Tribes may also claim rights to hunting and fishing through treaties. Many treaties include specific language reserving the right of tribal members to hunt and fish. Some treaties limit this reserved hunting and fishing right to the reservation, but many also include provisions under which members of a tribe reserve the right to hunt and fish off the reservation. For example, many Pacific Northwest Indian tribes have treaties reserving their right to fish in "Usual and Accustomed" fishing places that include habitat of important marine and freshwater fish. These rights are grounded in the treaty language, which makes them the supreme law of the United States. They should be understood not as grants of rights but as reserved rights, meaning that the treaty language reserves the right of the tribe to continue game and fish management and harvesting traditions that extend way back before the establishment of the United States.

TRIBAL hunting and fishing rules can preempt state rules, in all cases for tribal members on tribal trust lands on reservation, and in some cases for non-Indians on tribal lands or for tribal members even off-reservation under reserved fishing and hunting rights. In these scenarios, tribal — not state

— rules control harvest levels. This raises the question, what would happen if a tribe, by allowing more permissive hunting and fishing, started to have a negative impact on a species?

In such a case, federal courts recognize a "conservation necessity" exception to the rule that federal and tribal authorities on hunting and fishing can preempt state law. In the *Puyallup* series of cases, courts articulated three tests that a state regulation would have to pass in order to be able to validly restrict tribal fishing and hunting rights. First, the state must show that its regulation is reasonable and necessary to perpetuate the species, and second, that the regulation is the least restrictive means of achieving this goal. If alternative methods of conservation are available that are less injurious to the tribe's reserved rights, they must be utilized. Third, the regulation must not discriminate against Indians, either by placing greater burdens on them than on non-Indians, or by imposing restrictions that have the effect of preventing Indians from taking their share of the resource.

The conservation exception is important for those who are concerned about tribal resource management. A state may limit Indian-reserved fishing and hunting rights in the interest of conservation both on and off the reservation, and may prohibit tribes from engaging in any activity that would endanger continuation of the species, as long as the state's actions in doing so are nondiscriminatory and necessary. This is a high bar. In general, state and tribal agencies are on the same side, trying to manage and conserve valuable fish and wildlife populations.

IT'S worth concluding with a few examples of recent or ongoing situations in which tribes play an important role in natural resource management decisions.

The Penobscot River Restoration Program was jumpstarted when the Penobscot Indian Nation joined with environmental groups to challenge the relicensing of two dams that had been preventing salmon migration upstream. In 2004, a multiparty settlement agreement was entered into and subsequently approved by the Federal Energy Regulatory Commission. Under the settlement, the Penobscot River Restoration Trust received an option to purchase three dams from the license holders and remove the two most seaward dams. The existing licensees for six remaining dams on the river were allowed to increase electricity production. As a result, total generation remained constant, and the settlement provided funding for fisheries management and restored one thousand miles of habitat for eastern migratory fish, including Atlantic salmon, American shad, and short-nosed sturgeon. This is a prime example of the kinds of synergies between tribal goals of sovereignty over natural resources and improved fisheries management.

Another example of this synergy, but based on land, was the creation of Bears Ears National Monument by President Obama in 2016, largely in response to the request of five tribes — the Ute Mountain Ute, Navajo, Ute, Zuni, and Hopi — with cultural and ancestral ties to the region. At the time it was created, a management plan for the monument included tribal participation in stewardship of the land. After the monument was diminished by President Trump in an order that divided the monument into noncontiguous units, in October President Biden announced that he would restore Bears Ears, where tribes continue to collect plants, minerals, objects, and water for religious and cultural ceremonies and medicinal purposes.

In management decisions related to habitat conservation, hydropower, and fisheries harvest, environmental practitioners seeking to protect natural resources often share mutual goals with tribes looking to exercise sovereign rights

A currently brewing conflict between tribes and a developer involves Enbridge Energy's oil pipeline under the Great Lakes. In September, the Bay Mills Indian Community submitted written testimony to the Michigan Public Service Commission opposing the request of the corporation to build a new Line 5 oil pipeline tunnel. The tribe argues that the project threatens its treaty rights to hunt and fish, and its cultural and religious interests in the Great Lakes. The litigation over the pipeline will involve significant discussion of the tribe's right to protect the waters where it has fishing and hunting rights under treaty.

These examples demonstrate the importance of tribes in management decisions related to habitat conservation, hydropower, and fisheries harvest. Environmental practitioners seeking to protect natural resources often, but not always, share mutual goals with tribes looking to exercise sovereign rights to land and water stewardship. However, failing to understand the centrality of tribes, as well as the legal authorities underpinning their role, will result in a shortfall in both objectives.

Tribes are already participating in difficult natural resource management decisions. Moving forward, these collaborations will only become more common. In the world of natural resource management, tribes should never again be the forgotten sovereigns. Rather, environmental practitioners, in recognition of tribes' sovereign status and related legal rights, should be working to benefit from the voices of tribes in determining how to make efficient and wise use of natural resources. **TEF**