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## "Straight Stealing": Towards an Indigenous System of Cultural Property Protection

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# “STRAIGHT STEALING”: TOWARDS AN INDIGENOUS SYSTEM OF CULTURAL PROPERTY PROTECTION

Angela R. Riley\*

*Abstract:* Incidents involving theft of indigenous peoples’ traditional knowledge and the blatant appropriation of culture have become more widely acknowledged in recent decades. It is now apparent that international, national, and tribal laws must work together to protect the cultural property of indigenous groups. However, tribal law, which provides vital cultural context, must serve as the foundation. Unlike top-down legal systems, tribal laws reflect tribal economic systems, cultural beliefs, and sensitive sacred knowledge in nuanced ways that national and international regimes simply cannot. Accordingly, this Article offers two central reasons why the development of tribal law is critical for indigenous peoples to direct their own cultures and destinies in a technological world. First, the essence of sovereignty for indigenous peoples means exercising their inherent authority to define tribal laws and be governed by them. The development and enforcement of tribal legal systems reinforces tribal sovereignty and affirms principles of self-determination. Additionally, when extant and ascertainable, tribal law can influence dominant legal systems. Adjudicatory bodies increasingly draw on tribal law to address issues that go to the essence of tribal life. Focusing on the sui generis, tribal law systems of federally recognized tribes in the contiguous United States, this Article examines in detail the actions tribes are undertaking to ensure the preservation of their cultural property.

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## INTRODUCTION

The eclectic hip-hop/funk super-duo OutKast brought down the house at the 2004 Grammy Awards when they introduced their performance of “Hey Ya!” with an ethereal, Indian-sounding<sup>1</sup> melody. This serene, mystical introduction was immediately juxtaposed with a thumping bass and the descent of spaceship-like tipis as OutKast’s Big Boi and Andre 3000 (a.k.a. Dre) appeared on stage amidst a scantily clad dance troupe. Flanked by the University of Southern California marching band (wearing hats adorned with feathers), OutKast belted out the hit single. The duo racked up a total of three Grammys that night, including one for the coveted Album of the Year.<sup>2</sup> The raucous Grammy audience stayed on its feet for the duration of the performance and grew more excited as OutKast’s back-up dancers—most of whom appeared to be African-American women—bopped around the stage wearing buckskin bikinis, long braids and feathers in their hair. The dancers’ choreography included a sequence wherein they hit their open mouths with flat palms, imitating a traditional Plains-tribe war cry.

OutKast’s Grammy performance aired on CBS only weeks after the much-publicized Janet Jackson Super Bowl “breast incident,” shown by the same network. In fact, the fallout from CBS’s Super Bowl half-time show was so intense, the station rescinded Jackson’s invitation to participate in the Grammys.<sup>3</sup> Determined to prevent a repeat debacle,

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1. When referring to the indigenous peoples of the United States, this Article uses the terms “Native American,” “American Indian,” and “Indian” interchangeably.

2. OutKast’s album, *Speakerboxxx/The Love Below*, picked up Grammys for Album of the Year, Best Rap Album, and Best Urban/Alternative Performance. Matt Frilingos, *What a Blooming Good Year for an Outkast*, DAILY TELEGRAPH, June 10, 2004, at T14.

3. Lynn Norment, *Janet Speaks!*, EBONY, Apr. 1, 2004, at 148.

CBS took added precautions and broadcast the 46th Annual Grammy Awards with a five-minute delay to “screen out improprieties.”<sup>4</sup>

Media reports following the awards show indicated that CBS could breathe a sigh of relief; the 46th Annual Grammys, prominently featuring OutKast, was a big hit.<sup>5</sup> Soon thereafter, however, the Indian press—followed by a few larger media outlets—reported an outcry coming from Native communities over the act. Indians compared OutKast’s performance to whites performing in blackface;<sup>6</sup> some Indians speculated as to what the reaction would have been if the artists were “wearing yarmulkes and the Hasidic dress and bumping and grinding.”<sup>7</sup> Complaints ranged from a feeling of violation over the use of Indian symbols reserved for ceremonial purposes, like feathers and war paint,<sup>8</sup> to anger over the perpetuation of “tomahawk-and-tipi stereotypes.”<sup>9</sup> The greatest shock came when *Indian Country Today* revealed that the melody piped in to introduce “Hey Ya!” was the sacred Navajo (Dine) “Beauty Way” song.<sup>10</sup> According to the Navajo, the song is “meant to restore peace and harmony,” and it is improper to use the song for entertainment purposes.<sup>11</sup>

Several days after the event, CBS issued this statement: “We are very sorry if anyone was offended.”<sup>12</sup> However, no apology ever came from Andre 3000 or Big Boi for the use of ceremonial symbols or the sacred

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4. Jim Adams, *OutKast’s Grammy Performance Offends Many*, INDIAN COUNTRY TODAY, Feb. 18, 2004, at A1.

5. See Malcolm X Abram, *You Don’t Have to Be an OutKast to Enjoy*, AKRON BEACON J., Feb. 9, 2004, at A1; Geoff Boucher, *Grammy Show Boosts Sales for OutKast and Others*, L.A. TIMES, Feb. 14, 2004, at E14; Steve Morse, *The Grammys Shake It*, BOSTON GLOBE, Feb. 9, 2004, at B7.

6. Posting of Zoltan Grossman, Assistant Professor of Geography and American Indian Studies, University of Wisconsin–Eau Claire, to <http://209.157.64.200/focus/f-news/1075137/posts> (Feb. 9, 2004).

7. Joal Ryan, *Native Americans Rap Outkast*, E! ONLINE NEWS, Feb. 11, 2004, at <http://www.eonline.com/News/Items/0,1,13487,00.html> (last visited Jan. 29, 2005).

8. See Pat Seremet, *Java*, HARTFORD COURANT, Feb. 16, 2004, at D2 (quoting Tom Bee, an Albuquerque music producer, who said he was offended by the use of feathers, a sacred symbol for Natives, by the dancers in the show); Ryan, *supra* note 7 (quoting Andrew Brother Elk, chairman of the San Francisco-based Native American Cultural Center: “We’re not attacking OutKast as artists . . . but we are going to question the commercialization of our symbols.”).

9. Associated Press, *CBS Apologizes for Grammy Act*, L.A. TIMES, Feb. 17, 2004, at E3.

10. Jan-Mikael Patterson, *Grammy TV Show’s Use of Sacred Song Causes Outrage*, NAVAJO TIMES, Feb. 12, 2004, at A-1.

11. *Id.* (quoting Anthony Lee, Sr., president of the Navajo Medicine Man Association).

12. Levi J. Long, *Apologies Sought over Performance*, SEATTLE TIMES, Feb. 14, 2004, at B3.

song.<sup>13</sup> Not surprisingly, Andre 3000 has diligently defended his own works against appropriation.<sup>14</sup> At the 2003 Billboard Music Awards, Andre 3000 harshly criticized the unauthorized downloading of the hit song, “Hey Ya!,” off of OutKast’s multi-platinum *SpeakerBoxxx/The Love Below* album, calling the downloading “straight stealing.”<sup>15</sup> There is, of course, an important legal distinction between the unauthorized downloading of “Hey Ya!,” for example, and the appropriation of the Navajo “Beauty Way” song—the former is protected by copyright law, and the latter is not. In fact, no law currently exists to protect against OutKast’s appropriation of Native culture, Native symbols, Native dance, or Native music.<sup>16</sup>

The fact that OutKast could execute its act at the Grammys with little social or political response raises serious questions about the perception of the Indian in the American psyche: why are Indians viewed differently from other minority groups? Why is it that OutKast’s performance, so deeply offensive to Indian people, was embraced largely without comment by the viewing audience? Even in a time of heightened sensitivity, no one at CBS or the Grammys ever considered pulling the plug on OutKast’s act, even though their portrayal of Indians rivaled that of an insolent mid-century Hollywood Western.<sup>17</sup>

Setting aside these important questions for now—the answers to which are beyond the scope of this piece—this Article seeks to address the immediate legal issue: what, if anything, can be done about the appropriation and commodification of indigenous peoples’ cultural property?<sup>18</sup> More specifically, what *is* being done today in Native American and indigenous communities to ensure legal protection for indigenous culture?

Incidents involving theft of traditional knowledge and blatant

13. Associated Press, *OutKast Spot at Grammys Brings Apology from CBS*, OAKLAND TRIB., Feb. 14, 2004, at 7.

14. Dennis L. Wilson & Konrad Gatien, *Fan Web Sites and Copyright Enforcement*, L.A. LAW., May 2004, at 15.

15. *Id.* This is not the first time that OutKast has spurred controversy. OutKast included on its 1998 album, *Aquemini*, a single entitled “Rosa Parks.” Although the lyrics do not mention Rosa Parks, the chorus repeats the words, “Ah, ha, hush that fuss / Everybody move to the back of the bus.” OUTKAST, *Rosa Parks*, on *AQUEMINI* (LaFace Records 1998). Parks sued over unauthorized use of her name and image. *Parks v. LaFace Records*, 329 F.3d 437, 441 (6th Cir. 2003), *cert. denied*, 540 U.S. 1074 (2003).

16. See *infra* Part I.

17. See *infra* Part I.

18. For a complete discussion of the definitional scope of “cultural property” see *infra* Part I.

appropriation of culture have become more widely acknowledged in recent decades,<sup>19</sup> and much of the legal scholarship in this area has focused on the role of domestic and international law in protecting the cultural property of indigenous peoples.<sup>20</sup> I, too, have argued for the creation of federal laws within the United States to protect the cultural property of Native peoples, a proposal for which there is strong historical and constitutional support.<sup>21</sup> Nevertheless, it does not appear likely that Congress will enact such legislation, at least not anytime in the near future.<sup>22</sup> International solutions have begun to take shape, but complicated forces—such as the richly varied status and cultural dimensions of indigenous groups across the globe, the wide-ranging political power and standing of the nation-states in which they are situated, and the current backlash against the expansion of intellectual property rights in general—make them elusive as well.<sup>23</sup>

It is now apparent that a tiered system of laws—international,

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19. See generally Keith Aoki, *Weeds, Seeds & Deeds: Recent Skirmishes in the Seed Wars*, 11 CARDOZO J. INT'L & COMP. L. 247 (2003); Shubha Ghosh, *Globalization, Patents, and Traditional Knowledge*, 17 COLUM. J. ASIAN L. 73 (2003); Susan Scafidi, *Intellectual Property and Cultural Products*, 81 B.U. L. REV. 793 (2001); Rebecca Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 ARIZ. ST. L.J. 299 (2002).

20. See generally Rosemary J. Coombe, *The Recognition of Indigenous Peoples' and Community Traditional Knowledge in International Law*, 14 ST. THOMAS L. REV. 275 (2001); Terence Dougherty, *Group Rights to Cultural Survival: Intellectual Property Rights in Native American Cultural Symbols*, 29 COLUM. HUM. RTS. L. REV. 355 (1998); Ghosh, *supra* note 19; Agnes Lucas-Schloetter, *Folklore*, in INDIGENOUS HERITAGE AND INTELLECTUAL PROPERTY: GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE 315 (Silke von Lewinski ed., 2004); Traci L. McClellan, *The Role of International Law in Protecting the Traditional Knowledge and Plant Life of Indigenous Peoples*, 19 WIS. INT'L L.J. 249 (2001); James D. Nason, *Traditional Property and Modern Laws: The Need for Native American Community Intellectual Property Rights Legislation*, 12 STAN. L. & POL'Y REV. 255 (2001).

21. See Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L.J. 175, 205–14 (2000).

22. See WORLD INTELLECTUAL PROPERTY ORGANIZATION, SURVEY ON EXISTING FORMS OF INTELLECTUAL PROPERTY PROTECTION FOR TRADITIONAL KNOWLEDGE, at <http://www.wipo.int/tk/en/questionnaires/ic-2-5/replies.pdf> (last visited Jan. 29, 2005) (stating that the United States “does not have intellectual property laws that provide protection specifically for ‘traditional knowledge’” and it “is not of the view that special intellectual property protection is needed for ‘traditional knowledge’”).

23. See Coombe, *supra* note 20, at 277 (noting that, although indigenous groups certainly share some commonalities, each culture is distinct; there is no single “indigenous” viewpoint); Ghosh, *supra* note 19, at 117–18 (discussing the problem of theft of indigenous peoples’ traditional knowledge, not by outsiders, but by the “political-economic elites of less developed countries”). See generally LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* (2001) (arguing that increasingly expansive intellectual property laws shrink the public domain and threaten creative freedom.).

national, and tribal—will best protect the cultural property of indigenous groups. However, tribal law, which provides vital cultural context, must serve as the foundation. Because it is suited to indigenous groups' particular cultures and normative framework, tribal law is inimitably capable of capturing and accommodating the unique features of the tribal community. Tribal cultures are not all alike; tribal laws reflect a tribe's economic system, cultural beliefs, and sensitive sacred knowledge in nuanced ways that top-down national and international regimes simply cannot. Thus, attention has recently turned to the *sui generis* laws of indigenous peoples as the source for developing legal regimes to protect indigenous works.<sup>24</sup>

Critics charge, justifiably, that *sui generis* laws are limited because they are typically unenforceable outside of the communities in which they develop. Critics argue that, in the absence of corresponding state-sanctioned enforcement mechanisms, focusing on tribal law systems is futile.<sup>25</sup> This Article acknowledges that there are genuine jurisdictional limits on the ability of tribes to enforce tribal laws outside of their geographic territories. Despite these limitations, however, the development of tribal law is critical for indigenous peoples to direct their own cultures and destinies in a technological world. Sovereignty for indigenous peoples means exercising their inherent authority to define tribal laws and be governed by them.<sup>26</sup> This is the case even when tribes do not have the power to enforce those laws outside of their territorial bounds. The authority of sovereignty must not be limited by the colonizers' narrow vision of tribal power.

Beyond reinforcing tribal sovereignty, there is another equally important but independent justification for the creation and development of tribal laws. As this Article demonstrates, tribal law can influence dominant legal systems. When it is extant and accessible, adjudicatory bodies increasingly draw on tribal law to address issues that go to the essence of tribal life. The incorporation of tribal law into Anglo-American jurisprudence lends weight and legitimacy to tribal law and provides an opportunity to infuse the dominant legal system with indigenous conceptions of justice.

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24. See Coombe, *supra* note 20, at 277; Ghosh, *supra* note 19, at 117–18.

25. See, e.g., Srividhya Ragavan, *Protection of Traditional Knowledge*, 2 MINN. INTELL. PROP. REV. 1, 25–26 (2001) (stating that *sui generis* tribal law systems may be difficult to enforce and do not hold a great deal of influence in a world increasingly focused on the expansion of conventional intellectual property rights).

26. See *Williams v. Lee*, 358 U.S. 217, 220 (1959).

Battles over territory virtually define the tumultuous relationship between the United States and its indigenous peoples.<sup>27</sup> Now there is a new battle, and the properties at stake are less tangible, more elusive. Across the world, indigenous peoples are fighting to control their histories, their cultures, and their destinies.<sup>28</sup> As part of this struggle, tribes have begun to set forth their own laws regarding the disposition, ownership, and control of their cultural property and traditional knowledge.<sup>29</sup>

While there is ample anecdotal evidence of indigenous groups' efforts to protect their cultural property, this Article represents the first attempt to provide a comprehensive survey of what each of the federally recognized tribes in the contiguous United States has done to date to ensure the preservation of their cultural property. Part I of this Article briefly explores the gap between Anglo-American intellectual property regimes and indigenous creations and explains how this gap leaves indigenous cultural property unprotected and vulnerable to appropriation. Part I also describes international and national efforts to achieve the desired protections, but explains the importance of shifting focus to the customary legal systems of indigenous peoples themselves.

Focusing primarily on indigenous groups within the United States, Part II lays out empirical data that reveals what American Indian tribes are doing to protect their cultural property. Part II then examines, in particular, the role of cultural resource programs and tribal codes in this endeavor. Part III defines the concept of "living sovereignty" and emphasizes why it is essential for tribes to define and develop tribal law, not only to protect their cultural property, but as part of a broader struggle for collective rights and cultural and political sovereignty. Additionally, Part III sets forth an independent justification for the development of tribal law—namely, evidence suggests that tribal law is making its way into mainstream jurisprudence. Non-Indian courts are increasingly open to the application of tribal law, which presents

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27. See generally VINE DELORIA, JR., *BEHIND THE TRAIL OF BROKEN TREATIES: AN INDIAN DECLARATION OF INDEPENDENCE* (1974).

28. See generally Russel Lawrence Barsh, *Indigenous Peoples in the 1990s: From Object to Subject of International Law?*, 7 HARV. HUM. RTS. J. 33, 35 (1994) (noting that globally, "indigenous peoples have been struggling for the explicit recognition of their unqualified right to self-determination").

29. See *infra* Part II. This is not to say that, until now, tribes have been without internal controls regarding their cultural property. However, the process of developing legal protections through codification and formation of tribal common law in the tribal court system is a relatively recent phenomenon.



indigenous peoples with a unique opportunity to influence the world's dominant legal regimes in the arena of cultural property protection.

Finally, Part IV acknowledges and addresses a potential criticism of the indigenous approach to cultural property that this Article advocates—specifically, that the expansion of intellectual property laws threatens the free circulation of ideas<sup>30</sup> and our common cultural heritage. Despite this potential criticism, this Article seeks to justify the legal protection of indigenous peoples' cultural property on the grounds that, rather than signifying increased propertization, the recognition of indigenous peoples' cultural property merely means putting them on the same footing as other citizens.

## I. THE PROBLEM OF PROTECTING INDIGENOUS PEOPLES' CULTURAL PROPERTY

OutKast's Grammy performance passed largely without mainstream criticism because, simply put, it reflected true Americana. In a country where national football teams are named "Redskins," suburbanites tool around in Jeep "Cherokees," and youths swill "Crazy Horse" Malt Liquor, commodified caricatures of Indians are woven into the fabric of American life.<sup>31</sup> In fact, it is not only commonplace to commodify Indian culture, it is big business. Non-Indians pass themselves off as Indian shamans peddling spiritual enlightenment, non-Indian artists use Native symbols and designs to market their own "indigenous" art, and businesses from cigarette makers to butter companies evoke images of ancient Indians to push products.<sup>32</sup>

In the face of these hegemonic forces, the protection of cultural property is essential for the continued survival of indigenous peoples. In addition to maintaining control over tangible resources—such as land, water, fish, and game—indigenous peoples must also exert control over the intangible aspects of their culture.

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30. See Ben Depoorter, *The Several Lives of Mickey Mouse: The Expanding Boundaries of Intellectual Property Law*, 9 VA. J. L. & TECH. 4, ¶¶ 16–17 (Spring 2004) (discussing the well-known criticism—most prominently advanced by Lawrence Lessig—that the expansion of intellectual property laws is detrimental to the "innovation commons" of resources necessary for innovation and creativity), at [http://www.vjolt.net/vol9/issue2/v9i2\\_a04-Depoorter.pdf](http://www.vjolt.net/vol9/issue2/v9i2_a04-Depoorter.pdf) (last visited Jan. 29, 2005).

31. See MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE? 75–77 (2003). See generally PHILIP J. DELORIA, PLAYING INDIAN (1998).

32. See Tsosie, *supra* note 19, at 311–12; *Bulun Bulun v. R & T Textiles Proprietary Ltd.* (1998) 86 F.C.R. 244, 247 (Austl.).

Claims to cultural property encompass both tangible and intangible aspects. When cultural property law and theory first developed, “cultural property” was typically limited to a culture’s material possessions. John Henry Merryman, the father of cultural property law, defined cultural property as “objects of artistic, archaeological, ethnological, or historical interest.”<sup>33</sup> Today, however, cultural property is defined more expansively, as “the tangible and intangible effects of an individual or group of people that define their existence, and place them temporally and geographically in relation to their belief systems and their familial and political groups, providing meaning to their lives.”<sup>34</sup> Thus, indigenous peoples’ claims to cultural property include not only places and objects<sup>35</sup> (and all other physical materials of a particular culture), but also traditions or histories that are connected to the group’s cultural life, including songs, rituals, ceremonies, dance, traditional knowledge, art, customs, and spiritual beliefs.<sup>36</sup>

The continued existence of indigenous peoples depends on cultural maintenance.<sup>37</sup> Protection of both tangible and intangible property is necessary for the survival of indigenous groups.<sup>38</sup> Until recently, indigenous peoples’ claims to cultural survival have focused primarily on the preservation of tangible property.<sup>39</sup> This is in part because culture for native peoples is inseparable from the activities of daily life. For indigenous peoples, the natural, physical world is inexorably intertwined with the spiritual and cultural world. Thus, the stripping of tangible property often results in corresponding cultural destruction.<sup>40</sup>

Historical practice demonstrates the need to draw a connection between tangible and intangible indigenous cultural property. For example, in the United States, the federal government has systematically exercised its power to deprive indigenous nations of their tangible

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33. John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT’L L. 831, 831 (1986).

34. SHERRY HUTT ET AL., *CULTURAL PROPERTY LAW*, at xi (2004).

35. Claims to physical places and objects would not be limited to claims of ownership, but could include claims of access, such as in sacred site cases. See *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439, 451 (1988).

36. See Ronald Sackville, *Legal Protection of Indigenous Culture in Australia*, 11 CARDOZO J. INT’L & COMP. L. 711, 729–30 (2003).

37. Tsosie, *supra* note 19, at 305–09.

38. See Tsosie, *supra* note 19, at 305–06.

39. See Tsosie, *supra* note 19, at 311–12.

40. See Kristen A. Carpenter, *In the Absence of Title: Responding to Federal Ownership in Sacred Site Cases*, 37 NEW ENG. L. REV. 619, 620–21 (2003).

property.<sup>41</sup> The federal government's divestiture of Indian lands and resources represents an assault on tribal political sovereignty that has had devastating effects on indigenous peoples' cultural survival as well.

A now-infamous United States Supreme Court decision, *Lyng v. Northwest Indian Cemetery Protective Ass'n*,<sup>42</sup> provides a pointed example of such devastation. In *Lyng*, the Court affirmed the right of the federal government to build a road through a site sacred to the Yurok, Karok, and Tolowa Indians, thus essentially destroying the tribes' ability to practice their religion.<sup>43</sup> Because the religious practices were tied to that location, known as the "High Country," destruction of the site also destroyed the ceremonies attached to it.<sup>44</sup>

This phenomenon is not unique to the United States, but has played out across the world. In Brazil, for example, the obliteration of the rainforests has not only damaged indigenous inhabitants' tangible, physical world, but is also destroying their language, religion, and cultural existence.<sup>45</sup> For indigenous peoples, destruction of the physical environment often brings with it cultural devastation.

Similarly, the appropriation and distortion of indigenous peoples' intangible property also causes cultural devastation. As one critic has noted, "[t]he failure to protect Native cultures . . . perpetuates significant harm to Native people as distinctive, living cultural groups."<sup>46</sup> This harm occurs because the appropriation of Native culture by the majority society continues the systems of dominance and subordination that have been used to colonize, assimilate, and oppress indigenous groups.<sup>47</sup> When dominant culture appropriates Native culture, it is "transformed in the public imagination into some aspect of 'American' culture."<sup>48</sup>

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41. See generally *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980) (finding that, once gold was discovered, the United States had willfully abrogated the Fort Laramie Treaty pursuant to which the federal government had promised the Black Hills for the exclusive use and occupation of the Sioux Nation); *Tee-Hit-Ton v. United States*, 248 U.S. 272 (1955) (noting that the United States exercised its power to take Indian property without paying just compensation); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823) (justifying the conqueror's right to destroy Indians' rights to aboriginal title by conquest under the doctrine of discovery).

42. 485 U.S. 439 (1988).

43. *Id.* at 451.

44. See Carpenter, *supra* note 40, at 623.

45. See Samara D. Anderson, *Colonialism Continues: A Comparative Analysis of the United States and Brazil's Exploitation of Indigenous Peoples' Forest Resources*, 27 VT. L. REV. 959, 976 (2003).

46. Tsosie, *supra* note 19, at 310.

47. Tsosie, *supra* note 19, at 311.

48. Tsosie, *supra* note 19, at 314.

This phenomenon is evident, for example, in the use of Indian mascots. Non-Indians often claim that Indian mascots—for instance, the smiling, buck-toothed caricature of the Cleveland Indians' Chief Wahoo, or the Washington "Redskin"—merely represent nostalgic figures of America's past.<sup>49</sup> Rather than viewing Native peoples as distinct groups with thriving, vital cultures in a contemporary world, these caricatures of the Indian exist in the collective American consciousness, suspended opposite the mythical Cowboy. In this American consciousness, Indians are understood not as active participants in dynamic cultures, but as anachronistic symbols of days past. The OutKast performance trades on these stereotypes, depriving Native people control over sacred cultural elements—the feather, the song, the drum—and denying them a voice.

Today, the importance of intangible property protection to the survival of indigenous peoples is apparent.<sup>50</sup> In the past two decades it has become abundantly clear that existing intellectual property regimes, born in the West, simply do not protect the intangible cultural property of indigenous groups.<sup>51</sup> This lack of protection has become a subject of increasing concern in an age of globalization, where property and quasi-property can spread across the world in a matter of hours—or, with the proliferation of the Internet, in a matter of moments.<sup>52</sup> Accounts of appropriation of indigenous knowledge are continually reported, each one more troubling than the next. From the blatant pilfering of traditional indigenous music (in at least one case, an actual recording was lifted and incorporated into a mainstream pop song),<sup>53</sup> to the theft of indigenous designs<sup>54</sup> or the unauthorized taping of sacred ceremonies,<sup>55</sup>

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49. See Gavin Clarkson, *Racial Imagery and Native Americans: A First Look at the Empirical Evidence Behind the Indian Mascot Controversy*, 11 CARDOZO J. INT'L & COMP. L. 393, 403 (2003).

50. *Id.*

51. See Richard A. Guest, *Intellectual Property Rights and Native American Tribes*, 20 AM. INDIAN L. REV. 111, 116–33 (1996). See generally Nason, *supra* note 20; Riley, *supra* note 21. This is not to say that there is adequate protection for indigenous peoples' claims to tangible property. However, in this discussion of Western intellectual property law, this Part will focus on indigenous peoples' intangible property claims.

52. See Erica-Irene Daes, *Intellectual Property and Indigenous Peoples*, 95 AM. SOC'Y INT'L L. PROC. 143, 144 (2001).

53. See Riley, *supra* note 21, at 175–76 (discussing how the pop group Enigma incorporated the "Song of Joy" of the Ami, an indigenous group, into its own song "Return to Innocence," which then spent thirty-two weeks on *Billboard* magazine's Top 100 Chart).

54. *Bulun Bulun v. R & T Textiles Proprietary Ltd.* (1998) 86 F.C.R. 244, 247 (Austl.).

55. Sam Lewin, *Sovereignty Symposium Contains Scary Messages*, NATIVE AM. TIMES, June 9, 2004, at 1 (discussing the unauthorized videotaping of a sacred Pueblo ceremony that was then duplicated and distributed on the Internet).

examples of cultural appropriation and distortion are seemingly endless.

The lack of legal protection for indigenous peoples under current intellectual property systems is a complicated and multi-faceted problem. For example, under the U.S. regime (which has become the dominant regime in the world), songs are protected, if at all, largely by federal copyright law.<sup>56</sup> However, the “Beauty Way” song—a traditional Navajo “curing” song that has existed for thousands of years<sup>57</sup>—simply does not fit within the parameters of federal copyright law. Because the “Beauty Way” song is an inter-generational creation, formed as a living work within Navajo culture, the song is not “original,” it does not have a known author or author(s), nor is it “fixed in any tangible medium of expression.”<sup>58</sup> As a result, it is ineligible for protection under federal copyright laws.<sup>59</sup>

Copyright law similarly leaves unprotected other forms of Native intangible cultural property such as dances, music, stories, folklore, and oral literature.<sup>60</sup> As an example, if a sacred Indian dance or ceremony is secretly videotaped and mass-produced for sale on the Internet, there are no legal ramifications under copyright law because the work is thought to be in the public domain and therefore lacks those characteristics required for copyright protection.<sup>61</sup> As a result, the Navajo have no remedy for the appropriation of the “Beauty Way” song; thus non-Navajos may use it freely, even for commercial purposes.<sup>62</sup>

In fact, existing law does not provide Native people with a remedy for any aspect of OutKast’s performance. Although OutKast appropriated Native culture by dressing up like Indians, imitating Indian dances, and misusing the feather, a sacred symbol for Native Americans,

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56. The federal copyright act enumerates those works that may be copyrighted, including “musical works, including any accompanying words.” 17 U.S.C. § 102(a)(2) (2000). Performers may also obtain a copyright in recorded versions of their performances, *see id.* § 114, or “of those musical works.”

57. *See* Patterson, *supra* note 10, at at A-1 (interviewing Leon Yazzie, a Navajo Indian, whose family “practice[s] traditional healing ceremonies”).

58. *See* 17 U.S.C. § 102(a) (stating that copyright protection is available for “original works of authorship fixed in any tangible medium of expression”).

59. *See* Riley, *supra* note 21, at 187.

60. *See* Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1, 27–28 (1997).

61. A choreographic work not fixed in a tangible medium of expression, for example, would be ineligible for copyright protection pursuant to 17 U.S.C. § 102(a), and would, therefore, be in the public domain and available for public use. *See* Lewin, *supra* note 55, at 1.

62. The “Beauty Way” song may also be appropriated by Navajos for commercial use, unless the tribe has a tribal law addressing commercialization of its intangible property. *See infra* Part III.A.

contemporary intellectual property regimes simply are not designed to protect against this type of cultural appropriation.<sup>63</sup> Despite the fact that mass propertization is a distinctly Western<sup>64</sup> phenomenon, scholars have noted that the Western liberal tradition finds the protection of culture through law a difficult concept to grasp.<sup>65</sup> Similar problems exist for other types of intangible cultural property, including traditional medicine,<sup>66</sup> local farming techniques,<sup>67</sup> and the proper use and preservation of sacred sites.<sup>68</sup> All fail to satisfy Western notions of property.

Ironically, now that increasing value is being placed on the survival of minority cultures,<sup>69</sup> threats to their continued existence are

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63. Cf. William J. Hapiuk, Jr., *Of Kitsch and Kachina: A Critical Analysis of the Indian Arts and Crafts Act of 1990*, 53 STAN. L. REV. 1009, 1028–31 (2001) (critiquing the Indian Arts and Crafts Act for its narrow view of Indian art and its failure to accommodate the evolution of Indian identity). *But see* Indian Arts and Crafts Act, 25 U.S.C. §§ 305a–305f (2000) (protecting Indians from wrongful misappropriation of Indian art). Tribes must decide for themselves how to strike the proper balance between cultural property protection and cultural revitalization. *See infra* Part III.A.

64. The term “Western” is used throughout this Article to indicate those legal systems of European origin. It does not refer to the original “westerners,” the indigenous peoples who first inhabited the western hemisphere.

65. *See* Tsosie, *supra* note 19, at 309 (arguing that “liberals routinely fail to understand why control of Native culture should ‘belong’ to Native people”); cf. Paul J. Heald, *Trademarks and Geographical Indications: Exploring the Contours of the TRIPS Agreement*, 29 VAND. J. TRANSNAT’L L. 635, 645–49 (1996) (discussing the role of geographical indications under Trade-Related Aspects of Intellectual Property Rights (TRIPS), which safeguard geographically specific products of Western culture, such as feta cheese and champagne).

66. *See* JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 127–29 (1996). Boyle recounts the story of a Western drug company that developed a remedy for Hodgkin’s disease from vinca alkaloids derived from the rosy periwinkle of Madagascar. *Id.* The vinca alkaloids long had been used in Madagascar to treat diabetes. *Id.* These therapeutic qualities led the company to investigate the plant, which led to the development of a drug that cures Hodgkin’s disease and earns its manufacturer \$100 million per year. Madagascar shared in none of these profits. *Id.*

67. Gillian N. Rattray, *The Enola Bean Patent Controversy: Biopiracy, Novelty and Fish-and-Chips*, 2002 DUKE L. & TECH. REV. 0008, ¶¶ 12–13 (June 3, 2002) (discussing the Enola bean controversy, wherein Mexican farmers were prevented from exporting a traditionally grown food, the Enola bean, to the United States because a U.S. corporation had acquired a patent on the bean in a specific color), at <http://www.law.duke.edu/journals/dltr/articles/2002dltr0008.html> (last visited Jan. 29, 2005).

68. *See* Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Non-Owners*, 52 UCLA L. REV. (forthcoming 2005).

69. *See* S. James Anaya & Robert A. Williams, Jr., *The Protection of Indigenous Peoples’ Rights Over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33, 33 (2001) (“One of the most notable features of the contemporary international human rights regime has been the recognition of indigenous peoples as special subjects of concern.”).

simultaneously increasing, and with great vigor. Thus, efforts to protect these cultures are more critical now than ever.

#### A. *The Response from the Top Down*

In the last few decades, indigenous peoples have sought to define their right to continued existence under international law.<sup>70</sup> This process has resulted in a contemporary body of human rights law that addresses the survival of indigenous groups.<sup>71</sup> The International Labour Organization's (ILO) Convention Number 169 on the Rights of Indigenous and Tribal Peoples of 1989 was one of the first international documents devoted to addressing indigenous peoples' rights.<sup>72</sup> The Convention focused "on indigenous peoples' desire to control their own institutions and economic development as well as maintain their separate customs and beliefs."<sup>73</sup>

The ILO Convention was followed by the United Nations Draft on the Rights of Indigenous Peoples, which emphasized the rights of indigenous peoples to be free from exploitation and to prevent destruction of their natural resources.<sup>74</sup> Currently, there is a strong push to adopt a U.N. Declaration on the Rights of Indigenous Peoples,<sup>75</sup> in addition to efforts by the Organization of American States (OAS) to adopt a declaration on indigenous rights.<sup>76</sup> Additionally, general human rights principles that are incorporated into treaties, and already part of international law, have been interpreted as including the collective rights of the world's indigenous peoples.<sup>77</sup>

Since these critical documents were drafted, the world has entered

70. See Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660, 664.

71. S. James Anaya, *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, 21 ARIZ. J. INT'L & COMP. L. 13, 14–15 (2004). See generally S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (1996).

72. ANAYA, *supra* note 71, at 44.

73. McClellan, *supra* note 20, at 253.

74. See *Draft United Nations Declaration on the Rights of Indigenous Peoples*, U.N. Commission on Human Rights, 46th Sess., 36th mtg. at 105–17, U.N. Doc. E/CN.4/1995/2, E/CN.4/Sub.2/1994/56 (1994), available at <http://www.unhchr.ch/indigenous/main.html> (last visited Jan. 29, 2005).

75. See *id.* at 105.

76. See *Proposed American Declaration on the Rights of Indigenous Peoples*, Inter-Am. C.H.R., 1333d Sess., 95th Reg. Sess., at 636, OEA/ser.L/V/II.95, doc.7 rev. (1997), available at <http://www.cidh.oas.org/Indigenous.htm> (last visited Jan. 29, 2005).

77. *Id.*

another age of globalization.<sup>78</sup> Attention has turned from the “old” properties of land and natural resources to the increasingly valuable “new,” intangible properties of the world.<sup>79</sup> At the same time, international advocates of indigenous peoples’ rights have sought means of defending the intangible resources of indigenous groups and local communities. The World Intellectual Property Organization (WIPO) has led this charge, playing a critical role in the protection of folklore and traditional knowledge at the international level. In September 2000, WIPO established the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore.<sup>80</sup> The purpose of this Committee is to provide a forum for governments to discuss intellectual property matters concerning access to genetic resources, benefit-sharing, and the safeguarding of traditional knowledge, innovations, and expressions of folklore.<sup>81</sup> Additionally, WIPO has recently completed an extensive study that proposes a system of traditional knowledge protection that is based on an intellectual property model.

An efficient IP [intellectual property] system that protects TK [traditional knowledge] will promote continued creation and innovation based on that knowledge. IP is not only about conferring property rights. It is also about recognition of and respect for the contributions of human creators. From this perspective, IP has a very important role to play in protecting the

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78. See Amartya Sen, *Globalization and Poverty*, Address at the Santa Clara University Institute on Globalization (Oct. 29, 2002) (arguing that the phenomenon of “globalization” is not new, but rather, “over thousands of years, the constructive process of globalization has contributed to the progress of the world, through travel, trade, migration, spread of cultural influences, and dissemination of knowledge and understanding (including that of science and technology)”), available at <http://www.scu.edu/globalization/speakers/senlecture.cfm> (last visited Jan. 29, 2005).

79. See, e.g., Coombe, *supra* note 20, at 275 (examining “new intellectual property rights” and their corresponding impact on global politics). See generally David R. Downes, *How Intellectual Property Could Be a Tool to Protect Traditional Knowledge*, 25 COLUM. J. ENVTL. L. 253 (2000); Farley, *supra* note 60; Paul Kuruk, *Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States*, 48 AM. U. L. REV. 769 (1999); Doris Estelle Long, *The Impact of Foreign Investment on Indigenous Culture: An Intellectual Property Perspective*, 23 N.C. J. INT’L L. & COM. REG. 229 (1998).

80. Peter K. Yu, *An Introduction*, 11 CARDOZO J. INT’L & COMP. L. 239, 240 (2003); see WORLD INTELLECTUAL PROPERTY ORGANIZATION, *TRADITIONAL KNOWLEDGE, GENETIC RESOURCES AND FOLKLORE*, at <http://www.wipo.int/globalissues/igc/index.html> (last visited Jan. 29, 2005).

81. *Id.*



dignity of holders of TK and, by recognizing property rights in relation to such knowledge, giving those holders a degree of control of its use by others.<sup>82</sup>

The U.N.'s Convention on Biological Diversity (CBD) also acknowledges the significance of traditional knowledge in preserving biodiversity and achieving sustainable development.<sup>83</sup> "The CBD emphasizes the need, especially in developing nations, to ensure that local and indigenous communities retain control over and share in the benefits from their own biodiversity-related traditional knowledge and 'informal innovations.'"<sup>84</sup> Parties to the Convention are obliged to "respect, preserve and maintain knowledge, innovations and practices of the indigenous and local communities embodying traditional lifestyles."<sup>85</sup>

The international community is not alone in its efforts to protect indigenous peoples' traditional knowledge. Individual nations have also begun to act on behalf of indigenous peoples in general and in regard to the preservation of their traditional knowledge and cultural survival in particular.<sup>86</sup> These actions have taken many forms, from the inclusion of

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82. Ghosh, *supra* note 19, at 91 (citing WORLD INTELLECTUAL PROPERTY ORGANIZATION, INTELLECTUAL PROPERTY NEEDS AND EXPECTATIONS OF TRADITIONAL KNOWLEDGE HOLDERS 7 (2001)).

83. See Marie-Claire Cordonier Segger, *Sustainable Development in the Negotiation of the FTAA*, 27 FORDHAM INT'L L.J. 1118, 1193 (2004).

84. *Id.*

85. Ghosh, *supra* note 19, at 117 (quoting Convention on Biological Diversity, June 5, 1992, art. 8(j)), reprinted in SECRETARIAT OF THE CONVENTION ON BIOLOGICAL DIVERSITY, HANDBOOK OF THE CONVENTION ON BIODIVERSITY 8 (2001)).

86. See Eliana Torelly de Carvalho, *Protection of Traditional Biodiversity-Related Knowledge: Analysis of Proposals for the Adoption of a Sui Generis System*, 11 MO. ENVTL. L. & POL'Y REV. 38, 44-45 (2003) (stating that Brazil has passed a law to implement the CBD, as well as to regulate access to "genetic patrimony" and provide protection for traditional knowledge); Lucas-Schloetter, *supra* note 20, at 315-16 (explaining that Panama's Act No. 20 (2000), available at [http://r0.unctad.org/trade\\_env/docs/lopez.pdf](http://r0.unctad.org/trade_env/docs/lopez.pdf) (last visited Jan. 29, 2005), which concerns the regulation of "cultural expressions," stipulates that such works should be governed by the tradition of the indigenous community from which the "cultural expression" arose, and also creates a registry to put others on notice that such works will be protected under tribal law); Lucas-Schloetter, *supra* note 20, at 337 (noting that the Philippines passed the Indigenous Peoples Rights Act in 1997, available at [http://www.grain.org/brl\\_files/philippines-ipra-1999-en.pdf](http://www.grain.org/brl_files/philippines-ipra-1999-en.pdf) (last visited Jan. 29, 2005), to provide protection for some forms of "communit[y] intellectual property rights"). Although the United States has not acted specifically to protect indigenous peoples' traditional knowledge, it has in place federal laws such as the Indian Arts and Crafts Act, 25 U.S.C. §§ 305a-305f (2000), and the Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 (2000), both of which protect some aspects of tangible traditional knowledge and cultural property.

indigenous peoples' rights in national constitutions to the development of laws designed to ensure indigenous peoples' continued cultural and political existence.<sup>87</sup> In fact, according to WIPO, by January 2001 twenty-two countries and three regional integration organizations "had made or were in the process of making available specific legal protection for traditional knowledge-related subject matter."<sup>88</sup>

The United States also has enacted legislation dealing with some aspects of Native peoples' tangible cultural property. In response to a rash of counterfeit Indian art—goods that falsely suggest they are Indian-produced, an Indian product, or made by an Indian tribe—Congress passed the Indian Arts and Crafts Act (IACA),<sup>89</sup> designed to shield Indians and Indian artists from the wrongful misappropriation of their artistic productions. Moreover, in 1990, President George H.W. Bush signed into law the Native American Graves Protection and Repatriation Act (NAGPRA),<sup>90</sup> which established guidelines for the repatriation of indigenous remains and certain artifacts from federally funded museums, criminalized trafficking of wrongfully acquired Indian cultural property,<sup>91</sup> and set forth consultation procedures to govern future excavations of Indian human remains and funerary objects on tribal or federal lands.<sup>92</sup>

Both of these federal statutes afford some protection for American Indians' tangible property. They do nothing, however, to protect intangible cultural property. And the United States appears unlikely to

87. See, e.g., de Carvalho, *supra* note 86, at 44–45 (noting that Costa Rica has enacted the Costa Rican Biodiversity Law, which recognizes "knowledge" as a product generated by society through time, both in the traditional and the scientific format). See generally Osvaldo Kreimer, *Indigenous Peoples' Rights to Land, Territories, and Natural Resources: A Technical Meeting of the OAS Working Group*, 10 HUM. RTS. 13, 13 (2003) (noting that, "since the late 80s," fifteen out of twenty-four Latin American countries have recognized the rights of indigenous peoples in their constitutions, and Ecuador (in 1998) and Venezuela (in 1999) have expanded concepts of indigenous peoples' land and territories in their constitutions, incorporating elements of indigenous Quechua law, see ECUADOR CONST. ch. 5, § 1, art. 83–85; VENEZ. CONST. tit. VIII, art. 119–126).

88. *Id.* (citing WORLD INTELLECTUAL PROPERTY ORGANIZATION, INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE: TRADITIONAL KNOWLEDGE—OPERATIONAL TERMS AND DEFINITIONS, at [http://www.wipo.int/documents/en/meetings/2002/igc/pdf/grtkfic3\\_9.pdf](http://www.wipo.int/documents/en/meetings/2002/igc/pdf/grtkfic3_9.pdf), at 14 (last visited Jan. 29, 2005)).

89. See 25 U.S.C. §§ 305a–305f.

90. *Id.* §§ 3001–3013.

91. To give teeth to NAGPRA, Congress amended Title 18 of the U.S. Code to "criminalize trafficking in Native American cultural items and funerary objects." 18 U.S.C. § 1170(a)–(b) (2000).

92. 25 U.S.C. §§ 3005–3006.

act in this regard. At a meeting of WIPO, when pressed as to whether the United States had taken any actions to protect traditional knowledge, a U.S. representative responded that the United States “does not have intellectual property laws that provide protection for ‘traditional knowledge,’” and that it “is not of the view that special intellectual property protection is needed for traditional knowledge.”<sup>93</sup>

It is apparent that progress is being made in developing international and national protections for indigenous peoples’ cultural property. However, foundational principles, derived from tribal law, have been overlooked for too long. Tribal law systems express the core, fundamental beliefs of the tribal community and should form the foundation of this tripartite structure. As the next Part sets forth, the substantive protections afforded by tribal law are preferable to those of other systems. Only tribal law can reflect the culturally specific aspects of tribal life and allow for differences among various indigenous groups.

### *B. The Need for Tribal Law*

While international and national regimes have extended some protections to the cultural property of indigenous peoples, in many respects the results have not corresponded to their needs. Although there has been some participation by indigenous peoples in the development of these laws, the result has, nevertheless, largely been the creation of top-down, international norms that have yet to take shape and that are rarely sufficiently multi-faceted to encompass the differences among indigenous groups.<sup>94</sup> As such, the laws promulgated often are either too broad or too narrow to adequately capture the distinctions and nuances among indigenous groups and their particular cultural properties.<sup>95</sup>

Another problem with the top-down model is that it imports Western intellectual property regimes into indigenous communities.<sup>96</sup> Academics, activists, and indigenous peoples alike view such importation with great skepticism. One scholar warns that great care must be taken not to

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93. De Carvalho, *supra* note 86, at 59 (citing WORLD INTELLECTUAL PROPERTY ORGANIZATION, SURVEY ON EXISTING FORMS OF INTELLECTUAL PROPERTY PROTECTION FOR TRADITIONAL KNOWLEDGE, at <http://www.wipo.int/tk/en/questionnaires/ic-2-5/replies.pdf> (last visited Jan. 29, 2005)).

94. See Ragavan, *supra* note 25, at 27–32.

95. See Coombe, *supra* note 20, at 277.

96. See Stephen Gudeman, *Sketches, Qualms, and Other Thoughts on Intellectual Property Rights*, in VALUING LOCAL KNOWLEDGE: INDIGENOUS PEOPLE AND INTELLECTUAL PROPERTY RIGHTS 102, 103–04 (Stephen Brush & Doreen Stabinsky eds., 1996).

impose dominant legal systems wholesale upon traditional knowledge communities: “traditional knowledge deserves and requires greater recognition and protection through legal means, without unduly compromising its essence.”<sup>97</sup> Some scholars claim that extending Westernized intellectual property rights to indigenous communities constitutes neo-colonialism,<sup>98</sup> in that it simply borrows the language and methods of the oppressors and, in doing so, further empowers the oppressors.<sup>99</sup> Others maintain that addressing the problem of appropriation, distortion, and destruction of cultural property with a new form of property rights is just a “Western form of problem solving.”<sup>100</sup>

Whether these particular criticisms are on point, it is clear that the core motivations behind the creation and design of Western intellectual property rights, as well as the paradigm to which the protected knowledge must correspond, simply do not fit indigenous communities.<sup>101</sup> It is therefore logical to challenge the efficacy of imposing on indigenous groups today the same intellectual property structure that has failed them in the past.

The gap that exists between Western intellectual property regimes and traditional works reflects, in part, a tension between a market culture and a communitarian, gift-based culture.<sup>102</sup> Western intellectual property regimes incentivize creation for a market economy.<sup>103</sup> In the Western system, intellectual property rights “connote that the property has value as a means to accumulate more wealth or money.”<sup>104</sup> In this way, works protected by Western intellectual property laws are useful in any context; they possess a market value separate and distinct from

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97. Ghosh, *supra* note 19, at 119.

98. See, e.g., Paul J. Heald, *The Rhetoric of Biopiracy*, 11 CARDOZO J. INT’L & COMP. L. 519, 529 (2003) (inquiring whether the imposition of an intellectual property rights regime on the rainforests is merely a form of neo-colonialism); Riley, *supra* note 21, at 190 (noting that colonial influences of discovery, naming, and mapping in the colonizer’s image actually animate intellectual property laws, which are largely rejected—either implicitly or explicitly—by indigenous methods of creation).

99. Michael H. Davis, *Some Realism About Indigenism*, 11 CARDOZO J. INT’L & COMP. L. 815, 830 (2003) (discussing the adoption of intellectual property regimes in indigenous communities).

100. Heald, *supra* note 98, at 529.

101. See *supra* notes 51–62 and accompanying text.

102. See Ghosh, *supra* note 19, at 74.

103. Davis, *supra* note 99, at 817 (claiming that the global allocation and recognition of intellectual property rights is a question of wealth and resources between richer and poorer nations).

104. See Gudeman, *supra* note 96, at 103.

culture.<sup>105</sup>

In contrast, indigenous peoples' traditional knowledge is borne of a community economy, which emphasizes qualities such as sharing within the community, where members benefit from reliance upon others.<sup>106</sup> Rather than seeking to commercialize traditional knowledge, indigenous groups generally desire to assert ownership and control over it in order to protect it. The goal is to preserve the integrity of the knowledge and to keep it safe from appropriation, destruction, deformation, and extinction.<sup>107</sup> Thus, transplanting a truly Westernized system of intellectual property to an indigenous community will likely "lead to economic transformation or adoption of the market form exactly among those people whom it is said to protect."<sup>108</sup> This could mean, for many indigenous groups, an unwanted departure from tribal culture and tradition.

Moreover, indigenous intellectual property need not be "incentivized" in the same sense as Western works because, in part, much of the traditional knowledge that indigenous communities seek to protect already exists.<sup>109</sup> This is not to say, of course, that traditional knowledge need not be incentivized at all. Traditional knowledge is not static, but exists as a living, breathing entity within the indigenous world.<sup>110</sup> Its constant recreation is necessary to keep the works alive and relevant to the changing circumstances of the tribe.<sup>111</sup> The keeper of sacred songs or stories may infuse that knowledge with new meaning to keep the ceremonies strong. Thus, holders of traditional knowledge, though not motivated by the same incentives at work in a market economy, are nevertheless inspired by unique, community-based goals to constantly

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105. Gudeman, *supra* note 96, at 103.

106. Gudeman, *supra* note 96, at 105–06.

107. Davis, *supra* note 99, at 817–18; Thomas Greaves, *Tribal Rights, in VALUING LOCAL KNOWLEDGE: INDIGENOUS PEOPLE AND INTELLECTUAL PROPERTY RIGHTS* 25, 29–32 (Stephen Brush & Doreen Stabinsky eds., 1996). This is not to say that indigenous peoples have no economic interests in the creation of laws to protect their cultural property and traditional knowledge.

108. See Gudeman, *supra* note 96, at 104.

109. See Ghosh, *supra* note 19, at 75 ("The application of intellectual property rights to items like traditional music and dance or signs and devices or know-how about medicine is arguably misguided."); Gudeman, *supra* note 96, at 108.

110. See Coombe, *supra* note 20, at 279.

111. See Riley, *supra* note 21, at 176, 224 (noting that indigenous cultural properties—such as stories, songs, or medicinal knowledge—must be kept alive and adapted to the ever-changing circumstances of the tribe).

re-create and re-envision their works.<sup>112</sup>

Another reason why tribal law, rather than top-down models, should supply the framework for protecting intangible cultural property is that controversial proposals for the protection of traditional knowledge are now being introduced at the international level. For example, there is currently a strong push to create databases for the protection of traditional knowledge.<sup>113</sup> One author contends, for example, that

[k]nowledge from communities wishing to participate in the project should be catalogued and deposited in a restricted access database. Each community would have its own file in the database. The system would serve many purposes. Checks would be made to see whether each entry is not already in the public domain and whether other communities have the same knowledge.<sup>114</sup>

While the efficacy of such databases is apparent—there is a value, after all, to articulating, organizing, and putting others on notice of protected materials—such proposals have been met with opposition in some indigenous communities.<sup>115</sup> Opponents believe that databases will only make it easier for those who wish to exploit cultural heritage and appropriate secret and sacred traditions.<sup>116</sup> They question how the disclosure of a tribe’s sacred or confidential knowledge could possibly protect it from infringement, with one scholar calling the proposal “entirely wrong-headed.”<sup>117</sup> The idea of disclosing traditional knowledge within a public forum—even one with controlled access—represents a risk of exploitation and destruction that is, for many, far too great.<sup>118</sup>

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112. See LESLIE MARMON SILKO, CEREMONY 126 (1977) (“But after the white people came, elements in this world began to shift; and it became necessary to create new ceremonies. I have made changes in the rituals. . . . [O]nly this growth keeps the ceremonies strong.”).

113. See, e.g., Gerard Bodeker, *Traditional Medical Knowledge, Intellectual Property Rights & Benefit Sharing*, 11 CARDOZO J. INT’L & COMP. L. 785, 800 (2003) (discussing the development of global registration systems used to capture and document traditional knowledge).

114. *Id.*

115. Not all indigenous communities, of course, agree on this point. For example, the Navajo Nation has created its own database, the Navajo Natural Heritage Program (NNHP), to collect data pertaining to “community information.” See The Navajo Nation Natural Heritage Program, at <http://www.natureserve.org/nhp/us/navajo> (last visited Jan. 29, 2005).

116. See Daes, *supra* note 52, at 145.

117. Daes, *supra* note 52, at 145.

118. See Bodeker, *supra* note 113, at 804–05. At the 2002 meeting of the California Indian Law

Finally, relying solely on top-down efforts to define indigenous peoples' own cultural heritage undermines indigenous peoples' rights to self-determination.<sup>119</sup> Indigenous peoples must have the opportunity to articulate their own paths with respect to their traditional knowledge, including whether to reveal or license it, and when to veto research.<sup>120</sup> Empowering indigenous peoples to control and direct their culture and lifeways means emphasizing their role in the creation of their own destinies through the development of tribally specific cultural preservation laws.

In contrast to the international and national regimes discussed above, this Article contends that tribal law should be applied as the "ultimate determinant of rights and responsibilities in relation to indigenous cultural and intellectual heritage."<sup>121</sup> Employing tribal law to protect the cultural property of indigenous peoples opens the door to many possibilities. Tribal law is drawn from a tribe's traditional customary law, tribal belief systems, and other contemporary forms of tribal governance, including ordinances and tribal constitutions.<sup>122</sup> It therefore reflects not only substantive legal principles, but also the cultural context from which they evolved. Through tribal law, indigenous governance of cultural property and traditional knowledge will correlate specifically to the works tribes seek to protect, allow for forms of punishment consistent with the community's values, and properly incentivize behavior that is good for the community at large.

Tribal law is also uniquely well-suited to accommodate the religious and cultural beliefs of tribes in ways that Western law cannot.<sup>123</sup> For example, tribal codes may better reflect the relationship between tribes and the earth. Even if a tribe is no longer living in its aboriginal territory,

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Association, one Native American attorney said the existence of a list of sacred places would be tantamount to placing a neon sign over the sacred site and flashing the words, "Dig Here!" Anonymous Attendee, Meeting of California Indian Law Association (2002).

119. See Daes, *supra* note 52, at 146; *infra* Part III.A.

120. See Daes, *supra* note 52, at 146-47.

121. See Daes, *supra* note 52, at 147.

122. See Frank Pommersheim, *Looking Forward and Looking Back: The Promise and Potential of a Sioux Nation Judicial Support Center and Sioux Nation Supreme Court*, 34 ARIZ. ST. L.J. 269, 274 (2002); Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 249 (1994).

123. See Angela R. Riley, *Indian Remains, Human Rights: Reconsidering Entitlement Under the Native American Graves Protection and Repatriation Act*, 34 COLUM. HUM. RTS. L. REV. 49, 81-82 (2002) (discussing the conflict between indigenous and Western conceptions of ownership and their relationships to the earth).

most tribes share a common belief that the earth is sacred.<sup>124</sup> Tribal law is more apt to capture this belief than Western legal systems, which tend to view the earth and her resources as a collection of commodities to own, rather than an integral part of daily life.<sup>125</sup> Thus, tribes may choose to protect their sacred places in tribal codes even if, for culturally mandated reasons, they elect not to delineate them in detail.<sup>126</sup> In addition to the physical world, tribal codes may reflect the richness of the tribe's other resources, which are as varied as the community, tribal elders, and oral literature.

Tribally formulated laws governing the protection of traditional knowledge are free to evolve outside the constraints of Anglo-American intellectual property doctrine, and in most cases they should do so. Whether tribes choose to create collective rather than individual ownership schemes, to limit authority over cultural property to specific group members or to permit the inalienability of tribal cultural property, these choices are best effectuated by and through tribal law.<sup>127</sup> Some groups may even seek to form regional organizations devoted to recognizing, promoting, and supporting the rights of local communities to traditional knowledge.<sup>128</sup> Regardless of substantive variances, tribal law is most adept at accommodating the wide-ranging and diverse cultural lives of indigenous communities.<sup>129</sup>

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124. It is important not to essentialize indigenous peoples and their relationship with the earth. There are many different perspectives among indigenous groups. Nevertheless, it is true that many indigenous peoples, most of whom have a land-based culture, commonly share a deep sense of respect for and spiritual connection with the earth. See 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, 274 (1996) ("A central feature of many indigenous world views is found in the spiritual relationship that Native American peoples appear to have with the environment.").

125. In Blackstone's *Commentaries on the Laws of England*, William Blackstone asserted that "[t]he earth . . . and all things therein, are the general property of all mankind, exclusive of other beings, from the immediate gift of the creator." 2 WILLIAM BLACKSTONE, COMMENTARIES \*2-3; see Carpenter, *supra* note 68.

126. See Jack F. Trope & Dean B. Suagee, *Tribal Sacred Places and American Values*, 17 NAT'L RESOURCES & ENV'T 102, 103 (2002) ("It is often the case that tribes are reluctant to reveal certain information for cultural or religious reasons, or because of fears that, once identified, sites will be desecrated.").

127. See Bodeker, *supra* note 113, at 805-06; Riley, *supra* note 21, at 204-05.

128. See, e.g., Bodeker, *supra* note 113, at 806 (noting that "a recent Organization of African Unity (OAU) Model Law . . . proposes the establishment of a regional sui generis system to recognize, protect and support the 'inalienable rights' of local communities over their biological resources, knowledge and technologies").

129. Although significant differences exist among Indian tribes, many have drawn on their



## II. THE TRIBAL CODE

Indigenous peoples have responded to the need for laws to protect indigenous cultural property with grassroots movements.<sup>130</sup> Both domestically and abroad, indigenous peoples are pressing—from the inside, up—for the adoption of intellectual property rights capable of accommodating the unique aspects of their cultures. Though many differing viewpoints exist within this movement, there is broad consensus that the current Western intellectual property rubric falls far short of protecting traditional knowledge and the indigenous groups from which it is cultivated.<sup>131</sup> Accordingly, some indigenous peoples are now attempting to devise and construct tribally specific legal schemes to liberate themselves from the dominant legal paradigm and lead the search for solutions.<sup>132</sup>

In the United States, where American Indians enjoy a sovereign status vis-à-vis the federal government, the development and/or revitalization of tribal legal systems is an integral part of tribal life.<sup>133</sup> American Indians govern themselves by tribal law through various institutional forms, including, among others, tribal councils, tribal courts, and tribal peacemaking systems. This Part examines the tribal law of each of the federally recognized Indian tribes within the contiguous forty-eight

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similarities to create synergies in the area of tribal justice. To date, several tribes have already begun to create inter-tribal appellate court systems to hear appeals arising from tribal courts in various regions. See Margery H. Brown & Brenda C. Desmond, *Montana Tribal Courts: Influencing the Development of Contemporary Indian Law*, 52 MONT. L. REV. 211, 300 n.491 (1991).

130. See, e.g., CHARTER OF THE INDIGENOUS-TRIBAL PEOPLES OF THE TROPICAL FORESTS (Feb. 15, 1992); JULAYINBUL CONFERENCE ON INTELLECTUAL AND CULTURAL PROPERTY, *Julayinbul Statement on Indigenous Intellectual Property Rights*, in JULAYINBUL ABORIGINAL INTELLECTUAL AND CULTURAL PROPERTY 9–10 (Nov. 25–27, 1993), available at <http://web.archive.org/web/19990125090208/http://iclp.lawnet.com.au> (last visited Jan. 29, 2005) (asserting their right to self-determination and to control the use of their environment and traditional knowledge); Mataatua Declaration (1993), at <http://web.archive.org/web/19990125090208/http://iclp.lawnet.com.au> (last visited Jan. 22, 2005) (asserting their rights as indigenous peoples to control their intellectual and cultural property); Graham Dutfield, *TRIPS-Related Aspects of Traditional Knowledge*, 33 CASE W. RES. J. INT'L L. 233, 236 n.12 (2001) (noting that in 1993 the Maori tribes of New Zealand hosted the First International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples).

131. See Riley, *supra* note 21, at 202.

132. See de Carvalho, *supra* note 86, at 39–40.

133. See Gorden K. Wright, *Recognition of Tribal Decisions in State Courts*, 37 STAN. L. REV. 1397, 1399 (1985) (“[T]he United States has encouraged the tribes to ‘revitalize their self-government’ and to assume control over their business and economic affairs. Central to that revitalization has been the move toward representative tribal government, including the establishment of tribal courts by the tribes.”).

states as of June 2002 to ascertain what they are doing to protect their own cultural property and traditional knowledge. While certain factors—such as secrecy within tribal communities or the research methods utilized—may have influenced this study’s findings, this research reveals that, while some tribes have undertaken to protect their tangible cultural property, very few have addressed intangible cultural property protection. Although there appears to be a trend toward incorporating intangible cultural property protection within the scope of tribal law, few such laws have actually taken shape.

Part II.A explains the methodology used in gathering this data. Part II.B details the sources of law available to tribes in developing their tribal law, offers an explanation of “tribal customary law,” and describes some of the issues implicated in its identification and codification. Parts II.C and II.D set forth the empirical evidence and provide a detailed analysis of the study’s findings. Part II.E offers possible explanations for these findings and contemplates the potential legal ramifications.

### *A. Methodology*

The sample group used for this study included those tribes within the contiguous forty-eight United States that were federally recognized as of July 2002 and eligible to receive services from the Bureau of Indian Affairs.<sup>134</sup> The initial search for tribal codes regarding the preservation of cultural resources or traditional knowledge began with the Internet. A total of 351 Indian tribes were identified and researched via the Internet to ascertain whether they maintained a tribal website containing information about the tribe.<sup>135</sup> Of those that had websites, the search focused on finding references to cultural resource protection programs.<sup>136</sup> The websites were then examined to determine if the tribes

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134. See Notice of Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 67 Fed. Reg. 46,327–33 (July 12, 2002); Federally Recognized Indian Tribes, at <http://www.artnatam.com/tribes.html> (last visited June 11, 2004). The research did not include an examination of Native Alaskan Villages or the laws of Native Hawaiians.

135. In some cases, a tribe may have been referenced, for example, on the website of a state tourism office, but lacked an official website of its own. In order to ensure the accuracy of the information, the search undertaken here focused on identifying those tribes that maintained their own official website. For a complete list of all tribes researched and the corresponding results, see Appendix.

136. These tribes include those that have Natural Resources Departments (if they are also charged with preserving cultural resources) and tribes that have an Archeological Officer appointed, but may or may not also have a cultural preservation program.

maintained a codified system of laws and, if so, whether these tribal codes were accessible through their websites. When available, the tribal codes were studied to see if any related to the preservation of cultural resources, traditional knowledge, or both.<sup>137</sup>

This research was supplemented by using Internet search engines to find tribal codes directly, without attempting to go through a tribe's website. This led to repositories of tribal codes, such as the Repository of Indian Law Codes maintained by the University of Tulsa College of Law, which has Internet links to the tribal codes of forty-seven different tribes,<sup>138</sup> and the National Tribal Justice Resource Center, with links on its website to the tribal codes of fifty-three different Indian tribes.<sup>139</sup> Subsequently, a search was done at UCLA's Hugh & Hazel Darling Law Library, which maintains a repository collection of hardbound tribal codes of twenty-three Indian tribes.<sup>140</sup>

This research endeavored to ascertain how Native peoples in the United States are protecting their cultural property. In utilizing the method outlined above, attempts were made to collect the most accurate information available. Nevertheless, there are clear limits to the research methods undertaken here. Undoubtedly, there are tribes that have either cultural resource programs and/or relevant tribal codes that simply were not accessible through these sources.<sup>141</sup> Not all tribes have developed tribal websites. Others may have functioning tribal law systems that are not captured in written form. Some tribes may have written codes, but elect to keep the law private and accessible only to tribal members. Outside of universities with large Indian law collections, hard copy sources remain elusive. Therefore, simply because this research did not reveal that a particular tribe has a tribal code regarding preservation of its cultural resources does not mean one does not exist. Despite these

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137. This study does not account for those tribes that have tribal codes that were not discoverable through the above-referenced research methods.

138. See University of Tulsa College of Law, Native American Law Students Association, Tribal Codes, at <http://www.utulsa.edu/law/indianlaw/nalsa/tribalcodes.html> (last visited Jan. 29, 2005).

139. National Tribal Justice Resource Center, Tribal Council Resolutions and Codes, at <http://www.tribalresourcecenter.org/tribalcourts/codes/codesdirectory.asp> (last visited Jan. 29, 2005).

140. This number includes one Alaskan Native Village, which exceeds the scope of this survey.

141. The Iowa Tribe of Oklahoma, for example, references its Cultural Resources Ordinance on its website. The Tribe indicates that it protects all aspects of Iowa culture, including its intellectual properties. However, it was not possible to access that Ordinance through the sources utilized in this research. See Iowa Tribe of Oklahoma Website, at <http://www.iowanation.org/Government/Preservation.html> (last visited Jan. 29, 2005).

limitations, this comprehensive search provides a thorough starting point from which to examine American Indian nations' efforts to preserve their cultural resources through tribal programs, tribal codes, and tribal law.

### B. Sources of Law

In developing tribal law, tribal communities may draw from various sources. The relationship between Indian tribes and the federal government is one of sovereign to sovereign,<sup>142</sup> and this relationship has existed largely independent of state interference. Accordingly, with few exceptions, tribes are governed exclusively by federal and tribal law.<sup>143</sup> On some matters affecting the cultural survival of Indian tribes, the federal government has already passed protective legislation.<sup>144</sup> When the federal government has spoken, tribes will sometimes “borrow” from the federal legislation when drafting codes dealing with the same subject matter.<sup>145</sup> Tribes may also look to state law—usually the law of the state in which they are situated—for guidance in drafting and developing a particular code or ordinance.<sup>146</sup> However, given that the relationship between state and tribal governments has historically been a volatile one, tribes may be hesitant to incorporate state law when developing tribal legal principles.<sup>147</sup>

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142. See *Worcester v. Georgia*, 31 U.S. 515, 557 (1832) (“The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states”), *overruled on other grounds by Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 147–48 (1973).

143. In 1953 Congress passed Public Law 280, which withdrew federal criminal jurisdiction from Indian Country in six states, extended state criminal jurisdiction over the same territory, and also granted those states civil jurisdiction over cases against Indians arising in Indian Country. See Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (2000), 25 U.S.C. §§ 1321–1326 (2000), and 28 U.S.C. § 1360 (2000)); Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405, 1406 (1997).

144. See Indian Arts and Crafts Act, 25 U.S.C. §§ 305a–305f (2000); Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001–3013 (2000).

145. See *infra* Part II.D.2; see, e.g., CHEROKEE CODE, § 70-1(c) (1999) (anticipating issues that may arise under the NAGPRA).

146. See *R.J. Williams Co. v. Fort Belknap Hous. Auth.*, 719 F.2d 979, 982 (9th Cir. 1983) (“The tribe has chosen to adopt the framework of state law to cover gaps in the tribal code.”); Judith V. Royster, *Statute and Scrutiny: Post-Exhaustion Review of Tribal Court Decisions*, 46 U. KAN. L. REV. 241, 279 n.249 (1998).

147. See, e.g., *In re Validation of Marriage of Francisco*, 16 Indian L. Rep. 6113, 6115 (Am. Indian Law. Training Program) (Navajo 1989) (rejecting Arizona state law governing common law marriages and instructing the Tribal Council to amend the tribal code to reflect the traditional, customary law of the Navajos and to be wary of “allow[ing] outside law to govern domestic

With increasing frequency, tribes are returning to tribal customs, or tribal customary law, to develop laws and justice systems consistent with indigenous values and lifeways. For example, tribes are increasingly relying on traditional forms of tribal dispute resolution to resolve inner-tribal conflicts. A leading example is the Navajo Nation's Peacemaker Court, which incorporates traditional Navajo mediation methods into its contemporary justice system.<sup>148</sup> Others have reinstated the traditional penalty of banishment, wherein a tribal member is permanently excluded from the reservation and tribal life generally as a form of extreme punishment.<sup>149</sup> Tribes may draw on the customs of other tribes as well when developing their own law.<sup>150</sup>

Despite efforts to destroy the culture and, in some instances, the very existence of the indigenous peoples of America, customary principles persist. Those customary principles—the traditional and repeated practices of the tribal community—comprise tribal customary law. Constant repetition of these customs over time suggests that they have been accepted by the community.<sup>151</sup> These informal regimes are often monitored and enforced by elders, specialized experts, and religious leaders within the community.<sup>152</sup> Though many Native peoples in the United States walk in two worlds—the Indian and the Western—traditional tribal concepts may be very much alive, and tribal custom may work as the most effective way to govern the disposition, ownership, and control of traditional knowledge and cultural property

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relations within Navajo jurisdiction”).

148. The Navajo Peacemaker Court blends traditional tribal “methods of mediating disputes with regular court operations.” Matthew L.M. Fletcher, *The Drug War on Tribal Government Employees: Adopting the Ways of the Conqueror*, 35 COLUM. HUM. RTS. L. REV. 1, 65 n.314 (2003) (quoting James W. Zion, *The Navajo Peacemaker Court: Deference to the Old and Accommodation to the New*, 11 AM. INDIAN L. REV. 89, 89–90 (1983)).

149. See Sarah Kershaw & Monica Davey, *Plagued by Drugs, Tribes Revive Ancient Penalty*, N.Y. TIMES, Jan. 18, 2004, at 1; Renee Ruble, *Banishment Laws Revived Among Indians*, WASH. POST, Jan. 25, 2004, at A9.

150. See Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 314–15 (1998). Tribes are most likely to consider other tribes' laws when they are linked historically or share a common culture.

151. See J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 453 (2000) (noting that “[i]t is the community-like belief that a norm is legally required that provides customary law with authority and legitimacy”).

152. See Lucas-Schloetter, *supra* note 20, at 263; Richard Owens & Faith Odibo, *Presentation on Global Intellectual Property Issues and the LDCs*, in THE NEW MILLENNIUM, INTELLECTUAL PROPERTY AND THE LEAST DEVELOPED COUNTRIES (LDCs) 45, 48 (1999).

within those indigenous communities.<sup>153</sup> In fact, scholars contend that across the world most indigenous communities concerned with the protection of folklore are governed by customary law.<sup>154</sup>

Before a tribe begins identifying and codifying customary tribal law, it must decide whether codification is appropriate. There are a number of reasons why a tribe may not want to codify its tribal laws. Codification may be daunting for tribes that have maintained an oral tradition and have not bound themselves to the confining nature of the written word. There is a stasis within the written law that does not exist with oral tradition, which is more fluid and capable of accommodating changing circumstances.<sup>155</sup> Moreover, a written code may feel culturally foreign, and the resulting law may be inconsistent with what the community values, as well as how it functions. The process of codification may also require an enormous expenditure of valuable resources in terms of the time, energy, and funds required for the tribal community to collect, discuss, come to agreement, and reduce to writing an entire body of laws. Given existing jurisdictional limits on the application of such laws to outsiders, tribes may determine that developing a comprehensive tribal code is neither practical nor desirable.

Despite these drawbacks, however, there are persuasive arguments in favor of codification. While the legitimacy of state and federal courts is generally presumed, tribal courts are only now gaining respect from their own members and from the outside world.<sup>156</sup> Although codification and publication are noncustomary parts of Indian law, they are an aspect of Anglo-American law that may be useful to tribes and tribal communities.<sup>157</sup> A codified law provides the benefits of precedent, predictability, and notice to those affected.<sup>158</sup> Codification and publication also aid in legitimizing tribal law and tribal courts, which may allay the fears of outsiders who find themselves subject to tribal

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153. See, e.g., Candace S. Greene & Thomas D. Drescher, *The Tipi with Battle Pictures: The Kiowa Tradition of Intangible Property Rights*, 84 TRADEMARK REP. 418, 431–32 (1994) (discussing Kiowa customary law governing ownership and control of tribal members' stories and their depiction in tipi paintings).

154. Lucas-Schloetter, *supra* note 20, at 316.

155. See Ronald K.L. Collins & David M. Skover, *Paratexts*, 44 STAN. L. REV. 509, 524 (1992) (noting that, “[b]y enframing the law in fixed terms, writing limits the legal effects of oral memory’s more fluid recollections”).

156. Newton, *supra* note 150, at 293.

157. Valencia-Weber, *supra* note 122, at 249.

158. Valencia-Weber, *supra* note 122, at 249.

law.<sup>159</sup> Moreover, when tribes articulate tribal law, they act as “living sovereigns,” engaging in the essential tasks of self-government and nation building to ensure their continued existence.<sup>160</sup>

If a tribe elects to codify its law, it must first ascertain the appropriate substantive content. Tribes should begin this process by turning first to their traditional customs and practices. The use of custom to make law is not a unique process. The Anglo-American system, after all, was and is built around customary law.<sup>161</sup> However, tribal common law is distinguishable from Anglo-American common law by the indigenous cultural perspective underlying those customary beliefs.<sup>162</sup> When tribal courts affirm and sustain cultural values, they generate a body of tribal common law, which has survived the 500-year encounter with Anglo-American culture. As a result, tribal customary law becomes the wellspring for a tribal jurisprudence to be applied in tribal courts.<sup>163</sup>

Some tribes, particularly those that have maintained political autonomy and geographical consistency, may access and develop customary law with relative ease.<sup>164</sup> The relationship of the tribe itself to the natural world around it—particularly where that relationship has not been tremendously disrupted by contact with non-Indians—informs the tribe of its history and its connection to traditional life. Moreover, tribal elders, many of whom may be fluent in their native languages, are available to serve as valuable resources in ascertaining tribal custom on legal or cultural matters.

For other tribes, however, the process of accessing tribal law may prove more difficult. Historically, contact with non-Indians caused tribes to suffer thousands of casualties through genocide and disease.<sup>165</sup> Many

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159. Valencia-Weber, *supra* note 122, at 249.

160. *See infra* Part III.A.

161. *See* Valencia-Weber, *supra* note 122, at 244.

162. Valencia-Weber, *supra* note 122, at 262 (“A world view focused upon collective values, where nature is part of the community, presents different principles upon which to decide the recurring disputes among members.”).

163. Valencia-Weber, *supra* note 122, at 244. Tribal courts are also empowered to interpret and develop tribal common law. This process can take place, as in the Anglo-American system, without the presence of codified law. For example, the Winnebago Tribe of Nebraska defines “common law” to include both customary and common law: “The customs and traditions of the tribe, to be known as the tribal common law, as modified by the constitution and statutory law, judicial decisions, and the condition and wants of the people . . .” CONST. OF WINNEBAGO TRIBE OF NEB. art. I, § 2-104.

164. *See generally* Daniel L. Lowery, *Developing a Tribal Common Law Jurisprudence: The Navajo Experience, 1969–1992*, 18 AM. INDIAN L. REV. 379 (1993).

165. *See* Robert B. Porter, *The Meaning of Indigenous Nation Sovereignty*, 34 ARIZ. ST. L.J. 75,

experienced the loss of tribal culture through allotment, assimilation, and laws forbidding the practice of Native religion.<sup>166</sup> In some cases, the mass placement of Indian children in white, Christian boarding schools caused, among other things, the extinction of Native languages, which are often necessary to explain indigenous customs.<sup>167</sup>

These tribes may find that a consensus does not exist as to a particular custom. The relationship between the natural world and their aboriginal homeland may have been lost or diminished through relocation. Some tribes may even lack fluent Native speakers to complete the puzzle of their indigenous customs. In some cases, a particular “custom” may vary throughout the tribe.<sup>168</sup> Tribal members may dispute interpretation and application of custom. Or, a custom may be given application in court, but then fall out of use and cease to be true “custom.”<sup>169</sup>

To aid them in ascertaining tribal custom, tribes can use their legislative bodies—in whatever form they are constructed—to guide them in this process. A tribal ordinance may direct its members to the appropriate sources for identifying custom. Such ordinances may require testimony from elders, historical research, or meetings with other tribes who once lived in conjunction with the tribe. The White Earth Chippewa Judicial Code, for example, provides that

[t]raditional law and tribal custom shall be considered in combination with other laws. In the event any doubt arises as to customs and traditions of the Band, the Court may request the advice and assistance of the panel of elders.<sup>170</sup>

Once tribes that wish to put their laws into written form identify tribal customary law, the final step is codification. Whether the codification process will provide an opportunity for community participants to express views and opinions on the proposed legislation depends on the

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78 (2002). See generally HOWARD ZINN, A PEOPLE’S HISTORY OF THE UNITED STATES (rev. ed. 1995).

166. See Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773, 787–805 (1997).

167. Robert B. Porter, *Pursuing the Path of Indigenization in the Era of Emergent International Law Governing the Rights of Indigenous Peoples*, 5 YALE HUM. RTS. & DEV. L.J. 123, 141 (2002).

168. Lowery, *supra* note 164, at 391.

169. Lowery, *supra* note 164, at 391.

170. WHITE EARTH BAND OF CHIPPEWA JUD. CODE ch. VII, § 6(b) (1997).



tribe's structure. Some tribes, like those that comprise the Iroquois Confederacy, for example, are structured according to a matrilineal clan system.<sup>171</sup> In such a system, it may be that only certain members of the community have authority to give views on customary law. The process of codification, then, also becomes specific to each particular tribe.

Codification allows tribes to craft their laws to reflect their own unique beliefs and circumstances. For example, tribes may elect not to identify sacred sites, plants used in traditional Indian medicines, or burial practices to protect such property from desecration or theft. When tribes themselves define the parameters of cultural property laws, they are in the best position to determine whether and/or how to reveal culturally sensitive information. In this way, tribes may balance the drawbacks of written law by keeping secret certain specific elements of their cultural heritage.

### C. *Empirical Data*

This study consists of research on 351 Indian tribes. Of those, 193 maintained some version of an official website.<sup>172</sup> In several cases, tribal websites contained extensive information about the tribal government, tribal investments, culture, and natural resources.<sup>173</sup> Others were less comprehensive. A few focused specifically on particular tribal enterprises, such as gaming operations, while others merely maintained links to information regarding the tribe's history and culture.<sup>174</sup>

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171. See Robert A. Williams, Jr., *Gendered Checks and Balances: Understanding the Legacy of White Patriarchy in an American Indian Cultural Context*, 24 GA. L. REV. 1019, 1039 (1990).

172. Efforts were made to distinguish between those tribes that maintained a website on their own and those that were mentioned on another host's website. If there was uncertainty or skepticism as to whether a particular tribe's website was "official," then those tribes were not included in the study. Of course, one hallmark of an "official" website is that it contains detailed information about the tribe, such as a cultural resources program. In no case did an "unofficial" website link to a tribal code.

173. See, e.g., Official Website of the Citizen Potawatomi Nation of Oklahoma, at <http://69.53.86.10/Potawatomi.org> (last visited Jan. 27, 2005) (providing detailed information about tribal government, history, culture, language, and resources); Official Website of the Confederated Tribes of the Colville Reservation, at <http://www.colvilletribes.com> (last visited Jan. 27, 2005) (including information regarding tribal culture, history, government, and tribal events); Official Website of the Confederated Tribes of Warm Springs, at <http://www.warmsprings.com> (last visited Jan. 27, 2005) (containing information regarding, inter alia, tribal history, culture, government, investments and business enterprises, and preservation of natural resources).

174. See, e.g., Official Website of the Jackson Rancheria of Me-Wuk Indians of California, at <http://www.jacksoncasino.com> (last visited Jan. 27, 2005) (focusing solely on the tribe's casino enterprise); Official Website of the Sac and Fox Indians, at <http://www.sacandfoxcasino.com>

Approximately forty-five percent (or 158 out of 351) of the tribes researched did not maintain an official website.

Of the 193 tribes with a website, sixty-two indicated that they maintained specific programs dedicated to the preservation of cultural resources.<sup>175</sup> Twenty-seven had tribal codes that addressed, in some respect, the preservation of tribal cultural property, such as laws governing the use of sacred sites and proper treatment of the dead.<sup>176</sup> Only three tribes had laws that pertained specifically to preservation of their traditional knowledge.<sup>177</sup> These focused on the protection of plants, roots, and other elements essential to traditional medicines or ceremonies.<sup>178</sup> The research revealed that no tribe had enacted laws governing ownership and control of intangible properties, such as stories, dances, or folklore.<sup>179</sup> This Part provides a broad overview of the nature and scope of the cultural resource programs and tribal codes revealed by this research. Subsequently, Parts II.D and II.E offer analysis and explanation, respectively, of the study's findings.

### 1. *Cultural Resource Programs*

The term “cultural resources” is difficult to define because the concept varies between groups and is open to numerous interpretations.<sup>180</sup> This Article defines “cultural resources” as those

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(focusing on the tribe's casino enterprise in Northeast Kansas, but maintaining links to the tribal history of the three bands of the Sac and Fox Nation) (last visited Jan. 27, 2005).

175. See App., *infra* pp. 133–64.

176. See App., *infra* pp. 133–64. It is important to point out that there are, undoubtedly, tribes that have adopted relevant tribal codes that simply were not accessible through the research sources utilized for this paper.

177. CONFEDERATED SALISH & KOOTENAI TRIBES OF FLATHEAD RESERVATION, CULTURAL RESOURCE PROTECTION ORDINANCE Part III (2004); CONFEDERATED TRIBES OF WARM SPRINGS RESERVATION TRIBAL CODE ch. 490.010(4) (2003); GILA RIVER PIMA–MARICOPA INDIAN COMMUNITY OF GILA RIVER INDIAN RESERVATION TRIBAL CODE, tit. 15, ch. 3, § 15.301 (1988) (creating a “Native Plant Law”).

178. CONFEDERATED SALISH & KOOTENAI TRIBES OF FLATHEAD RESERVATION, CULTURAL RESOURCE PROTECTION ORDINANCE Part III (2004); CONFEDERATED TRIBES OF WARM SPRINGS RESERVATION TRIBAL CODE ch. 490.010(4) (2003); GILA RIVER PIMA–MARICOPA INDIAN COMMUNITY OF GILA RIVER INDIAN RESERVATION TRIBAL CODE, tit. 15, ch. 3, § 15.301 (1988) (creating a “Native Plant Law”).

179. Cf. CONFEDERATED SALISH & KOOTENAI TRIBES OF FLATHEAD RESERVATION, CULTURAL RESOURCE PROTECTION ORDINANCE Part II, § 1(f); *id.* Part III, § 1(g), (m)(1) (2004); CONFEDERATED TRIBES OF WARM SPRINGS RESERVATION TRIBAL CODE ch. 490.010(4) (2003).

180. See Sarah Harding, *Value, Obligation and Cultural Heritage*, 31 ARIZ. ST. L.J. 291, 297 (1999). The term “cultural heritage” has been used interchangeably with “cultural property.” *Id.* at

“places and things which can be considered ‘resources’ to be used for cultural preservation.”<sup>181</sup> This expansive definition accommodates a broad array of resources important to indigenous communities. It would include, for example, native languages, which comprise part of indigenous peoples’ distinct cultural identity.<sup>182</sup> Similarly, cultural preservation programs that aim to protect the natural world are also included in this definition because much of traditional indigenous culture—from subsistence living to religious practices and beliefs—is tied to land and natural resources.<sup>183</sup>

This research indicates that tribes have endeavored to protect their cultural resources in a wide variety of ways. Not every one of the sixty-two tribes reflected here maintain a formal cultural resource program, but all have some form of cultural preservation in place. Even in the absence of formal programs, language preservation efforts appear to be a top priority.<sup>184</sup> For example, the Paiute–Shoshone Tribe of the Fallon Reservation and Colony of Nevada promotes revitalization of the Paiute–Shoshone languages by offering study tapes and encouraging Paiute–Shoshone families to speak their native languages in the home.<sup>185</sup> The Choctaw Nation of Oklahoma’s website includes a link to “Culture” which explains the cultural life of Choctaws, from traditional dress to tribal history. The tribe also operates the Choctaw Language Program.<sup>186</sup>

Several tribes maintain natural resource preservation programs in lieu of cultural resource programs, evidencing their belief that many cultural practices exist in and through the natural world. The Quileute Tribe of the Quileute Reservation in Washington, for example, states its Natural

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297–98.

181. Dean B. Suagee, *Tribal Voices in Historic Preservation: Sacred Landscapes, Cross-Cultural Bridges, and Common Ground*, 21 VT. L. REV. 145, 211 (1996).

182. See Stephen D. Osborne, *Protecting Tribal Stories: The Perils of Propertization*, 28 AM. INDIAN L. REV. 203, 208 (2003–2004).

183. See Carpenter, *supra* note 40, at 620.

184. See, e.g., Official Website of the Alabama-Coushatta Tribe of Texas, at <http://www.alabama-coushatta.com/history/default/htm> (last visited Jan. 29, 2005) (stating that “a large majority of tribe members speak the Native language and great efforts are made to keep the language . . . alive”); Official Website of the Aroostook Band of Micmacs, at [http://www.micmacnsn.gov/html/cultural\\_program.html](http://www.micmacnsn.gov/html/cultural_program.html) (last visited Jan. 29, 2005) (stating that one of the objectives of its Cultural Program is to teach Micmac language).

185. See Official Website of the Paiute–Shoshone Tribe of the Fallon Reservation and Colony of Nevada, at <http://www.fpst.org> (last visited Jan. 27, 2005) (“Language is power. Language is culture.”).

186. Official Website of the Choctaw Nation of Oklahoma, at <http://www.choctawnation.com> (last visited Jan. 27, 2005).

Resources Mission on the first page of its website:

Our goal is to provide treaty year-round fishing opportunity for Quileute Tribal members, to exercise primary hunting rights through responsible management, and to protect subsistence and ceremonial gathering rights utilizing habitat conservation and restoration in our usual, accustomed and ceded areas on the land and in the ocean.<sup>187</sup>

The Lummi Nation and the Nooksack Indian Tribe, among others, also have extensive Natural Resources Departments dedicated to enriching the lives of their people through natural resource preservation.<sup>188</sup>

Of the sixty-two tribes that addressed cultural resource preservation, a majority have developed a formal tribal office or department dedicated to preserving tribal culture. The nature and extent of these programs varies significantly, and the tribes' offerings fall along a broad spectrum. At one end are tribal programs in the nascent stages of development. The Death Valley Timbi-Sha Shoshone Band of Indians in California, for example, has plans to develop such programs, but the links to its NAGPRA/Cultural Resources Department, Natural Resources Program, and Language Preservation Program indicate that the programs (or at least the links) are "coming soon."<sup>189</sup> Others, like the Samish Tribe of Washington, provide links to a "Cultural Department," but more comprehensive cultural resource programs are not referenced.<sup>190</sup>

At the other end of the spectrum, several tribes have websites that contain a plethora of information regarding the preservation of cultural resources. The Citizen Potawatomi Nation of Oklahoma supports a Cultural Resources Department with a promise to "maintain, protect, and nurture our culture, our spiritual beliefs, and our historic values, through

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187. Official Website of the Quileute Tribe of the Quileute Reservation of Washington, at <http://www.quileutetribe.org> (last visited Jan. 27, 2005).

188. Official Website of the Lummi Nation, at <http://www.lummi-nsn.org> (last visited Jan. 27, 2005); Official Website of the Nooksack Indian Tribe, at [http://www.nooksack-tribe.org/Natural\\_Resource.htm](http://www.nooksack-tribe.org/Natural_Resource.htm) (last visited Jan. 27, 2005).

189. Official Website of the Death Valley Timbi-Sha Shoshone Band of Indians of California, at <http://www.timbisha.org/programs.htm> (last visited Jan. 27, 2005).

190. Official Website of the Samish Indian Tribe of Washington, at <http://www.samishtribe.nsn.us> (last visited Jan. 27, 2005) (containing a link to its "Cultural Department"); *see also* Official Website of the Blackfeet Tribe of the Blackfeet Indian Reservation of Montana, at <http://www.blackfeetnation.com> (last visited Jan. 27, 2005) (containing a link to a cultural department page that is under construction).

the celebration of our unique traditions, languages, and sovereignty.”<sup>191</sup> The Potawatomi Cultural Resources Department maintains a language program, works on repatriation issues under NAGPRA, and is undertaking, among other things, a Tribal Heritage Program, which will record on DVD the history of the tribe through storytelling and photographs of tribal members and significant tribal events.<sup>192</sup> Similarly, the Hopi Tribe, which has long been recognized for its extensive efforts to protect its natural and cultural resources, maintains a Department of Natural Resources, a Cultural Preservation Office, an Environmental Protection Office, and a Water Resources Program, among others.<sup>193</sup> The Confederated Tribes of the Umatilla Reservation of Oregon own and operate the Tamastlikt Cultural Institute, which has a mission to keep alive the culture and history of the three tribes confederated on the Umatilla reservation—the Cayuse, Umatilla, and Walla Walla.<sup>194</sup> The Eastern Shoshone Tribe of the Wind River Reservation, the Chickasaw Nation of Oklahoma, and the Jicarilla Apache Tribe of New Mexico also maintain extensive cultural preservation programs.<sup>195</sup>

## 2. *Cultural Preservation Codes*

As with “cultural resources,” this Article adopts a broad definition of “cultural preservation.” If the tribal code addressed the preservation of culture in any respect, it was included in this review. For example, tribal codes establishing offices or setting up administrative authority for cultural resource programs are reflected here, as well as tribal codes relating to language preservation, physical integrity of reservation borders, and—the largest category—tribal codes related to the preservation of sacred places and Native burial sites.

Of the 351 tribes researched, twenty-nine had tribal codes relevant in

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191. Official Website of the Citizen Potawatomi Nation of Oklahoma, *at* <http://69.53.86.10/Potawatomi.org/> (last visited Jan. 27, 2005).

192. *Id.*

193. Official Website of the Department of Natural Resources of the Hopi Tribe, *at* <http://www.hopi.nsn.us/dnr.asp> (last visited Jan. 27, 2005).

194. Official Website of Tamastlikt Cultural Institute, *at* <http://www.tamastlikt.com> (last visited Jan. 27, 2005).

195. Official Website of the Chickasaw Nation, *at* <http://www.chickasaw.net> (last visited Jan. 27, 2005) (including a Division of Heritage Preservation, Cultural Resources Department, and Tribal Museums); Official Website of the Eastern Shoshone Indian Tribe of the Wind River Reservation of Wyoming, *at* <http://www.easternshoshone.net> (last visited Jan. 27, 2005); Official Website of the Jicarilla Apache People, *at* <http://www.jicarilla.net> (last visited Jan. 27, 2005) (referencing the Jicarilla Culture Center, which supports an Elder’s Committee and an Artisan’s Co-op).

some respect to the preservation of their tribal cultural resources.<sup>196</sup> Again, the codes varied widely in their scope and content. While a few tribes had extensive cultural resource codes,<sup>197</sup> they comprised a minority. Most tribes maintained codes on only one or two substantive topics. This Part does not offer an exhaustive discussion of each tribe's code, but rather illustrates the general findings using specific examples.

In a few cases, the sole mention of cultural resource preservation was in a tribal code or ordinance establishing a cultural preservation department (through which other, more extensive resources may be available).<sup>198</sup> These included codes that created arts councils,<sup>199</sup> historic preservation offices,<sup>200</sup> or positions for archaeological officers.<sup>201</sup>

In some instances, tribes addressed the preservation of their cultural resources indirectly through their code. The Hoopa Valley Tribe of California, for example, has maintained a traditional lifestyle of fishing on the Klamath River for thousands of years.<sup>202</sup> Preserving their natural environment and its attendant resources is essential to the Hoopa's cultural survival. Accordingly, the tribe's sole ordinance relating to the preservation of its cultural resources is one that requires the reservation to be closed to non-members, presumably to protect the tribe's natural resources from desecration or overuse. Pursuant to that code provision, a non-member cannot enter the Hoopa Valley Reservation, except with a member, and then only with a permit.<sup>203</sup>

Within the category of cultural preservation, a majority of tribes has

196. See App., *infra* pp. 133–64. Once again, it is important to point out that there are, undoubtedly, tribes that have adopted relevant tribal codes that simply were not accessible through the research sources utilized for this paper.

197. ABSENTEE–SHAWNEE TRIBE OF INDIANS OF OKLA. TRIBAL CRIM. CODE, § 516 (2004); EASTERN BAND OF CHEROKEE INDIANS TRIBAL CODE, CH. 70: SKELETAL REMAINS AND BURIAL SITE PRESERVATION (1998).

198. See, e.g., Department of Heritage Preservation Establishment and Organization Act of 2001, HO-CHUNK NATION CODE, 1 H.C.C. § 6 (2004) (creating a Department of Heritage Preservation which, presumably, contains heritage preservation resources for tribal members, even though those specific preservation objectives do not appear in the tribal code).

199. POARCH BAND OF CREEK INDIANS OF ALA., TRIBAL ORDINANCE NO. 88:004 (2004) (creating the Creek Indian Arts Council and Creek Indian Arts Council Endowment Fund).

200. Skokomish Tribal Nation Res. 00-63(78), Skokomish Tribal Council (2000) (establishing Skokomish Tribal Historic Preservation Office).

201. FORT MCDOWELL YAVAPAI COMMUNITY OF ARIZ. LAW & ORDER CODE § 19-6 (2000) (establishing the position of Archeological Officer).

202. Official Website of the Hoopa Valley Tribe of California, at <http://www.hoopa-nsn.gov> (last visited Jan. 27, 2005).

203. HOOPA VALLEY TRIBE CODE § 15.3 (2004).

enacted desecration statutes, most of which emphasize the protection of places of religious or historical significance, as well as places of archaeological interest. The desecration statutes have a broad scope; they focus on safeguarding tangible objects and physical places, such as tribal flags,<sup>204</sup> tribal monuments,<sup>205</sup> antiquities,<sup>206</sup> and religious and sacred sites.<sup>207</sup>

In some cases, the codes are broadly constructed to encompass any place or object a tribe may choose to protect. For example, the Absentee Shawnee's desecration statute reads, in pertinent part,

(a) It shall be unlawful to purposely desecrate any public monument or structure; or to purposely desecrate a place of worship or burial, *or other sacred place*.<sup>208</sup>

Numerous tribes also have criminal codes specifically addressing the desecration of burial grounds and, in some cases, human corpses. For example, the Chickasaw Nation of Oklahoma,<sup>209</sup> the Mille Lacs Band of Ojibwe Indians (Minnesota Chippewa),<sup>210</sup> and the White Earth Band of Chippewa all have laws devoted to the protection of burial grounds.<sup>211</sup> Several others have followed suit.<sup>212</sup> In some instances, the desecration statutes apply not only to places with religious significance, but to historic places as well. For example, Hopi law contains provisions devoted to the preservation of "Places and Objects of Sacred, Historical

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204. POARCH BAND OF CREEK INDIANS OF ALA. CRIM. CODE § 8-6-26 (1986) (criminalizing desecration of flags).

205. STOCKBRIDGE-MUNSEE TRIBAL LAW, PUB. PEACE & GOOD ORDER ORDINANCE § 16.4 (1997) (protecting tribal property, including monuments).

206. WHITE MOUNTAIN APACHE CODE § 2.61 (2000) (pertaining to removal or destruction of antiquities).

207. YANKTON SIOUX TRIBE LAW & ORDER CODE ch. XLII § 3-42-1 (2000).

208. ABSENTEE-SHAWNEE TRIBE OF INDIANS OF OKLA. TRIBAL CRIM. CODE § 516 (2004) (emphasis added).

209. Chickasaw Preservation Act of 1998, CHICKASAW NATION CODE § 15-307 (2003). The tribe has reserved space for its "Cultural Services" code, but nothing has yet been codified. *Id.* tit. 13, available at <http://www.chickasaw.net/documents/Title13.pdf> (last visited Jan. 29, 2005).

210. MILLE LACS BAND STATUTES tit. 10, ch. 2, § 1003 (1996).

211. Historic Preservation Act, WHITE EARTH BAND OF CHIPPEWA PROTECTION OF BURIAL GROUNDS CODE tit. I & II (1997).

212. *See, e.g.*, SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS OF MICH. TRIBAL CODE § 71.903 (2003); LAW & ORDER CODE OF UTE INDIAN TRIBE OF UTAH & OURAY RESERVATION OF UTAH § 13-4-101, -102 (1998).

and Scientific Interest on the Hopi Reservation.”<sup>213</sup>

One of the more extensive codes related to the preservation of human remains and sacred burial grounds is that of the Eastern Band of the Cherokee Nation. The Nation has comprehensive provisions regarding the excavation of skeletal remains. The code reads, in part,

(a) The graves of Cherokee people and their ancestors are sacred and shall not be disturbed or excavated.

(b) In the event skeletal remains of a Cherokee are excavated, such remains shall be reburied, together with all associated grave artifacts as soon as shall be reasonable [sic] possible . . . .<sup>214</sup>

The statute also requires that remains discovered outside of Cherokee trust lands must be reburied consistent with NAGPRA and, significantly, codifies the tribe’s position that “[t]he remains of Cherokee people shall not be subjected to destructive skeletal analysis.”<sup>215</sup>

The code is even more explicit with regard to the protection and preservation of the burial grounds of the Cherokee, and additional code sections regulate the proper disposition, preservation, and reburial of Cherokee ancestors and stipulate that proper care be given to burial sites.<sup>216</sup> The Cherokees have also established a Tribal Historic Preservation Office “to increase efforts in the location, documentation and evaluation of ancient, cultural, and historic properties . . . .”<sup>217</sup>

The vast majority of cultural preservation codes uncovered by this research relate specifically to tangible property.<sup>218</sup> In some instances, tribes have tailored these laws to protect tangible property that bears particular importance to them. For example, through its Cultural Resources Protection Act, the Confederated Tribes of the Colville

213. HOPI TRIBE OF ARIZ., ORDINANCE NO. 26 §§ 1, 2(a) (1974).

214. CHEROKEE CODE art. I, § 70-1(a) to -1(b) (1999).

215. *Id.* § 70-1(c).

216. *Id.* § 70-2(a) to -2(e); *id.* § 70-3(a) to -3(e); *id.* art. II.

217. *Id.* art. II, §§ 70-201 to -203.

218. *See, e.g.*, MAKAH LAW & ORDER CODE § 5.5.04 (1999) (addressing desecration of sacred places and objects); NISQUALLY TRIBAL CODE § 14.05.03-.04 (2003) (addressing the destruction of cultural resources); OGLALA SIOUX TRIBE LAW & ORDER CODE ch. 24 (1996) (addressing historic site preservation); PAWNEE TRIBE OF OKLA. LAW & ORDER CODE tit. VI, § 516 (1993) (addressing desecration); RED CLIFF BAND OF LAKE SUPERIOR CHIPPEWA CODE OF LAWS ch. 20 (1999) (addressing historic preservation and desecration).



Reservation provide for the general protection of natural resources, human remains, and tangible cultural property. They have also crafted their Cultural Resources Protection statute to fit their cultural needs by including items such as structured pit houses, rock paintings, talus slide depressions, and intaglios within the scope of the definition of “archaeological resources.”<sup>219</sup> Similarly, the Mille Lacs Band of Chippewa defines “archaeological resources” to include rock carvings, cairns, and tribal weapons.<sup>220</sup> Also, the Confederated Tribes of Siletz Indians of Oregon have a tribal code governing the “Abuse of Tribal Venerated Objects, Tribal Memorials or Objects of Special Tribal Significance,” which includes tangible objects, such as memorials to the dead, buildings, artifacts, artwork, and symbols.<sup>221</sup>

In addition to other forms of preservation, a few tribes have undertaken to protect those tangible—and perhaps even intangible—elements integral to the practice of their traditional knowledge.<sup>222</sup> For example, the Gila River Puma–Maricopa Indian Community of the Gila River Indian Reservation has created a “Native Plant Law” which protects native plants, including the *Washingtonia filifera* (Fam plant), *lysilima thornberi* (ornamental tree), and the *neoevansia diguetii* (dahlia cactus), among others.<sup>223</sup> Presumably, the tribe chose to protect these plants specifically because of their role in ceremonies or for their medicinal properties. Both uses fall within the ambit of tribal traditional knowledge.

Other tribes have gone further by seeking protection for “Indian medicines,” which may require the protection of intangible knowledge as well. “Indian medicines” implies not only the physical resources involved in the medicinal property, but also the intangible knowledge

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219. COLVILLE TRIBAL LAW & ORDER CODE § 4-4-3(d) (2004) (addressing cultural resources protection).

220. MILLE LACS BAND STATUTES tit. 10, ch. 1, § 3(a) (1996).

221. CONFEDERATED TRIBES OF SILETZ INDIANS OF OR. TRIBAL GOV'T OPERATIONS § 15.03(p) (1997).

222. The World Intellectual Property Organization defines traditional knowledge as “tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields.” WORLD INTELLECTUAL PROPERTY ORGANIZATION, REPORT ON FACT FINDING MISSIONS ON INTELLECTUAL PROPERTY AND TRADITIONAL KNOWLEDGE (1998–1999), available at <http://www.wipo.int/tk/en/glossary/index.html#9> (last visited Jan. 29, 2005).

223. GILA RIVER PIMA–MARICOPA INDIAN COMMUNITY OF THE GILA RIVER INDIAN RESERVATION TRIBAL CODE tit. 15, ch. 3, § 15.301B (1988).

necessary to concoct and apply it. For example, the Confederated Tribes of the Warm Springs Reservation have a code in place to protect “cultural materials,” including “eagle feathers, fish, game, roots, berries, cedar bark, *Indian medicines* and water having special significance.”<sup>224</sup>

Similarly, the Confederated Salish and Kootenai Tribes of the Flathead Reservation of Montana may also extend protection to intangible property in their “Cultural Resource Protection Ordinance” by including in the definition of “native plant materials,” “roots, berries, cedar bark, and *Indian medicines*.”<sup>225</sup> They also protect the locations where such materials may be found, defining “religious site” as a place where tribal members go to “gather, harvest, or maintain natural substances or natural products for use in religious ceremonies or for spiritual purposes, including all places or areas where such natural substances or products are located . . .”<sup>226</sup> In this way, the tribe’s code may be interpreted as preserving the ceremonies or practices associated with gathering the natural substances, not merely the substances themselves.

#### *D. Analysis of Cultural Resource Programs and Cultural Preservation Codes*

This Part analyzes tribal efforts to protect cultural heritage through both cultural resource programs and codified law. Part II.D.1 addresses tribal policy and programs directed toward the preservation of indigenous culture. Part II.D.2 goes further, analyzing tribal efforts to protect culture as expressly embodied in the tribes’ written law.

##### *1. Cultural Resource Programs*

Even tribes that have not yet mobilized to develop comprehensive tribal cultural resource programs have, nevertheless, undertaken efforts to revitalize their native languages. Such efforts are understandable, given that many native languages are in imminent danger of extinction.<sup>227</sup> As it relates to cultural property preservation, language is a

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224. CONFEDERATED TRIBES OF WARM SPRINGS RESERVATION TRIBAL CODE ch. 490.010(4) (2003) (emphasis added).

225. CONFEDERATED SALISH & KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, CULTURAL RESOURCE PROTECTION ORDINANCE Part III, § 1(g) (emphasis added).

226. *Id.* Part III, § 1(m)(1).

227. Michael Krauss, *The World’s Languages in Crisis*, 68 LANGUAGE 4, 7 (1992) (arguing that indigenous language and cultures are being overwhelmed by the dominant structure and that

curious property. Although it contains tangible components—in some cases, a written alphabet, recorded stories, and histories—it is in many ways intangible, particularly if the language has never been reduced to writing. Language is also unique in that it is a quasi-intangible property that indigenous peoples do not necessarily seek to keep secret. Rather, in the face of extinction, many tribes hope to see it thrive within the community and live on in future generations.<sup>228</sup>

The power of language has long been recognized by colonial powers, who, in an attempt to destroy tribal culture, systematically strove to extinguish tribal languages.<sup>229</sup> In fact, the loss of indigenous languages is very often the direct result of the assimilative and destructive forces of colonization.<sup>230</sup> Depending on how well the language has survived such forces, contemporary efforts to preserve or revitalize a native language may require the investment of significant resources.

For example, there are no native speakers left among the Santa Ynez Band of Chumash Mission Indians.<sup>231</sup> Accordingly, the tribe is currently working in conjunction with educators and anthropologists to bring the Chumash Inezeno language back into existence.<sup>232</sup> As part of this program, the tribe is devoting revenues from its Chumash Casino Resort to develop a ten-week course to teach Chumash Inezeno to tribal members.<sup>233</sup> Similarly, the Fort McDowell Yavapai Nation of Arizona operates a private elementary school, 'Hmañ 'shawa, which is funded entirely by the tribe.<sup>234</sup> The native language of the Yavapai has been integrated into the school's daily curriculum in an effort to "revive the language and culture of the Community."<sup>235</sup> The Mashantucket Pequot

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possibly ninety percent of the world's languages will be "dead or doomed" by the end of the century); Jim Chen, *Webs of Life: Biodiversity Conservation as a Species of Information Policy*, 89 IOWA L. REV. 495, 508–09 (2004).

228. The future of indigenous languages is precarious at best. Currently, four-fifths of the Native languages of Canada and the United States are not being learned by children. Chen, *supra* note 227, at 508–09.

229. See Carole E. Goldberg, *Individual Rights and Tribal Revitalization*, 35 ARIZ. ST. L.J. 889, 902 (2003).

230. *Id.*

231. See Official Website of the Santa Ynez Band of Chumash Mission Indians of the Santa Ynez Reservation of California, at <http://www.santaynezchumash.org/culture.html> (last visited Jan. 29, 2005) (including Chumash Language Program).

232. *Id.*

233. *Id.*

234. See Official Website of the Fort McDowell Yavapai Nation, 'Hmañ 'shawa Elementary School, at <http://www.ftmcdowell.org/elementary.htm> (last visited Jan. 29, 2005).

235. *Id.*

of Connecticut have gone so far as to create and sponsor a conference entitled, “Revitalizing Algonquian Languages Conference,” designed to share language renewal practices among the Algonquian language-speaking tribes.<sup>236</sup> In fact, of the sixty-two tribes with cultural preservation programs, several indicated that they were dedicating resources for the preservation and/or revitalization of their native languages.<sup>237</sup>

As discussed in Part II.C.1, natural resources programs also take a top priority. Because many aspects of Native culture can only be experienced through the natural world—from vision quests at sacred sites to crafting porcupine-quill earrings—preservation of the tribe’s physical environment is paramount to the perpetuation of tribal culture.<sup>238</sup>

Tribal preservation programs reflect this worldview. The Quileute’s Mission Statement is illustrative. The Quileute Tribe included within its Natural Resources Mission Statement the goal of protecting “subsistence and ceremonial gathering rights” integral to tribal religion and culture.<sup>239</sup> Other tribes similarly focus their energies on natural resources departments devoted to the preservation of the natural world through which Native peoples experience culture, family, and religion.<sup>240</sup> In the program summary for its Natural Resources Department, the Nooksack Indian Tribe asserts that “[f]or thousands of years, Nooksack tribal members have harvested fish in a sustainable manner to support their families and community members.”<sup>241</sup> The Natural Resources Department is devoted to protecting sustainable fishing so that Nooksack Indians may continue this cultural way of life as they have “since time

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236. Official Website of the Mashantucket Pequot, Revitalizing Algonquian Languages Conference, at <http://www.foxwoods.com/TheMashantucketPequot/Links/#> (last visited Jan. 29, 2005).

237. See App., *infra* pp. 133–64.

238. See Carpenter, *supra* note 40, at 620.

239. Official Website of the Quileute Tribe of the Quileute Reservation, *Quileute Natural Resources Mission*, at <http://www.quileutetribe.org> (last visited Jan. 27, 2005).

240. See, e.g., Official Website of the Houlton Band of Maliseet Indians, at <http://www.maliseets.com> (last visited Jan. 29, 2005) (emphasizing that the protection of the Meduxnekeag River, which flows through the tribe’s lands, is essential to preserve tribal practices, traditions, and history); Official Website of the Stillaguamish Tribe of Indians, at <http://www.stillaguamish.nsn.us/index.htm> (last visited Jan. 29, 2005) (discussing preservation of the tribe’s natural resources for economic, subsistence, and ceremonial purposes).

241. Official Website of the Nooksack Indian Tribe, Natural Resource Program Summaries, at [http://www.nooksack-tribe.org/Natural\\_Resource.htm](http://www.nooksack-tribe.org/Natural_Resource.htm) (last visited Jan. 29, 2005).

immemorial.”<sup>242</sup> Also, the Jicarilla Apache Tribe of New Mexico states that “[c]ultural traditions that continue today are grounded in ties to the land, natural resources, and ways of teaching.”<sup>243</sup> In fact, the tribe asserts that “[a]ccess to natural resources . . . [is] essential for cultural continuity.”<sup>244</sup> Through these programs and policies which link natural resources to culture, tribes evidence their need to maintain political and territorial sovereignty over the earth and tangible resources in order to enjoy and experience life through their culture.

In sum, this research indicates that there is increasing movement toward the creation of tribal cultural preservation departments. From funding tribal museums to developing comprehensive language programs, Indian nations in the United States are, more than ever before, working diligently to preserve their tribal cultural heritage.<sup>245</sup> The reasons for this are multi-faceted. First, as seen with the Santa Ynez Band of Chumash Mission Indians of California, tribal economic development projects—namely, gaming—have produced astonishing revenue streams for some tribes.<sup>246</sup> In fact, tribes that were deeply impoverished or driven almost to the point of extinction only decades ago are now able to invest in the preservation of their natural resources and cultural heritage.<sup>247</sup> Revenues from these enterprises have allowed tribes to hire cultural resource directors, archaeologists, and museum curators.<sup>248</sup> As the economic advantages so long absent from Indian

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242. *Id.*

243. Jicarilla Apache Nation History, available at <http://www.jicarilla.net/HistoryPage.html> (last visited Jan. 29, 2005).

244. *Id.*

245. See Mashantucket Pequot Museum & Research Center, at <http://www.pequotmuseum.org/ExhibitGalleries/MashantucketPequotsToday/FoxwoodsTheGamingEnterprise.htm> (last visited Jan. 29, 2005); Official Website of the Mashantucket Pequots, Revitalizing Algonquian Languages Conference, at <http://www.foxwoods.com/TheMashantucketPequots/Links/#> (last visited Jan. 29, 2005).

246. Of course, American Indians are still among the poorest people in America. Depending on the location of reservations, applicable state laws, and the state’s willingness to negotiate, many tribes do not have access to gaming as a source of economic development. See, e.g., Jana L. Walker et al., *A Closer Look at Environmental Injustice in Indian Country*, 1 SEATTLE J. SOC. JUST. 379, 389 (2002) (arguing that gaming is not curing poverty on reservations).

247. See, e.g., Official Website of the Mashantucket Pequots, at <http://www.foxwoods.com/TheMashantucketPequots/History> (last visited Jan. 29, 2005) (detailing the history of the Pequots, a tribe that has transitioned from a pre-contact thriving Nation to a tribe driven almost to the point of extinction by war and disease, but which has recently enjoyed great economic success and cultural revitalization).

248. The Mashantucket Pequots, for example, had dwindled to only a few members when they opened Foxwoods Resort and Casino in Connecticut. Today, the tribe has a comprehensive court

Country increasingly become available, tribes are investing in their most vital assets—their natural resources, cultural property, communities, language, and culture.

These preservation efforts are absolutely essential for indigenous peoples to survive in coming decades. Although threats to indigenous peoples' cultural survival have always existed, those threats have taken on added meaning in the new age of globalization. As Robert Porter has written, “[g]iven the extraordinary forces of assimilation that have been unleashed against our societies,” if indigenous peoples do not choose a “distinct developmental path,” they will eventually cease to exist.<sup>249</sup> As the outside world encroaches ever further on—and appropriates even more from—indigenous cultures, there is a growing desire among indigenous groups to stave off complete cultural assimilation. Many tribes are now using the technological tools of globalization to combat this assimilation. Through the creation of interactive museums, cultural heritage projects captured on DVD, and Indian dictionaries available on-line, indigenous peoples are embracing the technology of the digital age to ensure their continued survival.<sup>250</sup>

Today, indigenous peoples are more politically mobilized than ever before<sup>251</sup> and are responding to assimilative forces with great fervor. In the United States in particular, increasing emphasis has been placed on self-governance.<sup>252</sup> Many tribes have undergone constitutional reform, revitalized tribal governments, developed tribal courts, and are now

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system, a museum, and a research center, and members work diligently to revitalize and preserve traditional practices. One tribal member stated: “The success of the casino has generated funds for the tribe to reach a lot of the goals that it has set over time, including researching its own history, and supporting tribal members who are interested in the culture.” Official Website of the Mashantucket Pequot Museum and Research Center, *at* <http://www.pequotmuseum.org/ExhibitGalleries/MashantucketPequotToday/FoxwoodsTheGamingEnterprise.htm> (last visited Jan. 29, 2005).

249. Porter, *supra* note 167, at 130.

250. See Daes, *supra* note 52, at 144; Angela R. Riley, *Indigenous Peoples and the Promise of Globalization: An Essay on Rights and Responsibilities*, 14 KAN. J.L. & PUB. POL’Y 155, 157 (2004).

251. See generally Anaya, *supra* note 71 (providing overview of indigenous peoples’ increased political mobilization and movement towards assertion of collective rights).

252. See, e.g., Duane Champagne, *Challenges to Native Nation Building in the 21st Century*, 34 ARIZ. ST. L.J. 47, 47 (2002) (“Tribes in the future want more self-determination. They want to make their own decisions. They want to assert sovereignty . . . Greater emphasis on self-determination for Native communities means gaining an economic base and developing more effective tribal government.”).

codifying tribal law.<sup>253</sup> Despite the pressures of the outside world, indigenous peoples are, perhaps more than ever, asserting their right to their continued existence. Cultural preservation programs represent one facet of this endeavor.

## 2. *Cultural Preservation Codes*

This Part analyzes tribes' codified laws governing the preservation of culture. As the empirical data suggests, from mere policy statements to comprehensive schemes designed to protect tribes' traditional knowledge, the content and scope of the codes vary widely.

For example, the Assiniboine and Sioux Tribes of Fort Peck Minnesota's Tribal Education Code states, as a policy objective, that education on the Reservation should include "knowledge of Fort Peck Dakota and Nakoda languages and knowledge of Fort Peck Assiniboine and Sioux culture, government, economics, and environment; knowledge of the history of the Fort Peck Tribes and the role of tribal members in promoting the future of the Tribes . . . ."<sup>254</sup> While the code does not set forth any specific directives, it reflects the tribe's emphasis on retaining the language and culture of its people.

In contrast, most tribes with written laws in this area do set forth directives in their tribal codes. The majority of the laws examined provide specific guidelines regarding tribal burial practices, burial places, and treatment of the dead.<sup>255</sup> It is not surprising that tribes have made special efforts to protect their ancestors, given that U.S. law and policy has long ignored or affirmatively targeted Indian graves for excavation and looting.<sup>256</sup> In virtually all cultures, burial practices reflect cultural and religious beliefs, value for human life, reverence for the

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253. See, e.g., Brown & Desmond, *supra* note 129, at 221 (outlining the growth of tribal courts and their role in interpreting codified tribal law); Goldberg, *supra* note 229, at 909 (discussing constitutional reform in Indian Country).

254. ASSINIBOINE & SIOUX TRIBES OF THE FORT PECK INDIAN RESERVATION COMPREHENSIVE CODE OF JUSTICE, tit. XVI, § 103(c)(2) (2004).

255. ABSENTEE-SHAWNEE TRIBE OF INDIANS OF OKLA. TRIBAL CRIM. CODE § 516 (2004); Chickasaw Preservation Act of 1998, CHICKASAW NATION CODE § 15-307 (2003); MILLE LACS BAND STATUTES tit. 10, ch. 2, § 1003 (1996); SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS OF MICH. TRIBAL CODE § 71.903 (2003); LAW & ORDER CODE OF UTE INDIAN TRIBE OF UINTAH & OURAY RESERVATION OF UTAH § 13-4-101, 102 (1998); Historic Preservation Act, WHITE EARTH BAND OF CHIPPEWA PROTECTION OF BURIAL GROUNDS CODE tit. I & II (1997).

256. See Riley, *supra* note 123, at 52-53 (discussing the history of mistreatment of Native burial grounds under U.S. law). This is not to imply, of course, that tribes were not taking measures to protect their dead prior to codifying tribal burial codes.

land, and the community's relationship with nature.<sup>257</sup> This is particularly true of indigenous peoples, who define themselves through time and place as forever linked to ancestors, environment, and the earth.<sup>258</sup> Thus, it is consistent with Native culture to place special attention on protecting burial and sacred sites and preventing grave desecration.

The 1990 passage of NAGPRA likely inspired tribes to address the issue of burial grounds. This human rights law provides a model of protection that individual tribal communities can consider and apply. Several of the tribal burial ground codes seem to anticipate issues that have arisen or could arise under NAGPRA. The Eastern Band of Cherokee's admonition that the "[t]he remains of Cherokee people shall not be subjected to destructive skeletal analysis" is one such example.<sup>259</sup> Giving thought to such concerns in advance of litigation may be beneficial to tribes. While a tribal code that addresses the appropriateness of skeletal analysis may not bind non-Native courts, a codified law may nevertheless be persuasive if a case arises under NAGPRA.<sup>260</sup>

In several instances, tribes appear to have constructed their tribal law to facilitate expansive interpretation, presumably by their tribal court. For example, the Absentee Shawnee's desecration code, extending protection to "other sacred places," permits a tribal court to apply the statute to any place of cultural import to the tribe.<sup>261</sup> Similarly, the Hopi Tribe explicitly states its policy that Hopi law should be "liberally construed to maximize the authority of the Hopi Tribe to protect the sites, locations and objects of sacred, historic, and scientific interest within the jurisdiction of the Hopi Indian Tribe."<sup>262</sup> In this way, the Hopi Ordinance expressly affords tribal judges wide latitude to interpret the code for the benefit of the tribe and its cultural survival.

Despite comprehensive cultural property codes among several tribes, this research reveals that the majority of tribes surveyed have not undertaken codification as a means of protecting their cultural property.<sup>263</sup> Furthermore, it shows that tribes that have legislated in this

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257. See Riley, *supra* note 123, at 58.

258. See Riley, *supra* note 123, at 58.

259. CHEROKEE CODE § 70-1(c) (1999).

260. See *infra* Part III.B.

261. ABSENTEE-SHAWNEE TRIBE OF INDIANS OF OKLA. TRIBAL CRIM. CODE § 516 (2004).

262. HOPI TRIBE OF ARIZ. ORDINANCE NO. 26 §§ 1 & 2(a) (1974).

263. See *supra* Part II.C.2.



area have focused on the tangible, rather than the intangible. Accordingly, it is clear that a significant gap exists between the cultural property protection that tribes seek and the codification efforts that they have thus far undertaken to ensure such protection.

### *E. Research Implications*

There is no simple explanation for why tribes have not focused on intangible property when creating tribal codes. There are, however, some probable rationales for this lacuna.<sup>264</sup>

First, technology has only recently made possible the mass and immediate appropriation of indigenous peoples' intangible property. As this Article argues, the proliferation of the Internet presents a new threat to indigenous cultural property. Sacred material can be taken, distorted, and sent around the world almost instantaneously.<sup>265</sup> Until recently, if a sacred ceremony was viewed without authorization from the tribe, the viewer had limited means of communicating the ceremony's contents. Today, if that same ceremony is recorded on a digital camera, for example, it can be placed on the Internet and sold or disseminated globally in a matter of moments.<sup>266</sup> Technological advances in the past two decades have been tremendous, and it has been a struggle for the law to keep up.<sup>267</sup> Even international institutions devoted entirely to this effort are struggling to produce laws to safeguard intellectual property rights.<sup>268</sup> It is therefore no surprise that indigenous groups—who, by and large, have far fewer resources and clout than governments and corporations—find the development of such laws overwhelming.

Another major obstacle to the creation of tribes' intangible cultural property laws is that, in the United States, federal statutes largely define the domain of intellectual property protection.<sup>269</sup> Those laws exclude, by

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264. See *supra* notes 150–60 and accompanying text.

265. See, e.g., Riley, *supra* note 21, at 175–76 (recounting the story of the Ami and the wrongful appropriation of the “Song of Joy”).

266. See Lewin, *supra* note 55, at 1 (discussing the unauthorized videotape of a sacred Pueblo ceremony that was then duplicated and distributed on the Internet).

267. See generally Peter K. Yu, *The Escalating Copyright Wars*, 32 HOFSTRA L. REV. 907 (2004).

268. See Bryan C. Mercurio, *TRIPS, Patents, and Access to Life-Saving Drugs in the Developing World*, 8 MARQ. INTELL. PROP. L. REV. 211, 216 (2004) (noting that WIPO, the international body charged with protecting intellectual property rights, is unable to do so effectively due to a variety of “institutional shortcomings”).

269. See, e.g., 17 U.S.C. § 301 (2000) (specifying that the federal copyright act preempts much of state statutory and common law regarding copyright); 28 U.S.C. § 1338(a) (2000) (making jurisdiction over patent cases entirely federal and “exclusive of the courts of the states”); Mark I.

definition, most indigenous intellectual property.<sup>270</sup> Thus, tribes must look beyond the parameters of the dominant legal regime to define and protect their intangible works.<sup>271</sup> In the past, tribes governed the treatment of such property through social controls and informal systems.<sup>272</sup> Now, with the mass appropriation and dissemination of Indian culture, tribes are faced with the daunting task of developing formalized tribal laws to protect their tangible and intangible creations.

### III. RELUMING TRIBAL LAW: WHY IT MATTERS

Revitalization of indigenous nations requires that indigenous peoples actively pursue a distinct developmental path, culture, and identity.<sup>273</sup> The development of cultural property protection under tribal law is essential to this task. Part III.A focuses on the concept of “living sovereignty” and argues that indigenous peoples can significantly advance their struggle for survival by developing tribal cultural property law. Simply put, “cultural restoration is essential to the task of building strong Nations in the future.”<sup>274</sup> Part III.B also stresses the importance of establishing tribal cultural property law, but for a different reason. There is evidence that tribal law has made, and will continue to make, its way into the law of the nation and the world.<sup>275</sup> Given the increasing volume of litigation over intellectual property rights in the United States and abroad, the development of cultural property law presents indigenous nations with a unique opportunity to infuse dominant legal systems with indigenous perspectives regarding the appropriate protections for tribal cultural property.

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Koffsky, *Patent Preemption of Computer Software Contracts Restricting Reverse Engineering: The Last Stand?*, 95 COLUM. L. REV. 1160, 1169 (1995) (stating that “preemption can be inferred from the structure and purpose of the statutes governing patent law”); cf. David Hricik, *Remedies of the Infringer: The Use by the Infringer of Implied and Common Law Federal Rights, State Law Claims, and Contract to Shift Liability for Infringement of Patents, Copyrights and Trademarks*, 28 TEX. TECH. L. REV. 1027, 1075 (1997) (noting that the federal trademark statute, the Lanham Act, does not preempt the entire field of state trademark law).

270. See *supra* Part I.

271. See *supra* Part I.

272. See, e.g., Mark C. Suchman, *Invention and Ritual: Notes on the Interrelation of Magic and Intellectual Property in Preliterate Societies*, 89 COLUM. L. REV. 1264, 1265 (1989) (arguing that intellectual property rights did indeed exist in preliterate societies, as owners of these rights used magic as a way of creating and ensuring monopoly rights).

273. See Porter, *supra* note 167, at 130.

274. Tsosie, *supra* note 19, at 308–09.

275. See *infra* Part III.B.

### A. *Living Sovereignty*

Recent U.S. Supreme Court Indian law jurisprudence has placed strict limitations on tribal jurisdiction over non-Indians, even when there is clear evidence of resulting harm to the tribal community.<sup>276</sup> Consequently, some scholars question the utility of developing tribal laws to protect cultural property if those laws will be unenforceable outside of reservation boundaries.<sup>277</sup> Although *sui generis* systems offer unique local means of protecting traditional knowledge, the information they are designed to protect remains vulnerable to appropriation by non-Indians if these laws are unenforceable outside the region of origin.<sup>278</sup> Indeed, it is frustrating when laws exist to protect traditional knowledge, but they cannot be enforced in the industrialized countries where most of the commercial producers and consumers of indigenous cultural property actually live.<sup>279</sup>

The OutKast incident illustrates these shortcomings. Even if the Navajo Nation's tribal code prevented unauthorized use of the "Beauty Way" song, it is doubtful that the Navajo Nation could assert jurisdiction over OutKast. Although OutKast caused harm to Navajos on the reservation, the conduct itself did not occur there. Given tribes' inability to assert jurisdiction over the off-reservation activities of non-members, it is unlikely that the Navajo Nation would be able to enforce its laws

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276. See, e.g., *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997) (holding that a tribal court did not have adjudicatory jurisdiction over a nonmember pertaining to an accident that occurred on a state-maintained highway crossing tribal lands). Over the past twenty years, U.S. Indian law scholars have been vocal critics of the Supreme Court's assault on tribal sovereignty. See, e.g., Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 7 (1999) (explaining how recent Supreme Court decisions, rather than congressional action, have eroded tribal sovereignty); David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 290 (2001) (contending that the Supreme Court has made "radical departures from the principles of Indian law" in its unrelenting attack on tribal sovereignty); Joseph William Singer, *Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641, 643 (2003) (asserting that, "[o]ver the last twenty years, the Supreme Court has led a massive attack on tribal sovereignty"); Gloria Valencia-Weber, *The Supreme Court's Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets*, 5 U. PA. J. CONST. L. 405, 409 (2003) (stating that "[t]oday, the viscerating potential of the Court's Indian law decisions provokes a real and palpable fear among tribal nations for their future existence").

277. See Bodeker, *supra* note 113, at 787.

278. Ragavan, *supra* note 25, at 25–26.

279. Daes, *supra* note 52, at 145.

against OutKast in Navajo tribal court.<sup>280</sup>

Despite very real limits on enforcement of tribal law, indigenous nations must nevertheless pursue the path of a “living sovereign.” That is, Native American sovereign status should be reinforced not only through words, but also through the actions of a sovereign nation. Developing laws to protect cultural property would constitute such action. For instance, the Navajo Nation may be unable to assert jurisdiction over OutKast; however, “living sovereignty” requires that the Navajo Nation enact laws to address these harms and demonstrate a commitment to enforce them. Although jurisdictional concerns are real, no one would expect a state in the union to limit the development of its laws based on a fear that obtaining jurisdiction over a potential defendant would be difficult or even impossible. The act of “living sovereignty” is not and should not be dependent on the colonizer’s attempts to limit indigenous nations. As indigenous law scholar Robert Porter asserts

[w]hile Indigenous leaders quite frequently express and defend the sovereignty of their nations, the reality is that these same leaders and many of their own people have accepted the proposition that their nation is subject to the overriding authority of the United States and dependent upon its largesse. This dependence is not simply a dependence associated with receiving financial benefits from the colonial government or assistance in administering Indigenous lands and resources. It is a psychology of dependence that reflects a genuine and, in some cases, complete abandonment of the belief in inherent Indigenous freedom in favor of reliance on the colonizing state.<sup>281</sup>

As Porter’s comments illustrate, the creation of tribal laws is an

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280. See *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087, 1093–94 (8th Cir. 1998) (holding that a tribal court lacked jurisdiction over Crazy Horse’s descendants’ claim of violation of right of publicity caused by defendants’ marketing of Crazy Horse Malt Liquor adjacent to—but not within—the boundaries of the Rosebud Sioux Reservation). In contrast, the Federal Communications Commission threatened to fine Viacom, Inc.’s twenty television stations a total of \$550,000 for the harm caused to Americans by the mere viewing of Janet Jackson’s breast during the halftime show of the Super Bowl, regardless of where those viewers were physically located at the time. Reuter’s, *Janet Jackson Flash Could Get \$550,000 Fine*, MSNBC NEWS (June 30, 2004), at <http://www.msnbc.msn.com/id/5334465> (last visited Jan. 17, 2005).

281. Porter, *supra* note 167, at 133.

essential act of sovereignty and self-determination that can and should be undertaken independent of the U.S. government's position on tribal jurisdiction. Exercising self-determination necessarily means that indigenous peoples carry out their right to maintain and develop their own customary system of laws and self-governance.<sup>282</sup> Within their territorial boundaries, tribes can take all actions available to them to enforce their laws regarding traditional knowledge. Such efforts are consistent with a living sovereign—an independent, political entity that makes and enforces laws on its own behalf without waiting for “permission” to do so.<sup>283</sup>

In order to effectuate meaningful change in the way Western laws govern indigenous peoples, indigenous groups must exercise their authority to deal with issues of tribal justice in their own way, based on their own value systems.<sup>284</sup> Utilizing tribal law to address the protection of tribal cultural property, as well as other issues, empowers tribes. It reinforces their status as independent, self-governing entities with political and cultural sovereignty and as stewards of their own destiny. When the governing laws within reservation boundaries reflect the traditional customary law of the tribe, rather than that of dominant society, tribal lifeways are affirmed and tribal peoples are ever more committed to their continued survival.<sup>285</sup>

Moreover, the presence of tribal cultural property laws can have very real effects, particularly when offending conduct comes from within. In

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282. See ANAYA, *supra* note 71, at 48–52.

283. See Lorie Graham, *Securing Economic Sovereignty Through Agreement*, 37 NEW ENG. L. REV. 523, 543 (2003). Graham quoted tribal leader Ray Halbritter as stating,

We have empowered ourselves in a way that cannot be denied, and in a way that allows us to do things for our people that we have been unable to do for centuries. . . . I believe that such empowerment is more than just a statement of sovereignty, it is sovereignty, and we have established that sovereignty without waiting or depending on other people to define what that term means. Whatever . . . the pronouncements of the Supreme Court, sovereignty to us is the power to act . . . for ourselves.

*Id.*

284. See Marian E. Bryant, *Tsuu T'ina First Nations Peacemaker Justice System*, 26 LAW NOW 14, 15 (2002), available at <http://www.extension.ualberta.ca/lsp/LawNow26-4/264tsuu.pdf> (citing Tsuu T'ina Nation Court Proposal Final Report, Sept. 23, 1998) (last visited Jan. 29, 2005).

285. See Robert B. Porter, *Tribal Lawyers as Sovereignty Warriors*, 6 KAN. J.L. & PUB. POL'Y 1, 7, 12 (1997).

If the tribal lawyer does nothing other than, for example, borrow the state . . . law, the lawyer is doing nothing other than advising the tribe to replicate itself in the image of the dominant society. Because behavior does flow from the legal environment that encourages it, the tribal lawyer in that situation is unwittingly contributing to the demise of that tribe.

*Id.*

*Chilkat Indian Village v. Johnson*,<sup>286</sup> discussed fully in Part III.B, the Chilkat Indian Village used tribal law to recover precious tribal cultural property from thieves. In *Chilkat*, tribal members conspired with a non-Indian art dealer to steal sacred whalebone carvings from the tribe.<sup>287</sup> Through application of its Artifacts Ordinance, which stipulated that such property could not be removed from the tribe without permission of the tribal council, the tribe eventually obtained jurisdiction over the Indian defendants in tribal court.<sup>288</sup> The Artifacts Ordinance was essential to the outcome of the case because tribal law defined the tribe's ownership interest in the carvings.<sup>289</sup> Thus, the Artifacts Ordinance served as the linchpin for the tribe's cause of action against the defendants and for recovery of the artifacts.<sup>290</sup>

Each tribal society must decide whether aspects of its own culture can be sold, imitated, commodified, or commercialized by its own members or by those outside the tribe. In some societies, sacred elements—such as the kachina of the Hopi—may be so precious as to preclude their commodification and sale, even by members of the group.<sup>291</sup> It is crucial that tribes have statutes and ordinances in place in the event such appropriation or infringement occurs.<sup>292</sup> It may be difficult, for example, for a tribe to prevent an individual tribal member from turning a tribal song or story into an audio recording or a play, unless tribal laws preventing it are in place. Because such works are likely part of the “public domain,” federal copyright law would offer no protection against

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286. 20 Indian L. Rep. 6127 (Am. Indian Law. Training Program) (Chilkat Tribal Ct. 1993) [hereinafter *Chilkat II*].

287. *Id.* at 6128.

288. *Id.* at 6129.

289. *Chilkat Indian Vill. v. Johnson*, 870 F.2d 1469, 1472–73 (9th Cir. 1989) [hereinafter *Chilkat I*]. The United States Court of Appeals for the Ninth Circuit remanded the case to the district court, *id.* at 1473–75, which referred the matter to the tribal court. *Chilkat II*, 20 Indian L. Rep. at 6128. In ruling on the question of whether the tribe's causes of action for conversion arose under federal law, the Ninth Circuit determined that they did not. *Chilkat I*, 870 F.2d at 1473–75. The court held that the tribe's ownership interest in the artifacts was defined by the Artifacts Ordinance, a creation of tribal law, and therefore did not implicate federal law in any way. *Id.* at 1472–73.

290. *Cf.* Complaint at 1–2, *Toulumne Band of Me-Wuk Indians of Cal. Tuolumne Rancheria v. Baca* (E.D. Cal. 2003) (No. cv F-03-6363 OWW) (relying solely on federal and state causes of action) (on file with author). The Toulumne Band of Me-Wuk Indians sued in federal court to prevent the unauthorized sale of a video of the tribe's sacred ceremonies on the Internet. *Id.* at 5.

291. Tsosie, *supra* note 19, at 313 (discussing whether even Hopis themselves should be allowed to sell the sacred kachina dolls).

292. *See generally Chilkat II*, 20 Indian L. Rep. 6127.

such use.<sup>293</sup>

On the other hand, tribes may see the development of such works as a crucial part of tribal cultural revitalization that should be protected against claims of infringement.<sup>294</sup> Some scholars contend that extending intellectual property protections to indigenous intangible property may result in preserving a “static” culture rather than a living one.<sup>295</sup> Protecting intangible property may freeze culture as a historic relic and deny contemporary indigenous artists the opportunity to give new life and voice to indigenous works.<sup>296</sup> It is up to each individual tribe to determine which activities it seeks to incentivize and which activities it hopes to deter.

Either way, a tribe will be well-served if it achieves consensus on its tribal law prior to the emergence of a dispute. This way, a tribe can come together as a community to determine the appropriate treatment of its most valuable resources before infringement occurs. This process could serve to unify tribal members and provide an opportunity for elders to share with others the historical and spiritual significance of the tribe’s cultural property. In addition, defined laws have the benefit of putting others—both members and nonmembers—on notice of applicable restrictions on the use of the tribe’s cultural property.

The process of defining tribal law is symbiotic with the role of tribal judges in applying and interpreting it. Both the legislative and the judicial arms, working together, contribute to the independence and sovereignty of the tribal government and tribal community.<sup>297</sup> Indeed, the role of the tribal judiciary in defining, creating, and enforcing tribal law should not be underestimated.<sup>298</sup> Tribal courts not only act in a law-

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293. See *supra* Part I. However, despite the absence of tribal law governing intangible property, tribal communities have long exercised other methods of “social control” over their members. See Tsosie, *supra* note 124, at 290–91 (noting that even tribes that have not codified tribal law nevertheless informally regulate the behavior of tribal members).

294. See Osborne, *supra* note 182, at 233–34.

295. Osborne, *supra* note 182, at 233–34.

296. Osborne, *supra* note 182, at 233–34.

297. See Valencia-Weber, *supra* note 122, at 232 (“Tribally operated courts are the primary tribal institutions charged with carrying the flame of sovereignty and self-government.”).

298. See generally Russel Lawrence Barsh, *Putting the Tribe in Tribal Courts: Possible? Desirable?*, 8 KAN. J.L. & PUB. POL’Y 74 (1999); Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts*, 46 AM. J. COMP. L. 287 (1998); Newton, *supra* note 150; Frank Pommersheim, *Tribal Courts: Providers of Justice and Protectors of Sovereignty*, 79 JUDICATURE 110 (1995); Valencia-Weber, *supra* note 122; Carey N. Vicenti, *The Reemergence of Tribal Society and Traditional Justice Systems*, 79 JUDICATURE 134 (1995); J. Clifford Wallace, *The New Era of Federal-Tribal Court Cooperation*, 79 JUDICATURE

making role, but they also are the primary tribal institutions charged with carrying the flame of sovereignty and self-government as they implement, interpret, and enforce tribal laws.<sup>299</sup> Frequently, tribal court judges are tribal members who seek to infuse cultural values into the legal process.<sup>300</sup> Because tribal courts retain some independence from dominant adjudicatory bodies, they have freedom “to decide crucial questions that arise within the tribal territory.”<sup>301</sup> As one scholar argues, “[t]ribally operated courts are the vanguard for advancing and protecting the right of tribal self government.”<sup>302</sup>

### B. Making “Real” Law

There exists another important reason why tribes should develop tribal codes regarding the protection of cultural property. Tribes themselves are in the best position to determine whether laws designed to protect their intangible and tangible cultural property do, in fact, work effectively within the tribal context. As tribal laws are tested in the community, and possibly challenged in tribal courts, tribes gain valuable insight into the effectiveness of those laws. As international (and perhaps domestic) law advances toward the recognition and protection of indigenous peoples’ rights regarding cultural property, tribes that have tried and tested their laws will be able to speak to the ideal regime in terms of substance, scope, and content. These tribes will be in the best position to contribute to a new overarching legal system based on their knowledge and experience rather than hope and speculation.

Expecting the world to recognize and abide by tribal law may seem idealistic. As one intellectual property scholar noted, “romantic criticism . . . simply fails to persuade a large public audience.”<sup>303</sup> However, tribal law may, in fact, influence rule makers and judges outside of the tribal court system. Even where Anglo-American courts do not rely specifically on tribal law, the mere acknowledgment of tribal law in federal and state courts lends increased legitimacy and respect to

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150 (1995).

299. See Sandra Day O’Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 2 (1997).

300. *Id.*

301. Valencia-Weber, *supra* note 122, at 233.

302. Valencia-Weber, *supra* note 122, at 232.

303. Heald, *supra* note 98, at 543 (quoting Michael F. Brown, *Can Culture Be Copyrighted?*, 39 CURRENT ANTHROPOLOGY 193, 195 (1998)).



tribal law systems.

To date, tribal law has found its way into relatively few Anglo-American court decisions, but there have been successes. One example is the case of *Chilkat Indian Village v. Johnson*, discussed in the previous section. In *Chilkat*, an Alaskan native village sought to recover its precious artifacts and carvings from a non-Indian art dealer who had conspired with tribal members to acquire the artifacts.<sup>304</sup> After the first attempt to remove the artifacts in 1976, the Village created an Artifacts Ordinance. The Ordinance required that any party seeking to remove clan property from tribal custody must first seek and obtain permission from the tribe's governing body, the Chilkat Indian Village Council.<sup>305</sup> The 1976 Artifacts Ordinance read:

No person shall enter onto the property of the Chilkat Indian Village for the purpose of buying, trading for, soliciting the purchase of, or otherwise seeking to arrange a removal of artifacts, clan crests, or other traditional Indian art work owned or held by members of the Chilkat Indian Village or kept within the boundaries of the real property owned by the Chilkat Indian Village, without first requesting and obtaining permission to do so from the Chilkat Indian Village Council.<sup>306</sup>

With the Artifacts Ordinance in place, the tribe created a tribal court to ensure a forum where the dispute could play out.<sup>307</sup> The tribe also codified its choice of law provision, which stipulated that the tribal court would apply Tlingit customary law.<sup>308</sup>

After the federal district court dismissed the case, the United States Court of Appeals for the Ninth Circuit heard the case on appeal.<sup>309</sup> In addressing whether the tribe's conversion claims arose under federal law, the Ninth Circuit expressly acknowledged the legal underpinnings

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304. *Chilkat II*, 20 Indian L. Rep. 6127, 6127 (Am. Indian Law. Training Program) (Chilkat Tribal Ct. 1993); see Nell Jessup Newton, *Memory and Misrepresentation: Representing Crazy Horse*, 27 CONN. L. REV. 1003, 1039-40 (1995).

305. Vanessa Magnanini, *Constructing Tribal Sovereignty for the 21st Century: The Story of Lawmaking in Chilkat Indian Village*, *IRA v. Johnson*, 18 B.C. THIRD WORLD L.J. 45, 52 (1998).

306. *Chilkat II*, 20 Indian L. Rep. at 6129.

307. See *CHILKAT INDIAN VILLAGE, ORDINANCE NO. 80-001* (1980); *Johnson v. Chilkat Indian Vill.*, 457 F. Supp. 384, 386, 388 (D. Alaska 1978).

308. *Id.*

309. See *Chilkat I*, 870 F.2d 1469, 1470 (9th Cir. 1989).

of the tribe's claim by stating that the Village's proprietary interest in the artifacts was a "creature of tribal law or tradition."<sup>310</sup> As to the claims against the Indian defendants, the court dismissed them, stating that the case against them belonged in tribal court.<sup>311</sup> However, in doing so, the court recognized the customary law of the Tlingit people, referencing the Artifacts Ordinance and stating that the enforcement of the Ordinance against tribal members was an issue for the tribal courts.<sup>312</sup>

Although the Ninth Circuit did not adjudicate matters of tribal law (nor, most would argue, should it have), the mere incorporation of the Artifacts Ordinance in its opinion validated tribal law. When federal courts acknowledge tribal law in a published opinion—whether or not it actually influences the outcome of the case—it gives tribal law an increased legitimacy in the eyes of tribal members and the dominant culture. When other federal courts, looking to such opinions, see that tribal law has been utilized in this forum, it increases the likelihood that the dominant legal system will accept the important role tribal law can play in the adjudication of issues that go to the essence of tribal life.

Tribal customary law has also been applied in at least one other federal court case dealing with Native peoples' claims to religious freedom and access to a sacred site. In *Natural Arch and Bridge Society v. Alston*,<sup>313</sup> a group of non-Indians brought a First Amendment claim challenging the National Park Service's (NPS) management plan (the "Plan") for Rainbow Bridge National Monument.<sup>314</sup> The plaintiffs contended that the Plan's policy of requesting that visitors not approach or walk under Rainbow Bridge constituted a violation of the Establishment Clause.<sup>315</sup>

The site at issue, Rainbow Bridge, is a "unique natural resource of national and international significance."<sup>316</sup> Located in Southern Utah, it is the world's largest natural bridge.<sup>317</sup> In 1958, Congress approved construction of Glen Canyon Dam, south of Rainbow Bridge, which

310. *Id.* at 1473 (holding therefore that the conversion claim did not arise under federal law).

311. *Id.* at 1475.

312. *Id.* at 1475–76.

313. 209 F. Supp. 2d 1207 (D. Utah 2002), *aff'd by* No. 02-4099, 98 Fed. Appx. 711 (10th Cir. Mar. 23, 2004).

314. *Id.* at 1209.

315. *Id.* at 1214–15. For a full discussion of this case and its implications for Native peoples' access to sacred sites, see Carpenter, *supra* note 68, at 56–58.

316. *Natural Arch*, 209 F. Supp. 2d at 1210.

317. *Id.*

formed Lake Powell and an adjacent recreation area.<sup>318</sup> The creation of Glen Canyon Dam and National Recreation Area significantly increased tourism in the area, which resulted in environmental degradation of the natural arch and impeded Navajo ceremonies.<sup>319</sup> In response, the NPS announced a management plan to preserve the physical integrity of the monument and accommodate the religious beliefs of the Navajo. In the Plan, the NPS requested that certain portions of the monument be closed for revegetation and other measures. The Plan also requested the public to “respect cultural differences by voluntarily not walking underneath Rainbow Bridge.”<sup>320</sup> The Plan was challenged on the grounds that the Plan’s directive that tourists not walk underneath the Bridge constituted a constitutionally impermissible establishment of religion.

The district court, which ultimately upheld the constitutionality of the NPS Management Plan,<sup>321</sup> first acknowledged the importance of Rainbow Bridge in Navajo culture:

The Navajo have a tradition that long, long ago one of their hero gods, hunting in the canyon, was suddenly entrapped by a rush of flood waters. In this predicament, with escape cut off, death for the hunter seemed certain. But just then the great Sky Father cast a rainbow before the torrent, the hero god climbed to safety across the arch, and the latter turned to stone and has so remained until this very day.<sup>322</sup>

The court noted that historically Rainbow Bridge was “important to [Navajo] spiritual beliefs and identity as a people.”<sup>323</sup> These beliefs were recognized as informing Navajo conventions as to how humans should properly interact with the site.<sup>324</sup> Many Navajos expressed these beliefs by observing certain rules at Rainbow Bridge. The court recounted the story of Dogeye-begay, a Navajo guide who rode around the end of the bridge because he did not know the prayer to ensure his safe return should he pass beneath it.<sup>325</sup>

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318. *Id.* at 1211.

319. *Id.* at 1212–13.

320. *Id.* at 1214.

321. *Id.* at 1226–27.

322. *Id.* at 1210.

323. *Id.*

324. *Id.*

325. *Id.*

According to the district court, it was appropriate that the NPS Plan, which suggested that visitors walk around the site rather than underneath it, was devised consistent with Navajo customary law.<sup>326</sup> The court noted that the Plan relied on Navajo customary law to direct how visitors should relate to Rainbow Bridge and other national monuments:

Rainbow Bridge, although a natural feature, has symbolic value much like such places as Mount Rushmore, the Statue of Liberty, or the Lincoln Memorial.

Interpretation seeks to identify these particular values, both congenial and provocative, as well as to demonstrate their role in a living tradition concept. This concept simply invites visitors to assume a receptive state of awareness, much as one might in any meeting hall, cathedral, or temple of the mind. It encourages respect for cultural beliefs and strengthens the identity and heritage of the Navajo Indian.

It suggests that an honest appraisal of the historic example set by Dogeye-begay and other Indian guides, may offer a new awareness and appreciation for both natural and cultural values, irregardless of the life style from which they may originate.<sup>327</sup>

Thus, *Natural Arch* provides an example of the influence tribal customary law may have on a federal decision.<sup>328</sup> Though never identifying the Navajo tradition as “tribal customary law” per se, the court nevertheless relied on Navajo custom as a basis for shaping the management plan for the site.<sup>329</sup>

Other examples outside of the cultural property context further demonstrate that tribal law is making its way into the Anglo-American courts. Increasingly, Native plaintiffs filing lawsuits in state or federal court seek to apply tribal law. Although the possibility that a federal court would apply tribal law may seem remote, a recent federal case provides an apt example of such application.<sup>330</sup>

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326. *Id.* at 1223–24.

327. *Id.* at 1213 n.6 (quoting NPS documents).

328. The Tenth Circuit upheld the district court’s decision. *Natural Arch & Bridge Soc’y v. Alston*, No. 02-4099, 98 Fed. Appx. 711 (10th Cir. Mar. 23, 2004).

329. *See Natural Arch*, 209 F. Supp. 2d at 1223–24.

330. *See Cheromiah v. United States*, 55 F. Supp. 2d 1295 (D.N.M. 1999). *See generally* J.R. Mueller, *Restoring Harmony Through Nalyeeh: Can the Navajo Common Law of Torts Be Applied in State and Federal Forums?*, 2 TRIBAL L.J. (2001–02), at

In *Cheromiah v. United States*,<sup>331</sup> an Indian family sought to file an action for wrongful death against the United States government under the Federal Tort Claims Act.<sup>332</sup> Cheromiah, the deceased, had been misdiagnosed at an Indian Health Services-operated hospital and died after being transported to another hospital in Albuquerque, New Mexico.<sup>333</sup> The federal district court determined that the tort had occurred within the boundaries of the Acoma Indian Reservation.<sup>334</sup> Relying upon federal case law, the court explained that federal law provides that “the law of the place of injury controls.”<sup>335</sup> Accordingly, the court held that Acoma tribal law and not New Mexico tort law governed.<sup>336</sup> As one scholar noted, “[t]he *Cheromiah* decision signals the Federal Tort Claims Act as a future area for recognition of tribal law as a viable choice in conflicts of law.”<sup>337</sup>

In a final example, tribal law made its way into a federal case by reference when a federal judge determined that the tribal court exhaustion doctrine mandated that the case be adjudicated in tribal court.<sup>338</sup> In *United States v. Tsosie*,<sup>339</sup> the U.S. government brought a trespass and ejection action on behalf of itself and one Indian against another Indian concerning an Indian allotment.<sup>340</sup> Remanding the case to tribal court, the district court held that the United States was required to exhaust its tribal court remedies.<sup>341</sup> The judge determined that Navajo tribal law applied to the case:

As a non-Navajo, unschooled in the foundations of Navajo culture which, according to Justice Tso, constitute Navajo

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[http://tlj.unm.edu/articles/volume\\_2/mueller/index.php](http://tlj.unm.edu/articles/volume_2/mueller/index.php) (last visited Jan. 29, 2005).

331. 55 F. Supp. 2d 1295 (D.N.M. 1999).

332. *Id.* at 1297.

333. *Id.*

334. *Id.* at 1305.

335. *Id.*

336. *Id.* at 1305–08.

337. Katherine C. Pearson, *Departing from the Routine: Application of Indian Tribal Law Under the Federal Tort Claims Act*, 32 ARIZ. ST. L.J. 695, 706 (2000).

338. For a full discussion of the tribal court exhaustion doctrine, see generally Royster, *supra* note 146.

339. 849 F. Supp. 768 (D.N.M. 1994), *aff'd*, 92 F.3d 1037 (10th Cir. 1996).

340. *Id.*, 849 F. Supp. at 769; see also Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1779 n.140 (1997) (discussing *Tsosie* and commenting on the Tribal Court Exhaustion Doctrine).

341. *Id.* at 774–75.

common law, I am unqualified to interpret the law and rule on many of the legal issues which should arise in this case. As noted in [Supreme Court precedent], tribal courts are best qualified to interpret and apply tribal law.<sup>342</sup>

Though the court did not apply and discuss tribal law, the judge's comments demonstrate an appropriate deference, not only to the tribal court, but to tribal law in general.

These cases demonstrate that tribal law is influencing Western legal sources. Judges increasingly take advantage of the dynamic nature of law and go outside "normal" channels in the process of seeking justice. Anglo-American courts and judges will be far more likely to incorporate tribal law into their decisions when such law is ascertainable, either because it has been codified, defined by a tribal court, or made available through testimony of community members or elders. On matters related to the preservation of cultural property and traditional knowledge, it is possible that non-Indian courts may look to the moral authority of tribal law to broaden their conceptions of indigenous justice and non-Western ownership. At the very least, such efforts may encourage federal and state courts to afford deference to tribal beliefs and principles regarding traditional knowledge and cultural survival.<sup>343</sup> Accordingly, the so-called "rhetoric of justice" may have a place in this debate, as international and domestic courts begin to confront more and more cases regarding the appropriation and destruction of indigenous peoples' cultural property.<sup>344</sup> It is important to note that it was not so long ago that international law was thought to be merely a "charade,"<sup>345</sup> but it, too, has found its way into domestic judicial opinions and mainstream jurisprudence with increasing legitimacy.<sup>346</sup>

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342. *Id.* at 775.

343. See Kristine Olson Rogers, *Native American Collaboration in Cultural Resource Protection in the Columbia River Gorge National Scenic Area*, 17 VT. L. REV. 741, 763 (1993).

344. Heald, *supra* note 98, at 542 ("Although the rhetoric of justice is unlikely to convince international policymakers to grant long-term occupant communities new intellectual property rights, it has other clearly effective uses, especially in arguing against strict enforcement of the TRIPS Agreement against developing countries.").

345. See Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 665 (1986) ("In the popular view international law is a charade—governments obey it only if convenient to do so and disregard it whenever a contrary interest appears.").

346. See Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393, 394 (1997).

## IV. RESPONDING TO CRITICS

Undoubtedly, in an era where copyright protections are expanded for the sake of the Walt Disneys of the world,<sup>347</sup> there is no question that intellectuals—left, right, and center—are becoming increasingly suspicious of intellectual property rights.<sup>348</sup> Critics argue that intellectual property rights have taken on an unprecedented expansiveness, instilling fear in free thinkers everywhere.<sup>349</sup> The increased propertization of intangible property, some argue, is a detriment to the public domain and non-market values.<sup>350</sup> There has been a recent wave of scholarship, in fact, that argues against the creation of new property rights, if not a rolling back of existing ones.<sup>351</sup> Today, lobbyists and public interest organizations are devoting serious resources to fight against the growth of intellectual property rights.<sup>352</sup>

Much has been written, for example, about the imperialistic nature of the WTO/GATT Agreement involving Trade-Related Aspects of Intellectual Property Rights (TRIPS).<sup>353</sup> Critics of TRIPS have noted that, far from being limited to trade relations, the TRIPS agreement attempts to remake international copyright law in the image of Western copyright law.<sup>354</sup> As one scholar writes: “If TRIPS is successful across the breathtaking sweep of signatory countries, it will be one of the most effective vehicles of Western imperialism in history.”<sup>355</sup>

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347. LESSIG, *supra* note 23, at 107. *See generally* Depoorter, *supra* note 30.

348. *See, e.g.*, Ghosh, *supra* note 19, at 74 (noting that scholars have criticized the increased propertization of intellectual property and its negative effects on the public domain and non-market values). Just recently, *Business Week* reported that media giant Clear Channel Communications’ Instant Live unit records concerts and burns CDs for sale right after a show. Brian Hindo, *Slugfests: Burning to Burn Instant CDs*, *BUS. WK.*, July 12, 2004, at 14. Clear Channel has acquired a patent for Instant Live’s technology, which may not only preclude other competing companies from providing the same services at Clear Channel’s venues—the number of which is substantial—but may preclude them from offering the service altogether. *Id.* Rival groups, including DiscLive, argue that the patent ignores prior technology. *Id.* The Electronic Frontier Foundation is now petitioning to revoke the patent as part of a larger effort to fight the administration of patents that are overly broad. *Id.*

349. *See, e.g.*, LESSIG, *supra* note 23, at 11–16 (arguing that the free circulation of ideas is massively threatened by increasingly expansive intellectual property laws).

350. *See* Ghosh, *supra* note 19, at 75.

351. Heald, *supra* note 98, at 522.

352. Heald, *supra* note 98, at 523.

353. *See* Marci A. Hamilton, *The TRIPS Agreement: Imperialistic, Outdated, and Overprotective*, 29 *VAND. J. TRANSNAT’L L.* 613, 613 (1996).

354. *See id.* at 614.

355. *Id.*

While there are many valid criticisms of the expansion of intellectual property rights, a distinction must be made between agreements like TRIPS, for example, and efforts by indigenous groups to protect intangible cultural property. Critics' concerns regarding the imperialistic imposition of Western notions of property on less "sophisticated" countries and communities are well-taken. However, this Article contends that a proposal for the development of *sui generis*, grassroots intellectual property rights by indigenous groups actually operates against those Western efforts. In fact, the formation and establishment of tribal law on these issues does not serve to expand intellectual property rights as much as it arms indigenous communities with the tools necessary to combat oppressive tactics of theft and appropriation.

Because Western intellectual property laws simply do not protect indigenous peoples, the recognition of property rights in cultural property and traditional knowledge should not be viewed as increased propertization. To the contrary, the development of *sui generis* systems would allow indigenous peoples—who for so long have been unable to avail themselves of the protections of intellectual property laws—to finally control the integrity, disposition, and appropriation of their sacred knowledge. Thus, rather than extending additional rights to indigenous peoples, this proposal merely puts indigenous groups on the same footing as other citizens.

## CONCLUSION

In all truth, OutKast could burst onto the Grammy stage again tomorrow, adorned in feathers and buckskin, swaying to stolen songs, and there would likely be little indigenous nations could do about it. However, as indigenous peoples have learned over time, there is a legitimacy in law that serves to bolster moral claims. As property theorist Mary Ann Glendon has argued, "legally enforceable rights . . . have given minorities a way to articulate claims that majorities often respect, and have assisted the weakest members of society in making their voices heard."<sup>356</sup> Though indigenous groups have long had their own systems of laws, a revitalization—and, when appropriate, a codification—of those laws will promote the dual goals of advancing the cause of nation-building for indigenous peoples, while increasing their power and influence in the dominant society.

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356. MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 15 (1991).



The research presented in this Article reveals that tribes are actively pursuing protection of their cultural property. Resources so long out of reach are now making it possible for tribes to develop the infrastructure critical to cultural survival. Today, tribes maintain museums, colleges, and agencies committed to preserving and perpetuating indigenous culture. With their increased participation in the formation of national and global legal structures, indigenous peoples are also utilizing law more than ever to protect vital cultural resources. This trend is illustrated by the growing number of tribal codes dedicated to various aspects of cultural property protection.

There is, of course, more to be done. Assimilative forces have taken a toll on tribes. Thus, the creation of laws dedicated to combating those forces is more important than ever. History proves that indigenous peoples have successfully fought against encroachment for thousands of years. The challenge for indigenous peoples today is to use all legal mechanisms available—consistent with the way that they themselves envision them—in the continued struggle for cultural survival.

## APPENDIX

This Appendix lists all tribes, in alphabetical order, the Author researched for this Article. It also includes tribal information—website address, cultural preservation program, code section regarding cultural preservation, link to tribal code, and specific information regarding code—where available. A full list of federally recognized tribes is available at Notice of Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 67 Fed. Reg. 46,327–33 (July 12, 2002). The research did not include an examination of Native Alaskan Villages or the laws of Native Hawaiians.

### **Absentee–Shawnee Tribe of Indians of Oklahoma**

- Code Section Regarding Cultural Preservation: Yes – Desecration; Corpse Abuse
- Link to Tribal Code: <http://thorpe.ou.edu/codes/absshaw>

### **Agua Caliente Band of Cahuilla Indians of the Agua Caliente Indian Reservation – California**

- Website Address: <http://www.aguacaliente.org>
- Cultural Preservation Program: Yes – Cultural Center

### **Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation – Arizona**

- Website Address: Link to official site has been disabled

### **Alabama–Coushatta Tribes of Texas**

- Website Address: <http://www.alabama-coushatta.com>

### **Alabama–Quassarte Tribal Town – Oklahoma**

### **Alturas Indian Rancheria – California**

### **Apache Tribe of Oklahoma**

### **Arapahoe Tribe of the Wind River Reservation – Wyoming**

**Aroostook Band of Micmac Indians of Maine**

- Website Address: <http://www.micmac-nsn.gov>
- Cultural Preservation Program: Language; Generational Respect; Cultural Arts & Crafts

**Assiniboine & Sioux Tribes of the Fort Peck Indian Reservation – Montana**

- Website Address: <http://www.fortpecktribes.org/default.htm>
- Code Section Regarding Cultural Preservation: Yes – General cultural preservation; Desecration (tribal flag)
- Link to Tribal Code:  
[http://ww.tribwalresourcecenter.org/ccfolder/fortpeck\\_const.htm](http://ww.tribwalresourcecenter.org/ccfolder/fortpeck_const.htm)

**Augustine Band of Cahuilla Mission Indians of the Augustine Reservation – California**

**Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation – Wisconsin**

- Website Address: <http://www.badriver.com/about.html>

**Bay Mills Indian Community – Michigan (previously listed as the Bay Mills Indian Community of the Sault Ste. Marie Band of Chippewa Indians, Bay Mills Reservation, Michigan)**

- Website Address: <http://www.baymills.org>

**Bear River Band of the Rohnerville Rancheria – California**

**Berry Creek Rancheria of Maidu Indians of California**

**Big Lagoon Rancheria – California**

**Big Pine Band of Owens Valley Paiute Shoshone Indians of the Big Pine Reservation – California**

**Big Sandy Rancheria of Mono Indians of California**

**Big Valley Band of Pomo Indians of the Big Valley Rancheria – California**

**Blackfeet Tribe of the Blackfeet Indian Reservation of Montana**

- Website Address: <http://www.blackfeetnation.com>
- Cultural Preservation Program: Yes – Cultural Department

**Blue Lake Rancheria – California**

**Bridgeport Paiute Indian Colony of California**

**Buena Vista Rancheria of Me-Wuk Indians of California**

**Burns Paiute Tribe of the Burns Paiute Indian Colony of Oregon**

- Website Address: <http://www.harneycounty.com/1Paiute.htm>

**Cabazon Band of Cahuilla Mission Indians of the Cabazon Reservation – California**

- Website Address: <http://www.cabazonindians-nsn.gov>

**Cachil DeHe Band of Wintun Indians of the Colusa Indian Community of the Colusa Rancheria – California**

**Caddo Indian Tribe of Oklahoma**

**Cahuilla Band of Mission Indians of the Cahuilla Reservation – California**

**Cahto Indian Tribe of the Laytonville Rancheria – California**

**California Valley Miwok Tribe – California (formerly the Sheep Ranch Rancheria of Me-Wuk Indians of California)**

**Campo Band of Diegueno Mission Indians of the Campo Indian Reservation – California**

- Website Address: <http://www.campo-kumeyaay.org>
- Cultural Preservation Program: Yes – Cultural Repatriation Committee, at <http://www.kumeyaay.com/links.html>

**Capitan Grande Band of Diegueno Mission Indians of California:  
Barona Group of Capitan Grande Band of Mission Indians of the  
Barona Reservation – California**

**Capitan Grande Band of Diegueno Mission Indians of California: Viejas  
(Baron Long) Group of the Capitan Grande Band of Mission Indians of  
the Viejas Reservation – California**

- Website Address: <http://www.viejasbandofkumeyaay.org>

**Catawba Indian Nation (a.k.a. Catawba Tribe of South Carolina)**

- Website Address: <http://www.sciway.net/hist/indians/catawba.html>
- Cultural Preservation Program: Yes – Cultural Preservation Office

**Cayuga Nation of New York**

- Website Address: <http://tuscaroras.com/cayuganation/>

**Cedarville Rancheria – California**

**Chemehuevi Indian Tribe of the Chemehuevi Reservation – California**

**Cher-Ae Heights Indian Community of the Trinidad Rancheria –  
California**

- Website Address: <http://www.trinidad-rancheria.org>

**Cherokee Nation – Oklahoma**

- Website Address: <http://www.cherokee.org>

**Cheyenne–Arapaho Tribes of Oklahoma**

**Cheyenne River Sioux Tribe of the Cheyenne River Reservation – South  
Dakota**

- Website Address: <http://www.sioux.org>

**Chickasaw Nation – Oklahoma**

- Website Address: <http://www.chickasaw.net>
- Cultural Preservation Program: Yes – Extensive Cultural Resources
- Code Section Regarding Cultural Preservation: Yes – Cultural Resources; Land and Natural Resources Preservation; Cultural Services
- Link to Tribal Code: <http://www.chickasaw.net/index.html>

**Chicken Ranch Rancheria of Me-Wuk Indians of California**

**Chippewa–Cree Indians of the Rocky Boy’s Reservation – Montana**

- Website Address: <http://www.tlc.wtp.net/chippewa.htm>

**Chitimacha Tribe of Louisiana**

- Website Address: <http://www.chitimacha.com>

**Choctaw Nation of Oklahoma**

- Website Address: <http://www.choctawnation.com>
- Cultural Preservation Program: Yes – Cultural Resources Department

**Citizen Potawatomi Nation – Oklahoma**

- Website Address: <http://www.potawatomi.org>
- Cultural Preservation Program: Yes – Extensive Cultural Resources

**Cloverdale Rancheria of Pomo Indians of California**

- Website Address:  
<http://www.hometown.aol.com/clvrldler61/myhomepage/business.html>

**Cocopah Tribe of Arizona**

- Website Address: <http://www.cocopah.com>

**Coeur D’Alene Tribe of the Coeur D’Alene Reservation – Idaho**

- Website Address: <http://www.cdatribe-nsn.gov>

**Cold Springs Rancheria of Mono Indians of California**

**Colorado River Indian Tribes of the Colorado River Indian Reservation  
– Arizona & California**

**Comanche Nation – Oklahoma (formerly the Comanche Indian Tribe)****Confederated Salish & Kootenai Tribes of the Flathead Reservation – Montana**

- Website Address: <http://www.cskt.org>

**Confederated Tribes of the Chehalis Reservation – Washington****Confederated Tribes of the Colville Reservation – Washington**

- Website Address: <http://www.colvilletribes.com>
- Cultural Preservation Program: Yes – Cultural Resources Committee; History/ Archaeology Department
- Code Section Regarding Cultural Preservation: Yes – Establishing Cultural Resources Board and Program; Archaeological Protection
- Link to Tribal Code:  
<http://doc.narf.org/nill/Codes/colcillecode/cctoc.htm>

**Confederated Tribes of the Coos, Lower Umpqua and Siuslaw Indians of Oregon****Confederated Tribes of the Goshute Reservation – Nevada & Utah**

- Website Address: <http://www.itcn.org/tribes/goshute.html>

**Confederated Tribes of the Grand Ronde Community of Oregon**

- Website Address: <http://www.grandronde.org>
- Cultural Preservation Program: Yes – Cultural Resources Department

**Confederated Tribes of the Siletz Reservation – Oregon**

- Website Address: <http://www.ctsi.nsn.us>
- Cultural Preservation Program: Yes – Natural Resources Preservation; Cultural Center
- Code Section Regarding Cultural Preservation: Yes – Desecration; Corpse Abuse
- Link to Tribal Code:  
<http://www.tribalresourcecenter.org/tribalcourts/codes/codesdirectory.asp>

**Confederated Tribes of the Umatilla Reservation – Oregon**

- Website Address: <http://www.umatilla.nsn.us>
- Cultural Preservation Program: Yes – Language; Arts & Crafts; Oral Histories

**Confederated Tribes of the Warm Springs Reservation of Oregon**

- Code Section Regarding Cultural Preservation: Yes – Archaeological Protection and Management; Designation of “Cultural Materials”; Grave Desecration
- Link to Tribal Code:  
[http://warmsprings.gtrsoft.com/user/PDF/codebook/490\\_culturalresources.pdf](http://warmsprings.gtrsoft.com/user/PDF/codebook/490_culturalresources.pdf)

**Confederated Tribes & Bands of the Yakama Nation – Washington (formerly the Confederated Tribes & Bands of the Yakama Indian Nation of the Yakama Reservation)**

**Coquille Tribe of Oregon**

- Website Address: <http://www.coquilletribe.org>

**Cortina Indian Rancheria of Wintun Indians of California**

**Coushatta Tribe of Louisiana**

- Website Address: <http://www.coushattatribela.org>

**Cow Creek Band of Umpqua Indians of Oregon**

- Website Address: <http://www.cowcreek.com>

**Coyote Valley Band of Pomo Indians of California**

- Website Address: <http://www.coyotevalleytc.com>

**Crow Tribe of Montana**

- Website Address: [http://www.crownations.net/new\\_page\\_3.htm](http://www.crownations.net/new_page_3.htm)

**Crow Creek Sioux Tribe of the Crow Creek Reservation – South Dakota**

**Cuyapaipe Community of Diegueno Mission Indians of the Cuyapaipe Reservation – California**



**Death Valley Timbi-Sha Shoshone Band of California**

- Website Address: <http://www.timbisha.org>
- Cultural Preservation Program: Yes – Website resource of cultural preservation (i.e. Songs, Food, Language, Land Management, etc.)

**Delaware Nation – Oklahoma (formerly the Delaware Tribe of Western Oklahoma)****Delaware Tribe of Indians – Oklahoma**

- Website Address: <http://www.delawaretribeofindians.nsn.us/>

**Dry Creek Rancheria of Pomo Indians of California****Duckwater Shoshone Tribe of the Duckwater Reservation – Nevada****Eastern Band of Cherokee Indians of North Carolina**

- Website Address: <http://www.cherokee-nc.com>
- Cultural Preservation Program: Yes – Historic Preservation Office
- Code Section Regarding Cultural Preservation: Yes – Corpse Abuse; Removal of Archaeological/Cultural Property; Burial Sites Preservation; Establishing Historic Preservation Office; Permit System
- Link to Tribal Code: UCLA Hugh & Hazel Darling Law Library Tribal Collection Codes

**Eastern Shawnee Tribe of Oklahoma**

- Website Address: <http://www.easternshawnee.org/index.htm>

**Elem Indian Colony of Pomo Indians of the Sulphur Bank Rancheria – California**

- Website Address: <http://www.elemnation.com/>

**Elk Valley Rancheria – California**

- Website Address: <http://www.elkvalleycasino.com/>

**Ely Shoshone Tribe of Nevada**

- Website Address: <http://www.itcn.org/tribes/ely.html>

**Enterprise Rancheria of Maidu Indians of California**

**Flandreau Santee Sioux Tribe of South Dakota**

- Website Address: <http://www.fsst.org>

**Forest County Potawatomi Community – Wisconsin (previously listed as the Forest County Potawatomi Community of Wisconsin Potawatomi Indians – Wisconsin)**

- Website Address: <http://www.fcpotawatomi.com>

**Fort Belknap Indian Community of the Fort Belknap Reservation of Montana**

- Website Address: <http://www.fortbelknapnations-nsn.gov>

**Fort Bidwell Indian Community of the Fort Bidwell Reservation of California**

**Fort Independence Indian Community of Paiute Indians of the Fort Independence Reservation – California**

**Fort McDermitt Paiute & Shoshone Tribes of the Fort McDermitt Indian Reservation – Nevada & Oregon**

- Website Address: <http://www.itcn.org/tribes/ftmcderm.html>

**Fort McDowell Yavapai Nation – Arizona (formerly the Fort McDowell Mohave–Apache Community of the Fort McDowell Indian Reservation)**

- Website Address: <http://www.ftmcdowell.org>
- Cultural Preservation Program: Yes – Archaeological Officer
- Code Section Regarding Cultural Preservation: Yes – Archaeological Protection; Establishing Archaeological Officer; Desecration
- Link to Tribal Code: <http://www.narf.org/nil/tribaldocs.html#codes>

**Fort Mojave Indian Tribe of Arizona, California, & Nevada**

**Fort Sill Apache Tribe of Oklahoma**

- Website Address: <http://fsat.tripod.com>

**Gila River Indian Community of the Gila River Indian Reservation – Arizona**

- Website Address: <http://www.gric.nsn.us/nav.html>
- Cultural Preservation Program: Yes – Archaeological Officer
- Code Section Regarding Cultural Preservation: Yes – Natural Resources Preservation; Archaeological Protection; Desecration; Establishing Archaeological Officer
- Link to Tribal Code: <http://www.nplnews.com/toolbox/tribal/41.html>

**Grand Traverse Band of Ottawa & Chippewa Indians – Michigan (previously listed as the Grand Traverse Band of Ottawa & Chippewa Indians of Michigan)**

- Website Address: <http://www.gtb.nsn.us>

**Graton Rancheria – California**

- Website Address: <http://www.coastmiwok.com>

**Greenville Rancheria of Maidu Indians of California**

- Website Address: <http://www.greenvillerancheria.com>

**Grindstone Indian Rancheria of Wintun–Wailaki Indians of California**

**Guidiville Rancheria of California**

**Hannahville Indian Community – Michigan (previously listed as the Hannahville Indian Community of Wisconsin Potawatomie Indians of Michigan)**

**Havasupai Tribe of the Havasupai Reservation – Arizona**

- Website Address: <http://www.havasupaitribe.com/index.html>

**Ho-Chunk Nation of Wisconsin (formerly the Wisconsin Winnebago Tribe)**

- Website Address: <http://www.ho-chunknation.com>
- Cultural Preservation Program: Yes – Department of Heritage Preservation
- Code Section Regarding Cultural Preservation: Yes – Establishing Department of Heritage Preservation

**Hoh Indian Tribe of the Hoh Indian Reservation – Washington**

**Hoopa Valley Tribe – California**

- Website Address: <http://www.hoopa-nsn.gov>
- Code Section Regarding Cultural Preservation: Yes – Closed Reservation Policy; No Permits Granted to Non-Members for Archaeological Purposes
- Link to Tribal Code:  
<http://doc.narf.org/nill/Codes/hoopacode/hoopacodetoc.htm>

**Hopi Tribe of Arizona**

- Website Address: <http://www.hopi.nsn.us>
- Cultural Preservation Program: Yes – Natural Resources Department; Cultural Preservation Office
- Code Section Regarding Cultural Preservation: Yes – Desecration
- Link to Tribal Code:  
<http://www.tribalresourcecenter.org/tribalcourts/codes/codesdirectory.asp>

**Hopland Band of Pomo Indians of the Hopland Rancheria – California**

- Website Address: <http://www.hoplandtribe.com>

**Houlton Band of Maliseet Indians of Maine**

- Website Address: <http://www.maliseets.com/undercon.htm>
- Specific Information Regarding Code: Natural Resources Department website is under construction

**Hualapai Indian Tribe of the Hualapai Indian Reservation – Arizona**

**Huron Potawatomi, Inc. – Michigan**

**Inaja Band of Diegueno Mission Indians of the Inaja and Cosmit Reservation – California**

**Ione Band of Miwok Indians of California**

**Iowa Tribe of Kansas & Nebraska**

**Iowa Tribe of Oklahoma**

- Website Address: <http://www.iowanation.org>
- Cultural Preservation Program: Yes – Historic Preservation Office; Library and Online Educational Resources; Archaeological & Environmental Services

**Jackson Rancheria of Me-Wuk Indians of California**

- Website Address: <http://www.jacksoncasino.com>

**Jamestown S’Klallam Tribe of Washington**

- Website Address: <http://www.jamestowntribe.org>

**Jamul Indian Village of California**

- Website Address: <http://www.jamulindianvillage.com/index2.html>
- Cultural Preservation Program: Yes – Traveling Cultural Exhibit

**Jena Band of Choctaw Indians – Louisiana**

- Website Address: <http://www.jenachoctaw.org/index.cfm>

**Jicarilla Apache Nation – New Mexico (formerly the Jicarilla Apache Tribe of the Jicarilla Apache Indian Reservation)**

- Website Address: <http://www.jicarillaonline.com>
- Cultural Preservation Program: Yes – Cultural Affairs Office

**Kaibab Band of Paiute Indians of the Kaibab Indian Reservation – Arizona**

- Website Address:  
<http://www.swstrategy.org/tribal/guidepdfs/Aztribes/Kaibab%20Paiute%20Tribe.pdf>

**Kalispel Indian Community of the Kalispel Reservation – Washington**

- Website Address: <http://www.knrd.org/index-r.htm>
- Cultural Preservation Program: Yes – Cultural Resources Division

**Karuk Tribe of California**

**Kashia Band of Pomo Indians of the Stewarts Point Rancheria – California**

- Website Address: <http://www.kashaya.homestead.com/front.html>
- Cultural Preservation Program: Yes – NAGPRA Representatives

**Kaw Nation – Oklahoma**

- Website Address: <http://www.kawnation.com>

**Keweenaw Bay Indian Community – Michigan (previously listed as Keweenaw Bay Indian Community of L’Anse & Ontonagon Bands of Chippewa Indians of the L’Anse Reservation – Michigan)**

**Kialegee Tribal Town – Oklahoma**

**Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas**

**Kickapoo Tribe of Oklahoma**

**Kickapoo Traditional Tribe of Texas**

**Kiowa Indian Tribe of Oklahoma**

**Klamath Indian Tribe of Oregon**

**Kootenai Tribe of Idaho**

- Website Address: <http://www.isc.idaho.gov/kootenai.htm>

**La Jolla Band of Luiseno Mission Indians of the La Jolla Reservation – California**

- Website Address: <http://lajollaindianscom.siteprotect.net/>

**La Posta Band of Diegueno Mission Indians of the La Posta Indian Reservation – California**

- Website Address: <http://sctca.net/tribalsite/laposta.html>

**Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin (previously listed as Lac Courte Oreilles Band of Lake**

**Superior Chippewa Indians of the Lac Courte Oreilles Reservation of Wisconsin)**

**Lac du Flambeau Band of Lake Superior Chippewa Indians of the Lac du Flambeau Reservation of Wisconsin**

**Lac Vieux Desert Band of Lake Superior Chippewa Indians – Michigan (previously listed as the Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan)**

- Website Address: <http://www.lvdtribal.com/main.htm>
- Cultural Preservation Program: Yes – Cultural & Historic Preservation Committee; Language Preservation; Cultural Activities; Oral History; Artifact Collection

**Las Vegas Tribe of Paiute Indians of the Las Vegas Indian Colony – Nevada**

- Website Address: <http://www.itcn.org/tribes/lasvegas.html>

**Little River Band of Ottawa Indians – Michigan (previously listed as the Little River Band of Ottawa Indians of Michigan)**

**Little Traverse Bay Bands of Odawa Indians – Michigan (previously as the Little Traverse Bay Bands of Odawa Indians of Michigan)**

- Website Address: <http://www.ltbodawa-nsn.gov/home.htm>
- Cultural Preservation Program: Yes – Cultural and Historic Preservation; NAGPRA Department

**Los Coyotes Band of Cahuilla Mission Indians of the Los Coyotes Reservation – California**

**Lovelock Paiute Tribe of the Lovelock Indian Colony – Nevada**

**Lower Brule Sioux Tribe of the Lower Brule Reservation – South Dakota**

**Lower Elwha Tribal Community of the Lower Elwha Reservation – Washington**

**Lower Lake Rancheria – California**

**Lower Sioux Indian Community in the State of Minnesota (previously listed as the Lower Sioux Indian Community of Minnesota Mdewakantion Sioux Indians of the Lower Sioux Reservation in Minnesota)**

**Lummi Tribe of the Lummi Reservation – Washington**

- Website Address: <http://www.lummi-nsn.org>
- Cultural Preservation Program: Yes – Natural Resources Department

**Lytton Rancheria of California**

**Makah Indian Tribe of the Makah Indian Reservation – Washington**

- Website Address: <http://www.makah.com>
- Cultural Preservation Program: Yes – Museum; History
- Code Section Regarding Cultural Preservation: Yes – Desecration
- Link to Tribal Code:  
<http://www.tribalresourcecenter.org/ccfolder/makahcodetoc.htm>

**Manchester Band of Pomo Indians of the Manchester-Point Arena Rancheria – California**

**Manzanita Band of Diegueno Mission Indians of the Manzanita Reservation – California**

**Mashantucket Pequot Tribe of Connecticut**

- Website Address:  
<http://www.foxwoods.com/TheMashantucketPequots/Home>
- Cultural Preservation Program: Yes – Museum; Cultural Research Center

**Match-e-be-nash-she-wish Band of Pottawatomis Indians of Michigan**

- Website Address: <http://www.mbpi.org>

**Mechoopda Indian Tribe of Chico Rancheria – California**



**Menominee Indian Tribe of Wisconsin**

- Website Address: <http://www.menominee.nsn.us/index.htm>
- Cultural Preservation Program: Yes – Online Resources/History; Historic Preservation Repatriation Plan

**Mesa Grande Band of Diegueno Mission Indians of the Mesa Grande Reservation – California**

**Mescalero Apache Tribe of the Mescalero Reservation – New Mexico**

**Miami Tribe of Oklahoma**

- Website Address: <http://www.miamination.com>
- Cultural Preservation Program: Yes – Cultural Preservation Office

**Miccosukee Tribe of Indians of Florida**

- Website Address: <http://www.miccosukeeresort.com/tribe.html>

**Middletown Rancheria of Pomo Indians of California**

**Minnesota Chippewa Tribe – Minnesota (six component reservations: Bois Forte Band (Nett Lake), Fond du Lac Band, Grand Portage Band, Leech Lake Band, Mille Lacs Band, and White Earth Band)**

- Website Address: <http://www.mnchippewatribe.org>
- (1) **Minnesota Chippewa Tribe, Bois Forte Band (Nett Lake)**
    - Website Address: <http://www.boisforte.com>
    - Cultural Preservation Program: Yes – Natural Resources Department
  - (2) **Minnesota Chippewa Tribe, Grand Portage Band**
    - Website Address: <http://www.grandportage.com>
  - (3) **Minnesota Chippewa Tribe, Mille Lacs Band**
    - Website Address: <http://www.millelacsojibwe.org>
    - Cultural Preservation Program: Yes – Cultural Resources Board
    - Code Section Regarding Cultural Preservation: Yes – Establishing Cultural Resources Board; Permit System; Artifact Preservation
    - Link to Tribal Code: <http://www.millelacsojibwe.org/statutes.asp>

**(4) Minnesota Chippewa Tribe, White Earth Band**

- Code Section Regarding Cultural Preservation: Yes – Archaeological Preservation; Establishing Cultural Resources Program/Board; Desecration and Removal Policies; Permit System; Burial Grounds Protection
- Link to Tribal Code:  
<http://doc.narf.org/nill/Codes/wearthcode/wecodetoc.htm>

**Mississippi Band of Choctaw Indians – Mississippi**

- Website Address: <http://www.choctaw.org>

**Moapa Band of Paiute Indians of the Moapa River Indian Reservation – Nevada**

- Website Address: <http://www.itcn.org/tribes/moapa.html>

**Modoc Tribe of Oklahoma**

- Website Address: <http://www.eighttribes.org/modoc>

**Mohegan Indian Tribe of Connecticut**

- Website Address: <http://www.mohegan.nsn.us>
- Cultural Preservation Program: Yes – Cultural Resources Department

**Mooretown Rancheria of Maidu Indians of California**

**Morongo Band of Cahuilla Mission Indians of the Morongo Reservation – California**

- Website Address: <http://www.morongonation.org/index.html>

**Muckleshoot Indian Tribe of the Muckleshoot Reservation – Washington**

- Website Address: <http://www.muckleshoot.nsn.us/index3.htm>

**Muscogee (Creek) Nation – Oklahoma**

- Website Address: <http://www.muscogeenation-nsn.gov>
- Cultural Preservation Program: Yes – Cultural Preservation Office; Library/Archives Resources

**Narragansett Indian Tribe of Rhode Island**

- Website Address: <http://www.narragansett-tribe.org>
- Cultural Preservation Program: Yes – Tribal Historic Preservation Office

**Navajo Nation – Arizona, New Mexico, & Utah**

- Website Address: <http://www.navajo.org>
- Cultural Preservation Program: Yes – Natural Resources Division

**Nez Perce Tribe of Idaho**

- Website Address: <http://www.nezperce.org/main.html>

**Nisqually Indian Tribe of the Nisqually Reservation – Washington**

- Code Section Regarding Cultural Preservation: Yes – Natural Resources Preservation
- Link to Tribal Code:  
<http://www.tribalresourcecenter.org/tribalcourts/codes/codesdirectory.asp>

**Nooksack Indian Tribe of Washington**

- Website Address: <http://www.nooksack-tribe.org>
- Cultural Preservation Program: Yes – Natural Resources Department

**Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation – Montana**

- Website Address: <http://www.ncheyenne.net>

**Northfork Rancheria of Mono Indians of California**

**Northwestern Band of Shoshoni Nation of Utah (Washakie)**

**Oglala Sioux Tribe of the Pine Ridge Reservation – South Dakota**

- Code Section Regarding Cultural Preservation: Yes – Historic Site Preservation
- Link to Tribal Code:  
<http://doc.narf.org/nill/Codes/oglalacode/oglalatoc.htm>

**Omaha Tribe of Nebraska**

**Oneida Nation of New York**

- Website Address: <http://www.oneida-nation.net>
- Cultural Preservation Program: Yes – Cultural Center; Language Preservation; Oral History

**Oneida Tribe of Indians of Wisconsin (previously listed as the Oneida Tribe of Wisconsin)**

- Link to Tribal Code: <http://www.oneidanation.org>

**Onondaga Nation of New York**

**Osage Tribe – Oklahoma**

- Website Address: <http://www.osagetribe.com>

**Ottawa Tribe of Oklahoma**

- Website Address: <http://www.eighttribes.org/ottawa>

**Otoe-Missouria Tribe of Indians – Oklahoma**

**Paiute Indian Tribe of Utah**

**Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony – California**

**Paiute-Shoshone Tribe of the Fallon Reservation & Colony – Nevada**

- Website Address: <http://www.fpst.org>
- Cultural Preservation Program: Yes – Language Preservation

**Paiute-Shoshone Indians of the Lone Pine Community of the Lone Pine Reservation – California**

- Website Address: <http://lppsr.org/index.htm>

**Pala Band of Luiseno Mission Indians of the Pala Reservation – California**

- Website Address: <http://www.palaindians.com>

**Pascua Yaqui Tribe of Arizona**

- Website Address: <http://www.pascuayaqui-nsn.gov>

**Paskenta Band of Nomlaki Indians of California**

**Passamaquoddy Tribe of Maine**

- Website Address: <http://www.wabanaki.com>
- Cultural Preservation Program: Yes – Musuem; Cultural Resource Center

**Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation – California**

**Pawnee Nation of Oklahoma**

- Website Address: <http://www.pawneenation.org>
- Code Section Regarding Cultural Preservation: Yes – Desecration; Corpse Abuse
- Link to Tribal Code: <http://www.narf.org/nill/tribaldocs.html#codes>

**Pechanga Band of Luiseno Mission Indians of the Pechanga Reservation – California**

- Website Address: <http://www.pechanga.com>

**Penobscot Tribe of Maine**

- Website Address: <http://www.penobscotnation.org>
- Cultural Preservation Program: Yes – Cultural & Historic Preservation Department

**Peoria Tribe of Indians of Oklahoma**

- Website Address: <http://www.peoriatribes.com>
- Cultural Preservation Program: Yes – Repatriation Committee; Historical Committee; Culture and Language Committee

**Picayune Rancheria of Chukchansi Indians of California**

- Website Address: <http://www.chukchansi.net>
- Code Section Regarding Cultural Preservation: Yes – Natural Resource Commission; Arts & Crafts; Language Preservation

**Pinoleville Rancheria of Pomo Indians of California**

- Website Address: <http://www.pinoleville.org/index1.html>

**Pit River Tribe – California (including Big Bend, Lookout, Montgomery Creek, & Roaring Creek Rancherias & XL Ranch)**

**Poarch Band of Creek Indians of Alabama**

- Website Address: <http://www.poarchcreekindians-nsn.gov>
- Cultural Preservation Program: Yes – Arts Council; Cultural Center
- Code Section Regarding Cultural Preservation: Yes – Desecration and Removal of Antiquities; Establishing Arts Council and Cultural Center
- Link to Tribal Code: <http://www.narf.org/nill/tribaldocs.html#codes>

**Pokagon Band of Potawatomi Indians – Michigan & Indiana (previously listed as Pokagon Band of Potawatomi Indians of Michigan)**

- Website Address: <http://www.pokagon.com>

**Ponca Tribe of Indians of Oklahoma**

**Ponca Tribe of Nebraska**

**Port Gamble Indian Community of the Port Gamble Reservation – Washington**

- Website Address: <http://www.pgst.nsn.us/index.htm>
- Code Section Regarding Cultural Preservation: Yes – Cultural Resources Department

**Potter Valley Rancheria of Pomo Indians of California**

**Prairie Band of Potawatomi Nation – Kansas (formerly the Prairie Band of Potawatomi Indians)**

- Website Address: <http://www.pbpindiantribe.com>

**Prairie Island Indian Community in the State of Minnesota (previously listed as the Prairie Island Indian Community of Minnesota Mdewakanton Sioux Indians of the Prairie Island Reservation – Minnesota)**

- Website Address: <http://www.prairieisland.org>

**Pueblo of Acoma - New Mexico**

- Website Address: <http://www.puebloofacoma.org>

**Pueblo of Cochiti – New Mexico**

**Pueblo of Jemez – New Mexico**

- Website Address: <http://www.jemezpueblo.org>

**Pueblo of Isleta – New Mexico**

- Website Address: <http://www.isletapueblo.com>

**Pueblo of Laguna – New Mexico**

**Pueblo of Nambe – New Mexico**

**Pueblo of Picuris – New Mexico**

**Pueblo of Pojoaque – New Mexico**

**Pueblo of San Felipe – New Mexico**

**Pueblo of San Juan – New Mexico**

**Pueblo of San Ildefonso – New Mexico**

**Pueblo of Sandia – New Mexico**

- Website Address: <http://www.sandiapueblo.nsn.us>

**Pueblo of Santa Ana – New Mexico**

- Website Address: <http://www.santaana.org/history.htm>

**Pueblo of Santa Clara – New Mexico**

**Pueblo of Santo Domingo – New Mexico**

**Pueblo of Taos – New Mexico**

- Website Address: <http://www.taospueblo.com>

**Pueblo of Tesuque – New Mexico**

**Pueblo of Zia – New Mexico**

**Puyallup Tribe of the Puyallup Reservation – Washington**

**Pyramid Lake Paiute Tribe of the Pyramid Lake Reservation – Nevada**

**Quapaw Tribe of Indians – Oklahoma**

**Quartz Valley Indian Community of the Quartz Valley Reservation of California**

**Quechan Tribe of the Fort Yuma Indian Reservation – California & Arizona**

**Quileute Tribe of the Quileute Reservation – Washington**

- Website Address: <http://www.quileutetribe.org>
- Cultural Preservation Program: Yes – Natural Resources Department

**Quinault Tribe of the Quinault Reservation – Washington**

- Website Address: <http://209.206.175.157>

**Ramona Band or Village of Cahuilla Mission Indians of California**

**Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin**

- Code Section Regarding Cultural Preservation: Yes – Historic Preservation; Permit System
- Link to Tribal Code: <http://www.narf.org/nill/tribaldocs.html#codes>

**Red Lake Band of Chippewa Indians – Minnesota (previously listed as the Red Lake Band of Chippewa Indians of the Red Lake Reservation – Minnesota)**

- Website Address: <http://www.redlakenation.org>

**Redding Rancheria – California**

- Website Address: <http://www.redding-rancheria.com>

**Redwood Valley Rancheria of Pomo Indians of California**



**Reno-Sparks Indian Colony - Nevada**

- Website Address: <http://www.rsic.org/default.asp>

**Resighini Rancheria – California (formerly the Coast Indian Community of Yurok Indians of the Resighini Rancheria)**

**Rincon Band of Luiseno Mission Indians of the Rincon Reservation – California**

- Website Address: <http://sctca.net/tribalsite/rincon.html>

**Robinson Rancheria of Pomo Indians of California**

**Rosebud Sioux Tribe of the Rosebud Indian Reservation – South Dakota**

- Website Address: <http://www.rosebudsiouxtribe-nsn.gov>

**Round Valley Indian Tribes of the Round Valley Reservation – California (formerly the Covelo Indian Community)**

- Website Address: <http://www.covelo.net/tribes/pages/tribes.shtml>
- Cultural Preservation Program: Yes – Natural Resources Department; Cultural Resources Management

**Rumsey Indian Rancheria of Wintun Indians of California**

**Sac & Fox Tribe of the Mississippi in Iowa**

**Sac & Fox Nation of Missouri in Kansas & Nebraska**

- Website Address: <http://www.sacandfoxcasino.com/tribal-history.html>
- Cultural Preservation Program: Yes – Tribal Museum

**Sac & Fox Nation – Oklahoma**

**Saginaw Chippewa Indian Tribe of Michigan (previously listed as the Saginaw Chippewa Indian Tribe of Michigan, Isabella Reservation)**

- Website Address: <http://www.sagchip.org>

**Salt River Pima-Maricopa Indian Community of the Salt River Reservation – Arizona**

- Website Address: <http://www.saltriver.pima-maricopa.nsn.us>

**Samish Indian Tribe – Washington**

- Website Address: <http://www.samishtribe.nsn.us/home.html>
- Cultural Preservation Program: Yes – Cultural Department, at [http://www.samishtribe.nsn.us/cultural/cultural\\_1.html](http://www.samishtribe.nsn.us/cultural/cultural_1.html)

**San Carlos Apache Tribe of the San Carlos Reservation – Arizona**

**San Juan Southern Paiute Tribe of Arizona**

**San Manuel Band of Serrano Mission Indians of the San Manuel Reservation – California**

- Website Address: <http://www.sanmanuel-nsn.gov>

**San Pasqual Band of Diegueno Mission Indians of California**

- Website Address: <http://www.sanpasqualindians.org>

**Santa Rosa Indian Community of the Santa Rosa Rancheria – California**

**Santa Rosa Band of the Cahuilla Mission Indians of the Santa Rosa Reservation – California**

**Santa Ynez Band of Chumash Mission Indians of the Santa Ynez Reservation – California**

- Website Address: <http://www.santaynezchumash.org>
- Cultural Preservation Program: Yes – Language Preservation

**Santa Ysabel Band of Diegueno Mission Indians of the Santa Ysabel Reservation – California**

- Website Address: <http://www.sctca.net/tribalsite/santaysabel.html>

**Santee Sioux Tribe of the Santee Reservation of Nebraska**

- Website Address: <http://www.santeedakota.org>

**Sauk-Suiattle Indian Tribe of Washington**

- Website Address: <http://www.sauk-suiattle.com>
- Cultural Preservation Program: Yes – Artifact Recovery Program

**Sault Ste. Marie Tribe of Chippewa Indians of Michigan**

- Website Address: <http://www.sootribe.org>
- Link to Tribal Code: <http://www.saulttribe.org/code/table.htm>
- Code Section Regarding Cultural Preservation: Yes – Desecration

**Scotts Valley Band of Pomo Indians of California**

**Seminole Nation of Oklahoma**

- Website Address:  
<http://www.cowboy.net/native/old-seminole-old/historic.html>
- Cultural Preservation Program: Yes – Historic Preservation Office

**Seminole Tribe of Florida, Dania, Big Cypress, Brighton, Hollywood & Tampa Reservations**

- Website Address: <http://www.seminoletribe.com>

**Seneca Nation of New York**

- Website Address: <http://www.sni.org>

**Seneca-Cayuga Tribe of Oklahoma**

- Website Address: <http://www.eighttribes.org/seneca-cayuga>

**Shakopee Mdewakanton Sioux Community of Minnesota (previously listed as Shakopee Mdewakanton Sioux Community of Minnesota (Prior Lake))**

- Website Address: <http://www.shakopeedakota.org>
- Cultural Preservation Program: Yes – Cultural Preservation Program

**Shawnee Tribe – Oklahoma**

**Sherwood Valley Rancheria of Pomo Indians of California**

**Shingle Springs Band of Miwok Indians, Shingle Springs Rancheria (Verona Tract) – California**

**Shoalwater Bay Tribe of the Shoalwater Bay Indian Reservation – Washington**

**Shoshone Tribe of the Wind River Reservation – Wyoming**

- Website Address: <http://www.easternshoshone.net>
- Cultural Preservation Program: Yes – Cultural Center

**Shoshone-Bannock Tribes of the Fort Hall Reservation of Idaho**

- Website Address: <http://www.shoshonebannocktribes.com>

**Shoshone-Paiute Tribes of the Duck Valley Reservation – Nevada**

**Sisseton-Wahpeton Sioux Tribe of the Lake Traverse Reservation – South Dakota**

**Skokomish Indian Tribe of the Skokomish Reservation – Washington**

- Website Address: <http://www.skokomish.org>
- Cultural Preservation Program: Yes – Historic Preservation Office
- Code Section Regarding Cultural Preservation: Yes – Desecration
- Link to Tribal Code: <http://doc.narf.org/nill/Codes/skocode/toc.htm>

**Skull Valley Band of Goshute Indians of Utah**

- Website Address: <http://www.skullvalleygoshutes.org/main.html>

**Smith River Rancheria – California**

- Website Address: <http://www.tolowa.com>

**Snoqualmie Tribe – Washington**

- Website Address: <http://www.snoqualmiecasinoproject.com>

**Soboba Band of Luiseno Indians – California (formerly the Soboba Band of Luiseno Mission Indians of the Soboba Reservation)**

- Website Address: <http://www.soboba-nsn.gov>
- Cultural Preservation Program: Yes – Cultural Heritage; Language Preservation

**Sokaogon Chippewa Community – Wisconsin (previously listed as the Sokaogon Chippewa Community of the Mole Lake Band of Chippewa Indians – Wisconsin)**

- Website Address: <http://www.molelake.com/Tribal/ourtribe.htm>

**Southern Ute Indian Tribe of the Southern Ute Reservation – Colorado**

- Website Address: <http://www.southern-ute.nsn.us>
- Cultural Preservation Program: Yes – Department of Natural Resources, Division of Wildlife Resource Management, Links to Cultural Information

**Spirit Lake Tribe – North Dakota**

- Website Address: <http://www.spiritlakenation.com>

**Spokane Tribe of the Spokane Reservation – Washington**

- Website Address: <http://www.spokanetribe.com>

**Squaxin Island Tribe of the Squaxin Island Reservation – Washington**

- Website Address: <http://www.squaxinland.org/home.html>
- Cultural Preservation Program: Yes – Cultural Resources Department; Online Resources

**St. Croix Chippewa Indians of Wisconsin (previously listed as the St. Croix Chippewa Indians of Wisconsin, St. Croix Reservation)****St. Regis Band of Mohawk Indians of New York**

- Website Address: <http://www.peacetree.com/akwesasne/home.htm>

**Standing Rock Sioux Tribe of North & South Dakota**

- Website Address: <http://www.standingrock.org/index1.htm>

**Stockbridge Munsee Community – Wisconsin (previously listed as the Stockbridge-Munsee Community of Mohican Indians of Wisconsin)**

- Website Address: <http://www.mohican-nsn.gov/index.htm>
- Cultural Preservation Program: Yes – Historical Library and Museum, Family Services, Family Center
- Link to Tribal Code:  
<http://www.mohican-nsn.gov/TribalOrdinances/TribalOrdinances.htm>
- Specific Information Regarding Code: Establishing Conservation Officer; Desecration

**Stillaguamish Tribe of Washington**

- Website Address: <http://www.stillaguamish.nsn.us/index.htm>
- Cultural Preservation Program: Yes – Natural Resources Department

**Summit Lake Paiute Tribe of Nevada**

- Website Address: <http://www.itcn.org/tribes/summit.html>

**Suquamish Indian Tribe of the Port Madison Reservation – Washington**

- Website Address: <http://www.suquamish.nsn.us/home.htm>

**Susanville Indian Rancheria – California**

**Swinomish Indians of the Swinomish Reservation – Washington**

- Website Address: <http://www.swinomish.org>

**Sycuan Band of Diegueno Mission Indians of California**

- Website Address: <http://www.sycuan.com>

**Table Bluff Reservation-Wiyot Tribe – California**

- Website Address: <http://www.wiyot.com>
- Cultural Preservation Program: Yes – Cultural Restoration Vision; Online Resources

**Table Mountain Rancheria of California**

**Te-Moak Tribe of Western Shoshone Indians of Nevada**

- Website Address: <http://www.itcn.org/tribes/te-moak.html>

**Thlopthlocco Tribal Town – Oklahoma**

**Three Affiliated Tribes of the Fort Berthold Reservation – North Dakota**

- Website Address: <http://www.mhanation.com/main/main.html>

**Tohono O'odham Nation of Arizona**

**Tonawanda Band of Seneca Indians of New York**

**Tonkawa Tribe of Indians of Oklahoma**

- Website Address: <http://www.tonkawatribe.com>

**Tonto Apache Tribe of Arizona**

**Torres-Martinez Band of Cahuilla Mission Indians of California**

**Tule River Indian Tribe of the Tule River Reservation – California**

**Tulalip Tribes of the Tulalip Reservation – Washington**

- Website Address: <http://www.tulaliptribes-nsn.gov>
- Cultural Preservation Program: Yes – Cultural Resources Department

**Tunica-Biloxi Indian Tribe of Louisiana**

- Website Address: <http://www.tunica.org>

**Tuolumne Band of Me-Wuk Indians of the Tuolumne Rancheria of California**

**Turtle Mountain Band of Chippewa Indians of North Dakota**

- Website Address: <http://www.tmbci.net/Flash/Index.html>

**Tuscarora Nation of New York**

**Twenty-Nine Palms Band of Mission Indians of California (previously listed as the Twenty-Nine Palms Band of Luiseno Mission Indians of California)**

**United Auburn Indian Community of the Auburn Rancheria of California**

- Website Address: <http://www.auburnrancheria.com>

**United Keetoowah Band of Cherokee Indians in Oklahoma (previously listed as the United Keetoowah Band of Cherokee Indians of Oklahoma)**

**Upper Lake Band of Pomo Indians of Upper Lake Rancheria of California**

**Upper Sioux Community – Minnesota (previously listed as the Upper Sioux Community of the Upper Sioux Reservation – Minnesota)**

**Upper Skagit Indian Tribe of Washington**

**Ute Indian Tribe of the Uintah & Ouray Reservation – Utah**

- Code Section Regarding Cultural Preservation: Yes – Desecration; Corpse Abuse
- Link to Tribal Code: <http://doc.narf.org/nill/Codes/uteuocode/utetoc.htm>

**Ute Mountain Tribe of the Ute Mountain Reservation – Colorado, New Mexico, & Utah**

- Website Address: <http://www.utemountainute.com>

**Utu Utu Gwaitu Paiute Tribe of the Benton Paiute Reservation – California**

**Walker River Paiute Tribe of the Walker River Reservation – Nevada**

**Wampanoag Tribe of Gay Head (Aquinnah) of Massachusetts**

- Website Address: <http://www.wampanoagtribe.net>
- Cultural Preservation Program: Yes – Cultural Resources Protection Department; Historic Preservation Officer; Repatriation Program

**Washoe Tribe of Nevada & California**

- Website Address: <http://www.itcn.org/tribes/washoe/washo.html>

**White Mountain Apache Tribe of the Fort Apache Reservation – Arizona**

- Website Address: <http://www.wmat.nsn.us>
- Code Section Regarding Cultural Preservation: Yes – Removal and/or Destruction of Antiquities
- Link to Tribal Code: <http://thorpe.ou.edu/codes/wmtnapache/index.html>

**Wichita & Affiliated Tribes (Wichita, Keechi, Waco, & Tawakonie) – Oklahoma**

- Website Address: <http://www.wichita.nsn.us>
- Cultural Preservation Program: Yes – Cultural Preservation



**Winnebago Tribe of Nebraska**

- Website Address: <http://www.winnebagoTribe.com>
- Cultural Preservation Program: Yes – Cultural Center & Museum

**Winnemucca Indian Colony of Nevada**

**Wyandotte Tribe of Oklahoma**

- Website Address: <http://www.wyandot.org/oklahoma>

**Yankton Sioux Tribe of South Dakota**

- Cultural Preservation Program: Yes – Wildlife Conservation Department; Language and Cultural Courses
- Link to Tribal Code:  
<http://doc.narf.org/nill/Codes/yanktoncode/yanktoncodetoc.htm>
- Specific Information Regarding Code: Desecration

**Yavapai-Apache Nation of the Camp Verde Indian Reservation – Arizona**

- Website Address:  
<http://www.yavapai-apache-nation.com/Pages/ftverde.html>

**Yavapai-Prescott Tribe of the Yavapai Reservation – Arizona**

- Website Address: <http://www.ypit.com>

**Yerington Paiute Tribe of the Yerington Colony & Campbell Ranch – Nevada**

**Yomba Shoshone Tribe of the Yomba Reservation – Nevada**

**Ysleta Del Sur Pueblo of Texas**

**Yurok Tribe of the Yurok Reservation – California**

**Zuni Tribe of the Zuni Reservation – New Mexico**