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2021 Fall Legal Journal

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PRESIDENT'S NOTE

Dear CILA Members and Supporters:

I am thrilled to welcome you to the Third Edition of the California Indian Law Association, Inc. (CILA) Legal Journal. On behalf of the CILA Board of Directors (Board), I would like to extend a heartful thank you to all the authors who contributed to this year's amazing edition.I would also like to thank our wonderful Legal Journal Committee for the time and hard work they put into this year's edition.

Like so many others in the COVID-19 pandemic, CILA faced many challenges in 2021. Nevertheless, we adapted and persevered. The Board was very proud to host the 2021 Pathway to Law Program virtually in March, with seventeen (17) participants, our largest cohort yet. Thanks to the Federated Indians of Graton Rancheria, Tachi-Yokut Tribe, and individual donor, Nathan Voegeli, CILA was able to offer LSAT preparation scholarship to all 17 Program participants. We were also able to distribute $25,000 in scholarships to current Native law students and recent graduates in partnership with the San Manuel Band of Mission Indians and California ChangeLawyers.

CILA remains dedicated to offering educational opportunities and programing to our community. During the virtual 20th Annual California Indian Law Conference and Honoring Celebration, CILA offered CLEs on topics varying from recent legislative and litigation updates and drafting effective MOUS, to current and emerging issues regarding PL-280 and ethical consideration for those advising tribal leadership in the #MeToo era. CILA also hosted a free Virtual California Indian Law Series in May 2021 with CLEs on Water Law and the Klamath River Basin with Amy Cordalis and California Tribal Courts Under PL-280 Jurisdiction with Judge Christine Williams.

In light of the Delta variant and rise in COVID-19 cases across the nation, the CILA Board decided to hold a virtual panel series in 2021 in lieu of an in-person conference. I am pleased to announce the 2021 California Indian Law Virtual Panel Series will be held viz Zoom starting October 7, 2021, and then every other week until December 16, 2021. Please see calindianlaw.org for more information.

We hope you enjoy this Third Edition of the CILA Legal Journal. Please reach out to the Board at calindianlaw@gmail.com with questions and feedback.

Erica Costa
President of the CILA Board
(Pomo/Wailacki)

Social Media Marketing and the Native Professional

BY ASHLEY HEMMERS

The pandemic came with a whole suite of challenges for native communities. However, one thing about indigenous excellence, our people find a way. And that's just what folks did, Native people have increased their reach in digital spaces two-fold amidst the backdrop of a global pandemic. Between Native Twitter rallying tweet storms to address the lack of accountability[1] in a major news network's proximity to revisionist history; Native Instagram helping to push out life-saving health information to urban and rural Native communities; and Native Facebook creating virtual events using Facebook LIVE for pow-wows, bird sessions[2], and round-dances to share hope – Native social media activity has helped to increase visibility to the point that Rolling Stone Magazine, the Guardian, and many other major media outlets have had to take notice.[3]

Community has long been a common shared value for Native people so it makes sense that there would be an intuitive path for Native optimization of platforms made solely to build community. And while there is still a gap for Natives in tech, that cannot diminish the resourcefulness of the Native associations, advocates, artists, water protectors, authors, and other Native influencers who have utilized, amplified, and monetized these platforms effectively.

Indian Country comprises some of the most beautiful, albeit geographically remote, places in the world. A cell phone and access to Wi-Fi has made it possible for people all over Indian Country to connect, especially with others who otherwise could not. Like the water protectors who show up each day to #stopline3 or the Inuk throat singer Shina Nova from northern Quebec who expands Indigenous beauty standards by incorporating her traditions, social media platforms have opened a window for Native people from diverse backgrounds to share and engage in their own ways.

Each platform whether Twitter, LinkedIn, Instagram, Tik-Tok, or Facebook, have their own niches and audience goals. There is a place for every engagement level, even if engagement is just participating. One of my new favorite podcasts, NDN Tea Podcast, would say, "Facebook is like the Tribal Gym of social media,"[4] so how can Native professionals show up without getting schooled? This article intends to help frame basic concepts of social media marketing for Native professionals who may be interested or curious in promoting their own professional growth in these growing domains.

What is social media marketing?

In its simplest form, social media marketing is the use of social media platforms and websites to connect with your audience to promote a product or service.[5] These platforms allow you to build your personal or business brand to increase sales of your product or service and drive website traffic.

Major social platforms include Facebook, Instagram, LinkedIn, Twitter, Tik-Tok, and YouTube. Each platform can be used to speak to your audience in a different way to share information (content) to help grow knowledge about your field or provide a service to your clients and customers.

While many content creators use a combination of social platforms to form their brand identity as they grow, it is best to start with one or two platforms so that you are not overwhelmed by the many system options in each platform. For example, if you have a LinkedIn profile, you may want to consider establishing an Instagram creator profile to promote your LinkedIn page. That way, if you share long-form content like a decision or opinion that impacts your practice on your LinkedIn page, then you can use a free program like Canva to create visual content for Instagram to link your clients and future clients to that information on your LinkedIn page. It's that simple.

Do I need a large following?

You do not need a large number of followers to build community around your services or causes. However, what you will find is that the more you post, the more your following will grow.

There are five groups of influencer categories for content creators: nano-influencers with 1K to 10K followers; micro-influencers with 10K to 50K followers; mid-tier influencers with 50K to 500K followers; macro-influencers with 500K to 1M followers; and mega-influencers with 1M to 5M followers. Most Native influencers fall in the nano, micro, and mid-tier categories. However, unicorns do exist, and a few Natives in performative arts or fashion have hit macro-influencer levels on Instagram and mega-influencer levels on Tik-Tok.

However, as online marketplaces continue to grow, there is emerging focus on the reach of nano-influencers within their communities. In fact, in a recent report by Planoly, one of the leading social marketing platforms with 5M+ users, noted that nano-influencers have the highest engagement rate of any other influencer group.[6] People are gravitating more and more to using their phones to shop products, which means websites and social media handles are becoming increasingly important. As a result, if you are not easily searchable online, through social media accounts, you may be decreasing the trust factor for your service or business. I'm not arguing for you to start Tik-Tok dances if that is not your cup of tea, but learning how to incorporate a simple social media strategy that integrates your online presence can help you grow your client base.

How do I start?

Each profession is different, it is best to do a quick web search for any social media parameters held by any associations or professional networks that you belong to. Your social platforms are an extension of you, make sure that you are following industry standards as you would if in-person. Once you have an idea of what is appropriate for your field, the next step is to pick a platform.

- Twitter is a micro-blog that can drive traffic to your website or other social media platforms like Instagram or LinkedIn.

- YouTube is best for those who are comfortable in front of a camera and interested in sharing knowledge on a topic or niche.

- Instagram is best to create visual content and videos that drive traffic to your website for those seeking professional services, digital products, or shopping for products.

- Facebook is best for nurturing existing communities of clients.

Sit down and identify your goals. Picking the best platforms for your needs becomes easier once you are aware of how you would like to engage with your clients or community.

Time . . . What's that? I'm a Lawyer

You have a job, I get it. There is a limited amount of time in the day to accomplish what you need to on your full agenda and try to figure out this digital space. Luckily, these platforms are built on systems, something those in the legal field are very familiar with. Most content creators "batch" content and use free apps like Creator Studio or Later to set a posting schedule. Batching content means setting out a couple of hours to build content for the week, month, or next few months depending on your niche. Once you have created your visuals, you upload them to these apps and use the apps to post them to your social media channels on a set schedule. While some of these apps offer subscription services for more advanced options, if you are only building a simple social strategy, like posting tweets to your Instagram that drives traffic to your LinkedIn or websites, then the free options are more than enough to get started.

Next Steps

A part of the mission stated on the California Indian Law Association, Inc.[7] website is to "enhance the legal profession and tribal justice systems." Indian Law is a highly specialized niche – even to those professionals reliant on your expertise. Social media platforms will help to grow community, what better way to enhance this cause then to amplify your professional voice so that others can find you, learn from you, and work with you?

Endnotes:

[1] Peter Wade, *CNN Has Finally Had Enough of Rick Santorum*, ROLLING STONE, May 22, 2021, https://www.rollingstone.com/politics/politics-news/cnn-fires-rick-santorum-1173447/.

[2] Bird songs are a series of traditional songs shared amongst Tribes in Southern California, Arizona, and Nevada.

[3] Wade, *supra* note 1.

[4] NDN Tea Podcast Episode 7: Natives on Social Media: Breaking Down Twitter, Instagram, TikTok & Facebook (June 3, 2021) (available via Audible).

[5] *See, e.g.*, BUFFER, https://buffer.com (last visited September 11, 2021).

[6] Andrew Hutchinson, *Nano Influencers: Who Are They and How to Work With Them*, SOCIALMEDIATODAY (Feb. 14, 2021) https://www.socialmediatoday.com/news/nano-influencers-who-are-they-and-how-to-work-with-them-infographic/595048/.

[7] CALIFORNIA INDIAN LAW ASSOCIATION, INC., *Our Mission*, https://www.calindianlaw.org/our-mission.html (last visited September 11, 2021).

***Ashley Hemmers**, enrolled member of the Fort Mojave Indian Tribe, is a nation-building strategist and digital marketing Executive Coach for tribal professionals. Ashley holds a B.A. from Yale University and a Graduate Certificate in Non-Profit Management, Masters of Public Administration from the University of Nevada, Las Vegas. She enjoys creating dialogue with tribal nations & federal/state partners and sharing content that amplifies indigenous voices in business, personal finance, policy implementation, and climate action. Instagram @tribalreclamation. Email: tribalreclamation@gmail.com.*

Indigenous Sovereignty and Self-Determination Through Hip-Hop

BY EVERADO REYES

Indigenous hip-hop creates a space where Indigenous people can exercise self-determination and self-recognition and construct alternative futures through media and technology. Through sound and performance, Indigenous hip-hop practitioners and audiences practice resurgent forms of listening and recognition that refute settler colonial imaginaries. In this article I contend that music creates a cultural practice that helps radically challenge the colonial politics of recognition as music can disrupt colonial recognition and create a space for Indigenous people to reclaim and define themselves. Seen in this way, Indigenous hip-hop, sonic sovereignty, Indigenous futurity, and remix are interrelated.

This article covers the theoretical conversations in First Nations and Indigenous Studies regarding recognition with discourses within ethnomusicology literature and considers how Indigenous hip-hop is intertwined with Indigenous sovereignty and law. This article is a modified and condensed version of a University of California Berkeley Master's thesis.

Law, Territory, Sound

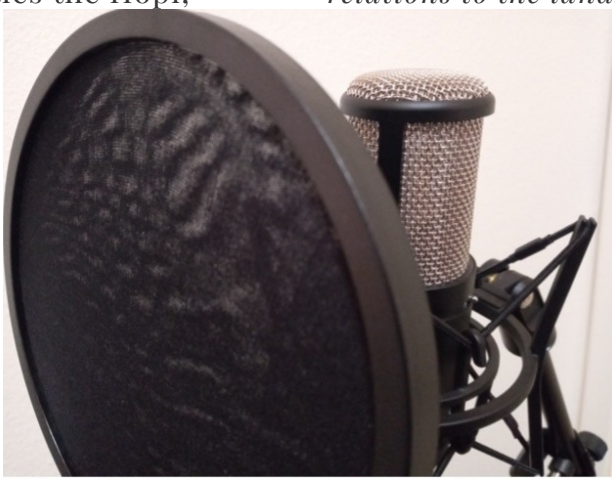
Trevor Reed (Hopi) explains how taatawi (Hopi traditional song and performance) is an extension of Indigenous governance and sovereignty. Reed argues that we must "rethink what Indigenous song is, how it functions, and how we might listen and respond to it."|1|

This call for a more critical listening by Reed has implications for law and sovereignty. For example, Indigenous song can call into question settler law and create "territorial authority" through song.|2| By exemplifying how Indigenous music sustains its authority and law, Reed showcases one of "the many ways Indigenous peoples continue to govern through sound within territories settler-colonial regimes claim as their own."|3| I extend Reed's conceptualization of this sonic authority to Indigenous hip-hop as it calls into question settler ways of knowing and creates its authority and governance within settler colonial territories.

Reed supports his claim by examining a taatawi performed by Clark Tenakhongva (Tribal Vice Chairman and Hopi composer). Through taatawi, Tenakhongva uses music and performance to extend "authority generated out of our relations to the land."|4| Reed argues that through Hopi verse (Hopi Language), taatawi takes the form similar to a legal text. Reed explains that what sustains sonic sovereignty in taatawi is the words, meaning that "lyrics are literally legal texts."|5| He pays attention to Öngtupqa, Hopi for 'salt canyon.'|6| The song explains the importance of water and the river in sustaining life and facilitating "individual and collective destinies."|7| Reed uses taatawi to illustrate how "Hopi philosophy and governance" are connected to musical composition and performance.|8|

But Reed takes discussions about listening and pushes them forward, arguing that Indigenous song enacts a type of sovereignty

that ties Indigenous people to territory. More specifically, in discussing the political authority of Hopi song, Reed argues that Öngtupqa song is an articulation of sonic sovereignty as it exercises territorial authority through song. Reed argues that "[i]f our Indigenous songs are meant to resonate within our territories, giving voice to Indigenous authorities within those spaces, then the creation and performance of Indigenous song should be understood as an act of sovereignty."|9| By performing Öngtupqa, Indigenous song ties the Hopi, and other Indigenous communities not acknowledged by settler law, to the land.



The sonic authority and sovereignty of Öngtupqa recognizes other Indigenous people's connection to Hopi territory and undermines settler law that refuses to acknowledge these inter-tribal connections. In this light, the performance of Öngtupqa is in opposition to colonial-settler law: "What it failed to recognize, however, was the fact that Öngtupqa remains a sovereign territory of Hopi and several other Indigenous peoples, despite being severed from them under settler law."|10| By examining taatawi in Öngtupqa, Reed argues that sonic sovereignty is in direct opposition to settler law.

Furthermore, Öngtupqa calls into question settler law and ways of knowing while also demanding respect from settlers. I quote Reed in full:

> *To my ears, the song, an admonition for respect of the land and the beings who live there, was being directed both to the American Settlers who Tenakhongva acknowledged in his pre-concert remarks 'could not understand him,' and also—and perhaps more importantly—to the Diné people through their spiritual relations, who he hoped would hear, remember and act. Importantly, he did this in and through a mode of authority generated out of our relations to the land.*|11|

In the quote above, sonic sovereignty does more to sustain Indigenous self-determination and authority than law, as it supports Indigenous self-determination that rejects colonial recognition. As a result, taatawi maintains autonomy in opposition to settler law: "accepting taatawi as sovereignty challenges the very foundations of settler governance and control over Indigenous lands."|12| Indigenous music sustains a connection to the land and maintains inter-tribal relationships in direct opposition to settler-colonial recognition and law.

Indigenous listening practices also reject settler ways of knowing and jurisprudence by deconstructing the dichotomies that sustain its 'power.' In this light, sonic sovereignty can be read as a type of remix that synthesizes settler dichotomies such as law and music. For example, Reed suggests

that a function of sonic sovereignty in Tenakhongva's performance of Öngtupqa "requires merging theories of sound and law–intellectual domains which European and European-descendent settler thought has traditionally conceptualized as separate and perhaps irreconcilable."|13| Sonic sovereignty merges what settler colonialism has considered 'irreconcilable' concepts. Music plays a vital role in carving out self-determination as settler jurisprudence is limited in its scope of creating equity and justice. Put another way; settler law will never bring about Indigenous sovereignty. We need Indigenous law, built on self-determination and remix, to bring on real change.

Indigenous hip-hop centers Indigenous history, ways of knowing, practice, and language through storytelling, sampling, dance, and performance. There has been scholarship that expresses "how rap music expresses themes of political resistance and empowerment for Aboriginal artists."|14| Telling Indigenous stories and narratives counters settler knowledge and can sustain Indigenous ways of knowing and ratify territorial authority.

Indigenous hip-hop enacts an authority to land and refuses settler claims to space. For example, the song "Australia Does Not Exist" rejects settler-colonial logic, history, law, and claims to land. The song is written by Drmngnow, a single artist named Neil Morris from Melbourne, and features Philly, Adrian Eagle, and Culture Evolves.

By contesting the notion of Australia as a nation-state, Drmngnow explicitly draws into question Eurocentric ideals of nationhood and law as exemplified by the song's lyrics. At the beginning of the song, Neil Morris brings awareness to the Indigenous ways of knowing colonialists ignored during their settlement of Australia. Morris powerfully and painfully starts the song with the date of colonization (1788)|15| and proceeds to sing about how colonialists "Didn't recognize there was governance at hand. Laws and conditions not based upon demands" and continues:

> *What they didn't see this majesty right before their eyes. They labeled us as savages and plotted our demise. Took our star formations to represent their plots. Not realizing the natural essence brought into those knots. Busy painting laws, side step our rights.*

This first verse is imperative, as it is decentering the colonialist narrative that surrounds and supports the idea of Australia. Explicitly, the lyrics show how even today, the legacy of colonialism is legitimized through the existing ideals and institutions left over from colonialism. The concept of Australia as a nation-state is a solid reminder for whom the name signals to, whose history is essential, and for whom rights belong to. As rapper Philly vocalizes in the second verse:

> *and if they don't assimilate in every single way, I guess we'll have to demonstrate our superiority in every single way. And remind them how we conquered them every single day. And what better way to do this then give this land a name.*

Australia yeah! The great land that was claimed.

But Drmngnow does not only critique colonization, through words, visuals, and the circulation of media, they are creating Indigenous futurities and are reclaiming Indigenous identity.

A Tribe Called Red and Self-Determination

Using sampling, dance, and performance, the genre coined Electric Pow Wow highlights how self-recognition and self-determination are exercised through music and performance. As Woloshyn argues, by engaging in hip-hop, Indigenous communities can create new possibilities while also coming together and expressing Indigenous ways of knowing history and healing.|16|

A Tribe Called Red (ATCR now known as The Halluci-Nation) is an Ottawa-based DJ collective that synthesizes traditional First Nation music with dance beats.|17| Woloshyn explains how ATCR performs self-determination as their music and live performances create a sonic space where Indigenous cultural ideologies and pride can be shared with other Indigenous peoples. Woloshyn states, "[p]ride and self-recognition is central to the shared and embodied cultural self-determination at Electric Pow Wow."|18| ATCR exercises self-determination as they blend traditional First Nation music with hip-hop to create new narratives. By creating spaces where Indigenous people can connect and dance, ATCR sustains an 'embodied sovereignty' that unites listening to the body.|19| Woloshyn argues that this embodied sovereignty (kinaesthetic listening) "mak[es] visible and audible to both Aboriginal and non-Aboriginals an urban-based indigeneity —in the now."|20| This embodied sovereignty sustains a resurgent politics that rejects colonial recognition as ATCR "actively rejects colonial regulation of the Aboriginal body."|21| Through Electric Pow Wow, ATCR inspires self-determination as Indigenous audiences listen and dance this 'embodied sovereignty.' This 'kinaesthetic' embodied sovereignty reorientates Indigenous politics and self-determination through the body, creating an inward embodied sovereignty that challenges settler-colonial definitions.

ATCR also uses visual media with music to highlight embodied sovereignty. For example, Woloshyn argues that the music video 'Sisters' is crucial as it depicts Indigenous culture in the 21st century and that the music video showcases "an opportunity for Aboriginals to gather, resulting in shared and embodied cultural self-determination and self-recognition."|22| Simultaneously, the music video celebrates the bonds of sisterhood, which has been jeopardized by the tragedy of missing and murdered Indigenous women and girls in Canada.

Sonically, the song is crucial as it centers Indigenous Pow Wow music in the center of contemporary music and culture in Canada. For the 'Sisters' track ATCR samples the music of the Northern Voice Singers, a group of singers from the "Atikamekw territory of

Wemitaci in Quebec."|23| When coupled with the issue of missing and murdered Indigenous women and children, the song brings to the forefront more significant issues entangled with settler-colonial violence in Canada. However, it also celebrates the importance of sisterhood by showcasing the movement and embodied sovereignty of Indigenous people in Canada. Quoting Recollet, Woloshyn observes how the song "ignites a shift wherein spaces considered unsafe...are seemingly transformed into sites wherein girls and women can feel free to dance and move, as opposed to just spatial geographies where women and girls' bodies are recovered, or seen last by passersby before going 'missing.'"|24|

Snotty Nose Rez Kids and Self Determination

Indigenous hip-hop can also take on a more explicit form of self-determination, as heard through the lyrics from hip-hop duo Snotty Nose Rez Kids. Yung Trybez and Young D are of "Haisla (Indigenous) descent from Kitimat, BC."|25| They perform drill music, often invoking Indigenous ways of knowing and political commentary on Indigenous issues in Canada. In their song, Skoden, they take on an oppositional role with Justin Trudeau (The Canadian Prime Minister) and the Trans Mountain pipeline. The opening line in their song is "Fuck Justin Trudeau." They use hip-hip to reject Canadian's settler-colonial political and legal system that uses governance to undermine Indigenous claims to land for profit and access to oil.|26|

Remix and Indigenous Hip-Hop: Rejecting Settler Borders

Lastly, one can consider how Indigenous hip-hop uses sound and music to contest settler-colonial borders. I build upon Karyn Recollet's work on remix and Indigenous futurity as a way to image a space and place in the Americas where Indigenous peoples can move freely.|27| Recollet argues that remix allows for Indigenous artists to juxtapose tradition with newer forms of art (like hip-hop). These remixes then create new possibilities—a type of Indigenous futurity. More specifically, Recollet examines the music video 'Ay I Oh Stomp' by the Vancouver art collective Skookum. In the music video, an Indigenous hip-hop artist dances in b-boy style while the footage of him dancing is remixed with archival footage from 1914 of a Kwakwaka'waka Thunderbird dance. The footage of the b-boy dancer slowly vanishes as the archival footage comes into focus. The b-boy dance then reappears and this flux between the two dancers repeats. Recollet argues that this remixing between tradition and modern dance facilitates a new space where Indigenous artists can perform and create a type of Indigenous futurity.

Inspired by Recollet's critical scholarship on remix and Reed's argument about sonic sovereignty, I invite the reader to consider how Indigenous hip-hop can reject colonial recognition and create sonic collations of Indigenous sovereignty across and despite settler colonial law and borders. This ability for Indigenous hip-hop to decolonize settler

colonial borders is best stated by Recollet who writes about the importance of futurity:

> *The future imaginary offers new possibilities for activating our relationships with land and territories as an overflowing of boundaries to include the multiple Indigenous scales that occupy space/time simultaneously. I believe that the process of jumping scale from settler colonialism and its hold on territories and bodies, activates the Indigenous scales that refuse racialized gender violence-and in this refusal shape movements as choreographies of radical love and hope.|28|*

What better way to 'jump settler colonialism and its hold of territories and bodies' than to use song, dance, and performance as a weapon to decolonize the borders and settler law that define it? Indigenous hip-hop sustains connections across settler colonial space and uses song and performance to extend Indigenous authority and relations. For example, collaborations between Lido Pimienta (Afro-Indigenous, Afro-Colombian) and ATCR or the work done by Shining Soul (Tohono O'odham and Chicanx) showcase how music acts as a conduit in which song connects Indigenous communities within and across settler colonial borders. Indigenous hip-hop provides the groove to allow for this choreography that can reject settler boundaries and claims to land through remix.

Alongside making collations across settler colonial borders, Indigenous hip-hop also refutes borders and the usurpation of land through verse and rhymes. Rage Against the Machine (RATM) lead singer Zach De La Rocha, (Mexica/Nahua and Chicanx) uses hip-hop and metal to contest settler-colonial borders. In the song, 'People of the Sun,' he expresses the history of colonialism in Mexico and invokes Nahuatl language, history, and epistemologies to enact sonic sovereignty. He starts with the year "1516" to mark early colonialism in Mexico and expresses how borders have been created since then to crush and hold down Chicanx people. More importantly, De La Rocha invokes part of his Nahua/Mexica history.|29|

> *Since 1516 minds attacked and overseen. Now crawl amidst the ruins of this empty dream. With their borders and boots on top of us. Pullin' knobs on the floor of their toxic metropolis. But how you going get what you need to get? The gut eaters, blood drenched get offensive like Tet. The fifth sun sets get back reclaim. The spirit of Cuahtemoc alive an untamed. Now face the funk now blastin' out ya speaker, on the one Maya, Mexica. That vulture came to try and steal your name. But now you got a gun, yeah this is for the people of the sun.|30|*

De La Rocha invokes Nahua/Mexica history and philosophy to reject the stealing of history (signified by the mention of surnames, which for most Chicanx people denote Spanish settler-colonial heritage and not Meso-Indigenous names). Not only does De La Rocha perform music that is politically aware, he also supported the Indigenous Zapatista movement in the '90s, protested the enactment of SB 1070 (a law that allowed police in Arizona to profile brown people with no other probable cause to check for

citizenship papers), and opposed the appointment of Sheriff Joe Shapiro who enforced said law.

Conclusion

Through storytelling and sampling, Indigenous hip-hop centers Indigenous knowledge while sustaining a self-recognition-based approach. The result is that Indigenous hip-hop extends Indigenous sovereignty and governance forward to new possibilities. Simultaneously, it unsettles colonial listening practices and cuts across settler-colonial boundaries around law, sound, space, and place. Listening from a settler perspective has had consequences for Indigenous people as it has rendered Indigenous voices and ways of understanding as inaudible to settler legal systems, therefore having consequences regarding sovereignty and claims to land.

If listening can negate Indigenous sovereignty, then one must reconsider how to listen. This is precisely the argument made by Robinson, who states that "[d]ecolonzing musical practice involves becoming no longer sure what LISTENING is."|31| If we are to reconsider what listening is, we can hear how Indigenous song undermines settler law and enacts Indigenous authority to territory.

***Everado Reyes** is of Rarámuri descent and Chicanx. He is a Ph.D. student in Ethnomusicology at UC Berkeley whose research focuses on Indigenous sovereignty and self-determination through music and technology. He is studying Nahuatl and is part of the Indigenous Language Revitalization Designated Emphasis.*

Endnotes:

[1] Trevor G. Reed, *Sonic Sovereignty: Performing Hopi Authority in Ongtupqa*, Journal of the Society for American Music, 13(4):508-530, at 510 (2019) (emphasis added).

[2] *Id*.

[3] *Id*. at 510.

[4] *Id*. at 533.

[5] *Id*. at 515.

[6] *Id*. at 516.

[7] *Id*.

[8] *Id*. at 508.

[9] *Id*. at 526.

10] *Id*. at 508.

[11] *Id*. at 523.

[12] *Id*. at 515.

[13] *Id*. at 510.

[14] John Manzo and J.J. Potts, *Rez Style: Themes of Resistance in Canadian Aboriginal Rap Music*, Canadian Journal of Native Studies, 33(1):169 (2013).

[15] The year of colonial settlement is so important, and we will see this theme come up again regarding colonialism in Mexico.

[16] It should also be noted that ATCR has collaborated with a large range of musicians from Afro-Indigenous Latinx musician Lido Pimienta to musicians like Yassin Bay (formerly Mos Def). Future research could highlight this multicultural collaboration in hip-hop.

Endnotes cont'd:

[17] The group changed its name in 2021 to the “Halluci-Nation." For the sake of simplicity, I refer to them as ATCR when referencing Woloshyn's piece, as that was the group's name during the date of publication.

[18] Alexa Woloshyn, *Hearing Urban Indigeneity in Canada: Self-Determination, Community Formation, and Kinaesthetic Listening with A Tribe Called Red*, American Indian Culture and Research Journal, 39(3):1-23, at 5 (2015).

[19] *Id*. at 4, 17.

[20] *Id*. at 17.

[21] *Id*. at 6.

[22] *Id*.at 13.

[23] *Id*. at 13.

[24] *Id*. at 15.

[25] Snotty Nose Rez Kids Biography, Wav Records, (Retrieved 2021 at https://snottynoserezkids.com/bio).

[26] For more information on the complicated history between state capitalism, Canada’s settler state, and Indigenous activism and politics, see the discussion of the 1969 White papers in Glen Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (2014).

[27] Karyn Recollet, *Gesturing Indigenous Futurities through the Remix*, Dance Research Journal, 48(1):91-105 (2016).

[28] Id. at 100.

[29] Around 1521, Cuahtemoc was a Nahua/Mexica who led the 'Fifth Sun' Indigenous rebellion against Cortes and the Spanish colonialist. Cuahtemoc ended up being "hanged, drawn, and quartered..." by Cortes about three years after the uprising. Michael D. Coe & Rex Koontz, *Mexico: From the Olmecs to the Aztecs* 235 (2013). Cuahtemoc was the last of the Aztec emperors. *Id.*

[30] People of the Sun by Rage Against the Machine.

[31] Dylan Robinson, *Hungry Listening; Resonant Theory for Indigenous Sound Studies* 47 (2020).

20th Annual California Indian Law Conference

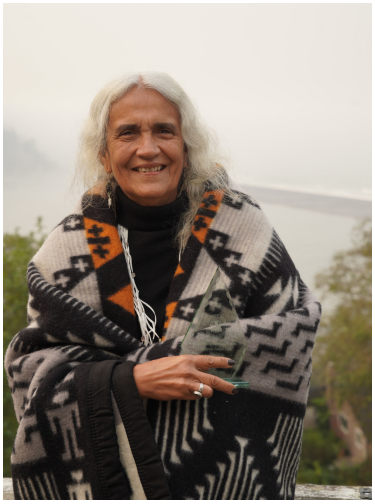
CILA's 20th Annual Indian Law Conference and Honoring Celebration was held virtually October 15-16, 2020, and became CILA's most popular event ever hosted with over 150 registered attendees. The Conference featured diverse and engaging panels and a keynote address by Angi Cavaliere, Staff Attorney for the Yurok Tribal Court, on the To' Kee Skuy' Soo Ney-Wo-Chek' ("I Will See You Again in a Good Way") report on Missing and Murdered Indigenous Women, Girls, and Two Spirit People (MMIWG2) in Northern California. CILA was also happy to host a virtual social event for conference attendees, offering the community time and space to connect, share, and enjoy time together during the ongoing COVID-19 pandemic.

The 2020 conference panels and speakers were as follows:

- **1) Litigation & Legislative Update** with Angela Riley, Professor of Law, UCLA Law; Fatima Abbas, Senior Advisor, U.S. Department of the Treasury and former Director of Policy and Legislative Counsel, National Congress of American Indians; Kevin Eastman, Vice President, PACE LLC; and Loretta Miranda, CILA Board President.
- **2) Drafting Effective MOUs with Government Partners During Covid-19 and Other Emergencies** with Christina Snider, Tribal Advisor to Governor Gavin Newsom and Executive Secretary of the Native American Heritage Commission; Denise Turner Walsh, Attorney General, Rincon Band of Luiseno Indians; Rovianne Leigh, Partner, Berkey Williams LLP; and Anna Hohag, CILA Board Member.
- **3) PL-280 Jurisdiction: Hot Topics** with Dorthy Alther, Legal Director, California Indian Legal Services; Merri Lopez-Keifer, Director of the Office of Native American Affairs, CA Dept. of Justice Attorney General's Office; Carole Goldberg, Distinguished Research Professor of Law and the Jonathan D. Varat Distinguished Professor of Law Emerita, UCLA School of Law; Michelle LaPena, Partner, Rosette, LLP; and Samantha Cypret, CILA Board Member.

- **4) Ethics**: Advising Tribal Leadership in the Me Too Era with Mary Kathryn Nagle, Partner, Pipestem Law; Kerry Patterson, Partner, Procopio, Cory, Hargreaves & Savitch LLP; and Michelle LaPena, CILA Board Member.

20th Annual California Indian Law Conference Honorees



CILA recognized three outstanding individuals for their achievements: Hon. Abby Abinanti (Chief Judge of the Yurok Tribal Court) received the 2020 Outstanding Achievement in Indian Law Award. Fatima Abbas (Senior Advisor, U.S. Department of the Treasury, and former Director of Policy and Legislative Counsel, National Congress of American Indians) and Lauren van Schilfgaarde (San Manuel Band of Mission Indians Director, UCLA Tribal Legal Development Clinic) received the 2020 Outstanding Young Attorney Award. CILA scholarship recipients were also honored.

CILA thanks all of our sponsors, presenters, and attendees for making the 20th Annual CILA Indian Law Conference and Honoring Celebration a success. A special thank you to Procopio, Rosette LLP, Ray-Bear McLaughlin LLP and Berkey Williams LLP for their consistent and unwavering support of CILA's Annual California Indian Law Conference.

The National Institutes of Health and Capacity Building: A Recognition of Tribal Data Sovereignty

BY KEVIN W. DOXZEN & ALEC D. TYRA*

Current Data Regime and Tribal Sovereignty

The Navajo Nation enacted a moratorium on genetics research in 2002, a decision resulting from years of unethical use of tribal DNA and few medical benefits reaching tribal communities.[1] Lack of informed consent, improper consultation, and misuse of samples have negatively impacted Indigenous communities (Native Americans, Alaskan Natives, and Native Hawaiians) across the country for decades.[2] Recently, the Navajo Nation has reconsidered participating in genetics research, yet questions across Indigenous communities regarding data privacy and ownership remain unresolved.[3]

This fraught relationship between Western medicine and Indigenous communities is the backdrop against which the United States launched the Precision Medicine Initiative (PMI) in 2015. The PMI aims to transition away from the current one-size-fits-all approach to health care towards personalized treatments and interventions.[4] The government intends for this way of improving health and treating disease to benefit all Americans, including Indigenous communities.

**The views expressed in this article are those of the authors alone and not the World Economic Forum*

However, without explicit agreements and benefit-sharing mechanisms in place, tribes are hesitant to participate by providing genetic data necessary for research and skeptical of government officials delivering improved medical resources.

At the center of the PMI is the *All of Us* research program led by the National Institutes of Health (NIH). *All of Us* is the largest longitudinal study in U.S. history, set up to recruit one million volunteers who will donate personal health data and biospecimens.[5] Deidentified data will be stored in a common cloud (online) environment for use by approved academic institutions and companies. Researchers will use this information to better understand the individual and synergistic roles that genes, environment, and lifestyle play in disease manifestation and health outcomes.

A primary goal of *All of Us* is to assemble a cohort that broadly reflects the diversity of the U.S., with a particular focus on recruiting underrepresented minority populations, including Indigenous communities.[6] This database is vital to ensuring that precision medicine research benefits all U.S. demographics. However, Native nations recognize that participation does not guarantee reciprocal benefits and that inclusion does not always lead to equity.[7]

Establishing explicit benefit-sharing agreements between the NIH and Indigenous communities is critical for overcoming historical injustices and ushering in a new era of Indigenous genetics research.

Indigenous tribes can restrict and protect access to their members' DNA information based on the tribes' status as sovereign entities in a trust relationship with federal government. Obviously, individual tribal members have an interest in their own biological material. But beyond each individual interest, tribes have a collective interest in the shared cultural resource of tribal genetic data.[8] Principles of tribal sovereignty support the idea that use of tribes' shared cultural resources require specific agreements with tribal governments to access this data.

Tribes have an interest in protecting their genetic data to avoid issues of cultural harm from the misuse of tribal data collections. This type of group harm was the basis of the claim in the infamous case between the Havasupai Tribe and the Arizona Board of Regents, which led to significant NIH policy and university research reform.[9] Further, tribes have an interest in protecting genetic information, as this type of data can be valuable tools in the development of the tribe or "nation building."[10] Ideally, the data sharing would directly advance research for medical issues afflicting tribal communities and improving on-reservation medical infrastructure. This "nation building" with genetic data can be facilitated through benefit-sharing agreements with the federal government. These types of agreements and policy changes that impact Indigenous communities would need to be made in consultation with tribal governments, further underscoring tribal sovereignty over genetic data.[11]

The combined interest of individual members and tribes in Indigenous genetic data provides opportunities to create different compensation models at both the individual and collective level. This Article explores aspects of other successes in benefit sharing with various groups and advances a Collective Compensation Model. This model both places tribal sovereignty over genetic data at the center of any approach from government officials and allows tribal leaders and advocates to leverage valuable information for the benefit of their members.

Benefit Sharing and Capacity Building – Lessons from Africa and Water Law

The concept of benefit sharing carries multiple definitions and justifications.[12] In lieu of legally binding frameworks, researchers and participants have difficulty establishing benefit-sharing agreements that are deemed ethical, just, and fair. This is particularly true for research involving the human genome, which the United Nations Educational, Scientific and Cultural Organization (UNESCO) calls the "heritage of humanity."[13] UNESCO's Declaration on Human Genome and Human Rights states that "benefits from advances in biology, genetics and medicine, concerning the human genome, shall be made available to all."[14] Under these terms, availability is deemed "reasonable" if individuals who contribute genetic data for the common good have access to resulting benefits, addressing concerns of justice and reciprocity.

Critics of the "reasonable availability" benefit-sharing model argue that this approach still does not guarantee the reciprocity of benefits for research participants.[15] The NIH addressed the shortcomings of reasonable availability by co-developing an agreement with the Navajo Nation to increase equitable outcomes in biomedical research.[16] Despite this progress, the NIH has not established similar agreements for genetics research.

As an alternative to reasonable availability, international research organizations have developed "capacity building" models designed to sustainably support populations who participate in research programs. The Human Hereditary and Health in Africa (H3Africa) research initiative meets this goal by using genomic technologies to study genetic diseases relevant to African populations, while simultaneously investing in research infrastructure in African communities.[17] H3Africa is partially funded by the NIH; thus, familiarity with this program and its capacity-building model can be applied to *All of Us.*

Similar benefit-sharing arrangements exist in Indian water rights settlements. Federally recognized tribes often have large and superior claims on water resources in river and groundwater basins under a variety of legal doctrines.[18] These superior rights create tensions with non-tribal water users in basins that are often already over-allocated and the subject of complex litigation.[19] In some cases, non-tribal water users will offer improved water infrastructure projects in exchange to settle tribes' superior claims.[20] Tribes benefit from the improved infrastructure while other parties benefit from decreased uncertainty in water deliveries.[21] Similar mutually beneficial models can be developed for genetics research.

Capacity Building on an Individual Level

Ownership over genetic data is a contentious issue for Indigenous communities,[22] who are especially worried about government invasion of their rights and privacy.[23] To overcome the general apprehension of Indigenous communities to donating genetic data, Congress could recognize that individual tribal members retain property rights over the donated information. Individual members could then license the genetic data to the *All of Us* database and generate revenue as companies access the information.[24] This model—an Individual Compensation Model—would amount to an individualized level of compensation[25] for tribal members from companies with the *All of Us* program acting as a middleman. This is similar to how some companies that gather DNA samples already sell information to third parties, but through compensation models with the *All of Us* program, tribal members would see some of that revenue. Providing donors an economic stake in the research would alleviate the worries of tribes that private organizations would expropriate and commercialize their genetic data without any reciprocal benefit.[26] However, there are risks that the return on investment for an individual sample in a large dataset is too *de minimus* to be effective.[27]

In addition, Indigenous communities often have less genetic diversity than other American communities.[28] When one individual shares their genetic data, that individual may potentially shed light on the genetic makeup of the community as a whole. The combination of only needing some genetic data to gain insight into an entire community and ethical concerns about direct payments could mean that the Individual Compensation Model could incentivize a race among some individuals to donate material.

Lastly, there is also substantial risk that companies may avoid using Indigenous samples for which they must pay.[29] If companies avoid using Indigenous materials, that will defeat the overall inclusive mission of *All of Us*. With the issues associated with an Individual Compensation Model, it is more advantageous for tribes and the government to develop frameworks around a Collective Compensation Model.

Capacity Building on a Collective Level

Applying the models and lessons learned from H3Africa, supported by the NIH, the *All of Us* program can integrate capacity-building

mechanisms that feed back into Indigenous communities. Increasing an Indigenous community's capacity for genetics research requires investments in infrastructure and training specialists. The funds for these investments could derive from a Partnership Contribution System (PCS), in which companies pay a yearly contribution to access Indigenous data from *All of Us's* depository. The World Health Organization (WHO) has successfully applied the PCS model to ensure that benefits, such as diagnostics and vaccines, are shared with vulnerable communities who donate genetic data to the WHO for pandemic viral surveillance purposes. Under this system, Indigenous communities would decide how contributions collected by the NIH will be distributed. For example, funds could support programs such as the Summer Internship for Indigenous Peoples in Genomics (SING) or hospitals and research facilities on reservations.

Rather than only benefiting individuals who choose to donate genetic data to *All of Us*, a capacity-building approach benefits entire communities. Investing in infrastructure and personnel training ensures that benefits are sustained over generations and do not end when the *All of Us* program ends. Supporting the medical and research capacity of Indigenous communities allows these communities to gain independence and non-reliance on federal or state research funding or initiatives, which helps Indigenous communities pursue research that aligns with their values. Furthermore, by supplying tribes with the initial infrastructure to independently conduct medical research, a Collective Compensation Model provides critical components for nation building.

How this model will work in practice is still unknown. The price of partnership contributions from companies is based on the value of genetic data. As stated in an Individual Compensation Model, genetic data gains value when used in aggregate; thus, determining independent or isolated value is difficult. Additionally, assigning monetary value before a product has been developed and sold is challenging. Still, once the NIH and companies have agreed upon contribution prices, tribes must also establish equitable distribution agreements designed to share money across and within tribes. Distribution agreements could be based on the relative size of tribes, number or percentage of members who donate genetic data, or multiple other possible parameters. Achieving consensus on how to fairly distribute funds may prove difficult, but this model holds the most promise for securing the participation of Indigenous communities.

Conclusion

The NIH should consider adopting a Collective Compensation Model. A Collective Compensation Model better supports nation building among Indigenous communities and recognizes Indigenous data sovereignty, while advancing the goal of the *All of Us* program to improve diversity in genetics research. While both individualized and collective compensation models present challenges, the Collective Compensation Model is preferable due to several ethical questions raised by Individual Compensation Models.

The Collective Compensation Model most importantly creates a government framework that recognizes tribal sovereignty over genetic data. Within that framework, tribal leaders and advocates can use the H3Africa program and water settlement agreements as examples in developing their own capacity-building mechanisms with the NIH.

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THE CALIFORNIA COURT OF APPEAL APPLIES THE INDIAN CANON OF LEGAL REALISM:

Interpret Statutes to Favor Economic Values Over Tribal Cultural Heritage

By Michelle LaPena

The California Court of Appeal recently decided that a prehistoric tribal shellmound is not a "historical structure" for purposes of a statute intended to streamline the approval process for housing developments.[1] This article tells the story of the West Berkeley Shellmound and how it has become the latest example of the court system's failure to appreciate the significance of tribal cultural resources.

I. The West Berkeley Shellmound

Before Berkeley was Berkeley, it was Ohlone land. In what is now West Berkeley, stands the remains of an Ohlone shellmound. Ohlone people built these complex, cone-shaped, structures over many-thousand centuries of use, until the Spanish missionaries arrived and began to colonize the Native lands. Ohlone people built the shellmounds out of the remains of the dead, which included the remains of Ohlone people as well as the remains of all other creatures and plants that they consumed.

It is believed, based on maps from Spanish missionaries and others, that there were at least 425 shellmounds around the shores of the San Francisco Bay, and many hundreds more across the central California coast. Located at the original shoreline, and by the mouth of Strawberry Creek, the West Berkeley Shellmound is estimated to have been 30 feet high and 100 yards long, a burial ground for the ancestors of the Ohlone of the East Bay and a sacred place,

Ohlone people inhabited a village adjacent to the Shellmound continuously from around 3,700 B.C. to 800 A.D. At that point, the village was relocated nearby, but the mound maintained ongoing ceremonial purposes, including as a burial site. While white settlers removed above ground portions of the mound to build roads and for other commercial purposes between the years of 1853 and 1910, the subterranean portions of the mound remain.

The Ohlone Village and Shellmound site was landmarked by the city of Berkeley in 2000.[2] The Ohlone Confederated Villages of Lisjan, led by their spokesperson Corrina Gould, has actively sought the protection of this important cultural site.

II. The Developers Attempt to Short-Cut Project Review with SB 35.

In 2015, Ruegg & Ellsworth and the Frank Spenger Company (Developers) applied for a permit from the City of Berkeley for commercial and residential

development at the site of a 2.2 acre parking lot at 1900 4th Street. Part of the lot includes the footprint of the West Berkeley Shellmound, as recorded by the City of Berkeley. The application proceeded through the normal discretionary review process, including environmental analysis under the California Environmental Quality Act (CEQA). A draft environmental impact report (EIR) concluded the project would cause "a substantial adverse change on a historical resource," and recommended mitigation measures "[3] including "cultural awareness and sensitivity training" for the construction workers, that would reduce those impacts to a "less-than-significant level."

While the developers navigated the existing environmental and permitting process, California Senator Scott Wiener marshaled Senate Bill No. 35 (SB 35) through the state legislature. Effective January 1, 2018, SB 35 added Section 65913.4 to the California Government Code which provides that, if a proposed "multifamily housing development" satisfies certain "objective planning standards," it is subject to a "streamlined, ministerial approval process" and not any discretionary "conditional use permit" or other local discretionary zoning controls. Developments satisfying the "objective planning standards" include those: "[N]ot located on a site where ... the development would require the demolition of a historic structure that was placed on a national, state, or local historic register."[4]

In March 2018, the Developers submitted an application for ministerial approval under SB 35 which now included low-income housing in an attempt to qualify for streamlining, and asked Berkeley to suspend processing of its previous application. In September 2018, the City of Berkeley denied the Developers' request for ministerial approval, in part, because it would demolish a listed historic structure—the West Berkeley Shellmound.

The Developers sued the City of Berkeley in November of 2018, seeking a writ of mandamus to issue the permit. The Confederated Villages of Lisjan intervened.

III. The Superior Court Concluded the Shellmound Was Protected Under Law.

In October 2019, the Alameda County Superior Court ruled in favor of preserving the West Berkeley Shellmound. Judge Frank Roesch rejected the Developers' argument that the Shellmound was not a "historic structure," agreeing with the Confederated Villages of Lisjan and the City of Berkeley that the West Berkeley Shellmound constitutes a historic structure, even though it has been demolished above ground.[5] Judge Roesch wrote:

"A historic structure does not cease to be a historic structure or capable of demolition because it is ruined or buried. That proviso is without basis in the text of the statute and would exclude many of the world's most beloved archeological treasures, such as Hezekiah's tunnel in Jerusalem, the Roman ruins in Pompeii, the mausoleum of Qin Shi Huang, the cave cities of Cappacdocia, and the tombs in the Valley of the Kings. Any reading of a statute protecting historic structures that would exclude such features from protection must be rejected."[6]

The Developers appealed.

IV. The Court of Appeal Approved Demolition of Sacred Cultural Sites.

The Developers appealed various issues from below, including the trial court's determination that the West Berkeley Shellmound triggered the exception to ministerial approval.

Although nominally applying a deferential standard of review, Code Civ. Proc. § 1085 (calling for the court to determine whether "the agency's decision was arbitrary, capricious or entirely lacking in evidentiary support, contrary to established public policy, unlawful or procedurally unfair"), the Court examined the issue de novo. The Court turned to two online dictionaries and one legal dictionary to conclude that a "structure" had to be either "built" or a "building."[7] Applying that definition, the Court of Appeal agreed with the Developers that the Shellmound was best characterized as a "mound" or "heap" rather than a structure:

> *There is no evidence in the record that the Shellmound is now present on the project site in a state that could reasonably be viewed as an existing structure, nor even remnants recognizable as part of a structure.[8]*

The City of Berkeley and Confederated Villages of Lisjan petitioned for review by the California Supreme Court. Review was subsequently denied.

V. The Legislature Attempts to Correct the Appeals Court's Insensitivity.

While the proceedings in the Court of Appeal were underway, the Legislature amended SB 35 to correct an "oversight" to prohibit ministerial approval of a project on any site that contains "a tribal cultural resource that is on a national, state, tribal, or local historic register list."[9] Because of this amendment, SB 35's failure to protect the West Berkeley Shellmound is hopefully limited to that singular case. However, the Court of Appeals' failure to appreciate the significance of tribal cultural resources and interpret statutes in way that favors development over preservation of these resources is likely to continue unless State law is further clarified to promote preservation of tribal cultural resources.

Michelle LaPena *is experienced in a wide variety of tribal legal matters including cultural resource protection, Indian child welfare, tribal taxation, tribal gaming regulation, tribal governance, the fee to trust process and real estate transactions, and general civil litigation involving tribal governments. Michelle is a member of the Pit River Tribe and Partner at Rosette, LLP. She can be reached at mlapena@rosettelaw.com.*

Endnotes:

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2021 PATHWAY TO LAW INITIATIVE

2021 Pathway to Law Cohort

By Erica Costa

The 3rd Annual Pathway to Law Program ("Program") occurred virtually March 5-6, 2021. The Program was co-sponsored by California ChangeLawyers, the National Native American Bar Association ("NNABA") Foundation, the Santa Rosa Rancheria Tachi Yokut Tribe, and the Federated Indians of Graton Rancheria. This year's Program was the largest yet, with seventeen (17) Native American undergraduate students and recent graduates participating virtually from all over the country.

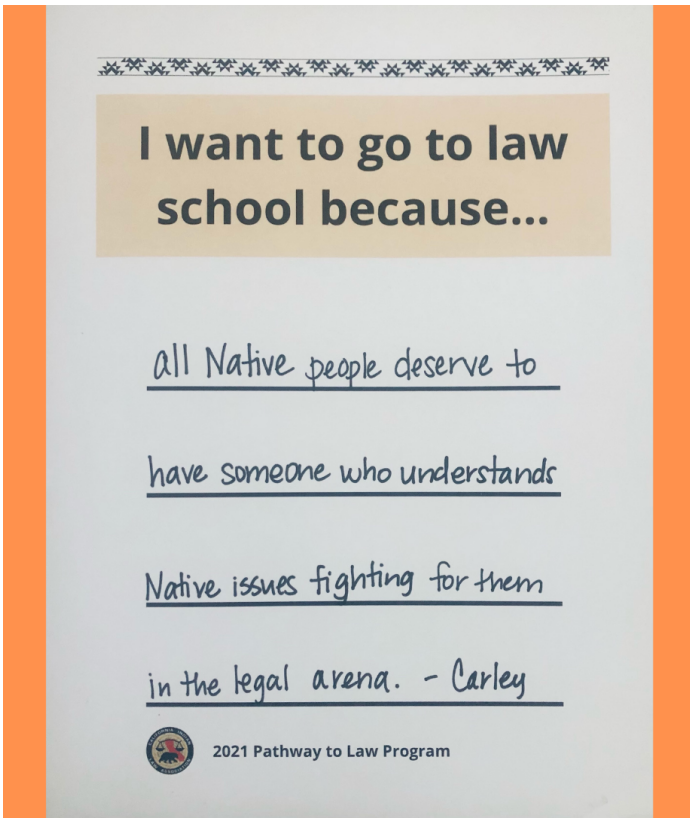
The Program is a two-day law school application workshop for Native undergraduate students and professionals committed to taking the LSAT and applying to law school. The goal of the Program is to "de-mystify" the law school application process and support prospective Native American law students who may not otherwise have the resources to submit a successful law school application. The Program works to (1) help Native American college students and professionals gain admission to competitive law schools and improve their position when they enter the job market, (2) increase the number of Native American students applying to and attending law school, and (3) ensure that Native American attorneys grow and progress in the legal profession by providing mentorship and support early in their journey to law school.

Program participants had the opportunity to participate in a "mock" Federal Indian Law class taught by Professor William Wood (Southwestern Law School), participate in a Q&A session with law school admissions counselors, receive personalized, individual feedback on their draft law school personal statements, explore potential financial aid options, learn about best practices for LSAT preparation, and hear from a panel of current law students and attorneys with diverse legal backgrounds and experiences. Following the Program, Participants were grouped into attorney-mentor "pods," with 2-3 attorney-mentors and mentees per pod. All Program participants were offered an LSAT test prep scholarship. Program participants were offered all of this at no cost.

Even with the challenges presented by COVID-19 and a virtual setting, CILA received overwhelmingly positive feedback on the Program from the participants. Participants reported that they were leaving the Program with more knowledge about the law school application process and confidence to apply than they had before participating in the Program. One participant shared the following about their experience: "I am truly honored and thankful for this program. The information provided is invaluable for Native students who would otherwise have to navigate applying to law school alone. Thank you!"

CILA will continue to support our 2021 Program cohort by hosting virtual social events, facilitating mentor pod meetups, sharing potential scholarship and/or job opportunities and much more to ensure all the participants have the resources and confidence they need to be successful.

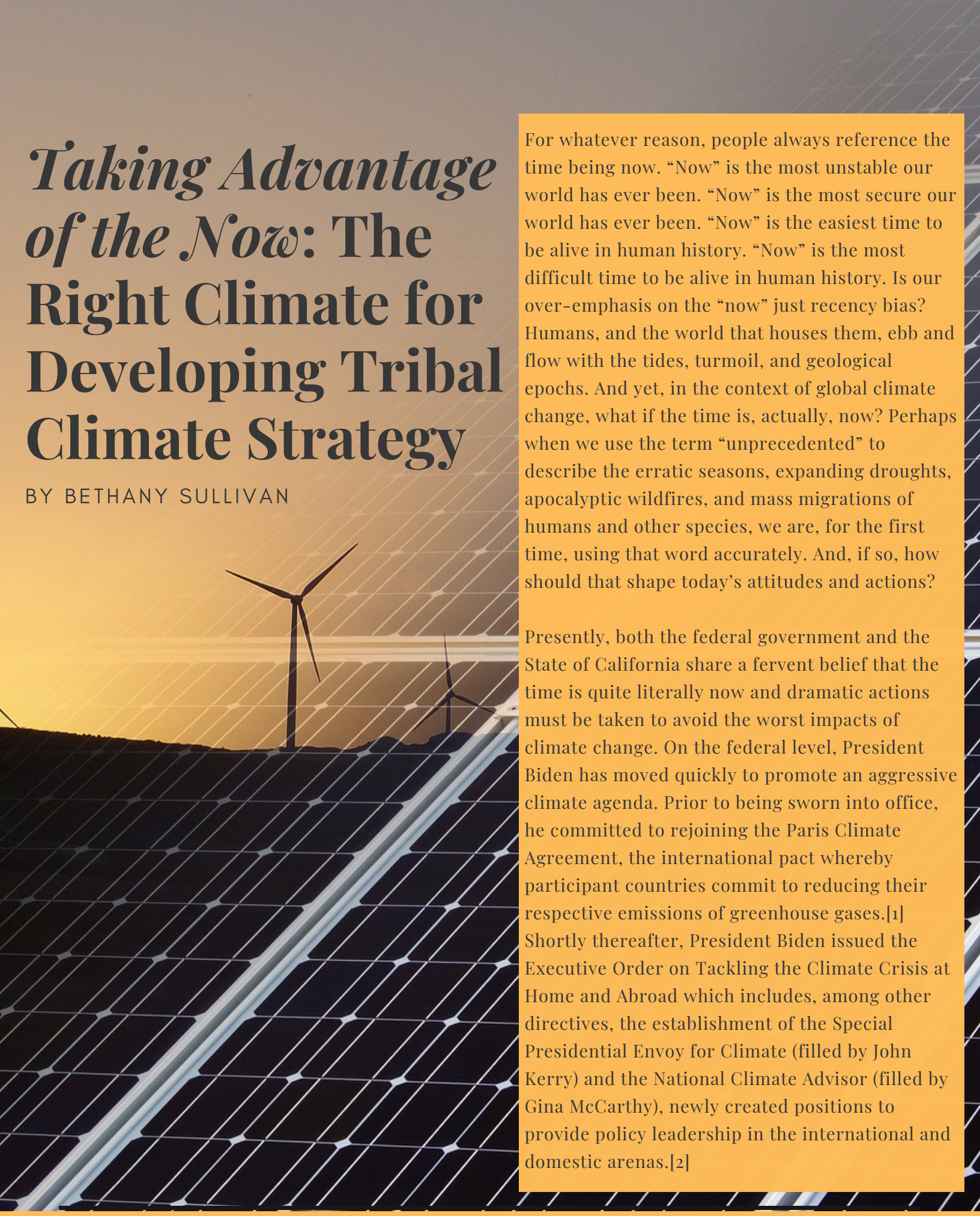
CILA would like to congratulate the following participants for their commitment to and engagement in the 2021 Pathway to Law Program: Alyssa Mendoza (Navajo); Alyssa Suarez (Gila River Indian Community); Beladona "Bela" Ontiveros (Gabrielino-Tongva Indian Tribe); Cara Sue Owings (Tolowa Dee-ni); Carley Tafoya (Jicarilla Apache); Carolann Duro (San Manuel Band of Mission Indians); Dustin Murray (Shingle Springs Band of Miwok Indians); Everardo "Ever" Reyes (Raramuri); JoAnne Lee (North Fork Rancheria of Mono Indians); Katelyn Widell (Mississippi Choctaw); Makai Zuniga (Paiute – Reno Sparks Indian Community); Naomi White Horse (Chumash and Rosebud Lakota); Patrick Burtt (Washoe Tribe of Nevada and California); Rory Wheeler (Seneca Nation); Sabrina Rigor (Turtle Mountain Band of Chippewa); Sadie Red Eagle (Otoe-Missouria Tribe of Indians); and Shundeen Martinez (Navajo).



CILA would like to thank the Santa Rosa Rancheria Tachi Yokut Tribe and the Federated Indians of Graton Rancheria for generously sponsoring LSAT preparation scholarships for the 2021 cohort. CILA would also like to thank the following entities for their generous support of the 2021 Pathway to Law Program: American Indian Law Center, Inc., California ChangeLawyers, NNABA Foundation, Stanford Law School, TestMasters, UC Berkeley Law School, UC Davis School of Law, UCLA School of Law, Yale Law School, and Write Track Admissions.

Taking Advantage of the Now: The Right Climate for Developing Tribal Climate Strategy

BY BETHANY SULLIVAN



For whatever reason, people always reference the time being now. "Now" is the most unstable our world has ever been. "Now" is the most secure our world has ever been. "Now" is the easiest time to be alive in human history. "Now" is the most difficult time to be alive in human history. Is our over-emphasis on the "now" just recency bias? Humans, and the world that houses them, ebb and flow with the tides, turmoil, and geological epochs. And yet, in the context of global climate change, what if the time is, actually, now? Perhaps when we use the term "unprecedented" to describe the erratic seasons, expanding droughts, apocalyptic wildfires, and mass migrations of humans and other species, we are, for the first time, using that word accurately. And, if so, how should that shape today's attitudes and actions?

Presently, both the federal government and the State of California share a fervent belief that the time is quite literally now and dramatic actions must be taken to avoid the worst impacts of climate change. On the federal level, President Biden has moved quickly to promote an aggressive climate agenda. Prior to being sworn into office, he committed to rejoining the Paris Climate Agreement, the international pact whereby participant countries commit to reducing their respective emissions of greenhouse gases.[1] Shortly thereafter, President Biden issued the Executive Order on Tackling the Climate Crisis at Home and Abroad which includes, among other directives, the establishment of the Special Presidential Envoy for Climate (filled by John Kerry) and the National Climate Advisor (filled by Gina McCarthy), newly created positions to provide policy leadership in the international and domestic arenas.[2]

More recently, President Biden announced a new national target to achieve a 50-52% reduction from 2005 levels in economy-wide net greenhouse gas pollution by 2030.[3]

California has been even more aggressive. The State set a 2030 target of reducing emissions 40% below its 1990 levels.[4] Additionally, the State hopes to reach carbon neutrality by 2045, meaning any remaining amounts of carbon emissions are to be offset by the removal of carbon from the atmosphere due to carbon sinks or carbon capture and storage.[5] Tailored measures in different industries are necessary to meet such ambitious goals. For example, the State is requiring that renewable and zero-carbon energy resources supply 100% of electric retail sales to customers by 2045.[6] Regarding vehicular emissions, the State has set a goal that by 2035, 100% of in-state sales of new passenger cars and trucks will be zero-emission.[7]

These federal and state goals require a sea change in our industries and daily practices. They also require a massive infusion of capital and human resources. If it sounds daunting... well, it is. However, this moment provides a tremendous opportunity for tribal nations to influence external policy, develop internal policy, expand in-house expertise and government services, pursue new forms of economic development, and to lead by example.

Regarding external policy, while high level targets have been set by the federal and state governments, the actual mechanisms needed to achieve such targets are still being developed. To that end, there have been many tribal consultations concerning proposed regulations and programs. For example, the Department of the Interior conducted consultation with tribal leaders on clean energy resources on tribal lands, which included discussion of facilitating access to capital and ensuring tribal control of such projects.[8] On the state level, the California Natural Resources Agency has consulted with California Tribes on traditional ecological knowledge, including land and water management practices, in order to incorporate nature-based solutions to climate change and biodiversity loss in state policy and practices.[9] The State also commissioned the Tribal Gap Analysis to gather data on tribal climate preparedness and energy systems, as well as projected needs and gaps in satisfying such needs, for the purpose of informing state programs and grant opportunities targeted at California Tribes.[10]

The development of internal tribal policy, expansion of in-house expertise and government services, and pursuit of new forms of economic development are, in a sense, different sides of the same coin. They are all manifestations of an overarching tribal strategy to mitigate and adapt to climate change. But this begs the question: what is the overarching tribal strategy?

Has your Tribe or tribal client already developed a comprehensive strategy for the immediate, mid-term, and long-term actions necessary to address climate change? I suspect the answer for many is no, or not entirely. Tribal governments are extraordinarily busy and the idea of sitting down to identify assorted climate needs, objectives, and pathways for moving forward may seem both overwhelming and laughable. This Article urges you to make the attempt, nonetheless, because this moment will likely be unparalleled in terms of both opportunity and importance.

Case in point: the largest federal appropriation for Indian country in the history of the United States is currently under way. In March 2021, Congress enacted the American Rescue Plan Act (ARPA) which, in addition to other programs and funding channeled towards Native communities, set aside $20 billion in Fiscal Recovery Funds (FRF) for direct distribution to tribal governments.[11] Many Tribes are already planning how they will spend the funds over the next several years.[12] There are rules to how funds can and cannot be used,[13] yet there exist many opportunities for Tribes to use these funds to promote their climate agendas. While this Article does not constitute legal advice and every Tribe should consult with its legal and financial advisors to determine appropriate spending options, the following are just a few ideas for climate-related projects funded by the ARPA FRF.

One category of allowable uses is for responding to the Covid-19 public health crisis and its negative economic impacts. The rules governing this category provide wider latitude for projects that correct systemic inequities in communities disproportionately impacted by the pandemic, such as tribal communities. Such latitude includes addressing health disparities, investing in housing and neighborhoods, addressing educational disparities, and promoting healthy childhoods.[14] Therefore, Tribes could consider public health programs that provide tribal citizens supplies and assistance to deal with climate caused environmental hazards, such as dangerous air quality resulting from wildfire, extreme heat events, or decreased water supply during periods of drought. Tribes could also establish housing programs to help citizens with climate impacts, such as emergency housing for citizens temporarily or permanently dislocated from their homes due to wildfire. Housing programs could further help reduce carbon emissions by offering grants or technical assistance to citizens for home energy efficiency measures or installation of rooftop solar panels. Tribes could also issue public health grants to tribally or Indian owned businesses for installing air filtration systems, which would not only to reduce the threat from airborne viruses such as Covid-19, but would also treat particulate matter from wildfire smoke.

Another category of allowable uses is for water, sewer, and broadband infrastructure projects. For water and sewer projects, recipients are advised to look to the existing Environmental Protection Act (EPA) programs for the Clean Water State Revolving Fund

(CWSRF) and the Drinking Water State Revolving Fund (DWSRF) to determine allowability.[15] The rules provide their own parameters for broadband infrastructure projects, including minimum download speeds and prioritizing underserved communities.[16]

The climate nexus with such projects is manifold and the Department of Treasury expressly "encourages recipients to consider green infrastructure investments and projects to improve resilience to the effects of climate change."[17] For example, projects eligible under the DWSRF may reduce the energy required to treat drinking water by preventing pollution from reaching the sources of drinking water.[18]

CWSRF eligible projects include "measures to conserve and reuse water or reduce the energy consumption of public water treatment facilities."[19] Moreover, given the increased frequency and intensity of precipitation events, Tribes in storm-prone areas need resilient stormwater systems and supportive green infrastructure. As Treasury identifies, this supportive infrastructure could include "rain gardens that provide water storage and filtration benefits, and green streets, where vegetation, soil, and engineered systems are combined to direct and filter rainwater from impervious surfaces."[20] And for Tribes in drought-prone areas, funds could be used to provide relief through interconnecting water systems or rehabilitating existing wells.[21] There are also ties to clean energy generation since funds may be used to finance the generation and delivery of clean power to an eligible wastewater system or water treatment plant.[22] Last, the use of funds for expanding the scope and reliability of broadband in rural tribal communities increases opportunities for remote work and virtual educational programs, decreasing commuting time and cars on the road.

The final category to be discussed authorizes using ARPA FRF funds for the provision of government services to the extent of lost tribal revenues associated with the pandemic.[23] In order to qualify, Tribes must first calculate lost tribal revenues, such as from tribally-owned businesses that were forced to close pursuant to tribal public health orders, then dedicate the same amount towards government services.[24] The Treasury rules offer "broad latitude" as to what constitutes "government services" and provide examples such as "maintenance of infrastructure or pay-go spending for building new infrastructure, including roads; modernization of cybersecurity, including hardware, software, and protection of critical infrastructure; health services; environmental remediation; school or educational services; and the provision of police, fire, and other public safety services."[25]

These funds could be used in numerous ways to advance a tribal climate agenda.[26] For example, a Tribe could create a new government position in climate or energy strategy. This would build in-house expertise, a trusted person or department to help guide tribal leaders as they asses their current climate needs and vulnerabilities, identify workable milestones, and craft the policies and programs needed to achieve the overarching climate strategy. Alternatively, a Tribe could hire consultants to conduct an energy audit of the tribal infrastructure or a general assessment of the Tribe's climate risks and opportunities.[27]

A Tribe might also consider pursuing specific projects, such as constructing local electric vehicle (EV) charging stations. Another idea, which dovetails with conservation goals, is developing carbon offset projects, a particularly appealing option for Tribes with forest or other natural resource reserves.[28] If energy security is critical, as it often is for Tribes in rural areas subject to frequent utility power shutoffs, a Tribe could use its funds for designing and constructing a microgrid to serve tribal buildings and/or the local residential community.[29] Tribes can and should be creative with identifying government services that further their climate agendas, with the caveat that the rules for the ARPA FRF are still being developed and should be closely monitored.

To conclude, tribal governments may want to consider the following points in deciding whether and how to develop their climate strategies and, relatedly, how to spend their ARPA FRF monies.

- Do not hesitate to ask for, or demand, help. If federal and state agencies want to incorporate tribal nations and tribal values in their vision of the future, they should start by providing Tribes with individually tailored, meaningful technical assistance. Many Tribes do not know where to begin when it comes to evaluating their current climate assets, vulnerabilities, and goals for the future.

- Consider how climate and clean energy objectives tie into other tribal objectives, such as environmental stewardship, building intergenerational knowledge, diversification of tribal economies and expanding work opportunities for citizens.

- Brainstorm ways to involve the younger generations as they will be essential to carrying out the Tribe's long-term vision. This may include assisting young tribal citizens with finding energy or climate related internships. Tribal governments could also create their own in-house internship programs.

- Consider working with neighboring Tribes on projects with shared benefits and/or sizable capital requirements (e.g., the constructing of a microgrid).

- Do not assume your ability to act is limited to your Tribe's own landholdings. Consider pursuing a co-management arrangement over state land and resources to protect biodiversity or manage carbon offsets.

- And finally, think big, but start small(ish). It is easy to be paralyzed by the seemingly innumerable opportunities and options. Identify smaller, discrete steps that serve as starting points to the larger overall strategy.

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Endnotes:

[1] *See* Elian Peltier and Somini Sengupta, *U.S. formally rejoins the Paris climate accord*, N.Y. Times, Jan. 19, 2021, https://www.nytimes.com/2021/02/19/world/us-rejoins-paris-climate-accord.html.

[2] *See* White House Press Release, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/.

[3] *See* White House Briefing Statement, https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies/.

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[6] *See* Cal. Energy Comm'n, Press Release "California Releases Report Charting Path to 100 Percent Clean Electricity" (Mar. 15, 2021) (referencing Senate Bill 100, Chapter 312, Statutes of 2018), *available at* https://www.energy.ca.gov/news/2021-03/california-releases-report-charting-path-100-percent-clean-electricity.

[7] *See* Executive Order N-79-20 (signed by Governor Gavin Newsom, Sept. 23, 2020), *available a*t https://www.gov.ca.gov/wp-content/uploads/2020/09/9.23.20-EO-N-79-20-Climate.pdf.

[8] *See* Dep't of Interior, Dear Tribal Leader Letter (dated Mar. 16, 2021), *available at* https://www.bia.gov/news/dttl-developing-tribal-renewable-and-conventional-energy-resources.

[9] *See, e.g.*, CNRA, Letter to CA Tribes on Conservation of 30% of California Land and Coastal Waters by 2030 and Climate Smart Lands Strategy (dated Jan. 27, 2021); CNRA, Letter to CA Tribes on State Adaptation Strategy 2021 Update (dated June 15, 2021).

[10] *See* https://caltribalgapanalysis.org/.

[11] American Rescue Plan Act of 2021 § 9901, Pub. L. 117-2, codified at 42 U.S.C. § 802 *et seq*.

[12] The ARPA FRF rules require that funds be obligated by December 31, 2024, however infrastructure projects have until December 31, 2026 to be completed. *See* Dep't of Treasury, Coronavirus State & Local Fiscal Recovery Funds Frequently Asked Questions, FAQ 6.2 (last updated July 19, 2021) (hereinafter Treasury FAQs).

13] *See* Coronavirus State and Local Fiscal and Recovery Funds, Interim Final Rule, 86 Fed. Reg. 26,786 (May 10, 2021) (to be codified at 31 C.F.R. pt. 35) (hereinafter Interim Rule); Treasury FAQs.

[14] Interim Rule at 26,791, 26,796; Treasury FAQ 2.11.

[15] Interim Rule at 26,802–26,804.

[16] *Id*. at 26,804–26,806.

[17] *Id*. at 26,803.

[18] *Id*.

[19] *Id*.

[20] *Id*.

[21] *Id*.

[22] Treasury FAQ 6.13.

[23] The ARPA FRF include a fourth category that permits premium pay for essential workers, however that category is not relevant to this discussion.

[24] See Treasury FAQs pt. 3.

Endnotes cont'd:

[25] *See* Treasury FAQ 3.8. The Treasury rules expressly prohibit using these funds to pay interest or principal on outstanding debt or fees or issuance costs for new debt, which is important to keep in mind when financing projects. *Id*.

[26] Some industry experts have opined that Tribes should only use ARPA FRF for existing government services, i.e. those which were already offered or in the early stages of development prior to the pandemic. The Treasury rules themselves, however, place no prohibition on using funds for new government services (and in fact, contemplate "new" infrastructure projects). Treasury FAQ 3.8.

[27] Alternatively, the Office of Indian Energy (OIE) in the U.S. Department of Energy provides free technical assistance to Tribes, including the initial work to develop a strategic energy plan and provides numerous other resources, including online trainings and an online solar calculator to assess a Tribe's solar potential. *See* Office of Indian Energy Policy & Programs, https://www.energy.gov/indianenergy/office-indian-energy-policy-and-programs (last visited July 23, 2021).

[28] *See, e.g.*, Carolyn Korman, *How Carbon Trading Became a Way of Life For California's Yurok Tribe*, New Yorker, Oct. 10, 2018, https://www.newyorker.com/news/dispatch/how-carbon-trading-became-a-way-of-life-for-californias-yurok-tribe.

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Maintaining Confidentiality for Traditional Ecological Knowledge Obtained from Indigenous Nations: Overcoming the Presumption of Public Disclosure

BY CURTIS VANDERMOLEN

In September 2020, the Metronome Clock that faces Union Square in Manhattan, New York, was reprogrammed to display the time remaining until the effects of climate change on human life will be irreversible.[1] The countdown as of September 20, 2020, displayed seven years, one-hundred and three days, and fifteen hours.[2]

Wildfire is one of the most well-known symptoms of climate change, and in recent years millions of acres of inhabited land around the world have been scorched by uncontrolled wildfires.[3] Indigenous communities worldwide are being recognized for their historic and cultural knowledge and practices for combatting such highly destructive wildfires.[4] Traditional ecological knowledge (TEK), which is the historic and cultural knowledge kept by Indigenous communities, is scientific information about our interconnected ecosystems.[5]

This environmental knowledge reaches into every aspect of the natural world and is a vast resource – mostly untapped in the United States.

Even where the government and private organizations seek to obtain TEK from an Indigenous nation, its people may be reluctant to offer their historic and cultural knowledge. Indigenous nations in the United States have survived major historical trauma inflicted upon them by federal and state governments, and private individuals. So, when the government comes knocking and asking about sacred cultural sites, traditional and spiritual practices, and intimate details of Indigenous society, it is not shocking that Indigenous nations are reluctant to share TEK. The problem is compounded when the government cannot tell the Indigenous nation that their sensitive information will be protected from public disclosure – revealing to the world each of their sacred sites and cultural secrets.

This article explores how and whether the federal and California freedom of information and environmental statutes protect confidential TEK that an Indigenous nation might share with the government. TEK is not protected from federal Freedom of Information Act requests. California's model provides more thoughtful confidentiality for TEK, but problems remain.

Background for Understanding TEK in Context.

To combat climate change and better understand the environment and ecosystems, U.S. governments have turned to Indigenous nations for help. For thousands of years, Indigenous people developed a wealth of scientific knowledge about the environment, commonly referred to as TEK, through observed, recorded, and analyzed, conservation practices as part of their subsistence, and culture. U.S. governments struggle to obtain TEK from Indigenous nations, which must be protected because of cultural elements, spiritual practices, and sensitive sites of historic significance which are an integral part of that knowledge. However, federal law presumes that information held by the government should be disclosed to the public, thereby creating a strong disincentive for Indigenous nations to share TEK.

Historic Traumas Prevent A Free Exchange of Information.

There is a long history of trauma visited upon Indigenous nations by U.S. governments which tends to suppress a free exchange of information. The United States has vacillated between policies of extermination, assimilation, abject disregard, and acknowledgement of Indigenous people. The documented history of oppression and genocide perpetrated by the United States upon the Indigenous peoples of North America is likely to leave "[I]ndigenous elders suspicious when the government asks for information about sensitive environments, cultural resources, and practices."[6]

Trauma continues to be perpetrated today. For example, in the 2020 election, several state governments made affirmative efforts to prevent Indigenous people from voting.[7] Additionally, private parties continue to desecrate Indigenous sacred sites in the United States with impunity.[8]

These examples show that it is important for Indigenous nations to carefully guard their sensitive information from both private individuals and governments that disrespect them.

Therefore, the federal and state governments face a difficult quandary: how to benefit from the centuries of TEK maintained by Indigenous nations when there is a justifiable lack of trust that sensitive information will be kept secret. Indigenous nations need more than a wink and a nod from Western governments to entrust them with sacred cultural and spiritual information that is directly relevant to the environment and climate change.

Safeguarding Against Federal Disclosure Requirements Under FOIA and NEPA.

The Freedom of Information Act (FOIA)[9] and National Environmental Policy Act (NEPA)[10] both establish presumptions of full disclosure, and each is enforced through the Administrative Procedures Act (APA).[11] Of the exceptions from FOIA for domestic intelligence, three are relevant to protecting the confidentiality of TEK: (1) a trade secret or confidential business information; (2) information that is part of the agency's "deliberative process;" and (3) confidential information that is specifically exempted in statute.[12]

Trade secrets are defined as confidential information "related to a product or service used or intended for use in interstate or foreign commerce" and "to the economic benefit of anyone other than the owner."[13] To be exempt from a public records request, the information must be both related to a product or service, and intended for use in commerce.

Indigenous knowledge arguably constitutes secrets that affect commerce and the economic circumstances of the nation, because information about the integrated development and movement of people, goods, and resources is part of the overall ecosystem evaluated by and disclosed in TEK. But the trade secrets exemption cannot be read so broadly. TEK is not usually part of a business enterprise. There is no identifiable product or service that requires TEK to remain secret, and there is no specific economic advantage granted to a person by withholding TEK from the public.[14] The knowledge is not closely held for the purpose of interstate or foreign commerce.

Federal agencies have attempted to use the deliberative process exemption in court to protect the confidentiality of external sources, and failed.[15] In one recent case, the Department of Interior exchanged information with Indigenous nations to evaluate water rights in the Klamath River Basin. Non-Indigenous water users demanded disclosure of Interior's notes, and documents that it had received from the Indigenous nations during consultation. The Supreme Court stated that the deliberative process exemption did not protect the information from disclosure, because the source was not a government agency.[16]

FOIA also recognizes that other federal statutes exempt information from disclosure.[17] However, it severely limits the extent of this exemption. Statutory exemptions must (1) leave no discretion to the agency in whether to withhold the information, or (2) establish particular criteria for withholding the information.[18] Even in the few circumstances where information about a resource is statutorily protected, the ability of a court to properly evaluate whether the information should be protected is deeply suspect. For example, a private non-Indigenous organization in Utah recently demanded records relating to Indigenous cultural resources.[19] Although the Archaeological Resources Protection Act (ARPA) prohibits public disclosure of information about archaeological resources, the D.C. District Court decided that the "impacts" information about archaeological resources was not excluded from disclosure.[20] The court failed to understand how the location and nature of a resource – information protected by the ARPA – could be easily discerned by reviewing the impacts information.[21]

NEPA also does not protect information from disclosure, because disclosure of information contained in an Environmental Impact Statement (EIS) is expressly "governed by FOIA." While the court acknowledges that the "decisionmaking and disclosure requirements of NEPA are not coextensive," the exemptions to disclosure under FOIA are so narrowly construed as to render them relatively useless for Indigenous nations that have provided TEK to support an agency's environmental review.[22]

FOIA enables individuals to request information from an agency when the person can reasonably identify the information sought, whereas NEPA mandates disclosure of information without a public information request. NEPA requires an agency to provide detailed information about the environmental impacts of every major federal action that may significantly affect the quality of the human environment.[23] Under the APA, a NEPA document must fully disclose the agency record upon which the agency action is predicated.[24] Agencies usually err on the side of greater disclosure in their NEPA documents to prevent project delays from court challenges.

An Alternative Approach – California Law and TEK.

In stark contrast to federal law, California has thoughtfully attempted to address confidentiality for Indigenous knowledge in the environmental context. Public information disclosure is addressed under the California Public Records Act (CPRA),[25] which operates much like FOIA. Traditional ecological knowledge is specifically addressed within the California Environmental Quality Act (CEQA).[26]

California has enacted CPRA which establishes a presumption similar to FOIA.[27] Under the

California Public Records Act (CPRA), "every person has a right to inspect any public record. . . ."[28] CPRA provides exceptions that limit disclosure of "records of Native American graves, cemeteries, and sacred places and records of Native American places, features, and objects" described in the Native American Historic Resource Protection Act which are maintained by or in the possession of a state or local agency.[29]

In addition, like the ARPA, CPRA specifically exempts records relating to archaeological site information and reports, including records obtained through a consultation process between an agency and an Indigenous nation.[30] Unlike FOIA which mandates disclosure, an agency has discretion to balance the public interest of disclosure versus non-disclosure and withhold the record from the public; including when an Indigenous nation provides an agency with confidential information that is not otherwise exempt under CPRA.[31]

Specific protections for TEK under the California Environmental Quality Act (CEQA).

California also enacted the California Environmental Quality Act (CEQA) which requires agencies to gather and publish information about environmental impacts when undertaking a project.[32] Similar to FOIA and NEPA, the disclosure of public information under CEQA is controlled by CPRA. However, unlike NEPA, CEQA contains specific provisions that require consultation with Indigenous nations and protect the confidentiality of TEK.

CEQA defines tribal cultural resources (TCR) as including "sites, features, places, cultural landscapes, sacred places, and objects with cultural value to a California Native American tribe."[33] CEQA gives an agency sole discretion to determine that a resource is significant.[34] Agencies are likely to receive TCR information from California Indigenous nations, because consultation with a California Native American Tribe is required under statutory provisions added by the legislature in 2004 and 2014.[35]

When an agency acquires information about TCR, it is prohibited from including that information in its public environmental documents, and from disclosing the information to any other public agency or the public.[36] Even if the information is shared with a private project applicant, that person is required to exercise a "reasonable degree of care" to "maintain the confidentiality of the information," and is prohibited from disclosing the information to a third party.[37] Instead of publishing the Indigenous nation's confidential information, the agency is authorized to describe the information in general terms "so as to inform the public of the basis of the [agency's] decision without breaching the confidentiality required."[38]

CEQA still has some problems that need to be addressed.

Indigenous nations face a major problem when the proposed project is, or may become, jointly state and federal. While CEQA may protect the TEK an Indigenous nation provides to the state agency, it cannot control the disclosure of that information by the federal agency.[39] In essence, when a project requires approval or involves funding from a federal agency, California's thoughtful approach to protecting the confidentiality of TEK is mostly worthless.

There is another gap in CEQA's protection for the confidentiality of TEK. A private project proponent is only held to a reasonable degree of care in protecting the Indigenous nation's confidential information. Because local government agencies frequently outsource the preparation of environmental documents to the project proponent, this lack of protection can be a barrier to intergovernmental cooperation. California's Indigenous community is understandably suspicious of private actors – usually land developers.[40] Without greater assurances that a release of confidential information by a public or private party will be met with strong enforcement and penalties, Indigenous communities are likely to continue to closely guard TEK.

Conclusions & Recommendations.

Obtaining TEK and applying it to federal, state, and private actions is imperative to slow the countdown until the effects of climate change on human life become irreversible. The U.S. government and its states are passing statutes which require agencies to "consult" with Indigenous nations before taking action that may affect the environment. But Indigenous nations are reasonably cautious and concerned about sharing culturally sensitive information with their colonial oppressors. When TEK is withheld or incomplete because of distrust, it necessarily impairs the government's ability to fully assess and mitigate the environmental impacts of its decisions.

The U.S. government does not protect TEK from public disclosure. TEK must fit within an express statutory exemption under the APA. In some cases, the physical components of TEK may qualify, but even then, the cultural and spiritual components do not. Although federal agencies are required to seek TEK for their environmental documents, Indigenous nations continue to be reluctant to provide confidential information because the agency cannot protect it from public disclosure.

On the other hand, California has tried to reassure Indigenous nations that their sensitive information will be protected. Although there are gaps in the system established under CEQA, it is a significant improvement over the dearth of protection afforded Indigenous nations under NEPA. As a minimal step, Congress should adopt the provisions in CEQA for environmental analyses under NEPA. But much more could be done to improve intergovernmental cooperation to combat climate change.

Instead of placing protections for TEK in NEPA statutes, Congress should exempt all confidential information provided by Indigenous governments from public disclosure under FOIA. The cultural and spiritual secrets of Indigenous nations are at least as important as the trade secrets of American businesses – information which is already protected from public disclosure, and which often would reveal negative impacts on the environment.

Moreover, Congress should provide substantial penalties for any public or private party that discloses TEK which it should know is confidential.

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[7] *See Driscoll v. Stapleton*, 401 Mont. 405 (Mt. Sup. Ct. 2020); Yazzie v. Hobbs, 977 F.3d 964 (9th Cir. 2020); Patty Ferguson-Bohnee, *How the Native American Vote Continues to be Suppressed*, American Bar Association, Feb. 9, 2020, *available at* https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-rights/how-the-native-american-vote-continues-to-be-suppressed; *Court Permanently Strikes Down Montana Law That Restricts Voting Rights of Native Americans*, American Civil Liberties Union, Sep. 25, 2020, *available at* https://www.aclu.org/press-releases/court-permanently-strikes-down-montana-law-restricts-voting-rights-native-americans; and Erik Ortiz, *Trump campaign seeks to block Navajo Nation voters' lawsuit over Arizona mail-in ballots*, NBC News, Sep. 4, 2020, *available at* https://www.nbcnews.com/politics/2020-election/trump-campaign-seeks-block-navajo-nation-voters-lawsuit-over-arizona-n1239328.

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[9] 5 U.S.C. §§ 552-552b.

[10] 42 U.S.C. § 4321 et seq.

[11] 5 U.S.C. § 551 et seq.

[12] 5 U.S.C. §§ 552(b)(3), (4), and (5).

[13] 18 U.S.C. § 1832.

[14] Trade secrets are defined in other statutes similarly to 18 U.S.C. § 1832. For example, California defines trade secrets as information "known only to certain individuals. . . having commercial value [and giving] its user a business advantage over competitors. . . ." Cal Gov't. Code § 6254.7(d).

Endnotes cont'd:

[15] 5 U.S.C. § 552(b)(5) exempts "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency. . . ."; *Natural Res. Def. Council v. U.S. Env. Protection Agency*, 954 F.3d 150, 157 (2nd Cir. 2020) (To be protected, disclosure of the information must "be thought likely to diminish the candor of agency deliberations in the future.").

[16] *U.S. Dep't of the Interior v. Klamath Water Users Protective Ass'n*., 532 U.S. 1, 8 (2001).

[17] 5 U.S.C. § 552(b)(3).

[18] *Id*.

[19] *Southern Utah Wilderness Alliance v. U.S. Bureau of Land Mgt.*, 402 F.Supp.2d 82, 84-85 (D.C. Dist. 2005).

[20] *Id*. at 91.

[21] *Id*. Impacts information included things like animal grazing, roads, recreational vehicle access, and mining.

[22] *Id*.

[23] 42 U.S.C. § 4332(C).

[24] *See, e.g.*, 5 U.S.C. § 706; *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

[25] Cal Gov't. Code § 6250 et seq.

[26] Cal Gov't. Code § 21000 et seq.

[27] Cal Gov't. Code § 6253.

[28] *Id*.

[29] Cal Gov't. Code § 6254(r).

[30] Cal Gov't. Code § 6254.10.

[31] Cal Gov't. Code § 6255(a).

[32] Cal Gov't. Code § 21000 et seq.

[33] Cal. Pub. Res. Code § 21074.

[34] *Id*.

[35] In 2004, the legislature passed SB 18 (Burton; Ch. 905, Stats. 2004) which requires local agencies to consult with Indigenous nations when adopting or updating a general plan "for the purpose of preserving specified places, features, and objects that are located within the city or county's jurisdiction." Cal Gov't. Code§ 65352.3. Ten years later, consultation with Indigenous nations was expanded to include every environmental review by an agency which may affect tribal cultural resources, as defined in AB 52 (Gatto; Ch. 532, Stats. 2014).

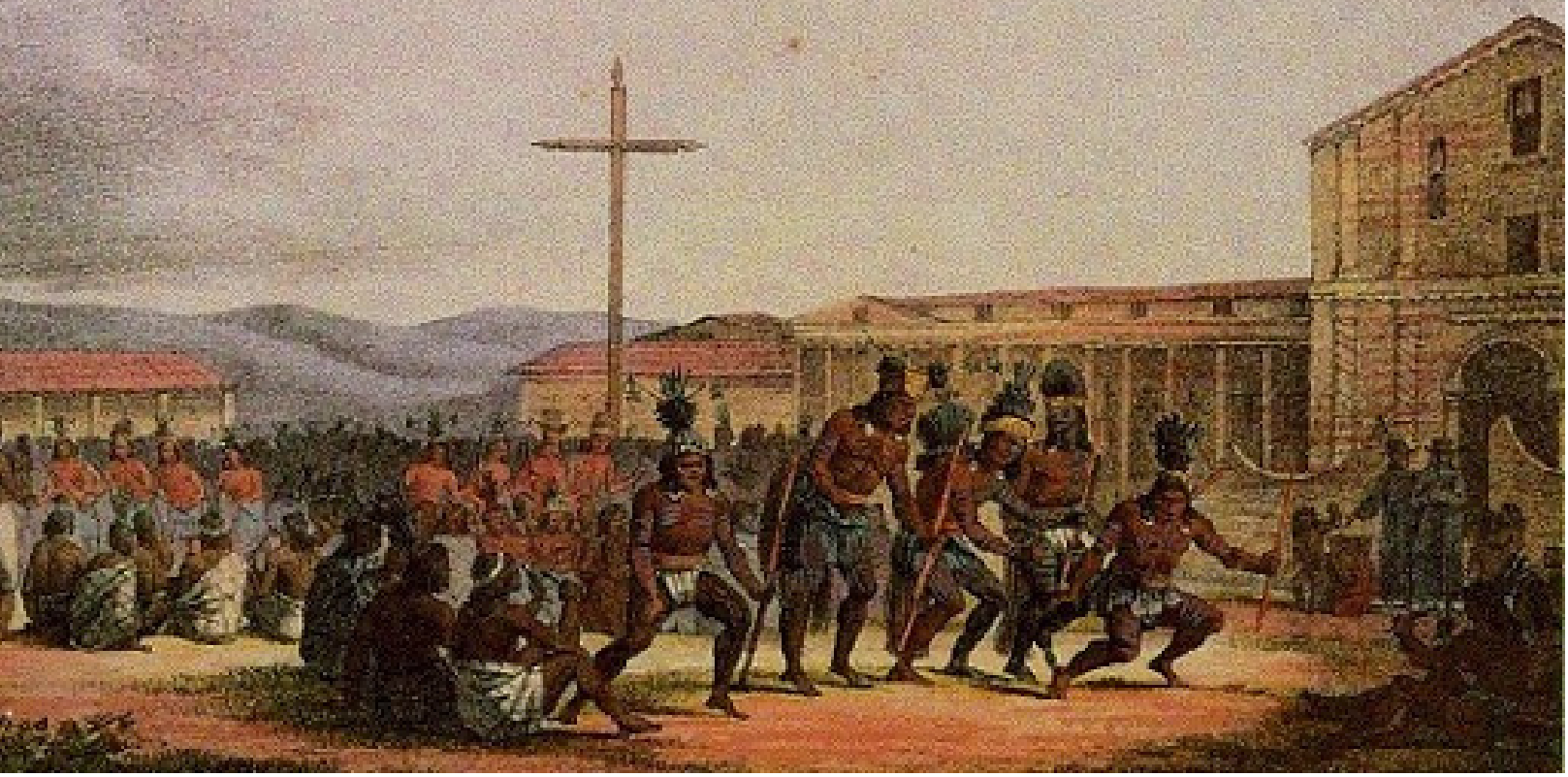
[36] Cal. Pub. Res. Code § 21082.3(c)(1).

[37] *Id.* at § 21082.3(c)(2)(A).

[38] *Id.* at § 21082.3(c)(4).

[39] U.S. Const. art. IV (supremacy clause); *Oneok, Inc. v. Learjet*, Inc., 575 U.S. 373, 377 (2015) (when "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," federal law is the supreme law of the land).

[40] In 2019, California's Governor Gavin Newsom formally apologized to the California Native American community "for the many instances of violence, maltreatment and neglect California inflicted on tribes." Newsom's executive order acknowledged California's history of "violence, exploitation, dispossession and the attempted destruction of tribal communities. . . a war of extermination between the two races until the Indian race becomes extinct. . . ." Exec. Order N-15-19 (signed by Governor Gavin Newsom, June 18, 2019), *available at* https://www.courts.ca.gov/documents/BTB25-PreConTrauma-02.pdf.



California Labor Law: Before and After the European Invasion

BY J. DAVID SACKMAN

Contrary to what you may have been taught in school, before the explosion of the Gold Rush, there were people in California. Where there are people, there must be labor, and where there is labor, there must be some system of ordering that labor and its fruits. That is what we now call "Labor Law." Here I review the "Labor Law" of California, before and after the European invasion, as it affected the people already here.

PRE-INVASION

Before Europeans arrived, what is now California was one of the most populated and prosperous areas of the North American Continent. The Native peoples had already developed advanced agricultural and industrial skills, and had an active trade throughout the state and beyond. The Chumash, who occupied the Central Coast area, even had a system of guilds, called "Gremios," which connected skilled workers from different villages. Membership in the Gremios was usually, but not always, hereditary, with the younger generation serving an apprenticeship under a skilled master. These Gremios included guilds of net makers, flint workers and morticians. But the most respected and powerful Gremios were those of the canoe makers and shamans. There were not only guilds, but capitalists among the Chumash, particularly the owners of the plank-canoe boats, who hired others to work those boats for transportation and fishing. Pre-Mission California society even had its bankers. Shell bead money, made from the Olivella found only on one of the Channel

Islands, was the basis for trade not only among the Chumash, but throughout California, making those islanders the "bankers" of that society.[1]

With guilds, capitalists and bankers, there must have been conflicts between them, and systems for resolving those conflicts. We know little of those conflicts and their resolution, unfortunately. Whatever they were, the traditional society, and its labor law, was swept away with the arrival of the Spanish Missionaries, and later the Americans.

THE MISSION ERA

The Spaniards brought with them their feudal system of labor law. The status of those who performed useful labor was that of serfs, who owed their entire loyalty (and the product of their labor) to their lord. The Spanish feudal system brought to the New World developed from the *reconquista*—the conquest of the Iberian Peninsula from the Moors—which just happened to have been completed in 1492, when Queen Isabella sent Columbus on his voyage to what they thought would be the Indies. When Columbus claimed to have "discovered" a new continent instead, Spain transferred its feudal system to the newly-conquered territories.

The system of labor first imposed by Spain in the New World was known as the *encomienda*, which means "to entrust." As in the *reconquista*, the Spanish monarch "entrusted" the *adelantados* with the care of the people they conquered.

As in all feudal systems, the encomienda not only gave the *encomendero* the right to extract tribute from the people entrusted to him, but placed on them the obligations to protect the Natives and instruct them in the Spanish language and the Catholic faith.[2]

The encomienda system was mostly abused by the encomenderos, who ignored their obligations to the people entrusted to them. Because of this, and the much more serious (in the eyes of the Crown) offense of failing to fulfill obligations to Spain, the system was formally abolished before the settlement of California, although it persisted in some areas of Mexico. In the transition period, "Charles I and his successors proceeded to pick at it by writing laws to limit the free use of Indians held in encomienda, and to protect them and their property from Spaniards in other ways."[3] These "Leyes de los Reinos de las Indias" or "Laws of the Indies" ostensibly gave more rights to the subjected peoples.[4] Slavery of Indians was abolished, and their service could not be transferred between masters.[5] They were to be given health care, allowed to attend mass, and could not be worked on "holy" days.[6] There was even a system of arbitration established to adjudicate wage disputes.[7]

Before Junípero Serra, Jesuits had been establishing "theocratic communities" in Baja California "blending Spanish and Native American cultures."[8] But when they fell from grace with the Vatican and the King, the Franciscans were sent to replace them. That is how Serra, and Gaspar de Portolá, began the "Sacred Expedition" to establish

Franciscan Missions, with a significant military presence, in Alta California.[9]

Serra originally brought a contingent of Natives from Baja California to perform the labor on the missions to be established in Alta California. Only after many of these Baja Natives fled the missions, and Serra's pleas for more laborers went ignored, did the Franciscan Fathers turn to the Native population around the missions as the primary source of labor.[10]

As opposed to the Jesuit approach of "blending" Native and Catholic cultures, the Franciscans sought to totally supplant the Native culture with their own.There is some dispute as to the extent that Native Californians voluntarily joined the missions. Whether they made the choice of their own accord, or at the point of a bayonet, once the choice was made, these "novitates" were committed to leaving their old lifestyle behind forever, and embracing the mission life and rules, as laid down by the padres, completely and absolutely.

The Mission system of labor was another permutation of feudalism, with the Native novitates as the serfs, and the padres as the lords. The labor was performed by the novitates, under the supervision of the padres, for the benefit of the entire mission. Later, the padres hired *majordomos* from the military, to supervise this captive workforce, and imported skilled craftsmen from other areas of New Spain to train the novitates. "Once they had received training it was the Indians who performed the bulk of the labor, both skilled and unskilled."[11] The control of the padres over their novitates was absolute and eternal. "Franciscans placed heavy emphasis on an unbroken calendar of activities, believing it was essential to fill the long days and keep everyone active and involved."[12] The padres' only competition was from the military, who often raped and abused novitates. Later, the missions started loaning out their workforce to the presidios, to other missions, and to the new secular settlements, such as Los Angeles, keeping the workers' wages in the missions, in apparent violation of the Laws of the Indies.[13]

Given this total control over every aspect of their lives (and after-life), these workers had no other way to resolve their grievances than either flight or armed rebellion. The fact that they often engaged in these extreme measures of resistance shows that, however voluntary their initial choice was, they were not always content with their treatment. The first mission Father Serra built was burned to the ground within a few months, followed by an attack on the San Diego Mission in 1775, in which the resident padre was killed.[14] This type of resistance continued into the Mexican era.[15]

THE MEXICAN ERA

Nearly a year after the fact, news of Mexican independence from Spain reached California. California authorities swore an oath of allegiance to the new government on April 11, 1822. While the independence movement was based in large part on the

desire to diminish the power of the Church, a meeting of military, civil, and mission authorities in California on October 8, 1822 decided that "secularization was not to be immediately enforced."[16]

Perhaps emboldened by the radical republican talk of the Mexicans, a series of revolts by Native laborers spread through the Southern California missions in 1824. It started in Mission Santa Inés, after a particularly brutal flogging of a novitate laborer. The Native laborers expelled both the majordomos and padres, and barricaded the Mission. The revolt soon spread to the Purísima and Santa Barbara Missions. Soldiers from Monterey and San Luis Obispo were sent to put down this rebellion.[17]

Native laborers were caught in a battle between the military and mission authorities, each invoking the welfare of the novitates as their goal. The military claimed that they were implementing the intent of the Mexican Constitution to free the natives from serfdom, when they were really more interested in seizing mission lands. The mission padres claimed that the Native peoples were the absolute owners of the missions, but were still "children requiring parental control" who needed their fatherly supervision.[18] In 1826, a gubernatorial decree allowed neophytes to leave the missions (thus acknowledging the fact of their involuntary status) if they were Christians from childhood, were married, and could prove the ability to earn a livelihood.[19] Few could meet all these qualifications, and also obtain the favorable report from the padres and permit from the military required to exercise this "freedom." Governor José Maria Echeandia brought the issue to a head in 1831, by implementing his "Plan para convertir en Pueblo los Misiones."[20] In his words "I proposed to consolidate the security and good order of the territory by converting into free men and proprietors the 18,000 forzados, indigentes reducidos in the old missions."[21]

Instead of converting the "indigent oppressed" in the old missions to "free men and proprietors," the main effect of Echeandia's decree was to speed up the growth of ranchos—large land grants given to military officers and others. More than six hundred land grants were made in California under Mexican rule, ushering in the over-romanticized era of rancheros and the dons who ruled them.[22] As for the Natives who the padres maintained were the "absolute owners" of these lands, a puzzling choice was given. They were told they were free to leave the mission life and become owners of their own land, or

remain on the missions with the padres, which was the only life most of them knew. Those who chose to leave found the promise of land was usually empty. Instead, they supplied the labor for the dons who ruled the large ranchos once promised to them. While some became skilled and respected *vaqueros*, most served as common field hands, laborers or personal servants, for little or no pay.[23]

Those who left the missions but did not find permanent employment in the ranchos faced an even crueler purgatory. Local ordinances were enacted, requiring Natives outside of the mission to be gainfully employed. As Street reports from *Ayuntamiento* and Court records in 1844:

"Los Angeles officials began requiring natives to carry documents indicating the reasons they had been released from work and where they were headed; none could obtain employment without these passes. Men who lacked documentation remained unemployed; those found loitering in public places were arrested as vagrants, tried quickly, and after always being found guilty, fined, and given a choice between a stint in jail or work on public projects like mucking out the zanja madre."[24]

Sadly and ironically, it was the Natives who became the first "undocumented workers" in California. As one historian put it, "Indians were free, but they were not free to be idle."[25]

THE AMERICAN ERA

While the missionaries were intent upon converting the Native people to Catholicism and the European way of life, and the Mexicans intent on exploiting their labor, the Americans were intent on wiping them out completely: "[T]he Indians among us, as far as we have seen, are more of a nuisance than a benefit to the country; we would like to get rid of them."[26] The Americans nearly succeeded in this; a campaign of genocide in the last half of the nineteenth century left only a small fraction of the pre-Mission population.[27]

The American conquest of California was an afterthought to the Mexican-American War, fought to expand the territory of slavery.[28] The American military authorities found they could do no more than validate existing labor practices, while Congress debated the status of the new territories. Commodore John B. Montgomery, the naval commander in San Francisco who found himself the de facto government, issued an ordinance on January 11, 1847 similar to the Los Angeles ordinance mentioned above. While declaring that the Natives shall "not be regarded in the light of slaves," they were required to have jobs and abide by their labor contracts, or they could be subject to arrest and forced labor on public works. [29]

A subsequent ordinance foreshadowed the employer sanctions in current law. Employers were required to issue their Native workers documentation; Natives found outside of the mission or rancho without such a pass could be arrested.[30]

On January 24, 1848, a carpenter employed by John Sutter to build a mill, discovered gold flecks on the riverbank. The news of Gold! Gold! Gold! brought hundreds of thousands of gold-seekers to California.[31] In short order, California adopted its Constitution, petitioned Congress for statehood, elected a legislature, and started passing laws even before California was admitted as a state.

That first California legislature essentially codified the rules making the Native people indentured peons, or "undocumented" workers, with an "Act" supposedly "for the Government and Protection of Indians."[32] Any "Protection" offered by the law was cancelled by the provision that "in no event shall a white man be convicted of any offence upon the testimony of an Indian" and making any punishment "discretionary with the Court or jury."[33]

The "Indians" however, were required to be employed. Any able-bodied Indian "found loitering and strolling about, or frequenting public places where liquors are sold, begging, or leading an immoral or profligate course of life, shall be arrested on the complaint of any resident citizen of the county . . . ." If found "guilty," the authorities "shall hire out such vagrant within twenty-four hours to the best bidder . . . for any term not exceeding four months."[34]

This law belies the claim in the "Memorial" sent to Congress accompanying the request for admission to the Union that "[t]he relation of master and slave has never existed in the country, and is there generally believed to be prohibited by Mexican law."[35]

Slavery, in some form, did indeed exist, and was exacerbated by the transition from feudalism to capitalism.

While it may seem that these pre-statehood systems of labor law are now an interesting, but irrelevant footnote, I maintain that they still haunt our "modern" labor laws in this state. The pattern of large agricultural land-holdings serviced by itinerant and migratory labor, established with the ranchos of the Mexican era, persists as the norm of California agriculture today.[36] The precedent of requiring documents for Native workers in the nineteenth century has an eerie echo in the treatment of "undocumented workers" in the twenty-first century. We have not shaken our addiction to an exploitable work-force with shadowy legal status. Native Californians were the first, but not the last, "undocumented workers" to be exploited.

Note: This article is adapted from a chapter by the Author in his book—Lucile Eaves and J. David Sackman, *A History of California Labor Legislation: Revised and Updated Centennial Edition* (Queen Calafia Publishing, 2012).

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After passing the bar, Sackman moved to the border town of El Centro, California, where he defended persons from deportation at the detention center. He then worked in the Migrant Unit of California Rural Legal Assistance, representing migrant farmworkers in labor, education and housing issues.

Returning to his home town of Los Angeles, Sackman worked for Roger Frommer, and then the firm of Reich, Adell, Crost & Cvitan (now Reich, Adell & Cvitan), representing unions, workers and union benefit funds. His clients include a cross-section of labor in Southern California, but especially in the construction and entertainment industries, whose labor relations bear a strange similarity to agriculture.

Endnotes:

[1] *See* Jeanne E. Arnold, *Craft Specialization in the Prehistoric Channel Islands, California* (1987); Lynn H. Gamble, *The Chumash World at European Contact: Power, Trade, and Feasting Among Complex Hunter-Gatherers* (2008). This is not to say that craft-specialization and these forms of economic relationships did not exist among other peoples in California. Arnold, for example, mentions similar crafts among the Pomo. Arnold, *supra*, at 53. But the majority of available research focuses on the Chumash.

[2] *See* Lesley Byrd Simpson, *The Encomienda in New Spain: The Beginning of Spanish Mexico* (1950).

[3] *Spanish Laws Concerning Discoveries, Pacifications, and Settlements Among the Indians* 56 (S. Lyman Tyler ed., 1980).

[4] See the translation and compilation of these laws in *The Indian Cause in the Spanish Laws of the Indies* (S. Lyman Tyler ed. and trans., 1980) (hereinafter Recopilación).

[5] Recopilación, *supra* note 4, tit. 13, Law 18, at 314.

[6] Id. tit. 13, Law 21, at 315.

[7] "That if the Indians are not moderate with respect to the amount of their wages, the Justicias determine their wages." *Id*. tit. 13, Law 2, at 306.

[8] *See* Kevin Starr, *California: A History* 29 (2005).

[9] *Id*. at 30.

[10] Richard Steven Street, *Beasts of the Field: A Narrative History of California Farmworkers, 1769-1913*, at 9-20 (2004).

[11] Robert Archibald, *The Economic Aspects of the California Missions* 152 (1978); *see also id*. at 142-58.

[12] Street, *supra* note 10, at 40.

[13] *Id*. at 36-37, 37 n.45. This practice was contrary to Laws 12 and 18 of Title 13 of the Laws of the Indies, as stated in the Recopilación, *supra* note 4.

[14] Starr, *supra* note 8, at 41.

[15] Street, *supra* note 10, at 60-85; *see also* Almon Wheeler Lauber, *Indian Slavery in Colonial Times Within the Present Limits of the United States* (1913).

[16] 2 Hubert Howe Bancroft, *History of California* 451-52, 461 (San Francisco, The History Co. 1886).

[17] *Id*. at 527-34.

[18] *Id*. at 309.

Endnotes cont'd:

[19] 3 *id*. at 102-03.

[20] José Maria Echeandía, Decreto de Secularizacion de Misiones (Jan. 6, 1831), *reprinted in* 3 Bancroft, *supra* note 16, at 305 n.6.

[21] 3 Bancroft, *supra* note 16, at 304 (quoting José Maria Echeandía, Carta que dirige á Don José Figueroa (1833)).

[22] Starr, *supra* note 8, at 49-50.

[23] *See* Street, *supra* note 10, at 89-114; Starr, *supra* note 8, at 48-50; Leonard Pitt, *The Decline of the Californios: A Social History of the Spanish-Speaking Californians*, 1846-1890, at 1-26 (1966).

[24] Street, *supra* note 10, at 96.

[25] James J. Rawls, *Indians of California: The Changing Image* 84 (1984).

[26] Californian (S.F.), Mar. 15, 1848, at 2.

[27] *See* Starr, *supra* note 8, at 99-100 ("Such slaughter, reinforced by the devastating effects of disease, reduced an estimated population of 150,000 in 1845 to less than 30,000 in 1870, with 60 percent of the deaths attributable to disease, the rest to murder. Tragically, the Native American peoples of California had been reduced by 90 percent since the arrival of the Spanish in 1769, and by 1870 they stood on the brink of extinction.").

[28] *See* Abiel Abbot Livermore, *The War With Mexico Reviewed* (Boston, Wm. Crosby & H.P. Nichols, 1850).

[29] These official ordinances were collected and presented to Congress during the debates over California's admission. Cong. Globe, 31st Cong., 1st Sess. 334-35 (1850) (serial no. 537). A summary and explanation of these territorial laws can also be found in Lindley Bynum, *Laws for the Better Government of California*, 1848, 2 Pac. Hist. Rev. 279, 279-91 (1933).

[30] H.W. Halleck, Circular to Indian Agents and Others (Sept. 6, 1847), *reprinted in* Cong. Globe, *supra* note 29, *and in* Cal. Star (S.F.), Sept. 18, 1847, at 3.

[31] *See* Starr, *supra* note 8, at 78-80.

[32] Act for the Government and Protection of Indians, ch. 133, 1850 Cal. Stat. 408.

[33] *Id.* § 6.

[34] *Id*. § 20.

[35] John Ross Browne, *Report of the Debates in the Convention of California, on the Formation of the State Constitution, in September and October, 1849* (Washington, D.C., John T. Towers 1850), app. at xix.

[36] This was the thesis of Carey McWilliams' landmark work, *Factories in the Field* (1939).

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