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Living Sqélix: Defending the Land with Tribal Law

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Essay

Living Sqélixʷ: Defending the Land with Tribal Law

M. Jordan Thompson & Chelsea L.M. Colwyn

The Salish and Pend d’Oreille—known today as part of the Confederated Salish and Kootenai Tribes (CSKT) of the Flathead Indian Reservation in Montana—have been part of the landscape of what is now Montana, Idaho, and eastern Washington ever since Coyote prepared the world for them. The Salish and Pend d’Oreille traditionally “managed” their “natural resources” by living in relationship with the land. European settlers directly and indirectly interfered with this relationship and imposed a very different view of natural resources management. Despite these relentless efforts, the Salish and Pend d’Oreille have survived the invasion of European colonization and made enormous strides to revive their ability to live in relationship with the land according to their traditional values. They have adopted and adapted environmental statutes that are familiar to federal agencies and to U.S. courts, which has allowed the Tribes to manage these tribal “natural resources” and create at least some space for the re-emergence of traditional land management practices and values. CSKT’s determination to live in relationship with the land and to manage it through a tribal perspective offers an example of working to reinsert traditional values into natural resource management, as well as a model for western society, struggling to overcome the vast environmental challenges facing humanity today.
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Living Sqélixʷ: Defending the Land with Tribal Law

M. JORDAN THOMPSON* & CHELSEA L.M. COLWYN*

INTRODUCTION

Over thousands of years, the Native peoples of North America had learned how to live in relationship with the land. The relationship was one of reciprocity, of give and take, of gratitude and recognition of the ways in which the land—the plants and animals, even the soil¹—took care of the people, and the duties and responsibilities that came with the understanding that the people also needed to take care of the land.² The accumulated knowledge of the special gifts that the plants and animals provided for people—shelter, food, warmth—was passed down to each generation, often through stories that warned of the consequences of taking too much, or of failing to take care of the land, plants, and animals.³ This traditional way of living, learned over thousands of years, sustained both the Native peoples of North America and the lands in which they lived.⁴ The arrival of Europeans in North America immediately threatened this traditional way of living in relationship with the land.⁵ Over time, European settlers almost completely

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¹ See Zoe Schlanger, Dirt has a Microbiome, and it May Double as an Antidepressant, QUARTZ (May 30, 2017), https://qz.com/993258/dirt-has-a-microbiome-and-it-may-double-as-an-antidepressant/ (pointing out that recent research has found that breathing in, playing in, and digging in dirt acts as an antidepressant and activates serotonin-producing neurons).

² See Peter Whiteley, The Fire Burns Yet: Native American Peoples are Still Here and Still Caring for Their Land. Can Their Conquerors Say the Same?, AEON (Nov. 25, 2013), https://aeon.co/essays/the-love-of-land-still-burns-bright-for-native-americans (pointing out that Natives defend the land today, and their ancestors fought and died to protect the land for centuries).

³ See ROBIN WALL KIMMERER, BRAIDING SWEETGRASS 175–85 (2013) (explaining the ongoing relationship between tribes and nature, as well as many of the stories and guidelines that inform their culture and understanding).

⁴ See id. at 235–38 (explaining that there are numerous examples of the loving, foundational relationship between Native peoples and the land and that, in some Native languages, the word for “plants” translates to “those who take care of us”); see also id. (noting that in Apache, the root word for “land” is the same as the word for “mind,” and in Mohawk, the word for “cattail” means that the cattail wraps the humans in her gifts, in recognition of all the gifts that the cattail plant provides for people).

⁵ Nassima Dalal, The Impact of Colonial Contact on the Cultural Heritage of Native American Indian People, 4 DIFFUSION: UCLAN J. UNDERGRADUATE RES. 1, 3–5 (2011) (discussing various ways
eliminated this traditional way of life. They did so through the deceitful and often forceful removal of Indigenous peoples from the land, the relentless suppression of indigenous cultures, and the heavy imposition of a vastly different world view.

The Salish and Pend d’Oreille (“the tribes”) have been part of the landscape of what is now Montana, Idaho, and eastern Washington ever since Coyote prepared the world for them. The Salish and Pend d’Oreille today are part of the Confederated Salish and Kootenai Tribes (“CSKT” or the “Tribes”) of the Flathead Indian Reservation in Montana. This Essay will describe how the Salish and Pend d’Oreille traditionally “managed” their “natural resources” by living in relationship with the land. It will then describe the many ways European settlers directly and indirectly interfered with this relationship and imposed a very different view of natural resources management onto the tribes and the land. Despite these relentless efforts, the Salish and Pend d’Oreille have survived the invasion of European colonization and made enormous strides to revive their ability to live in relationship with the land according to their traditional values. They have done this by adopting and adapting environmental statutes that are familiar to federal agencies and to U.S. courts, which has allowed the Tribes to manage these tribal “natural resources” and create at least some space for the re-emergence of Sqéelix values. CSKT’s efforts to regain the ability to live in relationship with the land and to manage natural resources through a tribal perspective offers an example of working to reinsert traditional values into natural resource management, as well as a model for western society, struggling to overcome the vast environmental challenges facing humanity today.

I. IT’S ALL ABOUT THE LAND

Land is at the crux of the relationships between Indigenous peoples and settlers in settler societies . . . . Settler societies often regard land only in the constructs of property or natural resource . . . . For Indigenous societies, land is peoplehood,
relational, cosmological, and epistemological. Land is memory, land is curriculum, land is language.\textsuperscript{11}

A. The Salish and Pend d’Oreille: Part of the Land Since Time Immemorial

As tribal elder Clarence Woodcock told:

Our story begins when the Creator put the animal people on this earth. He sent Coyote ahead, as the world was full of evils and not yet fit for mankind. Coyote came with his brother Fox to this big island, as the elders call this land, to free it of these evils. They were responsible for creating many geographical formations and providing good and special skills and knowledge for people to use.\textsuperscript{12}

This is the creation story for the Bitterroot Salish (or simply, Salish) and Pend d’Oreille (also known as Kalispel) tribes. Long ago, these distinct but closely related tribes were part of one large Salish tribe.\textsuperscript{13} This tribe expanded and broke into smaller tribes, which now comprise the Salish speaking tribes and bands that stretch all the way from western Montana to the Pacific Ocean.\textsuperscript{14} The Bitterroot Salish’s homeland ranged from the Bitterroot Valley of what is now known as western Montana to the Yellowstone area in eastern Montana.\textsuperscript{15} The Pend d’Oreille lived to the north of the Salish in bands whose lands surrounded Flathead Lake and its vast drainage systems that included the Flathead, Swan, and Clark’s Fork rivers all the way into what is now known as northern Idaho and eastern Washington.\textsuperscript{16} The Tuňáx, a related Salishan band, lived on the east side of the continental divide along the Rocky Mountains as far north as present day Browning, Montana.\textsuperscript{17} Coyote created the homelands of the Salish and Pend d’Oreille, and everything in it had spiritual power.\textsuperscript{18} Since time immemorial,\textsuperscript{19} these tribes have lived as part of the natural world.

\textsuperscript{11} Aimee Carrillo Rowe & Eve Tuck, \textit{Settler Colonialism and Cultural Studies: Ongoing Settlement, Cultural Production, and Resistance}, 17 \textit{CULTURAL STUD. CRITICAL METHODOLOGIES} 1, 5 (2016).

\textsuperscript{12} \textit{THE SALISH-PEND D’OREILLE CULTURE COMM. CONFEDERATED SALISH & KOOTENAI TRIBES}, supra note 9, at 8.

\textsuperscript{13} \textit{Id.} at 11.

\textsuperscript{14} \textit{Id.}

\textsuperscript{15} \textit{Id.}

\textsuperscript{16} \textit{Id.} at 11–12.

\textsuperscript{17} \textit{THE SALISH-PEND D’OREILLE CULTURE COMM. CONFEDERATED SALISH & KOOTENAI TRIBES}, supra note 12, at 12.

\textsuperscript{18} \textit{Id.} at 8.

\textsuperscript{19} Stories passed down tell of events that occurred and animals that were present during the last ice age, which was around 12,000 years ago, while some stories suggest the tribes were already here when the ice age began around 40,000 years ago. \textit{Id.} at 13.
These tribes call themselves Sqélixʷ (human). This Salish word is derived from two other Salish words, which translate into English as flesh (sseqlté) and land (stulixʷ). Similarly, the Pend d’Oreille band that lived next to Flathead Lake was called Slʔtkʷmsčínʔt, which translates into English as “people living along the shore of the broad water” (Flathead Lake). The sustenance that the land and animals provided to the tribal people made up their bodies; the deep spiritual relationship they had with their homeland created a responsibility to take care of it. The land and the tribes were connected.

There is no Salish word for “natural resources,” which has a possessive connotation to it and commodifies the natural world. By living according to Sqélixʷ values, the natural world, which the Sqélixʷ are a part of, is protected and enhanced. The Salish and Pend d’Oreille’s interconnectedness with their homelands allowed them to live in harmony with their environment. As the Salish-Pend d’Oreille Culture Committee states:

Our ways of hunting, of fishing, and of gathering plants were based on a profound relationship with this place, on a detailed and precise knowledge—gained through thousands of years of living in one place—of the land’s short and long cycles of scarcity and abundance.

This knowledge included understanding how to live in a respectful and balanced way so that the plants and animals would always be a part of the tribal homelands. Important lessons remain, as elders constantly say, “[d]on’t take more than is needed,” and “[d]on’t waste anything.” These teachings instill a respect for “the one who gave its life so that the people might live,” which included both the animals and plants. By living in respectful relationship with the land and animals, there was always enough for future generations.

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21 SELIS NYOXMUNT, MEDICINE FOR THE SALISH LANGUAGE, ENGLISH TO SALISH TRANSLATION DICTIONARY 441 (Tachini Pete ed., 2d ed. 2010).
23 Id. at 20.
24 See id. (referring to the land and animals as “earth’s bounty,” which gave their people “all the materials necessary for a comfortable life”).
25 Id. at 21–22.
26 Id.
27 Id. at 22.
28 SALISH-PEND D’OREILLE CULTURE COMM. & ELDERS CULTURAL ADVISORY COUNCIL CONFEDERATED SALISH & KOOTENAI TRIBES, supra note 22, at 22.
The homelands of the Salish and Pend d’Oreille were rich with everything the people needed for a comfortable life. According to tribal elder Mitch Smallsalmon:

Of course, long ago the Indian people who were living were happy all the time . . . You know, that’s how things were for the Indians long ago. All the animals were here, many animals. Plenty of everything, and this land was good. And the air here was clean.\(^\text{29}\)

In addition to preserving the abundance with their values of respect and limiting what was taken, the tribes also subtly enhanced and managed their homelands by using controlled fires to burn the undergrowth in the forests and lowland valleys.\(^\text{30}\) This created beautiful prairies and open forests with large, old-growth trees, increased natural production of plants and berries, and increased forage for wildlife.\(^\text{31}\)

The Salish and Pend d’Oreille lived in a cycle of life across their homelands. In the spring a ceremony was held to give thanks when the bitterroot, the first primary food of the tribes, was ready.\(^\text{32}\) Bitterroot was found across the tribes’ homelands, including one important area called NÎsay (Place of the Small Bull Trout), located at what is now Missoula, which, as the name indicates, was also an important place for fishing.\(^\text{33}\) When the wild roses bloomed in the early summer, the tribes knew the seas of buffalo east of the continental divide would be fat and large parties would make the months-long hunting trip.\(^\text{34}\) Summer was abundant with life for the land and the people, and this was a time when the Salish and Pend d’Oreille would often visit with other friendly tribes to the west to have celebrations and trade.\(^\text{35}\) Fall became a time to hunt the herds of deer and elk that roamed west of the continental divide, where meat was then divided among all the people in the camp.\(^\text{36}\) When the cold came, the tribes made their winter camps, and it was a time to tell Coyote stories and conduct prayer dances.\(^\text{37}\)

The Salish and Pend d’Oreille way of life kept the land healthy for thousands of years, which in turn ensured the health of the people. By viewing everything in the natural world as a relative, the tribes ensured they

\(^{29}\) Id. at 20.
\(^{30}\) Id. at 30–31.
\(^{31}\) Id.
\(^{32}\) Id. at 24.
\(^{33}\) Id. at 46.

\(^{34}\) THE SALISH-PEND D’OREILLE CULTURE COMM. CONFEDERATED SALISH & KOOTENAI TRIBES, supra note 9, at 27–28. A hunting chief would lead the hunters in taking the buffalo, after which the entire tribe would work day and night to ensure every part of the buffalo was taken care of. Id. at 28. When the tribes had enough, the women would call the hunting off to ensure no more was taken than was needed. Id.
\(^{35}\) Id. at 22, 28.
\(^{36}\) Id. at 29.
\(^{37}\) Id. at 32.
lived with respect and within the limits of their homelands’ abundance.\textsuperscript{38} The Sqélix’ way of moving across their vast homelands in seasonal patterns ensured they did not exhaust the land’s bounty of life and gave nature time to replenish.\textsuperscript{39} Salish and Pend d’Oreille elders have said that the fundamental basis of the tribes’ way of life remained stable until influences from the West came to their homelands just a few hundred years ago.\textsuperscript{40}

B. \textit{Western Influence Begins Altering the Tribes’ Ability to Live as Part of the Land}

Although the Salish and Pend d’Oreille had not yet seen the European settlers that landed on the shores of the big island,\textsuperscript{41} impacts from their presence already began deeply impacting the tribes’ relationship with their homelands. Between 1680 and 1730 the Salish and Pend d’Oreille acquired horses, which gave the tribes more mobility, but also intensified conflict with enemy tribes and allowed disease to spread faster.\textsuperscript{42} During the eighteenth century, new diseases were introduced that wiped out entire bands, removing them from the landscape.\textsuperscript{43} In the late 1700s, fur traders began setting up outposts to the north.\textsuperscript{44} This provided the historically antagonistic Blackfeet tribe access to guns, which caused heavy casualties to the Salish and Pend d’Oreille tribes during conflict and began restricting the tribes’ ability to access their traditional lands and buffalo hunting territory east of the continental divide.\textsuperscript{45} The tribes, once numbering between an estimated 20,000 and 60,000 just 100 years prior, had been decimated to around just 2,000–8,000 by the time they encountered their first European settlers.\textsuperscript{46}

The first human contact with the European settlers set the stage for another onslaught of challenges to tribal life. When the Salish tribe met Lewis and Clark just over 200 years ago in the Bitterroot Valley in 1805, they had never seen such strange looking people.\textsuperscript{47} To the Salish, Lewis and Clark’s party looked cold (due to their pale skin) and destitute (for they had no blankets).\textsuperscript{48} Čell S̓qéy̓mi (Chief Three Eagle) decided to welcome the

\textsuperscript{38} Id. at 22.
\textsuperscript{39} See id. (describing the seasonal harvesting patterns of the Salish People).
\textsuperscript{40} Salish-Pend d’Oreille Culture Comm. & Elders Cultural Advisory Council Confederated Salish & Kootenai Tribes, supra note 22, at 22.  
\textsuperscript{41} See The Salish-Pend d’Oreille Culture Comm. Confederated Salish & Kootenai Tribes, supra note 9, at 8 (stating that tribal elders referred to the continent of North America as “the big island”).
\textsuperscript{42} Smith, supra note 102, at 21–22.
\textsuperscript{43} Id. at 22–23.
\textsuperscript{44} Id. at 24.
\textsuperscript{45} Id. at 23–24.
\textsuperscript{46} Id. at 22–23.
\textsuperscript{47} Salish-Pend d’Oreille Culture Comm. & Elders Cultural Advisory Council Confederated Salish & Kootenai Tribes, supra note 22, at 93–94.
\textsuperscript{48} Id.
strangers as friends, and the tribe practiced the tradition of gift-giving, providing Lewis and Clark’s party with buffalo meat and roots to eat from their dried stores, buckskins and buffalo robes to wear, and twelve of their finest horses and pack saddles.\textsuperscript{49}

While the physical appearances of Lewis and Clark were odd, the tribes could not even begin to fathom the completely alien ideology they were bringing with them.\textsuperscript{50} Lewis and Clark were agents of the United States, a burgeoning young empire looking to expand across the continent.\textsuperscript{51} President Thomas Jefferson and the U.S. Congress sent Lewis and Clark to explore and map the west as a precursor to the United States’ expansion.\textsuperscript{52} However, in order to access Salish and Pend d’Oreille lands for its own uses, the United States would need a way to deal with the tribes who had lived on and were a part of those lands for thousands of years. The U.S. Supreme Court would provide the nation with a legal framework to legitimize the taking of Salish and Pend d’Oreille (and other tribes’) lands—a process which would severely rupture the tribes’ relationship with the land.

C. Establishing U.S. Dominion Over Tribes and Their Land Through the Law

\textit{In seeking the conquest of the earth, the Western colonizing nations of Europe and the derivative settler-colonized states produced by their colonial expansion have been sustained by a central idea: the West’s religion, civilization, and knowledge are superior to the religions, civilizations, and knowledge of non-Western peoples. This superiority, in turn, is the redemptive source of the West’s presumed mandate to impose its vision of truth on non-Western peoples.}\textsuperscript{53}

In the foundational three cases of Indian law, known as the Marshall Trilogy, John Marshall, the fourth chief justice of the U.S. Supreme Court,\textsuperscript{54} established a legal structure that would enable the United States to almost

\textsuperscript{49}Id. at 86. Stories from elders tell that Lewis and Clark’s party refused the food and clothes, and in his journal, Clark would write about “the cheap rate at which horses are to be obtained.” \textit{Id.} The Lewis and Clark party would later experience hardship crossing the Bitterroot Mountains, and they had to eat the horses for survival. \textit{Id.} at 87.

\textsuperscript{50}Id. Lewis and Clark never told the Salish who they were or why they were there. What they told the Salish, through extremely difficult translation, was that they were on their way through and wanted to trade for horses. \textit{Id.}

\textsuperscript{51}Id. at 85.

\textsuperscript{52}In a letter to Congress, President Jefferson argued that establishing U.S. trading posts throughout this area would help turn Indian people away from their traditional ways of life and toward the agricultural and commercial economic system, thus helping the United States more easily acquire Indian lands. \textit{Id.}


completely destroy the tribes’ ability to live in relation with the land. The U.S. Supreme Court did this by first justifying the taking of tribal lands and then sanctioning the suppression of the traditional way of living on that land. In *Johnson v. M’Intosh*, the first case of the Marshall Trilogy, decided in 1823, the U.S. Supreme Court held that tribes did not have the ability to sell their land to a private party, but rather only to the United States. In this case, Marshall describes the Doctrine of Discovery, the agreement that Christian European nations subscribed to when settling America:

On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire . . . . But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession. The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it.

Marshall went on to assert that the Doctrine of Discovery not only regulated property interactions between European nations, but that it also diminished the property rights of the tribes:

[T]he rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they

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56 See, e.g., Worcester, 31 U.S. at 556–57 (explaining the control of the federal government over tribal sovereignty); Cherokee Nation, 30 U.S. at 17–18 (discussing the role of the federal government in directing the tribes’ way of life); Johnson, 21 U.S. at 603 (discussing the limits of tribal land ownership).
57 Johnson, 21 U.S. at 569, 587.
58 Id. at 572–73.
pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.\footnote{59}

The Christian nations of Europe then, according to this agreement amongst themselves, had “the exclusive right . . . to appropriate the lands occupied by the Indians.”\footnote{60} After the United States won the Revolutionary War, all of Great Britain’s “right to soil . . . passed definitively” to the United States.\footnote{61} From this, the United States asserted that “discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest.”\footnote{62}

Regardless of the Court’s own views on whether the Doctrine of Discovery was just, Marshall wrote that the Court could not question it, for “[c]onquest gives a title which the Courts of the conqueror cannot deny.”\footnote{63} Nevertheless, Marshall provided ample reason for why “the superior genius of Europe might claim an ascendancy”\footnote{64} over the “character and religion”\footnote{65} of the Natives: “[B]ut the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness . . . .”\footnote{66} In \textit{Johnson}, the Supreme Court adopted as U.S. law the racist, colonial-European derived Doctrine of Discovery that would give the United States ultimate title to the Salish and Pend d’Oreille homelands.\footnote{67} Following \textit{Johnson}, the tribes still retained the right of occupancy that the United States would need to acquire through purchase or conquest in order to gain control of the land.\footnote{68} The next case in the trilogy would provide the basis to eliminate that step.

\textit{Cherokee Nation v. Georgia}, the second case in the Marshall Trilogy, was decided in 1831.\footnote{69} It built on the Doctrine of Discovery and racism in \textit{Johnson} to claim that, in addition to having ultimate control over Indian lands, the United States also had ultimate control over Indians.\footnote{70} There, Chief Justice Marshall wrote the lead opinion that held that the Cherokee, whose treaty-reserved sovereignty was under attack by Georgia’s racist laws, had no standing to bring a case to the Supreme Court because tribes

\footnote{59} Id. at 574.  
\footnote{60} Id. at 584.  
\footnote{61} Id.  
\footnote{62} Id. at 587.  
\footnote{63} Id. at 588.  
\footnote{64} Id. at 573.  
\footnote{65} Id.  
\footnote{66} Id. at 590.  
\footnote{67} Id. at 567. \textit{See} \textit{Williams}, Jr., supra note 53, at 326 (“The Doctrine of Discovery was nothing more than the reflection of a set of Eurocentric racist beliefs elevated to the status of a universal principle—one culture’s argument to support its conquest and colonization of a newly discovered, alien world.”).  
\footnote{68} \textit{Johnson}, 21 U.S. at 563.  
\footnote{69} 30 U.S. (5 Pet.) 1, 1 (1831).  
\footnote{70} Id. at 2.
are not foreign states as envisioned in Article III, Section 2 of the Constitution.\textsuperscript{71} According to Marshall:

\begin{quote}
[Tribes] may more correctly perhaps be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases—meanwhile they are in a state of pupilage. Their relations to the United States resemble that of a ward to his guardian.\textsuperscript{72}
\end{quote}

Later court decisions would use the domestic dependent nation and ward status of tribes, as laid out in \textit{Cherokee Nation}, coupled with the Doctrine of Discovery from \textit{Johnson}—all justified by the constant undercurrent of white supremacy—to validate that Congress had complete, or plenary, authority over tribes.\textsuperscript{73}

In the final case of the Marshall Trilogy, decided one year later in 1832, \textit{Worcester v. Georgia}, the Court recognized that the appropriate sovereign to carry out relations with tribes was the U.S. government and not the states.\textsuperscript{74} There, the Court voted five to one to recognize that arresting missionaries under Georgia law within the boundaries of Cherokee territory was in error as “[t]he Cherokee nation . . . is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force.”\textsuperscript{75}

With the Marshall Trilogy now in place, the United States had a structure to claim ultimate dominion over Salish and Pend d’Oreille lands and life. The tribes, of course, did not know this, as these proceedings were happening far from the Salish and Pend d’Oreille’s lands. So, in the subsequent treaty interactions with U.S. agents, the tribes believed they were negotiating as friendly nations.

\textsuperscript{71} Id. at 1–2.
\textsuperscript{72} Id. at 2.
\textsuperscript{73} See \textit{United States v. Kagama}, 118 U.S. 375, 382, 384–85 (1886) (holding that Congress “can enforce its laws on all the tribes” as this power was “necessary to their protection” being “wards of the nation” and “communities dependent on the United States”); \textit{see also} \textit{Lone Wolf v. Hitchcock}, 187 U.S. 553, 565, 568 (1903) (discussing how “[p]lenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning,” and thus to abrogate a treaty is a valid exercise of Congress’s power over “the wards of the government”).
\textsuperscript{74} 31 U.S. (6 Pet.) 515, 561 (1832).
\textsuperscript{75} Id. at 520. While a celebrated decision at the time for Indian rights, the decision would largely be rendered moot as the Cherokee were ultimately removed from Georgia during the Trail of Tears and subsequent Supreme Court decisions would largely negate any backpedaling Marshall seemed to attempt in \textit{Worcester}. \textit{See id.} at 520, 531 (holding Georgia state laws unconstitutional).
D. **The United States Uses Legal Structures to Separate the Salish and Pend d’Oreille from the Land**

Whatever settlers may say—and they generally have a lot to say—the primary motive for elimination is not race (or religion, ethnicity, grade of civilization, etc.) but access to territory. Territoriality is settler colonialism’s specific, irreducible element.76

The United States began the process of separating the Salish and Pend d’Oreille from their lands through treaties that would turn out to be false promises.77 As the tribes were removed from their homelands, this gave U.S. settlers the ability to freely settle those lands and treat the land as a set of natural resources to exploit rather than as a relationship to be cherished and nurtured. The settlers’ view that exploiting natural resources was the only civilized way to live continued encroaching on the tribes until their life and land would be almost completely under settler control.78

1. **Treaty Making**

After Lewis and Clark scouted the west, settler wagons soon began to trickle into the Salish and Pend d’Oreille lands, and the United States needed to secure land for settlement and economic activity.79 As opposed to costly and deadly wars to create space for settlers, treaty making proved to be the most effective way for the United States to clear Indians from their vast stretches of homeland and confine them to smaller pieces of land.80 In 1853, the United States charged Governor Isaac Stevens of the Washington Territory to travel through the West and enter into treaties with the region’s tribes.81

In July of 1855, Governor Stevens met with X̌elx̌alx̌ín (Many Horses or Chief Victor) of the Bitterroot Salish, Tmlx̌alx̌ín (No Horses or Chief Alexander) of the Pend d’Oreille, Chief Michel of the Ksanka band of

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76 Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RES. 387, 388 (2006). For a discussion of “colonialism,” see Eve Tuck & K. Wayne Yang, *Decolonization is Not a Metaphor, 1 DECOLONIZATION: INDIGENITY, EDUC. & SOC’Y 1, 5 (2012). Tuck and Yang explain that “colonialism” is when settlers come to a land already inhabited by indigenous people, declare that land is now their new home, and then insert “settler sovereignty over all things in their new domain.” *Id.*


78 *Id.* at 607–08.


80 *See* Wilkinson & Volkman, *supra* note 77, at 608–11 (describing how the United States used treaties to sequester Indians into smaller pieces of land).

81 In the Name of the Salish & Kootenai Nation: The 1855 Hell Gate Treaty and the Origin of the Flathead Indian Reservation 19 (Robert Bigart & Clarence Woodcock eds., 1996) [hereinafter *In the Name of the Salish & Kootenai Nation*].
Kootenai Indians,82 and other tribal leaders by the river banks of the Clark Fork River, several miles west of what is now Missoula.83 The tribes, having always been friendly towards the United States and its settlers, believed they were meeting with their U.S. ally to discuss an agreement to facilitate peace with the Blackfeet.84 Governor Stevens informed the tribes, however, that he was there to ask the three tribes to cede vast stretches of their traditional homelands in order to choose one area of land for all three of the tribes to live.85 Not only was the intent of the meeting a misunderstanding, in large part so too were the entire treaty negotiations.86

One of the major issues that Governor Stevens faced was either convincing Chief Victor and the Salish to leave the Bitterroot Valley and go north to Pend d’Oreille and Kootenai territory in the Flathead Lake, Mission, and Jocko Valleys or alternatively, to have Chief Alexander and the Pend d’Oreille, along with Chief Michel and the Ksanka, leave their lands and go south to live in the Bitterroot Valley.”87 Governor Stevens spent much time during the negotiations trying to convince the tribes of the benefit of living all on one reservation.88 Governor Stevens decided to draft the Hellgate Treaty to create a reservation in the Mission Valley that extended up to the middle of Flathead Lake, known as the “Jocko Reserve” (which would come to be known as the Flathead Reservation), a proposal wholly unsatisfactory to Chief Victor.89 To deal with the issue of moving the Salish north to the Jocko, Governor Stevens inserted Article 11 into the treaty, which called for the Bitter Root Valley to be surveyed, examined, and set aside as a separate reservation for the Salish if the President, in his judgment, determined that it was a better homeland for them than the Jocko Reserve.90 Article 11 also stated, “No portion of the Bitter Root Valley, above the Loo-lo Fork, shall be opened to settlement until such examination is had and the decision of the President made known.”91

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82 The Ksanka band of Kootenai Indians were a completely different tribe, with a different language and culture than the Salish and Pend d’Oreille. The Ksanka were traditional allies of the tribes. See The Salish-Pend d’Oreille Culture Comm. Confederated Salish & Kootenai Tribes, supra note 9, at 7 (noting that the Kootenai Indians speak a different language than the Salish tribe).
83 Id. at 28.
84 Id. at 22–24.
85 Id. at 24. Putting multiple tribes on one reservation was Governor Stevens’ preferred method of treaty making. See id. at 30 (describing two treaties where Governor Stevens put multiple tribes on a single reservation).
86 Language barriers provided a major obstacle to the parties’ intent being understood by each other. See id. at 142 (“What a ridiculous tragi-comedy the whole council proved . . . . Not a tenth of it was actually understood by either party, for [the translator] speaks Flathead very badly and is no better at translating into English.”).
87 Id. at 28–29.
88 See id. at 24–25, 28, 30, 40–41, 44, 47–48, 58 (detailing how Governor Stevens spent many days describing the benefits the tribes would receive by agreeing to live on one reservation).
89 Id. at 50–51, 55–56.
90 Id. at 55–58.
91 Treaty of Hellgate, Article XI.
In his efforts to convince the tribes to live on a reservation, Governor Stevens made clear that the tribes would be able to live there free from outside influence. As Governor Stevens expressed:

[W]ithin yourselves you will be governed by your own laws. The agent will see that you are not interfered with, but will support the authority of the chiefs. You will respect the laws which govern the white man and the white man will respect your laws.\(^\text{92}\)

Governor Stevens’ promise was sealed in the Treaty in Article II, which states that:

[The reservation] shall be set apart . . . for the exclusive use and benefit of said confederated tribes as an Indian reservation. Nor shall any white man, excepting those in the employment of the Indian department, be permitted to reside upon the reservation without permission of the confederated tribes . . . .\(^\text{93}\)

The Treaty of Hellgate was signed on July 16, 1855 and ratified by Congress in 1859.\(^\text{94}\) From the tribes’ perspective, the Treaty guaranteed them two homelands\(^\text{95}\) that came with goods and services\(^\text{96}\) and assured their ability to hunt and fish on all of the twenty-two million acres of their ancestral territories, which at the time had very few settlers.\(^\text{97}\) They certainly could not have anticipated the huge number of white settlers that would soon flood in to settle the tribes’ ancestral lands.\(^\text{98}\)

The U.S. government had a fairly different view of the Treaty, and one that would continue to change as white settlers’ demands for more land grew.\(^\text{99}\) The driving motivation of the U.S. government was to separate the Salish, Pend d’Oreille, and Kootenai tribes from the majority of their ancestral lands to make room for white settlers who would, in their minds,

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\(^{92}\) Id. at 25.  
\(^{94}\) Id.  
\(^{95}\) Id.  
\(^{96}\) Id.  
\(^{97}\) Id. at art. III. In 1870, there were only 18,306 non-Indians in Montana. In 1910, there were 360,580 non-Indians in Montana. NPUSIN PRESS, SALISH KOOTENAI COLLEGE TRIBAL HISTORY PROJECT, CHALLENGE TO SURVIVE, HISTORY OF THE SALISH TRIBES OF THE FLATHEAD INDIAN RESERVATION 34 (2011) [hereinafter CHALLENGE TO SURVIVE].  
\(^{98}\) See infra Part I.D.2 (discussing the 1883 completion of the Northern Pacific Railroad which allowed for considerable development in the region).  
\(^{99}\) See infra Part I.D.5 (discussing allotment).
make better use of the land than the tribes by exploiting the wealth of resources.\footnote{100} Indeed, the promises made to the tribes were hollow; the United States did not respect tribal laws and both reservations would later be opened for white settlement against the Treaty promises and the tribes’ wishes.

2. \textit{Removal and Settlement Changes the Environment of the Tribes’ Traditional Homelands}

The signing of the Hellgate Treaty removed the tribes from huge portions of their homelands and opened the lands to white settlement and exploitation. In 1859, the government built the first major road in the region, allowing settlers chasing gold and agriculture opportunities easier access to the region.\footnote{101} Then, in 1883, the Northern Pacific Railroad was completed and provided a way to ship and sell the land’s “resources.”\footnote{102} As a result, non-Indians that were eager to make a profit from the land flooded the region.\footnote{103} One of the major initial shipments on the line was enormous quantities of buffalo bones.\footnote{104} As part of its policy to end the Indian way of life, the United States paid settlers to exterminate the millions of buffalo that the tribes had relied on for thousands of years; the bones were shipped east and converted into fertilizer and charcoal.\footnote{105} Farms and ranches began to overtake the traditionally Salish and Pend d’Oreille landscape on both sides of the continental divide.\footnote{106} Logging operations swept through the forests of the western valleys and mountains, and rivers once full of bull trout were used to transport logs downstream.\footnote{107} Immense mining operations were set up that exploited the hills and earth.\footnote{108} As settler demand for more resources continued to grow exponentially in the region, so did the desire for more Salish and Pend d’Oreille lands.

3. \textit{Removal from the Bitterroot Valley}

Since the Hellgate Treaty, Salish bands had remained in the Bitterroot Valley, secure in their treaty-reserved right to live there until the President

\footnote{100}See Wilkinson & Volkman, \textit{supra} note 77, at 607–08 (discussing the tension in land use between the government and the tribes).
\footnote{101}\textit{The Salish-Pend d’Oreille Culture Comm. Confederated Salish & Kootenai Tribes, supra} note 9, at 30.
\footnote{102}Id. at 34.
\footnote{104}\textit{The Salish-Pend d’Oreille Culture Comm. Confederated Salish & Kootenai Tribes, supra} note 9, at 34.
\footnote{105}See id. (discussing how wild bison became nearly extinct after the last leg of the Northern Pacific’s transcontinental railroad was completed, allowing Montana to fully participate in national and international markets).
\footnote{106}Id.
\footnote{107}Id.
\footnote{108}Id.
performed a survey to determine the best homeland for the Salish.\textsuperscript{109} With settler pressure mounting for more land, however, settlers and officials successfully lobbied President Ulysses S. Grant to declare that the survey required by the Hellgate Treaty had been performed and found the main reservation to the north to be a better suited homeland for the Salish.\textsuperscript{110}

When a delegation, led by future president James Garfield, came out to make arrangements with the Salish for their removal pursuant to the non-existent survey, Chief Charlot (Chief Victor’s son and successor) did not accept the United States’ demands of removal—made with threats of bloodshed—and he refused to sign any agreement to leave.\textsuperscript{111} Although the original copy of the agreement for removal would show no “x” mark beside Charlot’s name, the copies published for the Senate, which were used for the vote to ratify the removal of the Salish from the Bitterroot Valley, had Charlot’s mark forged on them.\textsuperscript{112} With the provisional treaty right gone, conditions soon became intolerable for the Salish, who remained on the Bitterroot Reservation.\textsuperscript{113} In October of 1891, Chief Charlot and all the remaining Salish were removed from their Bitterroot Reservation to the main reservation in what has been called Montana’s Trail of Tears.\textsuperscript{114}

\textsuperscript{109} Id. at 28–33.
\textsuperscript{110} Id. at 31.
\textsuperscript{111} Id.
\textsuperscript{112} Id. See Smith, supra note 102, at 31.
\textsuperscript{113} Id. at 31–32. The Government would allot the Salish who remained individual allotments of land and seize the rest of the Bitterroot Valley for white settlement. Id.
\textsuperscript{114} Smith, supra note 103, at 21.
A map of the Flathead Indian Reservation in 1855, when all land on the Reservation was tribal land.\textsuperscript{115}

After 36 years, the United States finally succeeded in placing all the tribes on one reservation, securing room for white settlement on the vast majority of the traditional Salish and Pend d'Oreille land.\textsuperscript{116} Now, instead of the Sqélix\textsuperscript{w} way of living in relationship with these lands, settlers exploited them for economic gain.\textsuperscript{117} With the tribes now living on one reservation,


\textsuperscript{116} \textit{Id.}

\textsuperscript{117} CHALLENGE TO SURVIVE, supra note 97, at 58.
the U.S. government turned its focus to destroying any vestige of tribal society, which would ultimately provide even more land to U.S. settlers. The U.S. government achieved this through assimilation policies that it began vigorously pushing on the Flathead Reservation.\textsuperscript{118}

4. Assimilation

Everything within a settler colonial society strains to destroy or assimilate the Native in order to disappear them from the land.\textsuperscript{119}

In 1885, official U.S. policies that aimed to assimilate Indians into western culture began to intensify on the Flathead Reservation.\textsuperscript{120} U.S. Indian Agent Peter Ronan used U.S. laws\textsuperscript{121} and the BIA-controlled Court of Indian Offenses to take power from the Salish and Pend d’Oreille chiefs and enforce a penal system that banned most aspects of traditional Salish and Pend d’Oreille culture.\textsuperscript{122} Traditional tribal life, such as dances and feasts, practices of medicine, and the tribal science of burning grasslands and brush, were now all punishable with jail time.\textsuperscript{123} Indian children were forced to attend the Jesuit boarding schools built on the Reservation and were forbidden to speak Salish.\textsuperscript{124} Settlers in Montana became increasingly emboldened, harassing and even killing tribal members who exercised their right to hunt off-reservation.\textsuperscript{125} Salish and Pend d’Oreille traditional life was forced underground, as the BIA now largely controlled how life looked on the Flathead Reservation.\textsuperscript{126}

Despite all of the assimilationist policies imposed on the Reservation, and the increased difficulty of hunting and fishing on ancestral lands off the reservation, the Salish and Pend d’Oreille were adapting and still lived largely as a community.\textsuperscript{127} The tribes turned increasingly to raising cattle

\textsuperscript{118} Id. See also Matthew L.M. Fletcher, A Unifying Theory of Tribal Civil Jurisdiction, 46 ARIZ. ST. L.J. 779, 787–88 (2014) (“[T]he federal government’s late nineteenth-century bureaucracy began to intrude on the daily operations of many, if not most, Indian tribes, so much so that, by the 1950s, federal bureaucrats purported to control even the bedtimes of some reservation Indians.” (footnotes omitted)).

\textsuperscript{119} Tuck & Yang, supra note 76, at 9.

\textsuperscript{120} CHALLENGE TO SURVIVE, supra note 97, at 58.

\textsuperscript{121} BIA was able to assert control over the Reservation by way of the Indian Trade and Intercourse Act of 1834, which was supplemented by a companion act that outlined the BIA and its duties. See VINE DELORIA, JR., CUSTER DIED FOR YOUR SINS 46 (1st ed. 1969).

\textsuperscript{122} CHALLENGE TO SURVIVE, supra note 97, at 58–59.

\textsuperscript{123} THE SALISH & PEND D’OREILLE CULTURE COMM. CONFEDERATED SALISH & KOOTENAI TRIBES, supra note 9, at 38–39.

\textsuperscript{124} Id. at 42–43; see also id. at 39–44 (discussing how the Swan Valley Massacre was a particularly tragic time in tribal history; additionally, game wardens killed four tribal members who were hunting within their traditional, treaty-reserved hunting grounds).

\textsuperscript{125} Id. at 39.

\textsuperscript{126} Id. at 103, at 21 (describing how the economic revolution restricted the resources for the tribal people and how the tribes maintained a community support system despite being forced to move and alter their lives).
and farming to supplement their traditional, cyclical way of life.\textsuperscript{128} New social events, like the Fourth of July powwow where tribal dances were cleverly disguised as a celebration for the United States, supplemented the tribes’ other communal activities like hunting and gathering.\textsuperscript{129} Despite the boarding schools, most tribal members still spoke Salish.\textsuperscript{130} And evidence suggests that the tribes were doing as well economically as the surrounding white settler communities.\textsuperscript{131} However, the U.S. government would soon deliver the most devastating blow yet to the Salish and Pend d’Oreille way of life with the enactment of the Flathead Allotment Act.\textsuperscript{132}

5. Allotment

\textit{Inasmuch as the Indian refused to fade out, but multiplied under the sheltering care of reservation life . . . there was but one alternative: either he must be endured as a lawless savage, a constant menace to civilized life, or he must be fitted to become part of that life and be absorbed into it.}\textsuperscript{133}

– Senator Henry Dawes

Montana businessmen, politicians, and the press all saw the vast quantities of pristine agricultural land on the Flathead Reservation and linked the future progress of the state to the availability of these lands for white settlement.\textsuperscript{134} Much of the general settler public believed that the tribes would be better off if they conformed to white standards of civilization and also agreed that these lands should be opened for homesteading.\textsuperscript{135} These views aligned with national sentiment at the time, which led to the passage of the General Allotment Act, also known as the Dawes Act, in 1887.\textsuperscript{136} The United States’ unilateral opening of reservations was deemed legal by the Supreme Court in \textit{Lone Wolf v. Hitchcock}, which used the plenary power of

\textsuperscript{128} \textit{Id.}

\textsuperscript{129} \textit{CHALLENGE TO SURVIVE, supra note 97, at 56.}

\textsuperscript{130} \textit{THE SALISH & PEND D’OREILLE CULTURE COMM. CONFEDERATED SALISH & KOOTENAI TRIBES, supra note 9, at 48.}

\textsuperscript{131} See \textit{id.} at 47 (describing how the Salish and Pend d’Orielle communities were “relatively prosperous and healthy” with low poverty and many successful economic opportunities).


\textsuperscript{134} \textit{id.} at 11.

\textsuperscript{135} See \textit{id.} at 11–12 (stating that “the general public believed that Indians would be better off once their lives were modified to conform to white perceptions of civilization” and quoting an op-ed from a local newspaper: “[t]he Indian must take his place with the white man. He must sink or swim, survive or perish with the paleface” (internal citation omitted)).

\textsuperscript{136} See \textit{DELORIA, JR., supra note 121, at 46 (“If . . . that land were divided on a per capita basis of 100 acres per Indian, the Indians would have sufficient land to farm and the surplus would be available to white settlement.”)).
Congress to justify the breaking of treaties. The Dawes Act established a general framework to break up the reservation by giving individual allotments of land to tribal members and then opening up the “remaining” land for non-Indian settlement, but Congress would still need to enact a Flathead Reservation-specific allotment act. In 1904, without any input from the Salish and Pend d’Oreille tribes, Montana Congressman Joseph Dixon was able to persuade Congress to pass the Flathead Reservation Allotment Act.

Unsurprisingly, the Salish and Pend d’Oreille overwhelmingly opposed allotment. The tribes wrote numerous letters and sent multiple delegations to Washington, D.C. to oppose the opening of the Flathead Reservation. In one letter, Ki-Ki-shee of the Flathead sent a letter to the Secretary of the Interior stating, “we had it understood that this was always to be a reserve.” The Acting Commissioner of Indian Affairs, C.G. Larrabee, responded:

When Governor Stevens made his treaty with the Flathead, Kootenay [sic], and Upper Pend d’Oreille Indians on July 16, 1855, conditions were altogether different from what they are today. The lands that were given to you were of small value, and the settlers were few. Now, however, the people have increased in numbers, and they must have land in order to live and support their families. You and I must bow to the laws which Congress in its wisdom sees fit to enact. . . . This law of Congress is supreme, and you must accept that which it believes to be for your best interest.

Despite tribal opposition and the promises made in the Hellgate Treaty in 1910, the Flathead Reservation would be opened to a flood of white

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137 See Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903) (holding that the plenary power of Congress over the Tribal relations and lands of confederated tribes could not be so limited by any of the provisions of a treaty with such Indians as to preclude the enactment by Congress of an act providing for allotments to the Indians in severalty out of the lands held in common within the reservation and purporting to give an adequate consideration for the surplus lands not allotted among the Indians or reserved for their benefit).

138 See Burton M. Smith, The Politics of Allotment: The Flathead Indian Reservation as a Test Case, 70 PAC. NW. Q. 131, 132 (1979) (“Although [the General Allotment Act] applied in theory to all reservations, the allotment act required passage of another, more specific bill in order to deal with a particular reservation.”).

139 Id. at 138 (“[T]he people most vitally concerned, the tribal members of the Flathead Indian Reservation, had no voice in the decision-making process.”).

140 See THE SALISH & PEND D’OREILLE CULTURE COMM. CONFEDERATED SALISH & KOOTENAI TRIBES, supra note 9, at 49 (“Chief Charlot, Antoine Moiese, Sam Resurrection, and other leaders continued to try to get the government to stop forcing the Indians to become white men.”).

141 See id. (“They sent countless letters and made numerous trips to Washington between 1905 and 1910, and even after that, to ask President Theodore Roosevelt to halt allotments and cancel the opening of the reservation.”).


143 Id. at 26.
homesteaders ready to make their claim to the land. White settlement was further encouraged when Congress passed another law in 1908 that provided for the massive Flathead Indian Irrigation Project that would bring water to 150,000 acres of dry lands on the reservation. The construction of this project destroyed natural streams and fish habitats in the Mission Mountains as well as many of the Salish and Pend d’Oreille’s small, naturally irrigated gardens. When the Reservation was opened, as one elder recalled, “They didn’t no more than open the reservation, and boy, you talk about the immigrants coming in . . . [h]orse, horse and wagon, buggies, some pack horses.”

Allotting the Flathead Reservation was a “devastating blow” to the tribal way of life. A private property system was introduced, where each individual Indian was allotted either 80 or 160 acres, and the “surplus” lands—which, by no accident, were also the most prized—were opened up for white settlement. The number of white settlers that flooded in to homestead soon made tribal members a minority on their own land, and whites assumed the dominant social and economic position on the Flathead Reservation. The Indian allotments were not large enough to sustain the successful community-oriented cattle operations at which the tribes had become proficient, and others could not afford the irrigation fees the BIA charged. With settler fences going up around private property, traditional food sites were often no longer accessible to tribal members. Without access to foods, this led to a greater reliance on a cash economy to purchase goods from the local mercantile stores, which created debt that store owners would often collect by taking the Indian allotments, leading to even more land loss. Between 1910 and 1929, over 409,000 acres of Flathead Reservation’s best agricultural lands were put into white ownership, with an additional 131,000 acres of Indian allotments also being lost to non-

144 The U.S. Court of Claims would determine that this was a breach of the Hellgate Treaty in 1971. Confederated Salish & Kootenai Tribes of Flathead Reservation v. United States, 437 F.2d 458, 468 (Cl. Cl. 1971); Smith, supra note 103, at 24–25.
145 Id. at 26.
146 Id. at 23.
147 See The Salish-Pend d’Oreille Culture Comm. Confederated Salish & Kootenai Tribes, supra note 9, at 48–52 (noting the tribe’s forced transition into private properties, deprivation of best agricultural lands, and loss of land ownership due to inability to sustain the tribe’s new way of life).
148 Id. at 49.
150 Id. at 50.
151 Id. at 51 (the Salish and Pend d’Oreille were originally told they would not have to pay for the water from the Flathead Indian Irrigation Project).
152 Id.
153 Smith, supra note 103, at 26 (noting the shift from maintaining “complex networks of communal interdependence,” involving “a mix of subsistence gardening and ranching,” to having to rely on purchasing goods from grocery stores).
Indians.\textsuperscript{154} Tribal members were left impoverished and starving, and for many, without any land on their own reservation.\textsuperscript{155}

\textit{By 1935, as a result of allotment and homesteading, a vast percentage of land on the Flathead Indian Reservation was no longer tribal.}\textsuperscript{156}

The U.S. government had almost completely destroyed the Salish and Pend d’Oreille and their traditional way of living in relation with the land. From the time the Salish met Lewis and Clark to the opening of the Flathead

\textsuperscript{154} \textit{Id.} at 25–26.

\textsuperscript{155} \textit{Id.} (highlighting the loss of allotment during 1910 to 1929, which primarily involved the limited high-quality lands).

\textsuperscript{156} Geographic Information System (GIS) Office, \textit{supra} note 115.
Reservation just fifty-five years later, the United States and its representatives relentlessly worked to separate the Salish and Pend d’Oreille from almost all of their land and to destroy the Salish and Pend d’Oreille way of life. As one tribal elder put it, “That’s government, that’s its job . . . we got no more land.” Yet the resilience of tribal people ensured that the Salish and Pend d’Oreille ways could not be fully extinguished, and even after the unyielding assault, a Sqélixw ember remained ready to be fanned into a flame once again.

II. EFFORTS TO REVIVE THE TRIBES’ RELATIONSHIP WITH THE LAND

Congressional policy toward tribes began to shift from a focus on assimilation to self-governance and empowerment with release of the Meriam Report in 1928. Requested by the Secretary of Interior, the report investigated the impacts of federal Indian policy and detailed the devastating effects of the allotment policy on the well-being of tribes. The Meriam Report led to a shift in federal Indian policy, beginning with the appointment of John Collier to Commissioner of Indian Affairs in 1933 and the passage of the Indian Reorganization Act (IRA) in 1934. The IRA included a number of important measures, but significantly, it authorized the Indian tribes to organize and adopt constitutions and to operate formalized tribal justice systems. Unfortunately, federal support for tribal self-government did not continue unabated, but rather took a dramatic shift with the implementation of the “termination” policy in the 1950s. Congress did not consult with, or in some cases, even alert tribes, when passing the Termination Acts. The Tribes that were aware opposed the Acts. Together, the Acts seriously hindered tribal self-government.

157 Smith, supra note 103, at 24.
159 Id.; see also Judith Royster, The Legacy of Allotment, 27 ARIZ. ST. L.J. 1, 16 (1995).
162 See Tadd M. Johnson & James Hamilton, Self-Governance for Indian Tribes: From Paternalism to Empowerment, 27 CONN. L. REV. 1251, 1260 n.41 (1995) (“Termination was a policy of assimilation in the most blunt and callous terms. Tribal assets were tallied and equally divided among a roll of all tribal members. As such, the tribe ceased to exist. All aspects of federal assistance and traditional relationships were ended. States were given jurisdiction over American Indians, including subjectation to state and local taxation. Nearly all terminated tribes lost their land, and with it, their rights to gain sustenance from the land as they saw fit.”); see also Charles F. Wilkinson & Eric R. Biggs, The Evolution of the Termination Policy, 5 AM. INDIAN L. REV. 139, 140 (1977) (calling the termination policy “the most extreme extension of assimilation”).
163 Johnson & Hamilton, supra note 162, at 1261.
164 Id.
165 Id.
While devastating to tribes, the failure of the termination approach quickly became apparent, and Congress again changed course in the late 1960s, particularly under President Richard Nixon, who recognized that tribes should be given greater say and freedom to govern themselves. For the remainder of the century and even up to present, federal Indian policy would, for the most part, encourage tribal self-determination. In 1975, Congress passed the Indian Self-Determination and Education Assistance Act. The law allowed tribes to enter into self-determination contracts to take over administration—in place of the Bureau of Indian Affairs or the Indian Health Service—of a large variety of programs, including membership and enrollment, tribal court, police, fire, ambulance, natural resources and conservation, education, employment training, and health care. CSKT quickly emerged as a leader in self-determination contracts, taking over 638 contracts for education and employment assistance, social services, law enforcement, tribal court, rights protection, wildlife, Mission Valley Power, agriculture, and real estate services. The self-determination program was widely successful, and in 1988, Congress started the Tribal Self-Governance project, which would give tribes the flexibility to reallocate funding and design and administer programs according to a tribe’s priority. Selected as one of ten tribes to participate in the demonstration project, CSKT obtained full self-governance rights in 1993. In 1995 and 1996, CSKT began administering forestry, wildland fire, title plant, and IIM

166 In his 1970 address on Indian affairs, Nixon said: “For years we have talked about encouraging Indians to exercise greater self-determination, but our progress has never been commensurate with our promises. Part of the reason for this situation has been the threat of termination. But another reason is the fact that when a decision is made as to whether a Federal program will be turned over to Indian administration it is the Federal authorities and not the Indian people who finally make that decision. This situation should be reversed. In my judgment, it should be up to the Indian tribe to determine whether it is willing and able to assume administrative responsibility for a service program which is presently administered by a Federal agency.” Special Message to the Congress on Indian Affairs, 213 PUB. PAPERS 564, 567 (July 8, 1970).


169 See 25 U.S.C. § 450f(a)(1) (2012) (“The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof, including construction programs . . . .”).


173 Swaney & Westerman, supra note 170, at 3.
Accounts under the self-governance program.\textsuperscript{174} In FY 2018, CSKT administered $27.9 million of self-governance programs, employing 125 full-time equivalents.\textsuperscript{175}

Taking full advantage of the self-governance programs, CSKT began asserting control over wildlife and natural resources on the Reservation in 1977, gradually expanding the scope and comprehensive nature of that management.\textsuperscript{176} We turn next to specific examples of CSKT’s natural resource management, demonstrating how CSKT has been able to manage natural resources in a way that is consistent with CSKT’s values but still recognizable to the U.S. government. Before doing so, however, it is important to state plainly what this Essay and the maps have thus far implied: CSKT’s ability to manage its land (both its ancestral territory and the Reservation) is severely hampered by the fact that CSKT does not own or control much of that land. CSKT has broad authority to manage its own tribal land; the same cannot be said of fee land even when it is located within the Reservation.\textsuperscript{177} Thus, CSKT has focused heavily on a strategy of reacquiring as much land on the Reservation as possible in order to more effectively manage the natural resources on the Reservation.\textsuperscript{178} Since the mid-1930s, CSKT has reacquired some 335,000 acres, focusing on land that offers the greatest protection to critical natural resources like the Lower Flathead River corridor.\textsuperscript{179}


\textsuperscript{175} Final FY 2018 BIA Self-Governance Compact Budget as enacted by the CSKT Tribal Council.

\textsuperscript{176} See Jason Williams, Beyond Mere Ownership: How the Confederated Salish and Kootenai Tribes Used Regulatory Control Over Natural Resources to Establish a Viable Tribal Homeland, 24 PUB. LAND & RESOURCES L. REV. 121, 126 (2004) (discussing the Tribes’ first regulatory control action); Swaney & Westerman, supra note 170, at 3 (summarizing regulatory actions taken by the Tribes beginning in 1977).

\textsuperscript{177} See infra Section III.C (discussing TAPO).

\textsuperscript{178} See map of reacquired lands. CSKT’s efforts to protect the Lower Flathead River provide a clear example of this strategy. In the early 1990s, the Tribes drafted the Lower Flathead River Corridor Management Plan (Plan)—a non-legally binding document—to protect the river ecosystem. See CONFEREDERATED SALISH & KOOTENAI TRIBES, LOWER FLATHEAD RIVER CORRIDOR MANAGEMENT PLAN (1992). The Plan identified a number of threats to the river corridor, and general management goals, but did not include any binding regulations. \textit{Id.} According to Tom McDonald, CSKT’s Fish, Wildlife, Recreation, and Conservation Division Manager, the Tribes were uncertain of their zoning authority over fee lands on the Reservation, and at the time, CSKT only owned about 60% of the river corridor. Interview with Tom McDonald, Fish, Wildlife, Recreation, & Conservation Div. Manager, Confederated Salish & Kootenai Tribes (Nov. 16, 2018). However, rather than pursue a strict regulatory course to protect the river resource, the Tribes focused on purchasing critical corridor parcels to ensure protection of the river. Today, the Tribes own 95% of the Lower Flathead River Corridor. \textit{Id.}

\textsuperscript{179} Geographic Information System (GIS) Office, supra note 115.
Current land status of the Flathead Indian Reservation, highlighting CSKT’s extensive reacquisition efforts since 1935.  

While CSKT’s land reacquisition efforts have been extensive and successful, they cannot rely solely on purchasing land to protect natural resources on the Reservation. We focus for the remainder of this Essay on these additional natural resource protection strategies.

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180 Id.
III. ADOPTING AND ADAPTING FEDERAL ENVIRONMENTAL STATUTES

“To be heard, you must speak the language of the one you want to listen.”

As described above, CSKT had an interdependent relationship with the land, one that ensured the survival of both the people and the land.\textsuperscript{181} While CSKT still retains knowledge of this relationship, the Tribes have also come to realize that the most effective way for them to protect the land and resources upon which they depend is to use tools that are recognizable and understandable to the U.S. government. The U.S. government has repeatedly worked to dismantle CSKT’s traditional relationship with the land;\textsuperscript{183} thus, because protection of the land is of utmost importance, CSKT has strategically opted for methods that are understandable to the U.S. government and courts, but that still align with CSKT’s traditional values. The Mission Mountain Wilderness, the Shoreline Protection and Aquatic Lands Conservation ordinances, and the Tribal Administrative Procedure Ordinance are just three of many examples of how CSKT has deftly employed this strategy.

A. Mission Mountains Tribal Wilderness Area

The Mission Mountains are an incredibly beautiful and rugged area that make up the eastern border of the Flathead Indian Reservation.\textsuperscript{184} The Mission Mountain Tribal Wilderness Area (MMTWA) protects the western slopes of the Mission Range, covering approximately 91,778 acres.\textsuperscript{185} It is approximately 34 miles long and an average of five miles wide, and it ranges in elevation from 4,000 feet to over 10,000 feet.\textsuperscript{186} The primary purpose of the area is to protect and preserve the “area’s natural conditions in perpetuity”\textsuperscript{187} in a way that meets “the specific needs and values of the Tribes.”\textsuperscript{188} The ordinance that establishes the MMTWA borrows heavily

\textsuperscript{181} ROBIN WALL KIMMERER, BRAIDING SWEETGRASS 158 (2013).
\textsuperscript{182} See supra Section I.A.
\textsuperscript{185} MISSION STUDY, supra note 183, at 14. The Mission Study contains more information about the history and present status of the Mission Mountain Tribal Wilderness Area.
\textsuperscript{186} Id.
\textsuperscript{187} Id. at 17.
\textsuperscript{188} Id. at 7.
from the federal Wilderness Act; however, important differences exist. Most significantly, the MMTWA Ordinance identifies the preservation of Tribal culture as a critical goal and also recognizes wilderness as essential to the perpetuation of traditional Indian religion. Thus, by using the framework of a federal act, but tailoring it to specific tribal needs and values, CSKT was able to achieve protection for the Mission Mountains area that is recognized and understood by non-Indians, but still true to CSKT values.

B. Shoreline Protection and Aquatic Lands Conservation Ordinances

Flathead Lake, the largest natural fresh body of water west of the Mississippi River, is another incredible natural feature of the Flathead Indian Reservation that contributes immensely to the culture and economy of the CSKT. In recognition of the vital importance of this lake to the Tribes’ spiritual, cultural, and economic well-being, the CSKT began to regulate activities along the shoreline to protect the lake’s health and the fisheries it sustains. In 1977, CSKT passed the Shoreline Protection Ordinance (SPO) in order to protect the lake and other navigable waters on the Reservation from the adverse environmental impacts of structures built close to the shorelines. The SPO survived a legal challenge in federal court that affirmed CSKT’s authority to regulate and protect the beds and the banks of the southern half of Flathead Lake. The court stated:

The conduct that the Tribes seek to regulate in the instant case—generally speaking, the use of the bed and banks of the south half of Flathead Lake—has the potential for significantly affecting the economy, welfare, and health of the Tribes. Such conduct, if unregulated, could increase water pollution, damage the ecology of the lake, interfere with treaty fishing rights, or otherwise harm the lake, which is one of the most important tribal resources.

The Ninth Circuit correctly recognized the importance of Flathead Lake to the Tribes. However, the Tribes knew that the remaining waters on the Reservation were also vital tribal resources that also needed protection. In

189 Id. at 11.
190 Id. at 12.
193 CONFEDERATED SALISH & KOOTENAI TRIBES, SHORELINE PROTECTION ORDINANCE 64A §§ 1.2–1.3 (2018).
194 Confederated Salish & Kootenai Tribes v. Namen, 665 F.2d 951, 953 (9th Cir. 1982).
195 Id. at 964.
196 See id. at 964–65 (recognizing the importance of the Tribes’ ability to regulate activity on Flathead Lake).
1986, CSKT passed the Aquatic Lands Conservation Ordinance (ALCO) to provide additional protection to all waters and aquatic lands of the Reservation.\(^{197}\) ALCO is modeled after Section 404 of the federal Clean Water Act (CWA), which regulates the discharge of dredged or fill material into the waters of the United States, including wetlands, through a permit process.\(^{198}\) ALCO (and SPO) also regulate such activities through a permit system.\(^{199}\) However, rather than adopt the implementing regulations for Section 404, CSKT promulgated their own set of regulations to implement these ordinances.\(^{200}\) While Section 404 of the CWA is a straightforward and effective statute to protect streambeds, CSKT knew that the implementing regulations would be subject to changing federal administrations and thus not necessarily the most effective or permanent way to protect streambeds.\(^{201}\) Thus, CSKT developed their own set of implementing regulations that have consistently protected the Reservation’s waters and aquatic lands and provided greater protection than the Section 404 regulations. Importantly, and in recognition of the changeable nature of federal regulations, CSKT included sections in both ALCO and SPO providing that in the case where any provision of the regulations included in ALCO and SPO are more stringent than any other applicable regulations (including CWA regulations), the ALCO and SPO regulations shall govern.\(^{202}\)

Recent debates over the scope of the CWA demonstrate clearly the wisdom of CSKT’s approach. ALCO covers not just “the waters of the United States,” a CWA term whose meaning is hotly contested,\(^{203}\) but all

\(^{197}\) Aquatic Lands Conservation Ordinance of the Confederated Salish & Kootenai Tribes, Tribal Ordinance 87A (1986) [hereinafter ALCO].


\(^{199}\) ALCO at pt. IV; Confederated Salish & Kootenai Tribes, Shoreline Protection Ordinance 64A, ch. 4 (2018).


\(^{202}\) Regulations for the Aquatic Lands Conservation Ordinance of the Confederated Salish & Kootenai Tribes § 1.3 (1986) [hereinafter ALCO Regulations]; Confederated Salish & Kootenai Tribes, Shoreline Protection Ordinance 64A § 1.6 (2018).

“reservation waters and aquatic lands.” While those resistant to federal regulation have attempted to cripple Section 404 of the CWA by pushing an ecologically-unsound definition of “waters of the United States,” CSKT has consistently applied ALCO to all Reservation waters and aquatic lands. CSKT recognized the critical importance of all Reservation waters to the Tribe, noting that all aquatic lands are “critical for the perpetuation of Reservation fisheries and wildlife, the preservation of Reservation water quality, and the maintenance of the health, safety and welfare of Tribal members and thereby of all persons residing on the Reservation.” Thus, while ALCO and SPO are modeled after the federal CWA, CSKT was able to provide greater protection for all of their waters under these tribal ordinances and regulations than is currently available to waters whose protection under the CWA is uncertain.

C. Tribal Administrative Procedures Ordinance

Perhaps the most important example of CSKT’s use of methods that are recognizable to the U.S. government, and critically, the U.S. legal system, is not specifically an environmental ordinance but rather a procedural ordinance that guarantees due process to members and nonmembers alike. The Tribes’ adoption of the Tribal Administrative Procedures Ordinance (TAPO) and the explicit application of the TAPO to the Shoreline Protection Ordinance and Aquatic Lands Conservation Ordinance was a critical step in


ALCO at pt. II, § 2. ALCO defines “Reservation waters” as “(1) All naturally occurring bodies of water [within] the exterior boundaries of the Reservation regardless of alteration by man, including but not limited to lakes, rivers, streams (including intermittent streams)[,] mudflats, wetlands, sloughs, potholes and ponds from which fish and wildlife are or could be taken, but does not include wholly manmade water bodies; (2) Tributaries of waters identified in subpart (1) above; (3) Wetlands adjacent to Reservation waters.” Id. at pt. III, § 1.m. Wetlands are still adjacent to Reservation waters even if separated by man-made dikes, barriers, or natural river berms. Id. at pt. III, § 1.a. “Aquatic Lands” are defined as “all land below the mean annual high water mark of a Reservation water body.” Id. at pt. III, § 1.c.

See Murphy, supra note 203, at 361–62 (“Justice Scalia, looking mainly to a 1954 dictionary to support his analysis, took a narrow view of jurisdiction. His opinion would dramatically limit the CWA’s coverage to ‘those relatively permanent, standing or continuously flowing bodies of water’ and ‘only those wetlands with a continuous surface connection to [other regulated waters].’ This view would cut off jurisdiction for the countless wetlands that may not be continuously hydrologically connected to nearby waters and put many upper-reach and arid-region tributaries at risk of losing federal protection from pollution and destruction. Justice Scalia tried to get around some of the obvious water pollution problems his approach presents by saying, in essence, that many of these streams could simply be regulated as point sources if they carried discharged pollutants into larger waters. For many reasons . . . this attempt to explain away any pollution concerns is troubling and misguided.” (internal citations omitted)).

ALCO at pt. II, § 1.a.
bolstering these two tribal ordinances against a legal attack from nonmembers.207

One of the best ways to protect natural resources is to regulate land use activities that impact those natural resources. As demonstrated by the act designating the MMTWA208 and the Tribes’ efforts to protect the waters on the Flathead Reservation, CSKT has made numerous efforts to regulate the land use activities that occur on the Reservation, giving special attention to those activities that occur on and near Reservation waters.209 However, the Tribes’ ability to comprehensively regulate these activities on the Reservation has been severely hampered by Supreme Court decisions.210 Though it might intuitively seem as though tribes should be able to regulate land use activities on their reservations, much as a local government typically has authority to regulate land use within their geographical jurisdiction, the long-lasting impacts of allotment and Supreme Court decisions have denied tribes such authority. As discussed above and demonstrated in the maps, most reservations, including the Flathead Reservation, contain a significant amount of fee land—land owned by non-Indians. While tribes are able to exercise some authority over nonmember activities on fee land, in general, their authority over this land is uncertain and much reduced, even when this land is within reservation boundaries.211

Specifically, in order for tribes to assert civil jurisdiction over nonmember activity on nonmember-owned land within reservations, the activity must fall into one of two exceptions outlined in Montana v. United States.212 The second exception (often called Montana 2) is relevant to land use activities and recognizes inherent tribal authority over nonmembers when they engage in activities on fee lands within reservations that threaten or directly affect

207 See Confederated Salish & Kootenai Tribes, Tribal Administrative Procedures Ordinance 86B (applying TAPO to the SPO); Confederated Salish & Kootenai Tribes, Resolution 95-82 (same); see also ALCO Regulations § 5.4, at 23 (discussing contested cases); Confederated Salish & Kootenai Tribes, Rules and Regulations for the Shoreline Protection Ordinance 64A § 7.6, at 23 (2018) (same).


209 Confederated Salish & Kootenai Tribes, Shoreline Protection Ordinance 64A (2018); ALCO; Confederated Salish & Kootenai Tribes, Mission Mountain Tribal Wilderness Ordinance 79A (1982).

210 See, e.g., Brendale v. Confederated Tribes of the Yakima Indian Nation, 492 U.S. 408, 429 (1989) (“The governing principle is that the tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land.”).

211 See Brendale, 492 U.S. at 431 (holding that “the county has jurisdiction to zone fee land on the reservation” but the Tribe does not); Thomas W. Clayton, Brendale v. Yakima Nation: A Divided Supreme Court Cannot Agree Over Who May Zone Nonmember Fee Lands Within the Reservation, 36 S.D. L. Rev. 329, 331 (1991) (“A divided Court could only muster a plurality opinion that granted the county jurisdiction over the parcel in the ‘open area’ and the tribe jurisdiction over the parcel in the ‘closed area.’” (citation omitted)).

212 450 U.S. 544, 565–66 (1981) (explaining that tribes have inherent sovereign power to exercise civil jurisdiction over non-Indians on their reservations on non-Indian fee lands in the area of commercial dealing, contracts, and leases, and when the conduct of the non-Indians threatens or has an effect on the political integrity, economic security, or health or welfare of the tribe).
“the political integrity, the economic security, or the health or welfare of the
tribe.”213 Under this exception, the Ninth Circuit affirmed CSKT’s inherent
authority to regulate activities along the shoreline of the southern half of
Flathead Lake, including fee land within the reservation boundaries.214

Much of the Supreme Court’s (and other courts’) skepticism
surrounding tribal jurisdiction over nonmembers on fee land within
reservations stems from concern over whether nonmembers will receive
adequate due process in tribal courts.215 While some of this skepticism may
be warranted,216 much of it is not based on the actual treatment nonmembers
receive in tribal courts.217 In fact, numerous tribal courts go to extensive
efforts to ensure both nonmembers and members receive fair treatment, due
process, and adequate protections.218

Cognizant of the Supreme Court’s skepticism toward tribal civil
jurisdiction over nonmembers, CSKT took care to ensure that nonmembers
and members alike would receive fair treatment when subjected to any
CSKT regulations, including the SPO and ALCO.219 Unlike the MMTWA,
which applies only to tribal land, the SPO and ALCO apply to a significant
number of fee parcels, as much of the land adjacent to the Flathead Lake and
other Reservation waterbodies is not currently tribal land.220 Accordingly,
the Tribes passed the Tribal Administrative Procedures Ordinance declaring
the following policy:

It is the policy of the Tribal Council to provide fair, open, and
equitable procedures to guide and govern the exercise of its
regulatory powers and to make available an opportunity for
hearing and for subsequent judicial review to every person
aggrieved by a regulatory action of a Tribal agency.221

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213 Id. at 566.
214 Confederated Salish & Kootenai Tribes v. Namen, 665 F.2d 951, 964 (9th Cir. 1982).
215 See, e.g., Duro v. Reina, 495 U.S. 676, 693 (1990) (explaining the due process concerns that
stem from the concept of criminal jurisdiction of tribal courts over non-Indians); see also Fletcher, supra
note 118, at 797–99 (discussing Justice Souter’s concurrence in Nevada v. Hicks, 533 U.S. 353, 384
(2001) (Souter, J., concurring)).
216 See Donald L. Burnett, Jr., An Historical Analysis of the 1968 ‘Indian Civil Rights’ Act, 9 HARV.
J. ON LEGIS. 557, 579–81 (1972) (listing some of the due process limitations of tribal courts); see also
Arthur Lazarus, Jr., Title II of the 1968 Civil Rights Act: An Indian Bill of Rights, 45 N.D. L. REV. 337,
217 For numerous examples of tribal courts providing adequate protections to nonmembers, see
Fletcher, supra note 118, at 798–99.
218 See id. (discussing a number of cases in which tribal courts “respected due process”).
219 The SPO had been passed prior to TAPO, and once TAPO was initially passed, it specifically
exempted the SPO from its procedures. However, a few years later, the Tribes amended both ordinances
to specifically apply the TAPO procedures to the SPO. ALCO, which was passed after both the SPO and
TAPO, has always been administered according to TAPO procedures.
220 See supra note 180 and accompanying text and map (current land status of Flathead Indian
Reservation).
221 CONFEDERATED SALISH & KOOTENAI TRIBES, TRIBAL ADMINISTRATIVE PROCEDURES
Furthermore, the Tribes found that creating administrative procedures for rulemaking and for hearing and deciding contested cases would help protect the “health, safety, and welfare of Tribal members and of all persons residing or doing business within the Flathead Reservation” because the procedures would formalize “Tribal guarantees that no person within Tribal jurisdiction shall be deprived of liberty or property by Tribal governmental action without due process of law.”

Setting up tribal procedures for those wishing to contest tribal regulations was also sensible in light of the Supreme Court’s tribal court exhaustion doctrine. This doctrine provides that nonmembers have a federal common law right and cause of action to challenge tribal jurisdiction over them. However, they must first exhaust all tribal remedies before bringing the federal suit. Thus, CSKT’s TAPO provides tribal remedies for nonmembers that must first be exhausted before nonmembers can bring their grievances to federal court. These administrative remedies (provided they are fair and applied neutrally) add an extra layer of protection to tribal regulations.

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222 Id. at pt. II, § 3(2).
223 See Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 19 n.12 (1987) (observing that, “[i]n National Farmers Union, [the Court] indicated that exhaustion would not be required where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith, or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of adequate opportunity to challenge the court’s jurisdiction” (internal quotations omitted)); Nat’l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856 n.21 (1985) (examining the exhaustion doctrine and its exceptions for tribal courts).
224 See Iowa Mut. Ins. Co., 480 U.S. at 19 (discussing how a petitioner may challenge a “lower court’s determination that the tribal courts have jurisdiction . . . in the District Court”); Nat’l Farmers Union Ins. Cos., 471 U.S. at 853 (“[A] federal court may determine under § 1331 whether a tribal court has exceeded the lawful limits of its jurisdiction.”).
225 See Iowa Mut. Ins. Co., 480 U.S. at 19 (noting that a “petitioner must exhaust available tribal remedies before instituting suit in federal court”); Nat’l Farmers Union Ins. Cos., 471 U.S. at 857 (concluding that exhaustion of tribal remedies is required before entertaining such claims in federal court).
226 Middlemist v. Sec’y of U.S. Dep’t of Interior, 824 F. Supp. 940 (1993), a case challenging CSKT’s Aquatic Lands Conservation Ordinance (ALCO), provides an illustrative example. In this case, two nonmember irrigators residing on the Flathead Reservation planned to do projects that would require a permit under ALCO. Id. at 942. The irrigators refused to apply for a permit and instead challenged the validity of the regulation and the Tribes’ authority to regulate their activities in federal court. Id. at 942–43. The district court found the exhaustion of tribal remedies to be dispositive in the case, requiring the plaintiffs to exhaust tribal administrative and judicial remedies prior to bringing the complaint to federal court. Id. at 943. The court explained that the policy reasons for applying the tribal remedy exhaustion doctrine “include the development of tribal self-government, practical considerations of judicial efficiency, and the benefits of tribal expertise and explanations.” Id. Explaining these reasons, the Middlemist court cited Burlington N. R.R. Co. v. Crow Tribal Council, 940 F.2d 1239, 1245 (9th Cir. 1991): “The policy of tribal self-government and self-determination goes to the heart of this case. Through the challenged ordinance, the Tribe reasserts its commitment to sovereign authority over Reservation affairs. The ordinance establishes governmental mechanisms for exercise of that authority.” Middlemist, 824 F. Supp. at 945. Similarly, CSKT demonstrated its commitment to sovereign authority over the Flathead Reservation and established mechanisms for exercising that authority by passing and implementing ALCO. Thus, by developing and providing administrative and judicial remedies to environmental regulations, CSKT demonstrated both its capacity for self-government and its
Thus, CSKT again borrowed a concept from the American legal tradition—administrative procedures to ensure due process, both in the development of regulations and for hearing grievances related to those regulations—to help ensure that the environmental regulations subject to those procedures would withstand judicial challenge. By committing to due process for all aggrieved persons, CSKT thus provided a protective measure to bolster CSKT’s environmental regulations by helping to ensure that courts will uphold the application of these regulations to nonmembers. Additionally, by ensuring fair process for nonmembers (and members), CSKT is helping to provide another example of tribes’ capacity to provide important protections to both members and nonmembers, thus undercutting the common law justifications for restricting tribal civil jurisdiction over nonmembers who impact tribes’ natural resources. Eventually, these demonstrations of commitment to due process could help to set the stage for an overhaul of federal Indian common law.

IV. ON-THE-GROUND ENVIRONMENTAL OUTCOMES

This Essay has focused on the legal methods CSKT has employed in order to realign natural resources management on the Flathead Reservation with CSKT’s traditional values. However, it would seem amiss not to highlight at least some of the real on-the-ground environmental successes CSKT has had as a result of the Tribes’ highly-sophisticated Natural Resources Department. As a result of numerous successful wildlife protection, pollution prevention, and other programs, the NRD (or Nerds, as they are lovingly referred to) command great respect and recognition from local, state, and federal agencies.

A. U.S. Highway 93: Culturally and Environmentally Sensitive Road Construction

Though there are numerous examples, we highlight just two particularly relevant successes here. The first is the reconstruction of U.S. Highway 93. In 1990, the Montana Department of Transportation (MDT) proposed to

commitment to sovereign authority over the Flathead Reservation and afforded itself an opportunity to interpret and explain the reasons for passing ALCO should it be subject to federal judicial review. 227 See, e.g., Robin Saha & Jennifer Hill-Hart, Federal-Tribal Comanagement of the National Bison Range: The Challenge of Advancing Indigenous Rights Through Collaborative Natural Resource Management in Montana, in MAPPING INDIGENOUS PRESENCE: NORTH SCANDINAVIAN AND NORTH AMERICAN PERSPECTIVES 143, 178 (Kathryn W. Shanley & Bjørg Evjen eds., 2015) (“The Tribes’ reputation as outstanding resource managers and their ability to utilize significant political connections, public relations, lobby prowess, legal expertise, and financial resources have enabled the Tribes to establish themselves firmly as legitimate comanagers [of the National Bison Range] . . . ”); see also JAMES L. SIPES & MATTHEW L. SIPES, CREATING GREEN ROADWAYS: INTEGRATING CULTURAL, NATURAL, AND VISUAL RESOURCES INTO TRANSPORTATION 195–202 (2013) (describing the Tribes’ critical role in ensuring that the highway reconstruction occurred in an environmentally and culturally sensitive way).
widen the two-lane highway that runs through the middle of the Flathead Reservation and fast-tracked the project. However, the Tribes, with the support of the Flathead Resources Organization, an NGO composed of both Indians and non-Indians, successfully opposed the project, wanting to ensure that any road modifications were culturally and environmentally protective and appropriate. With the assistance of two landscape consulting firms, the Tribes, MDT, and the Federal Highway Administration (FHA) were able to reach an historic agreement to redesign the highway in a manner that was consistent with the Tribes’ cultural and environmental goals. The final result included forty-two wildlife crossings, specially designed fencing to help direct animals toward crossings, thirty-seven interpretive signs and road signs written in Salish, Kootenai, and English, and a visitor center and overlooks incorporating the work of tribal artists. As one newspaper wrote, the highway project signified a “new era of harmony between people, habitat, and road.”

B. Wildlife Reintroductions

The Tribes have also had considerable success with wildlife reintroductions, successfully bringing Peregrine falcons, Columbia sharp-tailed grouse, northern leopard frogs, and most recently Trumpeter swans back to the Reservation. The story of the Trumpeter swans is a microcosm of the larger story described in this Essay. Early accounts from westerners include reports of the swans as early as 1842. But, after 1889, there are no reports of the birds—they simply “blinked out,” according to CSKT’s NRD Information and Education Specialist, Germaine White. It is likely that commercial hunting of the swans led to their disappearance—the Hudson Bay Company kept a trading post in the Flathead until the mid-1880s. The Company reported killing 108,000 swans in North America between 1823 and 1880, but only fifty-seven swans between 1888 and 1897.

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228 SIPES & SIPES, supra note 227, at 197.
230 Id. at 198.
231 Id. at 199, 201.
232 Id. at 202.
234 See id. (“One of the earliest written reports of trumpeter swans in western Montana came from Father Jean DeSmet, who in 1842 accompanied an Indian hunting party to the East Bay of Flathead Lake to gather swan eggs. E.S. Cameron observed trumpeter swans nesting on the Thompson River in 1871 and on the South Fork of the Flathead River in 1889.”).
235 Id.
236 Id.
237 Id.
settlers’ view that wildlife, plants, and the land were resources to be used, sold, and exploited likely led to the near extinction of the Trumpeter swans. To reestablish a viable population of Trumpeter swans on the Reservation, CSKT biologists had to launch a captive-breeding program and devise strategies to reduce utility line deaths. But perhaps most important of all, the biologists had to help both people and the swans themselves relearn the traditional knowledge that had allowed them to thrive on the Reservation in the past:

[O]ne of the program’s biggest hurdles was that “much of the traditional knowledge on the species was lost when it was on the brink of extinction,” says Janene Lichtenberg, a former biologist with the tribes . . . . This was in part propelled by the assimilation of indigenous people at the turn of the last century, she adds. Children were forced to enroll in boarding schools, and as a result, weren’t able to learn the natural history of the reservation firsthand. But the same kind of exchange faded across different generations of swans as well, Lichtenberg says. “Connections among older and younger birds are important for passing on information among generations such as migration routes, wintering areas, and food sources,” she explains. With the steady release and re-entrenchment of the birds, that knowledge is being relearned, however. Every spring, the wild Trumpeter population swells a little more after a seasoned set of individuals returns from migration. Today, nearly 200 swans make camp from March to December in Flathead’s carefully tended wetlands. Region-wide, the population numbers in the thousands.

CONCLUSION

As explained above, there is no Salish word for “natural resources.” And the need to “manage” nature was irrelevant. Living according to Sqélix values inherently protects and enhances the natural world of which the Sqélix, the wildlife, and the plants are all a part. Unfortunately, the Salish and Pend d’Oreille no longer have the complete freedom to live according to their traditional ways. However, CSKT has found that adopting (and adapting) environmental statutes that are familiar both to federal agencies (who must approve tribal ordinances) and to U.S. courts (who have the power to uphold or strike down tribal ordinances when they apply to nonmembers) is an effective way to protect tribal “natural resources” and


239 Id.
create at least some space for the reemergence of Sqélix values. According to the “Seventh Generation Philosophy,” decisionmakers must consider their actions seven generations into the future. To put this into perspective, consider that the seventh generation away from the chiefs who were at the treaty negotiations are here today. As CSKT looks to the future, the tribes strive to continue returning to the Sqélix way of life, and we see these tribal ordinances as important steps on the long journey to a world where Sqélix values can thrive again; a world where we “live as if this is the land that feeds [us], as if these are the streams from which [we] drink, that build [our] body and fill [our] spirit . . . live as if . . . our lives and the lives of all our relatives depend on it. Because they do.”