

RE-EVALUATING TRIBAL CUSTOMS OF LAND USE RIGHTS

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Indigenous peoples developed sustainable land tenure systems over countless generations, but these customary systems of rights are barely used by American Indian tribes today. Would increasing formal recognition of these traditional customs be desirable for tribes in a modern context? This Comment examines one traditional form of indigenous land tenure—the use right—and argues that those tribes that historically recognized use rights in land might benefit from increased reliance on these traditional customs. The Comment argues that in the tribal context, use rights can potentially be just as economically efficient, if not more so, than the Anglo-American system of unqualified, absolute ownership in land. The Comment also argues that tribal customs of land use rights may help preserve Indian cultural identity by cultivating core, non-economic values of tribal peoples. The Comment concludes by addressing some of the challenges tribes will likely face in attempting to more broadly rely on their customs of land use rights in the new millennium, while also remarking on some current and important opportunities for the re-integration of tribal customs in tribal land law.

INTRODUCTION

A persistent and largely false myth exists that Indians had no concept of land ownership in pre-contact times.¹ Traditionally, territorial boundaries were controlled by a particular tribe, and customs of private land “ownership” by individuals or families,² within tribal boundaries, were well-established

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1. The term “pre-contact” is used to refer to the period before the arrival of Europeans in North America.

2. This Comment adopts Robert Ellickson’s theoretical conception of “private” property: “*Private property* conventionally refers to a regime in which no

among many tribes.³ Indigenous forms of private land ownership, however, looked almost nothing like Anglo-American concepts of unqualified ownership—such as the fee simple absolute⁴—which provides an owner with a legally guaranteed bundle of rights in a parcel of land, irrespective of how the owner uses the land. By contrast, in tribal societies, individual or clan ownership of land was often based exclusively on use.⁵ Typically, an individual or family could stake out an available area for the beneficial purposes of hunting, gathering, fishing, or agriculture, and the use of the land would give rise to a customary “use right,” which protected the right to occupy and exploit the land.⁶ The right was thereby a qualified one, and it usually disappeared if the particular use was not recognized by custom, or if the use was not continuous.⁷

While tribal land use customs have no perfect modern analogue, scholars have likened such land use rights to the civil law concept of usufruct.⁸ A usufruct is defined as “the use and enjoyment of the profits of property belonging to another as long as that property is not damaged or altered in any way,”⁹ and is a useful analogue to customary tribal land use rights because the usufructuary is entitled only to “‘fruits,’ or things derived from the land *without* diminution of its substance.”¹⁰ A usufruct generally “may not be conveyed except by the [own-

more than a small number of persons have access to a resource. When more than a small number do, *public property* is present.” Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1322 (1993). This conception works for tribal customs of ownership if it is expansive enough to include ownership by families and clans. See Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559, 1571–72 n.47 (2001) (identifying property as “private” as long as “all members of the society in question” do not have general access to the land).

3. See generally Bobroff, *supra* note 2, at 1571–94.

4. See JESSE DUKEMINIER ET AL., PROPERTY 181–82 (6th ed. 2006) (describing fee simple).

5. See Bobroff, *supra* note 2, at 1571–94.

6. *Id.* at 1578.

7. See *id.* at 1578–79.

8. See, e.g., Eric T. Freyfogle, *Land Use and the Study of Early American History*, 94 YALE L.J. 717, 722 (1985) (“[A]n Indian who ‘owned’ agricultural lands simply had a usufruct right—an exclusive right for the period of ownership to use the land for agricultural purposes.”).

9. *Sokaogon Chippewa Cmty. v. Exxon Corp.*, 805 F. Supp. 680, 686 n.1 (E.D. Wis. 1992).

10. *Kennedy v. Kennedy*, 668 So. 2d 485, 489 (La. Ct. App. 1996) (interpreting usufructuary doctrine as enacted by Louisiana law), *aff’d in part, rev’d in part on other grounds*, 699 So. 2d 351 (La. 1996).

er's] consent, nor is it subject to levy and sale."¹¹ Perhaps unlike the modern concept of a usufruct, which may or may not be inheritable, customary tribal use rights could be perpetual, and subject to binding succession rules.¹² Transfers might also have been allowed within the tribe.¹³

Contact with Europeans brought profound changes in the connections between tribal peoples of North America and their traditional lands. American Indian tribes were first contractually, and then often forcibly, relocated onto small slices of their aboriginal hunting and gathering territory.¹⁴ Subsistence¹⁵ ways of living were almost wholly eradicated; without access to or control over their historically abundant lands, tribal peoples became increasingly dependent on the economies and legal institutions of the European colonizers.¹⁶ Assimilationist pressures¹⁷ also severely altered traditional forms of tribal land tenure—exemplified by the apportionment of tribal land to individual Indians¹⁸ in the General Allotment Act of

11. *Richmond Cnty. Bd. of Tax Assessors v. Richmond Bonded Warehouse Corp.*, 325 S.E.2d 891, 892 (1985) (interpreting usufructuary doctrine as enacted by Georgia law). *See also* Ellickson, *supra* note 2, at 1364 (“[A] classic usufruct can be defined as an immutable package of land-use rights that are not transferable and that terminate when the usufruct’s owner dies or ceases the use . . .”).

12. *See infra* Part I.A. The significance of the inheritability of a tribal use right, compared to the modern Anglo-American lease, is pointed out in Part IV.B, *infra*, with respect to housing on reservations. *See infra* Part II.C & II.D for a discussion of rules of succession.

13. *See infra* Part I.A.

14. John W. Ragsdale, Jr., *Individual Aboriginal Rights*, 9 MICH. J. RACE & L. 323, 325 (2004) [hereinafter Ragsdale, Jr. I].

15. A representative definition of “subsistence” may be found in the Alaska National Interest Lands Conservation Act (“ANILCA”):

As used in this Act, the term “subsistence uses” means the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade.

16 U.S.C. § 3113 (2006).

16. *See* CHARLES WILKINSON, *BLOOD STRUGGLE* 6 (2005). Alaska Natives represent an exception, since the land base has remained largely open. However, a reliance on subsistence ways is a continuing struggle there as well. *See generally* DAVID S. CASE & DAVID A. VOLUCK, *ALASKA NATIVES AND AMERICAN LAWS* 257 (2d ed. 2002).

17. “Assimilationist pressures” refers to efforts of people of European descent to “civilize” Indians. *See generally* DAVID H. GETCHES ET AL., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 27–30 (5th ed. 2005).

18. The General Allotment Act served as the foundational legislation by which tribal land was carved up on many reservations across the country. One

1887¹⁹—to the point that tribal customary land rights have been almost totally supplanted by Anglo-American concepts of unqualified private ownership.²⁰ As framed by one commentator:

White hegemony—racial, military, economic, legal, and political—limited the resultant legal contentions of the Native American population to a grinding end game of attenuated claims to the residuum. In making these begrudged claims, the tribes, as “domestic dependent nations,” were forced to speak in—and accept—the language and concepts of the conqueror.²¹

A society’s customary or formal legal system is fundamentally linked to its culture, and a customary system of land tenure is perhaps the most fundamental of regimes.²² This is true in particular for American Indians, who in almost all cases have deeply felt connections to the land and the earth²³—part of what Charles Wilkinson calls the “Indian worldview.”²⁴ In contrast to the Anglo-American view of land as something by

hundred and sixty acres of land was typically granted to a family head and converted to a fee simple after twenty-five years. *See generally Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the H. Comm. on Indian Affairs*, 73d Cong. 428–89 (1934) (statement of D.S. Otis); 2 FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 659–86 (1984) (describing the background and effect of the General Allotment Act).

19. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (codified at 25 U.S.C. § 331) (repealed by Indian Land Consolidation Act Amendments of 2000, Pub. L. 106-462, § 106(a)(I), 114 Stat. 1991, 2007).

20. John Fredericks III, *Indian Lands: Financing Indian Agriculture: Mortgaged Indian Lands and the Federal Trust Responsibility*, 14 AM. INDIAN L. REV. 105 (1989) [hereinafter Fredericks I] (“The federal policy expressed in the General Allotment Act was to end the system of tribal land ownership by Indians and to substitute private ownership in order to advance the assimilation of American Indians into white society.”). Ironically, allotment itself was not a straightforward application of Anglo-American forms of unqualified ownership, because title to Indian land (whether tribal reservation land, or a parcel allotted to an individual) was to remain formally held by the federal government, and inalienable by Indians. *Id.* at 105–06.

21. Ragsdale, Jr. I, *supra* note 14, at 325.

22. Ellickson, *supra* note 2, at 1317 (“[T]he pattern of entitlements to use land is a central issue in social organization.”).

23. *See, e.g.,* Bobroff, *supra* note 2, at 1572 (noting the “central importance” of land to Indian societies and to their “very identities” as people).

24. WILKINSON, *supra* note 16, at 353–57 (describing the existence of pan-tribal, “overarching values” of indigenous people across the American continent, composed primarily of a respect for other people and for the “natural world”).

which humans may profit at their will,²⁵ the Indian relationship to land includes a spiritual aspect.²⁶ For Indians in general, land is not disposed of according to the whim of its human custodians, but is to be respected as one's personal relative: "Many Native American groups describe the earth as being a mother or grandmother, a source of life for the people."²⁷

The displacement of customary forms of land tenure, especially through the allotment of tribally-held lands to individual owners, was signally destructive to Indian cultural coherence. Because of the "primacy of land in the Indian psychological makeup," when land was lost or alienated, "all other forms of social cohesion also beg[an] to erode."²⁸ Assimilationist pressures were also heightened after Allotment, as "affected Indian reservations were no longer . . . sanctuaries . . . where the Indians could maintain a separate political and cultural existence free of non-Indian influence."²⁹ Along with subsequent federal mismanagement of Indian land held in trust by the federal government, the forced land tenure system represented by Allotment is thought to be a principal cause of the extreme poverty within Indian communities.³⁰ Whatever the reason, American Indians are "the most impoverished minority in the United

25. See, e.g., JOHN LOCKE, AN ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT, AND END OF CIVIL GOVERNMENT para 26, at 328 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690) ("God, who hath given the World to Men in common, hath also given them reason to make use of it to the best advantage of life and convenience.").

26. See, e.g., Frank Pommersheim, *The Reservation as Place: A South Dakota Essay*, 34 S.D. L. REV. 246, 250 (1989) (noting that for Indians, land "is the source of spiritual origins and sustaining myth which in turn provides a landscape of cultural and emotional meaning"); VINE DELORIA, JR. & CLIFFORD M. LYTLE, THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY 10 (1984) ("With respect to the lands they lived on, many Indians felt a strong religious duty to protect their territory."); Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225, 284–85 (1996) ("Among the Cherokee, the word 'Eloheh' means both 'land' and the People's collective 'history, culture, religion.'").

27. Tsosie, *supra* note 26, at 277.

28. DELORIA, JR. & LYTLE, *supra* note 26, at 12.

29. See John Fredericks III, *America's First Nations: The Origins, History and Future of American Indian Sovereignty*, 7 J.L. & POL'Y 347, 373 (1999) [hereinafter Fredericks II] (noting that during the Allotment era reservations became "campuses for training Indians in the 'arts of civilization' ") (internal citation omitted).

30. See, e.g., TERRY L. ANDERSON, SOVEREIGN NATIONS OR RESERVATIONS? AN ECONOMIC HISTORY OF AMERICAN INDIANS 111–37 (1995); Jennifer Roback, *Exchange, Sovereignty, and Indian-Anglo Relations*, in PROPERTY RIGHTS AND INDIAN ECONOMIES 23 (Terry L. Anderson ed., 1992).

States,”³¹ and tribes have “remained near the bottom of the economic ladder.”³²

The damage to both the tribal land base and to tribal cultures caused by Allotment and other assimilationist policies remains severe, and this damage can arguably be addressed only by tribes themselves. While tribal governments are somewhat restricted in their sovereignty by the omnipresence of federal jurisdiction in Indian affairs,³³ under the current federal Indian policy of “self-determination,” tribes are by and large free to embrace their customs as they wish, remaining “independent of Federal control without being cut off from Federal concern and Federal support.”³⁴ In other words, since 1970, tribes have been freer to govern themselves according to their traditions than at any time since the establishment of reservations. Furthermore, in the new millennium, federal agencies that interact with tribes, such as the Bureau of Indian Affairs (“BIA”) and the Department of Housing and Urban Development (“HUD”), are arguably getting better at allowing for more tribal autonomy in various areas.³⁵ Since 1934, when modern tribal governments were first recognized by the United States after the passage of the Indian Reorganization Act,³⁶ many tri-

31. Joseph P. Kalt & Stephen Cornell, *The Redefinition of Property Rights in American Indian Reservations: A Comparative Analysis of Native American Economic Development*, in AMERICAN INDIAN POLICY: SELF-GOVERNANCE AND ECONOMIC DEVELOPMENT 121, 121 (Lyman H. Legters & Fremont J. Lyden eds., 1994); see also Ronald L. Trosper, *American Indian Poverty on Reservations, 1969–1989*, in CHANGING NUMBERS, CHANGING NEEDS: AMERICAN INDIAN DEMOGRAPHY AND PUBLIC HEALTH 172, 172 (Gary D. Sandefur et al. eds., 1996) (“[I]n 1989 over half of the American Indian families on [the 23 reservations studied] were in poverty.”).

32. Terry L. Anderson, *The Property Rights Paradigm: An Introduction*, in PROPERTY RIGHTS AND INDIAN ECONOMIES, *supra* note 30, at 1.

33. Fredericks II, *supra* note 29, at 386 (“The exercise of tribal sovereignty is essentially limited by the overriding interests of the United States government. . . . As a general rule, Indian tribes today still possess those aspects of their inherent sovereignty which are not expressly withdrawn by treaty or statute, or by ‘implication’ as a necessary result of their so-called dependent status.”).

34. President Richard Nixon formalized self-determination as federal policy in 1970. See RICHARD NIXON, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING RECOMMENDATIONS FOR INDIAN POLICY, H.R. Doc. No. 91-363, 91st Cong., at 3 (Comm. Print 1970). The U.S. government has abided by the mandate of Indian self-determination for over forty years. Carole Goldberg, *In Theory, In Practice: Judging State Jurisdiction in Indian Country*, 81 U. Colo. L. Rev. 1027, 1045–46 (2010) (“Since 1970, Congress has enacted numerous laws . . . that all recognize the value of increased tribal control over reservation affairs.”).

35. See *infra* Part IV.B.

36. Act of June 18, 1934, Pub. L. No. 73-383, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461–94a (2006)). For background on the IRA, see ELMER

bes have in fact formalized some of their customs of land tenure in their tribal codes.³⁷ Others have employed custom only as a form of common law or are only beginning to incorporate previously unwritten customs into their codes.³⁸ If tribes can formally recognize and employ customary forms of land tenure, the question emerges: should they? What advantages, for example, inhere in a usufructuary-type system in the modern context? Can such systems assist tribes in achieving a contemporary form of self-sufficiency while preserving vital aspects of tribal cultures?

This Comment addresses the extent to which traditional tribal systems of land use rights, in particular, may be both viable from an economic standpoint, and a significant factor in the goal of cultural preservation. It concludes that increased recognition of customary use rights may be useful to tribes with a history of such recognition, depending on their current circumstances, even in the modern context. First, customs of use rights may represent a land tenure system that is the best cultural match for societies still largely attached to tribalism and homeland,³⁹ and reinvigorated customs of use rights may help tribes maintain their cultural uniqueness. Secondly, and a factor of primary importance to many analysts, increased recognition of tribal customs of land use rights may in fact be as, if not more, economically efficient than Anglo-American models of unqualified private ownership. Whether tribes recognize customs of land use rights for purposes of agriculture, hunting, and/or fishing, resource development, housing, or other business pursuits, it may be important, now more than ever, for tribes to more liberally embrace their customs of land tenure.

R. RUSCO, A FATEFUL TIME: THE BACKGROUND AND LEGISLATIVE HISTORY OF THE INDIAN REORGANIZATION ACT (2000).

37. See *infra* Part I.B.

38. The Navajo Nation is a good example. See Kenneth Bobroff, *Diné Bi Beenahaz'áanii: Codifying Indigenous Consuetudinary Law in the 21st Century*, 5 TRIBAL L.J. 4, pt. II (2004/2005), http://tlj.unm.edu/tribal-law-journal/articles/volume_5/dine_bi_beenahazaanii_codifying_indigenous_consuetudinary_law_in_the_21st_century/index.php [hereinafter Bobroff II] (“[U]ntil recently, the legislative and executive branches of the Navajo Nation government have left the explicit use and development of consuetudinary law to the judicial branch. This changed in November 2002 when the Navajo Nation Council amended Title 1 of the NAVAJO NATION CODE to recognize the fundamental laws of the Diné’ . . .”). Bobroff uses the Spanish word “consuetudinary” to mean “custom recognized as having legal force; the unwritten law of custom.” *Id.* n.2 (quoting OXFORD ENGLISH DICTIONARY (2d ed. 1989)).

39. See DELORIA, JR. & LYTTLE, *supra* note 26, at 11.

Part I briefly examines Indian customs of land tenure, specifically those recognizing use rights, and then looks at some modern forms of these customary rights. Part II examines prevalent economic arguments that use rights are inherently less efficient than absolute ownership, both rebutting these arguments as inapposite to the tribal context, and illustrating how tribal customs of land use rights might not succumb to these theoretical problems. Part III considers non-economic values that may support broader recognition of land use rights by tribes. Finally, Part IV examines some practical challenges of recognizing tribal customs of land use rights, despite increasing assistance in this regard from federal agencies, and ends with a look at the unique opportunity represented by the attempt of Native Hawaiians to create a new form of sovereign government based on the mainland tribal model.

I. AN OVERVIEW OF CUSTOMS OF INDIAN LAND USE

The customary law of Indian tribes is not immediately accessible, as it was seldom written down by Indians themselves.⁴⁰ Still, Indian traditions remain vital both in the context of everyday life in Indian country⁴¹ and as embodied in the legal practices of modern tribes.⁴² Despite the fact that many contemporary tribal codes and constitutions are modeled on Anglo-American law,⁴³ vestiges of customary law are discernible, and tribal custom is often expressly recognized as a “source of law.”⁴⁴ Section A considers some of the known roots of traditional Indian land tenure, focusing on use rights among different tribes. Section B explores how those traditions have been incorporated into modern tribal law.

40. Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts* (pt. 1), 46 AM. J. COMP. L. 287, 290 (1998) [hereinafter Cooter & Fikentscher I] (noting that Indian custom is known primarily through “(1) reported ‘ways’ before contact with Europeans; (2) written accounts after contact; and (3) anthropological studies beginning in the late 19th century”).

41. See WILKINSON, *supra* note 16, at 353 (noting the resurgence of traditionalism in Indian country in the twentieth century).

42. See Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts* (pt. 2), 46 AM. J. COMP. L. 509, 510 (1998) [hereinafter Cooter & Fikentscher II].

43. See, e.g., *infra* notes 65–66 and accompanying discussion on the Indian Reorganization Act.

44. Cooter & Fikentscher II, *supra* note 42, at 510.

A. *Pre-Contact Roots*

Although traditional concepts of land tenure varied among tribes prior to the arrival of Europeans, similarities were usually present between tribes within geographic regions characterized by similar resources and scarcities. Among native groups practicing agriculture, systems of property rights depended on the “resource constraints” they faced.⁴⁵ Thus, Southwestern tribes such as the Navajo and Hopi treated abundant, difficult-to-enclose rangeland “as a common,” but considered farm land—a scarce resource—to be the property of individuals so long as they cultivated it.⁴⁶ The Pacific Northwest tribes, by contrast, were primarily concerned with harvesting fish for subsistence and trade, and therefore recognized individual or tribal property rights in valuable fishing spots.⁴⁷ These tribes, along with tribes from most regions of the United States, including Native Hawaiians,⁴⁸ recognized some form of land use right, although this type of right was not important or widely recognized by every tribe.⁴⁹

Customary use rights typically required continuity of use season to season: “[f]ailure to use land . . . meant that another could take possession and begin using it.”⁵⁰ For instance, New England tribes recognized a possessory right in agricultural land held by individual families as long as the family made “actual use” of the land, and continued possession hinged on the family returning the next planting season to sow the field.⁵¹ Use rights also did not include many rights of ownership as understood by Anglo-Americans. For example, there was often no ability to charge rent and no remedy for trespass or for gathering “nonagricultural food” on the land (thus, no right to exclude).⁵² However, tribes allowed for different limits on use

45. Leonard A. Carlson, *Learning to Farm: Indian Land Tenure and Farming Before the Dawes Act*, in PROPERTY RIGHTS AND INDIAN ECONOMIES, *supra* note 30, at 67, 68.

46. *Id.* at 71.

47. *Id.* at 72–73.

48. See Melody Kapilialoha MacKenzie, *Historical Background*, in NATIVE HAWAIIAN RIGHTS HANDBOOK 3, 4 (Melody Kapilialoha MacKenzie ed., 1991).

49. See Bobroff, *supra* note 2, at 1592 (“Tribes on the Great Plains who, after obtaining horses, hunted buffalo over large areas, recognized few property rights in land before the United States reduced their territories to a fraction of their previous size.”).

50. *Id.* at 1600.

51. Freyfogle, *supra* note 8, at 721–22.

52. *Id.*

rights. The Yurok Indians of the Pacific Northwest, for example, recognized exclusive use rights to fishing spots that could be sold or rented (thus, a right to transfer).⁵³

Despite the apparent unpredictability of a tenure in land that requires continuous and productive use, often such ownership proved as durable as any fee title. If maintained, rights were typically passed on after death based on customary tribal succession rules.⁵⁴ Transfer was sometimes allowed,⁵⁵ although generally restricted to conveyance within the tribe.⁵⁶

B. Tribal Law Today

Today, customs of land use rights appear in formal tribal codes and may be referenced in tribal common law.⁵⁷ With respect to formal codes, of the more than 550 federally recognized tribes, about 400 have written constitutions.⁵⁸ Formalized land use rights appear primarily in constitutions that include provisions regarding assignments of tribal land by the governing council.⁵⁹ While tribal constitutions do “vary considera-

53. Bruce L. Benson, *Customary Indian Law: Two Case Studies*, in PROPERTY RIGHTS AND INDIAN ECONOMIES, *supra* note 30, at 27, 29.

54. Cooter & Fikentscher II, *supra* note 42, at 530 (“[I]nheritance among tribal people typically follows, not the will of the decedent, but patterns prescribed by custom (‘matrilineal’ or ‘patrilineal,’ primogeniture or ultimogeniture, etc.)”).

55. See Bobroff, *supra* note 2, at 1573–94.

56. *Id.* at 1572 (Any “decision to transfer land rights outside the tribe [was restricted] to tribal leaders.”).

57. With respect to tribal constitutions and codes, executing primary research in this area can be difficult. Some tribes make their laws available on the internet, but others, such as the Southern Ute Tribe, do not. The National Indian Law Library in Boulder, Colorado maintains print and digital copies of many codes, but access to these materials may be limited according to the individual tribe’s wishes. Telephone Interview with David Selden, Library Dir., Nat’l Indian Law Library (Nov. 17, 2009). Some tribal governments appear to be “veiled in secrecy,” perhaps because news coverage of tribes is sometimes considered by tribal members as “biased or incomplete.” Jonathan Thompson, *The Ute Paradox*, HIGH COUNTRY NEWS, July 19, 2010, at 4, available at <http://www.hcn.org/issues/42.12/the-ute-paradox>. Tribes are also “generally not subject to states’ open records laws and the federal Freedom of Information Act.” *Id.*

58. *Comprehensive List of Online Codes and Constitutions*, NATIVE AM. RTS. FUND, <http://www.narf.org/nill/triballaw/onlinedocs.htm> (last visited Oct. 24, 2010). A sizable portion of federally recognized tribes are small Alaskan villages which have no written codes. Telephone Interview with David Selden, *supra* note 57.

59. This Comment uses “tribal land” to denote land that is technically owned by the U.S. government, and held “in trust” for tribes. GETCHES ET AL., *supra* note 17, at 22. The trust status entails, among other things, absolute restrictions on the transferability of tribal land to non-Indians, except by the federal government. *Id.* at 90 (discussing the federal “trade and intercourse” acts of 1790 and

bly,”⁶⁰ many provisions—such as those respecting assignments—reflect a certain homogeneity if the constitution was adopted pursuant to the Indian Reorganization Act of 1934 (“IRA”).⁶¹ Under the IRA, tribes were encouraged to adopt constitutions written “with the aid” of the BIA.⁶² Tribes were not forced into compliance with the IRA, but, as of 1981, about forty-five percent of federally recognized “Indian entities” had constitutions “drawn up under the authority of the IRA or the similar statute applying to Oklahoma.”⁶³ While Elmer Rusco has noted that there was no “model constitution” that Indian societies were “pushed to adopt,”⁶⁴ the process of implementing the IRA clearly involved tribal enactment of Anglo-American governmental forms, and adoption of identical provisions appear in “most constitutions.”⁶⁵ For example, the Constitution of the White Mountain Apache tribe provides: “The reservation land now unallotted shall remain tribal property and shall not be allotted to individuals in severalty, but assignments of land for private use may be made by the Council in conformity with ordinances which may be adopted on this subject.”⁶⁶ The Southern Ute Constitution provides identical wording, adding only the proviso that the “vested rights of members of the tribe are not [to be] violated.”⁶⁷ On the other hand, the Rosebud Sioux Constitution provides that “preference [for tribal land assignments] shall be given to heads of families, which are entirely landless,”⁶⁸ and further stipulates that these assignments are predicated on “use” of the land:

1802, which invalidated purchase of Indian lands unless through public treaty with the United States). See generally Fredericks I, *supra* note 20, at 107–15 (discussing the federal trust responsibility).

60. *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955, 973 (1972) [hereinafter *Tribal Self-Government*].

61. 25 U.S.C. § 476 (2006).

62. EDWARD H. SPICER, *CYCLES OF CONQUEST* 351 (1962).

63. Rusco, *supra* note 36, at 301.

64. *See id.*

65. *See Tribal Self-Government*, *supra* note 60, at 973.

66. CONST. OF THE WHITE MOUNTAIN APACHE TRIBE OF THE FORT APACHE INDIAN RESERVATION, ARIZ., art. IX, available at <http://wmat.us/Legal/Constitution.html>.

67. CONST. OF THE S. UTE INDIAN TRIBE OF THE S. UTE INDIAN RESERVATION, COLO., art. VIII, available at <http://thorpe.ou.edu/constitution/utecons.html>.

68. CONST. & BYLAWS OF THE ROSEBUD SIOUX TRIBE OF S.D., art. VIII, § 1, available at <http://www.narf.org/nill/Constitutions/rosebudconst/rstconst.htm#ArticleVIIIand>.

If any persons holding a "home assignment" of land shall for a period of six months *fail to use the land* so assigned or shall use the land for any unlawful purpose, his assignment may be canceled by the tribal council after due notice and opportunity to be heard. Such land may then be available for reassignment.⁶⁹

Tribal codes tend to address formal processes for assigning land with more specificity. White Mountain Apache tribal members apply to a five-member Tribal Land Board for open-ended assignments of unused tribal land "for farming and other beneficial purposes."⁷⁰ "Continued use and control of assignments shall be based on actual and beneficial use," and "[n]on-use of any portion of the assignment shall be considered sufficient cause for cancellation of the assignment."⁷¹ The Southern Ute Tribal Council also assigns tribal land to tribal members, following a formal process of application, including a notice requirement allowing for contestation of the assignment by tribal members.⁷² Assignments are indefinite in duration and inheritable,⁷³ but are reviewable to ensure beneficial purposes are being pursued.⁷⁴ Assignments may not be made to "associations" or "enterprises."⁷⁵

Outside of formal tribal codes, customs of land use rights appear to be recognized in tribal case law decisions.⁷⁶ Under Navajo case law, "most land is held by families in the form of a 'customary use area,' a term which refers to the area traditionally inhabited by one's ancestors."⁷⁷ Under Acoma Pueblo council practice, which is a form of common law, established Indian clans control the assignment of land to individual families by advising the tribal council.⁷⁸ By this practice, "[a]s long

69. *Id.* § 2 (emphasis added).

70. White Mountain Apache Land Code, §§ 1.2, 2.1 (2005), available at <http://www.wmat.nsn.us/Legal/Land Code.pdf>.

71. *Id.* § 2.8 A(3).

72. S. UTE TRIBAL CODE, Land Code Ordinance No. 17, § 5.A (effective Apr. 19, 1963) (on file with University of Colorado Law Review).

73. *Id.* § 5.C.

74. *Id.* § 5.N. (providing that assignments may be revoked for "flagrant abuse of the land" or "non-use").

75. *Id.* § 5.A.

76. Robert Cooter and Wolfgang Fikentscher conducted interviews of tribal court judges on many reservations in the 1990s, calling customary law used in modern tribal courts a form of tribal "common law." Cooter & Fikentscher I, *supra* note 40, at 287.

77. Bobroff, *supra* note 2, at 1597.

78. Cooter & Fikentscher II, *supra* note 42, at 524.

as the family stays [on the land], the assignment remains valid.”⁷⁹ Common law reversion provisions are also common, epitomized by a San Felipe Pueblo rule that allows tribal reclamation of an individual’s unused land after it has been abandoned for five years.⁸⁰ Similarly, the Jicarilla Apache tribe assigns land to its members, and can reclaim one-seventh of this land for every year it is neglected.⁸¹ However, even if the entire property is reclaimed after seven years, the assignee can get the property back if he ends the neglect.⁸²

These modern versions of land use right customs are a mere vestige of traditional Indian ways, but tribes are increasingly in a position to expand recognition of their legal customs. For example, federal legislation may soon provide Native Hawaiians, who have robust customs regarding land use, with the opportunity to form a new sovereign government based on the mainland tribal model.⁸³ On the mainland, \$2 billion of the recent \$3.4 billion *Cobell* settlement is earmarked for consolidation of tribal land through buybacks of “fractionated” interests in land held by individual Indians⁸⁴—with more money likely to flow in a pending suit involving tribal trust accounts⁸⁵—raising the stakes regarding the question of how tribes might best manage the land under their control. Requirements of federal oversight and control of tribal administration is waning, leaving these issues in the hands of tribes themselves.

The factors relevant to tribes in deciding which of their customs to formally recognize by tribal code or common law, and how best to recognize these customs, is a complex inquiry. There may not be universal agreement as to what the particular custom is, or whether the custom will function appropriate-

79. *Id.*

80. *Id.* at 517.

81. *Id.*

82. *Id.*

83. See *infra* Part IV.C.

84. Patrick Reis, *Obama Admin Strikes \$3.4B Deal in Indian Trust Lawsuit*, N.Y. TIMES, Dec. 8, 2009, <http://www.nytimes.com/gwire/2009/12/08/08greenwire-obama-admin-strikes-34b-deal-in-indian-trust-1-92369.html>. The most recent opinion in this drawn-out lawsuit is *Cobell v. Salazar*, 573 F.3d 808 (D.C. Cir. 2009). The plaintiffs in the case were suing for an accounting of trust money the BIA had allegedly mismanaged to the detriment of individual Indians. *Id.* at 809. News on the settlement can be found at the Indian Trust Settlement website, INDIAN TR. SETTLEMENT, <http://www.indiantrust.com> (last visited Feb 6, 2011).

85. John E. Echohawk, Exec. Dir., Native Am. Rights Fund, Presentation at the University of Colorado Law School (Mar. 19, 2010) (on file with author).

ly after being “frozen” as law.⁸⁶ Addressing these types of concerns is beyond the scope of this Comment. Instead, this Comment addresses the potentially broad benefits of incorporating customs of land use rights in modern expressions of tribal law, irrespective of how this is undertaken on the ground.

The following two parts attempt to provide a basis for tribes to evaluate to what extent they might benefit from more extensively recognizing customs of land use rights. Part II considers whether land tenure systems based on customs of use rights could be economically efficient even in the modern context. Perhaps more importantly for tribal cohesion and cultural preservation, some non-economic factors at issue are evaluated in Part III.

II. CAN USE RIGHTS BE ECONOMICALLY EFFICIENT?

“Efficiency” analysis is controversial as applied to law and policy decisions. On the one hand, a free market economy thrives and grows by adhering to principles of efficiency.⁸⁷ On the other hand, efficiency as a normative stance directing how the law should allocate entitlements, such as property rights, is seen by some as a hollow framework that does not adequately reflect real human values.⁸⁸ Outside this normative debate, however, Indian tribes presently seem to depend, in significant measure, on the global cash economy.⁸⁹ Recognizing this fact, while noting that traditional Indians may find Western notions of efficiency undesirable or even dangerous,⁹⁰ this part explores whether customary land use rights can be economically efficient if recognized by tribes today.

86. Kenneth Bobroff notes these concerns, as well as others such as “regional variations in understandings of [customary] law, . . . the temptation of elected legislators to distort the meaning of [customary] law to meet short-term political objectives,” and whether the customs can be meaningfully translated into English. Bobroff II, *supra* note 38, pt. VI.

87. In economics, productive efficiency is said to be achieved when it is impossible to produce the same output with less (or lower-cost) inputs, or when it is impossible to produce more output with the same combination of inputs. ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* 17 (5th ed. 2008). Hence, this Comment evaluates the efficiency of a land tenure system based on whether it produces the most wealth at the lowest cost.

88. See, e.g., Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980); Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974).

89. WILKINSON, *supra* note 16, at 6.

90. See *infra* Part III.

A society's land-rights scheme is a fundamental factor contributing to the efficiency of that society's productivity.⁹¹ There is a strong presumption in the modern, capitalistic world that land held without qualification by private individuals or entities is the most efficient possible land tenure system.⁹² Professor Robert Ellickson is an exponent of this presumption, and while he acknowledges that a variety of land regimes of "close-knit groups" may be equally efficient,⁹³ he asserts that "[a]s a group becomes literate and its lands become more scarce, its standard bundle of private land rights tends to evolve from the time-limited and inalienable usufruct to something like the perpetual and alienable fee simple."⁹⁴ This aptly describes the development of European and Anglo-American concepts of land ownership, and modern Indian tribes are both literate and embedded in a world of complex markets grounded in Anglo-American property law.⁹⁵ Accordingly, while traditional land use rights may have been efficient for Indian tribes before European arrival, it remains an open question whether it would be efficient for tribes to widely recognize customs of land use rights today.

This Comment argues that in the tribal context, depending on empirical circumstances, use rights can be just as economically efficient, if not more so, than the Anglo-American system of unqualified, absolute ownership in land. The following Sections rebut some theoretical claims that usufructuary rights in land are categorically inefficient.⁹⁶ Section A explores whether usufructuary systems are inevitably faced with the so-called "tragedy of the commons." Section B considers the critique that land not owned outright by private persons is unusable as a means to secure capital debt. Section C addresses the apparent

91. Access to or use of land (or natural resources) is one of the three classical "factors of production," along with capital and labor. See *Economics A-Z: Factors of Production*, ECONOMIST, <http://www.economist.com/research/Economics/alphabetical.cfm?letter=F#factorsofproduction> (last visited Oct. 10, 2010) (here, including "enterprise" as a fourth factor). Another legal factor affecting productive efficiency includes whether parties may rely on the law to enforce bargained contracts. See generally COOTER & ULEN, *supra* note 87, at 202.

92. See Ellickson, *supra* note 2, at 1331, 1334–35 (positing that, perhaps except in the case of large-scale management of land, "individual ownership is better than both open-access and group ownership for minimizing the sum of deadweight losses and transaction costs").

93. *Id.* at 1400.

94. *Id.* at 1398.

95. *E.g.*, WILKINSON, *supra* note 16, at 43–46.

96. In keeping with the abstract nature of the inquiry, the ensuing examples of possible tribal approaches are hypothetical.

problem of rent-seeking under a usufructuary regime. Lastly, Section D examines the claim that long-term incentives to use land efficiently are absent under a regime of land use rights.

A. *Tragedy of the Collectively Owned?*

Similar to arguments against the inefficiencies of centralized planning, economists generally hold the position that collectively-owned land is unlikely to be allocated with perfect efficiency because centralized authority cannot make decisions as well as market forces,⁹⁷ and that such practice leads to “wealth dissipation.”⁹⁸ Private buyers, on the other hand, are seen as choosing carefully and maximizing the value of their land.

A basic presumption of usufructuary rights is that there is some entity with authority to grant or recognize the right—current tribal law places this authority in the tribal governing body, which exerts absolute control over the tribal land base.⁹⁹ If there are no private “owners” of Indian land, there is no inherent market force tending to ensure maximum value is being realized in land. Furthermore, Garrett Hardin’s classic theory of the tragedy of the commons—which states that land held in common tends to be overexploited¹⁰⁰—raises the specter of inefficiency based on the assumption that use allocations are arbitrary and not guided by the rational self-interest exhibited when individuals purchase property.¹⁰¹ Privatization of land among individuals is assumed by economists to best incentivize efficient uses of land, in part because “externalities” (such as overexploitation, a burden shared among a community at-large if land is collectively owned) are “internalized” to a certain extent (the harm of overexploitation of an individual’s land would have its most direct effects on that individual owner).¹⁰²

These arguments on behalf of individualized private property are perhaps inapposite with respect to Indian tribes, as

97. See, e.g., David Luban, *Making Sense of Moral Meltdowns*, in *LAWYER’S ETHICS AND THE PURSUIT OF SOCIAL JUSTICE: A CRITICAL READER* 355, 362 (Susan D. Carle ed., 2005) (“[C]entrally planned economies have built-in infirmities. The reason that market economies beat planned economies is that they’re better at processing information and responding to change.”).

98. Roback, *supra* note 30, at 6, 9.

99. See *supra* Part I.B.

100. See Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243, 1244 (1968).

101. *Id.* at 1244–45.

102. Roback, *supra* note 30, at 9.

the arguments do not consider that the most appropriate “unit of analysis” in the tribal context may be extended families, clan groups, or the tribe itself, as opposed to individuals.¹⁰³ As Jennifer Roback elucidates, tribes and clans, if conceived of as an extension of the family or viewed as akin to a firm, may be efficient units of privatization.¹⁰⁴ Firms have been described by economists as a group of individuals working within a structure that develops “in response” to external factors, creating a “miniature command econom[y],” which then acts like the individual decision-maker of classical economics.¹⁰⁵ Allocations within such a unit are likely to be based on the efficient, local structure of the group; therefore, by definition, the internal structures do not lead to resource depletion and misuse.¹⁰⁶

Roback provides the example of the Southern Kwakiutl Indians, who had a system whereby kinship groups called *numayms* held a single property right to an entire run of salmon.¹⁰⁷ While this system may appear to be collective ownership from the point of view of each family within the *numaym*, it can be appropriately viewed as privately owned from the perspective of the *numaym* itself.¹⁰⁸ In other words, the *numaym* acts as an individual owner or unit (like a firm), not as a collective of individuals (for example, tenants-in-common under Anglo-American property law).¹⁰⁹ While there is probably no empirical evidence to show conclusively that this was the most efficient method of organizing land use, one is reasonable in assuming that the system developed in such a way that resources were “privatized over the group size that can best internalize the relevant externalities.”¹¹⁰ Professor Ellickson points out: “[A] close-knit group tends to create, through custom and law, a cost-minimizing land regime that adaptively responds to changes in risk, technology, demand, and other eco-

103. *Id.* at 6 (explaining that a private actor may be an individual or a group acting as a unit).

104. *Id.* at 6, 9–10.

105. *Id.*; Luban, *supra* note 97, at 362. The modern theory of the firm was famously outlined by Ronald Coase. See generally R.H. COASE, *THE FIRM, THE MARKET, AND THE LAW* (1988).

106. Roback, *supra* note 30, at 9–10 (noting that Coase’s theoretical firm achieves optimal internal resource allocation through “formal administration or by informal rules and processes”).

107. *Id.* at 9.

108. *Id.*

109. *Id.*

110. *Id.*

nomic conditions. In so doing, the group opportunistically mixes private, group, and open-access lands.”¹¹¹

The Southern Kwakiutl had a particular, but by no means unique, form of customary land use right; many Indian societies recognized private land rights held by family or clan groups.¹¹² Even if these were all efficient systems historically, can such customs function well in the modern world? Leonard Carlson has presented evidence that they can, in part because tribal customary systems are flexible and adaptable to new technology and pursuits.¹¹³ In the nineteenth century, on some reservations where tribes still exhibited customary land tenure systems, white assimilationists pressured the adoption of agriculture by tribes who had no previous farming experience, and this new venture proceeded successfully—with respect to actual crop yields—right up to the Allotment Era of the 1870s.¹¹⁴ Only after the annihilation of customary tribal land rights through individual land allotments did agricultural success plummet.¹¹⁵ Based on the implications of Carlson’s research, if Indians are left to adapt their customs to new pursuits and technologies, there is no persuasive evidence that tribal land use customs should prove less efficient than Anglo-American individual land ownership, even in a modern context.

B. Inability to Raise Capital Using Land Held in Usufruct?

Another challenge to the theoretical efficiency of usufructuary rights in land is that while the right may be transferable, it is typically retainable by the grantee only to the extent that the party taking possession proceeds to use the land non-destructively. By definition a usufruct in land is revocable, especially if land is being misused or abused.¹¹⁶ For example, the White Mountain Apache tribe retains discretion to revoke an assignment if it perceives an absence of “actual and beneficial use” of the land.¹¹⁷ This revocability conceivably limits usu-

111. Ellickson, *supra* note 2, at 1397–98.

112. *See generally* Bobroff, *supra* note 2, at 1573–94.

113. *See* Carlson, *supra* note 45, at 73–81.

114. *Id.*

115. *Id.*

116. *See supra* Introduction (discussing the definition of usufruct); *see also supra* notes 8–11 and accompanying text.

117. *See supra* Part I.B (discussing conditions of assignment revocation at Apache); *see also supra* notes 70–71 and accompanying text.

fructuary rights in land as a security for borrowing¹¹⁸—a fundamental method for raising capital in a market system. If a lending institution is unable to acquire a security interest in land, and thereby cannot foreclose on the property in the event of default, it may not supply a loan to begin with.¹¹⁹ Missed or lost opportunities to capitalize business ventures in Indian country may represent significant opportunity costs.¹²⁰ If recognizing customary land use rights means missing out on these opportunities, which would be otherwise available under a system of freely alienable private property, this opportunity cost would likely be large, and might give rise to systemic inefficiency.

One response is that, at the tribal level, tribes are sovereigns possessing the inherent authority to convey or securitize land to raise capital for the benefit of their people. The inherent sovereign authority to dispose of land is evidenced through the historical practice of tribes making treaties with the United States, in which tribal land was often granted. Over time, the tribes became politically weak, relative to the United States, and in 1871 Indians suffered the indignity of losing their legal right to make treaties as equal sovereigns.¹²¹ Thus, tribes today do not have the legal ability to alienate lands reserved and held in trust for them by the federal government.¹²² But this is a technical obstacle, not a theoretical one with respect to usufruct.¹²³ If tribes had retained, or if they were to re-acquire, sovereignty equal to the United States or other nation-states,

118. See ANDERSON, *supra* note 30, at 168 (“Limits on alienation, leasing, and bequests make it difficult for tribes and individual Indians to borrow against their property . . .”).

119. See *Economics A–Z: Collateral*, ECONOMIST, <http://www.economist.com/research/economics/alphabetic.cfm?letter=C#collateral> (“An ASSET pledged by a borrower . . . may be seized by a lender to recover the value of a loan if the borrower fails to meet the required INTEREST charges or repayments.”) (last visited Oct. 19, 2010).

120. In microeconomic theory, opportunity cost refers to “the economic cost of an alternative that has been foregone.” COOTER & ULEN, *supra* note 87, at 34.

121. An undebated appropriations act prohibited new treaties between Indian tribes and the federal government. Indian Appropriations Act of 1871, 25 U.S.C. § 71 (2006) (“No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired.”).

122. See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 5.04[4] (Nell Jessup Newton et al. eds., 2005) (discussing the federal trust responsibility).

123. Federal policies regarding tribes are, of course, always subject to change.

customs of usufructuary land rights would pose no barrier to the tribe disposing of its land as needed.

Returning to the present, with respect to non-trust land acquired by the tribe in fee, tribes have discretion whether to petition the Secretary of the Interior to take such newly acquired lands into trust, or not.¹²⁴ Non-trust land acquired by a tribe and not put into trust is alienable at the will of the tribe, and tribes are, in fact, increasingly acquiring fee land and using it to secure debt.¹²⁵ Contracts between a lender and a tribe are solely the product of lender confidence that the tribe will uphold its end of the deal.¹²⁶ How the tribe distributes its land internally should not represent a barrier to attracting lenders when the debtor is the tribe itself, or a subsidiary entity.

Individuals holding usufructuary interests in tribal fee land who want to use this interest as collateral would presumably need the tribe to underwrite any such use, making individual borrowing essentially tribal borrowing. This is akin to what the federal government already does on behalf of tribes when it supervises individual Indian owners of trust land in the execution of a mortgage or deed of trust attached to the land.¹²⁷ The tribe would rationally only underwrite such a transaction if it deemed the individual proposal unlikely to result in default.¹²⁸ Of course, lenders may put economic pressure on tribes to allocate land to individuals or entities that are likely to produce wealth, affecting the politics of tribal allocations. Ultimately, how the tribe makes allocations regarding land use rights is an empirical question, and does not affect the fundamental efficiency analysis as to whether fee ownership or a qualified land use right is inherently more efficient.

124. E-mail from Kristen Carpenter, Assoc. Professor of Law, Univ. of Colo. Law Sch., to author (May 15, 2010, 03:15 MST) (on file with University of Colorado Law Review).

125. See E-mail from Craig Dorsay, Partner, Dorsay & Easton, to author (Sept. 21, 2010, 12:10 MST) (on file with University of Colorado Law Review) (noting that Siletz and Samish tribes now raise capital primarily through gaming revenues and through securing tribal fee land).

126. Under the doctrine of tribal sovereign immunity, a tribe cannot be held to private contract provisions in a court of law unless it expressly consents to such suits. See Goldberg, *supra* note 34, at 1051.

127. Fredericks I, *supra* note 20, at 106 (describing the oversight of the BIA pursuant to 25 U.S.C. § 483a (2006), designed to “encourage individual Indian landholders to utilize commercial credit to the maximum extent possible”).

128. See *id.* at 123–28 (describing how such oversight authority should work in the federal-tribal context).

A second response, representing a more practical approach without the downside of possible tribal land losses, is that usufructuary rights should pose no inherent obstacle to the leasing of tribal trust land for development. In the last several decades federal law and policies have made it easier for tribes to exploit trust land for economic generation irrespective of how the land is held under tribal law, because the federal oversight requirements have lessened. For example, regulations pursuant to the Indian Tribal Energy Development and Self Determination Act guide tribes in “obtaining, implementing, and enforcing a tribal energy resource agreement (“TERA”) that will allow a tribe to enter into individual leases, business agreements, and rights-of-way *without obtaining Secretarial approval*” for the “purposes of energy resource development on tribal land.”¹²⁹ In short, tribes are now given extensive freedom to manage their land, including the resources thereon, according to their own laws. Native American Rights Fund (“NARF”) staff attorney Don Wharton further points out that other kinds of leases, for example under the Indian Mineral Development Act of 1982,¹³⁰ are also generally free from oversight if a commercial use of land is involved, and especially if the tribe has an official “resource development plan.”¹³¹

The upshot is that tribal land may now be leased for resource development, regardless of how the individual interests in the underlying land are defined under tribal law. It is effectively up to a tribe how it assigns its lands to its people, and whether it then pursues leasing those lands for development. The lessee, whether a tribal member or outside party, is free to distrust the stability or enforceability of the lease, especially if the lease is governed solely by tribal law, but this simply reflects the nature of private entities dealing with any sovereign government. As economist Terry Anderson points out, when formerly communist Eastern European countries began their foray into capitalism, they had to prove their creditworthiness.¹³² Many tribes have done just this over the past decades,¹³³ and private actors who seek to lease tribal land for

129. Tribal Energy Resource Agreements Under the Indian Tribal Energy Development and Self-Determination Act, 25 C.F.R. §§ 224.10(a)–(b) (2010) (emphasis added).

130. 25 U.S.C. §§ 2101–2108 (2006).

131. Telephone Interview with Don Wharton, Staff Attorney, Native Am. Rights Fund (Sept. 15, 2010).

132. See ANDERSON, *supra* note 30, at 171–73.

133. Southern Ute is a prime example. See Thompson, *supra* note 57.

resource development will refuse to do so at the peril of losing valuable contracts.

To the extent that a tribe or its members continues to require external capital to develop self-sufficiency, a usufructuary land tenure regime may present an impediment if outside investors lack confidence in the system, but it does not represent a theoretical barrier to securing debt. Assuming there are no other inefficiencies associated with tribal land held in usufruct, the need to raise capital should not be a justification for tribes to demote or eschew their traditional customs of land use rights.

C. *The Problem of Rent-Seeking?*

A further critique of a system of usufructuary land rights is that it can lead to “rent-seeking” behavior.¹³⁴ Rent-seeking refers to the resource waste that occurs when an individual or entity attempts to amass wealth without producing any value.¹³⁵ A common example of the behavior is when people try to obtain benefits politically.¹³⁶ Ellickson presents the argument that usufructuary transfers create an incentive among “would-be successors” to expend resources effecting no productive result other than the securing of the use right.¹³⁷ In other words, mere “jockey[ing] for position in a usufruct’s late stages”—for example, political maneuvering to secure a land assignment—is not efficient behavior.¹³⁸ The transfer of entitlements does not produce any commodity or service; thus, any expenditure in pursuit of such transfers is not itself productively efficient.¹³⁹ According to economists, it is in an individual’s self-interest to maximize her wealth or utility, so a rational actor will decide to seek rents if doing so presents an opportunity for making money.¹⁴⁰ Certainly, a system of tribal assignment of land use

134. See Ellickson, *supra* note 2, at 1364.

135. See generally *Economics A-Z: Rent-Seeking*, ECONOMIST, <http://www.economist.com/research/Economics/alphabetical.cfm?letter=R#rent-seeking> (last visited Oct. 26, 2010); Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291, 291–303 (1974).

136. David R. Henderson, *Rent Seeking*, in THE CONCISE ENCYCLOPEDIA OF ECONOMICS (2d ed. 2008), available at <http://www.econlib.org/library/Enc/RentSeeking.html>.

137. Ellickson, *supra* note 2, at 1364.

138. *Id.*

139. See *id.*

140. See, e.g., COOTER & ULEN, *supra* note 87, at 16.

rights can, and sometimes does, lead to wasteful rent-seeking, especially in cases of inter vivos conveyances of land.¹⁴¹

One response is that no more energy is necessarily spent by would-be assignees petitioning a tribal council for housing or land on which to start a business than is spent by an individual or entity in an Anglo-American society attempting to secure a home loan or attract capital investors to purchase or lease commercial property. And once the land interest is granted, productivity is not directly dependent on the form of the interest,¹⁴² so neither system (assignments of land use rights versus individual, unqualified land ownership) should necessarily underlie greater or lesser productive efficiency.

Clear rules that are followed by tribal governments, subject to the political check of the tribal membership at large, should also help minimize political jockeying, regardless of how land is transferred: “So long as there exist well-defined and widely known enforceable rules or laws that determine the identity of the potential recipients, independent of the choice of the donor, there is no profit to be gained from engaging in rent-seeking.”¹⁴³ Unbending rules do not have to be unchanging rules; rules typically can be changed according to established processes, and, as long as these established processes are followed, political jockeying should not represent any more of a problem under tribal customary systems than it represents under the Anglo-American system.

Customs of land use rights, coupled with a system whereby property interests are passed on to succeeding generations according to binding rules, may in fact be *more* efficient than a system of unqualified land ownership. Traditional Indian customs of inheritance are principally composed of binding succession rules, meaning property rights pass in an orderly fashion known by everyone in the group.¹⁴⁴ By contrast, succession

141. Cooter and Fikentscher report that rent-seeking behavior occurs at White Mountain Apache: “Like political bodies everywhere, the tribal council inevitably favors families loyal to the governing faction when distributing benefits, including the allocation of land. Tribal members apparently devote much energy to lobbying the council for land and other benefits, or to electing a council with the preferred loyalties.” Cooter & Fikentscher II, *supra* note 42, at 519.

142. See *infra* Part II.D for a discussion of long-term incentives to use land productively.

143. James M. Buchanan, *Rent Seeking, Noncompensated Transfers, and Laws of Succession*, 26 J.L. & ECON. 71, 78 (1983).

144. See, e.g., K. N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* 212–16 (1941); Cooter & Fikentscher II, *supra* note 42, at 530.

under Anglo-American law provides broad discretion on the part of testators,¹⁴⁵ which would appear to open the door to rent-seeking behavior among possible inheritors. Like the majority society in the United States, modern tribal governments also generally recognize individual bequests; however, tribal law is increasingly being recognized as controlling over state law.¹⁴⁶ Thus, if tribes were to recognize their customary succession rules, these would conceivably override an individual's wishes. This is important here because, once again, clear, unbending rules of land transfer quite certainly mitigate the potential for political jockeying.¹⁴⁷

Unbending regimes of land succession are also cheap to administer, although such rules may trigger what some analysts term "circumvention costs:" costs associated with trying to avoid the rules.¹⁴⁸ Nevertheless, considering the positive costs of the sometimes litigious Anglo-American probate process, a system of unqualified land ownership has certain inefficiencies, which likely would not exist under the coupling of a traditional tribal regime of land use rights with customary succession rules, even if some individuals prompt circumvention costs.¹⁴⁹ While there is an argument that it could be more efficient to provide holders of interests in land the discretion to leave land to an heir who will likely administer the property most productively, it is equally likely that land bequests will *not* be efficiently used by heirs in such cases, and a community has little recourse under a system of unqualified ownership. By contrast, when a tribal government has the ability to revoke interests in land, the destructive or non-productive uses can be stopped according to the will of the tribe. Again, clear rules are important to minimize political rent-seeking behavior.

145. See COOTER & ULEN, *supra* note 87, at 164 ("The law in Western countries has evolved over centuries toward more freedom for the owner to specify who may have the property after his or her death . . .").

146. E-mail from Craig Dorsay, *supra* note 125 ("[T]he BIA has recognized tribal laws giving Tribes the right of first refusal to buy land slotted for individual devise . . .").

147. See *supra* note 143 and accompanying discussion of clear rules mitigating rent-seeking.

148. See COOTER & ULEN, *supra* note 87, at 164 (noting that "[a]ny restriction on [an] owner's choices creates an incentive to circumvent it" and that such circumvention efforts, such as tricky land transfers requiring a lawyer, requires the expenditure of resources).

149. Note, of course, that while members of a close-knit group such as a tribe are probably unlikely to try to circumvent the succession rules, because of social approbation or other deterrents, almost all wills require the hiring of a lawyer (a cost), and many wills are disputed in court (a cost).

In sum, tribal customs of land use rights alongside clear, unbending rules regarding assignments and succession may result in the elimination of certain economically wasteful rent-seeking activities. While rent-seeking behavior is a theoretical cost under a usufructuary system, to the extent tribes revitalize their customs and maintain clear rules, this cost is probably minimal, or at least fails to be a big enough factor to counsel against broader recognition of customary land use rights. Finally, as will be addressed more fully in Part III, traditional assumptions of economic theory regarding self-interested, rational actors do not necessarily apply well to tribal cultures.¹⁵⁰ From this standpoint, general assumptions about rent-seeking behaviors may not be predictive and may need to be supported by more empirical evidence that the behavior is widespread before concluding that rent-seeking leads to inefficiency under a tribal system recognizing customs of land use rights.

D. *Lack of Long-Term Incentives?*

A final critique of customary land use rights addressed here is the claim that usufructuary rights do not incentivize land-holders to take either long-term use of the land or future users into consideration, leading to inefficient resource management.¹⁵¹ This may manifest as either wasteful underinvestment or wasteful overexploitation by the current landholder.¹⁵² Hypothetically, if a current landholder has no interest in the land beyond his tenure, he is both unlikely to invest in improvements and likely to deplete resources entirely for immediate gain (instead of putting them to their most efficient use over time).¹⁵³ For example, the White Mountain Apache tribal code provides that “[a]ny property placed on the land by the assignee which has become affixed to the realty shall not be removed by said assignee if his assignment has been cancelled either voluntarily or involuntarily.”¹⁵⁴ If an individual holding a land use right assignment cannot take his improvement with him, why would he expend resources to improve the property?

150. See *infra* Part III for a discussion of the potential incompatibility between the rational actor model and the Indian worldview.

151. Ellickson, *supra* note 2, at 1368–69.

152. *Id.*

153. *Id.*

154. White Mountain Apache Land Code § 2.7, at 4 (2005), available at <http://wmat.us/Legal/Land%20Code.pdf>.

There are at least four responses to this critique. First, there is no reason that land use rights cannot be transferred for cash value (while the underlying title to the land remains with the tribe) or for community prestige through gifting. Many tribes incorporated some form of gift economy—"gift giving, usually undertaken with an expectation of later reciprocity by the recipient, 'was a crucial means for establishing and reproducing one's position in society.'"¹⁵⁵ Therefore, improvements as well as restraint from overexploitation can theoretically create current value for the holder, through cash, prestige, or perhaps both.

Second, traditional Indian customs of inheritance are often orderly and binding on all types of property rights, including land use rights, which further "extend[s] owners' planning horizons" and reduces incentives to under-invest or over-exploit land.¹⁵⁶ For example, some analysts argue that tribal land tenure, in practice, is "distinguished by continuous ownership of specific lands over successive generations, leading to an ethic of stewardship that sustains the productivity of the land for those who will inherit it."¹⁵⁷ In other words, land use rights in the Indian context appear *more* apt to incentivize long-term stewardship than in the Anglo-American system, which seems to promote transfer of land for immediate profit.

Third, under-investment could, in theory, be mitigated through tribal underwriting of property improvements, which would reduce individual concerns that one party's entire investment will be lost upon revocation or abandonment of the land. Part IV addresses the practical opportunities for autonomous tribal decision-making, for example, even while utilizing federal housing grants.

Finally, as a jumping-off point to a discussion of non-economic values of tribal customs,¹⁵⁸ the question of long-term incentives reveals a possible limit to the usefulness of traditional metrics of economic analysis as applied to the practices of societies that value an extremely long-term balance of all life

155. Freyfogle, *supra* note 8, at 721 n.10 (quoting WILLIAM CRONON, *CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND* 61–62 (1983)).

156. Bobroff, *supra* note 2, at 1574 n.60.

157. *Id.* See generally Theodore S. Jojola, *Indigenous Planning and Resource Management*, in *TRUSTEESHIP IN CHANGE: TOWARD TRIBAL AUTONOMY IN RESOURCE MANAGEMENT* 303 (Richmond L. Clow & Imre Sutton eds., 2001).

158. See *infra* Part III.

on earth. The Indian worldview¹⁵⁹ is generally concerned with an extremely long-term context: what David Getches calls a “philosophy of permanence.”¹⁶⁰ By contrast, the traditional economist’s conception of efficiency contains (often tacit) assumptions regarding timeframe.¹⁶¹ Even long-term models of growth and efficiency cannot properly account for circumstances in which costs and benefits become unmoored from the current referents of value, such as wealth or consumption. While certain uses of the earth’s resources may seem efficient to the traditional Western economist, these same uses might appear inefficient and destructive when viewed as continuous practices carried out over many generations. In other words, even if the analysis in this Comment is incorrect, and Indian customary ways may be considered inefficient by a Western economic analysis, Indian customs, generally designed to uphold a permanent balance between human life and the earth’s ecosystem¹⁶²—if maintained—may enable tribes to outlast societies that lack such a value of long-term balance. As John Ragsdale, Jr., puts it:

For a society to endure, there must be more than a close fit between personal values and social institutions. There must also be an equilibrium between the society and its environment. Unfortunately, many of America’s values conflict with environmental concerns. Members of the dominant culture in North America, the “modern growth society,” support growth, which disturbs the equilibrium because of the finite nature of resources, the fragility of the

159. See *supra* note 24 and accompanying text discussing the “Indian worldview.”

160. See David H. Getches, *A Philosophy of Permanence: The Indians’ Legacy for the West*, J. OF THE W. 54 (July 1990), reprinted in GETCHES ET AL., *supra* note 17, at 33–35.

161. See Leff, *supra* note 88, at 476 n.69 (noting that economists calculate the costs versus the benefits of different choices “a little further” out in time than what may be immediately observable by human actors, but that this inquiry becomes extremely indeterminate the further one proceeds “down the chain of time and inference”); see also John W. Ragsdale, Jr., *Law and Environment in Modern America and Among the Hopi Indians: A Comparison of Values*, 10 HARV. ENVTL. L. REV. 417, 439–40 (1986) [hereinafter Ragsdale, Jr. II] (“Cost-benefit analysis is limited in scope, time, and space. Monetizing the interests to be compared distorts the consideration of intangibles such as beauty, peace, harmony, and love, that are by their nature priceless. Cost-benefit calculation also . . . ignores or discounts losses to the future.”).

162. See generally Ragsdale, Jr., I, *supra* note 14, at 323–24 (observing that pre-contact indigenous peoples generally lived “in relative balance with the land” in “a relationship apparently capable of enduring indefinitely”).

ecosystem, the unknown risks of technology, and the dangers of complexity and interdependence.¹⁶³

Ironically, indigenous peoples may be responsive to “incentives” on a scale that is much more “long-term” than economists are prepared to consider. Indian societies and cultures have proved hardy in the face of centuries of military and assimilationist pressures. The Hopi Indians, for example, have existed in the same place in northern Arizona for almost a millennium,¹⁶⁴ attributable perhaps to “a skillful, delicate, and pragmatic agricultural technique, which operates in equilibrium with nature, not in opposition to it.”¹⁶⁵ Economic analysis cannot account for the long-term value in such a prolonged existence.

So far, we have seen that tribal customs of land use rights are not inherently inefficient, at least with respect to tribes as close-knit groups. Akin to firms, tribes can theoretically function efficiently as units within a greater market system, while employing use rights as part of an efficient internal structure. This internal structure can be efficient because traditional forms of inheritance and transferable use rights address the conceptual problems of long-term incentives and rent-seeking behavior. When raising external capital is necessary for development, securing loans with usufructuary rights in land is feasible using non-trust land as collateral. All of this is important with respect to traditional economic analysis. The next part will examine the non-economic values that tribes may enjoy with a more robust land-tenure system based on their customs. These non-economic values may be the most significant factor for tribes to consider, as they more directly implicate issues of cultural cohesion and preservation.

III. NON-ECONOMIC VALUES OF CUSTOMARY TRIBAL USE RIGHTS

In the preceding part, tribal customs of land use rights were examined through the lens of modern economics to show that land use rights as employed by Indian tribes may be an economically efficient land tenure regime. However, while tri-

163. Ragsdale II, *supra* note 161, at 419.

164. See J.O. Brew, *Hopi Prehistory and History to 1850*, in 9 HANDBOOK OF NORTH AMERICAN INDIANS 514–23 (William C. Sturtevant ed., 1979).

165. Ragsdale, Jr. II, *supra* note 161, at 419.

bal land use rights may indeed function efficiently in a modern context, economic efficiency is not necessarily the most important aspect of a property system, and Indians themselves may find economic analysis dangerous to a traditional relationship with the land.¹⁶⁶ In any case, customs of land use rights may also have important non-economic aspects for tribes. They might, for example, help cultivate values that are central to Indian ways of life. As John Ragsdale, Jr., puts it:

[A] mutual reinforcement exists: values formed by myth, religion, custom, and education are in large part the foundation for social institutions, which in turn influence the members of society. To the extent that [social] institutions are longstanding reflectors of fundamental beliefs, institutionalized values develop a life of their own, acting to preserve and shape personal values and to limit the range and depth of responses to societal pressures.¹⁶⁷

The material in this part explores possible non-economic values of use rights, including: (A) the development of a holistic perspective regarding land; (B) fostering traditional communitarianism; and (C) cultivation of sustainable uses of land. As explored in the ensuing sections, all of these values can be considered part of the traditional “Indian worldview,”¹⁶⁸ and if a system of land tenure helps to support and reaffirm these indigenous cultural values, such a connection offers an argument for the employment of that system.

A. *Cultivating a Holistic Perspective Regarding Land*

Aldo Leopold, the father of modern ecology, once asserted that land is not “merely soil.”¹⁶⁹ Rather, he called land a “fountain of energy flowing through a circuit of soils, plants and animals,” and posited that “[w]hen a change occurs in one part of the circuit, many other parts must adjust themselves to it.”¹⁷⁰ Leopold was an early proponent of the widely accepted contemporary view that the earth is a holistic system and that one

166. Ragsdale, Jr. I, *supra* note 14, at 324 (“[N]ative peoples, in general, did not treat the land as a commodity, they did not regard it as a freely exploitable resource, they were not preoccupied with the economic growth or personal gain”)

167. Ragsdale, Jr. II, *supra* note 161, at 417.

168. See *supra* note 24 discussing the “Indian worldview.”

169. ALDO LEOPOLD, A SAND COUNTY ALMANAC 231 (1966).

170. *Id.* at 231–32.

parcel of land is not wholly divisible from other parcels. Myrl Duncan nicely states the modern viewpoint: "Today land ownership encompasses interconnectedness, context, correlativity, and the public interest among its core values."¹⁷¹ By contrast, the classic Anglo-American property regime of absolute ownership cultivates a narrow concern for isolated parcels of land; i.e., holding fee title to a piece of land emphasizes the holder's legal rights with respect only to the single parcel under his control.¹⁷² The fee owner likely cares about neighboring property only to the extent that it affects his own self-interest. Compare that with a land-tenure system under which, theoretically, everyone in the community "owns" the land, and consider how that might encourage interdependence and assumption of duty.¹⁷³ The latter conception is perhaps better suited to the currently understood reality of land and culture, since, as Duncan puts it, "[s]ocieties and ecosystems are interconnected wholes."¹⁷⁴

Usufructuary rights naturally embrace a fluidity of formal property rights in land, based on ecological realities, because usufruct generally presupposes continuous use that does not diminish the resource.¹⁷⁵ Any recognition of a land use right thus presumably includes continual reevaluation to ensure that the use is not destructive. If a land use is considered destructive, the right likely will no longer be recognized by the relevant group.¹⁷⁶ In contrast, under a system of unqualified ownership, there is less incentive (or ability) on the part of a community to evaluate or control uses of land, or to cease recognizing an owner's right to his property. Zoning is one example of community control over land use, but zoning regulations are voidable by courts, and thus cannot be applied based

171. Myrl L. Duncan, *Reconceiving the Bundle of Sticks: Land as a Community-Based Resource*, 32 ENVTL. L. 773, 804 (2002).

172. *Id.* at 787 (arguing that the "bundle of sticks" metaphor common to Anglo-American conceptions of property ownership reinforces "individual rights (sticks) in indistinguishable individual tracts").

173. See generally Randy Kapashesit & Murray Klippenstein, *Aboriginal Group Rights and Environmental Protection*, 36 MCGILL L.J. 925, 925 (1991) ("Aboriginal peoples base their relationship with the environment on concepts of respect and duty rather than rights and claims.").

174. See Duncan, *supra* note 171, at 775.

175. See *supra* notes 8–11 and accompanying discussion of the definition of usufruct.

176. According to Cooter and Fikentscher's research at White Mountain Apache, an assignment may currently be revoked by the tribal council "at any time, and revocation is more likely if no investments are made on the land." Cooter & Fikentscher II, *supra* note 42, at 519. Assignments are also apparently "less likely to be revoked the longer the family occupies the land." *Id.*

purely on the will of the community.¹⁷⁷ Under a system of unqualified ownership, when and if the community does wish to impose its will over that of a property owner, expensive administrative and litigation costs are almost a certainty, since the rights of the landowner are highly protected.¹⁷⁸

Fluidity of property rights is reflected in Anglo-American law in one key respect: water rights are based on usufructuary principles.¹⁷⁹ For example, under the “prior appropriation” doctrine in the western United States, a right to consumptive use of running water is recognized if certain elements are present, including putting diverted water to “beneficial use.”¹⁸⁰ Wasteful use will not preserve an appropriative right to divert and use water.¹⁸¹ Thus, unlike unqualified ownership in land—for example, vested in fee simple title—a usufructuary right in water may be nullified by court order. For instance, in the case of *Empire Water & Power Co. v. Cascade Town*,¹⁸² the Eighth Circuit held that Colorado law was designed to prevent waste and confine the use of water to “needs,” which did not include uses for the purpose of preserving natural beauty.¹⁸³ Therefore, what later came to be known as a right to “instream flows”¹⁸⁴ was not maintainable at the time of the *Empire Water* case, and Cascade Town’s water right was revoked.¹⁸⁵ One could quibble that in such an instance the usufruct was not nullified, but in fact never existed. However, this appears to be primarily a semantic distinction; whether a right once existed but is now not recognized versus whether the right ever existed, seems hard to differentiate from a practical standpoint.

The salient point is that no action is available that contemplates outright nullification of land title through a claim that an owner is misusing or wasting his land. In the Anglo-

177. See, e.g., *Nectow v. City of Cambridge*, 277 U.S. 183 (1928) (firmly establishing judicial review of zoning through striking a zoning ordinance as arbitrary and unreasonable).

178. For example, much costly litigation has occurred over what constitutes a “public use” sufficient to justify governmental condemnation of private land, to the point that the doctrine has been in a “shambles” for over a century. *DUKEMINIER ET AL.*, *supra* note 4, at 952–53.

179. *GETCHES ET AL.*, *supra* note 17, at 777–78.

180. *Id.* n.21.

181. *Id.*

182. 205 F. 123 (8th Cir. 1913).

183. *Id.* at 129.

184. Steven J. Shupe & Lawrence J. MacDonnell, *Recognizing the Value of In-Place Uses of Water in the West: An Introduction to the Laws, Strategies, and Issues*, in *INSTREAM FLOW PROTECTION IN THE WEST* 1-1 to 1-2 (1993).

185. *Empire Water & Power*, 205 F. at 129.

American tradition, water and land are considered different enough to justify different treatment, but this is a choice. Tribal custom does not recognize such a strong distinction.¹⁸⁶ The “fluidity” of usufructuary rights in water is considered by Western society as necessary due to the perceived scarceness of the resource,¹⁸⁷ and this property system reflects and encourages the perspective that people must be cautious not to waste the resource. By the same token, a fluid system of land rights, such as usufructuary rights, may actually encourage the recognition of the interdependency of land:

If water were our chief symbol for property . . . [w]e might think of rights literally and figuratively as more fluid and less fenced in; we might think of property as entailing less of the awesome Blackstonian power of exclusion and more of the qualities of flexibility, reasonableness and moderation, attentiveness to others[,] and cooperative solutions to common problems.¹⁸⁸

A system of land use rights inherently seems to require an ongoing investigation into what uses of land work in concert with the larger land system, cultivating a more holistic perspective. In contrast, a system of unqualified land ownership cultivates a myopic concern for individual parcels, and concern only with the state of land inside arbitrarily drawn boundaries is potentially ecologically harmful.¹⁸⁹ Cultivating a sustainable land ethic is a non-economic value that may be fostered inside (and outside) of tribal communities if Indian tribes more broadly recognize use rights in land.

186. Chief Luther Standing Bear, *Indian Wisdom*, in *THE GREAT NEW WILDERNESS DEBATE* 201, 202 (J. Baird Callicott & Michael P. Nelson eds., 1998) (describing how, for Lakota people, “a great unifying life force . . . flowed in and through all things—the flowers of the plains, blowing winds, rocks, trees, birds, animals”).

187. Duncan, *supra* note 171, at 798 (“In the United States, especially in the West, water is often in much scarcer supply than land.”).

188. *Id.* at 790–91 (quoting Carol M. Rose, *Property as the Keystone Right?*, 71 *NOTRE DAME L. REV.* 329, 351 (1996)).

189. *Id.* at 783–85 (noting wetland destruction and species loss as examples of harms that flow when property law ignores the interconnection of land in an ecosystem).

B. *Cultivating Traditional Communitarianism*

Tribal customs of land use rights may also cultivate traditional communitarian values¹⁹⁰—such as traditional “norms of economic redistribution”¹⁹¹—and simultaneously discourage adoption of Western values of excessive personal accumulation. While not everyone (and perhaps few economists) finds distribution of social wealth to be a universal value, even modern economists should accept that there are certain goals that market-based societies seek which could be more cheaply achieved if people acted more altruistically toward each other. Steven Kelman, defining altruism as behavior “motivated out of concern for others,” argues that:

Altruism is not only cheaper in terms of money spent. The image of a society with the degree of controls necessary to channel the exercise of self-interest into appropriate paths whenever such behavior led to bad results is a terrible one, not only for the surveillance and interference with people’s lives it implies, but for the sweeping aside of personal responsibility it represents.¹⁹²

In the Anglo-American system, community needs are generally only met by engaging bureaucratic mechanisms or by incentivizing private citizens to act in altruistic-like ways by making such action fall within their self-interest.¹⁹³ But making it worthwhile for private citizens to act for the communal good is often extremely expensive.¹⁹⁴

How is communitarianism or altruism cultivated or supported in a society? Recognizing some correlations may help in answering this question. A market-based, absolute land ownership system generally rewards the accumulation of wealth

190. Communitarianism generally emphasizes the importance of collectives and institutions, as opposed to the focus on individuals so common to political philosophy. See *Communitarianism and Education*, THE ENCYCLOPAEDIA OF INFORMAL EDUCATION (2001), <http://www.infed.org/biblio/communitarianism.htm>.

191. Duane Champagne, *Economic Culture, Institutional Order, and Sustained Market Enterprise: Comparisons of Historical and Contemporary American Indian Cases*, in PROPERTY RIGHTS AND INDIAN ECONOMIES, *supra* note 30, at 195, 200 (“[N]orms of economic redistribution remain active in many Indian communities.”).

192. STEVEN KELMAN, WHAT PRICE INCENTIVES?: ECONOMISTS AND THE ENVIRONMENT 39, 41 (1981).

193. *Id.*

194. *Id.*

and cultivates self-interest and egoism.¹⁹⁵ Individual competitors “cannot afford to be overly altruistic or to voluntarily support collective objectives that conflict with [the competitor’s] own gain-seeking.”¹⁹⁶ By contrast, Indian customary systems generally reward the giving away of wealth to others.¹⁹⁷ Accounts of traditional native societies suggest the existence of a community ethic: a caring for each other within tribal units. According to one Cherokee, “[t]he culture of the red man is fundamentally spiritual; his measure of success is ‘How much have I rendered to my people?’”¹⁹⁸ Similarly, a native man from Alaska stated that “our fathers, our forefathers . . . were taught to share, they were taught to help each others [sic] for thousands of years.”¹⁹⁹ In Native Alaskan villages, “[t]raditional rules of distribution ensure that subsistence products are available to every village household.”²⁰⁰ For the Lakota people, an “emphasis was placed on values of giving and sharing, on reciprocity and responsibility, and on the central value of the community as opposed to the Western fixation on the value of the individual.”²⁰¹

One may argue that the Indian customs were no less centered on rewarding self-interest than free market capitalism because honor and prestige directly involves egoism. However, Charles Wilkinson’s research reveals that something deeper than self-interest seems to be undergirding traditional tribal societies. He reports that among the Pacific Northwest tribes “individual wealth acquisition” played an atypically large role, in that it helped identify leaders and conferred prestige on individuals.²⁰² However:

Wealth had another, perhaps more significant, function: it carried with it a high responsibility to the village and en-

195. See Carl Schurz, *Present Aspects of the Indian Problem*, in *AMERICANIZING THE AMERICAN INDIAN* 13–26 (Francis Paul Prucha ed., 1973) (describing the isolation of the individual under capitalism).

196. Ragsdale, Jr. II, *supra* note 161, at 425.

197. Champagne, *supra* note 191, at 200 (“Wealth was accumulated not for economic reinvestment and further accumulation, but rather was distributed and transformed into social prestige, rank, and honor.”).

198. *Id.* at 199.

199. THOMAS R. BERGER, *VILLAGE JOURNEY: THE REPORT OF THE ALASKA NATIVE REVIEW COMMISSION* (1985) (caption next to photograph on unnumbered page between 47 & 48) (quoting Bobby Wells, Native Village of Kotzebue).

200. *Id.* at 56.

201. Tsosie, *supra* note 26, at 285.

202. CHARLES WILKINSON, *THE PEOPLE ARE DANCING AGAIN: THE HISTORY OF THE SILETZ TRIBE OF WESTERN OREGON* 11 (2010).

compassed a philanthropic mission. In addition to providing food to the needy and sometimes paying fines on behalf of the poor, responsibilities included sharing canoes, fishing sites, and off-shore rocks valuable for collecting seagull eggs or harvesting sea lions. Wealthy families sponsored dances and supplied the dancers with regalia, skillfully woven basket caps, and buckskin attire adorned with glistening red woodpecker scalps, abalone shells, and feathers. . . . As [one tribal member] explained, “When you bring your wealth to a ceremony and the dance people put them on, you are helping the dancers, helping the community, keeping the world right.”²⁰³

While the basis for communitarianism or “altruism” among Indian tribes may be the result of many cultural factors, a community relationship to land is part of the Indian worldview—indigenous people “often see themselves as ‘belonging’ to the land or being a part of the land.”²⁰⁴ Furthermore, it seems as though traditional land use rights included what Don Wharton has called a “fiduciary” responsibility, so that, for example, a recognized right in a choice fishing spot carried with it an obligation to provide fish to the tribe.²⁰⁵ If this is so, by logical implication, when the form of right disappears, the particular obligation disappears. Land ownership in the Anglo-American tradition carries with it few, if any, communitarian obligations.

Through its various policies toward the Indians over the past several centuries, the United States government has severed a natural bond between Indian peoples and the land, and has emphasized, instead, legal rights and economic commodities.²⁰⁶ It is at least arguable that Indian values have been disturbed most as a result of the displacement of traditional customs of land tenure, and it may be that broader recognition of customary land use rights would support and cultivate traditional Indian values such as communitarianism.

203. *Id.*

204. Tsosie, *supra* note 26, at 284–85.

205. Telephone Interview with Don Wharton, *supra* note 131.

206. See generally JOSEPH M. PETULLA, AMERICAN ENVIRONMENTAL HISTORY 63–80 (2d ed. 1988) (describing the commodification of Indian-held lands in the United States by pressure from white society).

C. *Cultivating Sustainable Use of Land*

While law and economics scholars may assert that “infinite land interest [of private property] is a low-transaction cost device for inducing a mortal landowner to conserve natural resources for future generations,”²⁰⁷ present society appears not to be conserving resources, but rather to be borrowing heavily from, perhaps even bankrupting, the future.²⁰⁸ Fee owners are concerned with only their own parcel, not only to the detriment of the system as a whole,²⁰⁹ but also to the detriment of future generations. In contrast, usufructuary rights generally presuppose use without excessive diminishment,²¹⁰ such that *destruction* of a resource is not inherently part of the bundle of rights included in a usufruct. Because the maintenance of a land use right requires non-destructive practices, land use rights logically encourage the development of sustainable uses of land. As experience in the present-day United States demonstrates, sustainable use of land is not inherent in a system of unqualified ownership.²¹¹

Even if one contemplates a net loss in productive efficiency if tribes more broadly and formally recognize their customs of land use rights, the loss is arguably mitigated by the preservation of resources and cultivation of sustainable practices encouraged by a usufructuary system. Indian tribes are, in general, very attentive to natural resource preservation—nearly every tribe has well-staffed natural resource offices, and tribes are now participating in forums that “set regional, national, and even international policy on the environment.”²¹² This is,

207. Ellickson, *supra* note 2, at 1368.

208. See generally EDWARD O. WILSON, *THE FUTURE OF LIFE* 22–41 (2002) (noting that population and income growth increase general scarcity and that “[t]he constraints of the biosphere are fixed”); Ragsdale, Jr. II, *supra* note 161, at 433 (“The failure to establish and maintain a balance between population, consumption, and the renewable resource base means that eventually a collision—possibly fatal—will occur.”).

209. See *supra* Part III.A.

210. See *supra* notes 8–11 and accompanying discussion.

211. See, e.g., Craig Anthony Arnold, *For the Sake of Water: Land Conservation and Watershed Protection*, 14 *SUSTAIN: J. OF ENVTL. & SUSTAINABILITY ISSUES* 16, 19 (2006) (“An estimated 70-90% of natural riparian vegetation, vital to maintaining the integrity of riverine-riparian ecosystems and biodiversity, has already been lost or is degraded due to human activities nationwide.”).

212. WILKINSON, *supra* note 16, at 317–28. Some tribes, of course, may be unable to resist the economic pressure to ignore environmental preservation. See Kevin Kamps, *Environmental Racism, Tribal Sovereignty and Nuclear Waste*,

of course, not a recent phenomenon. As Gifford Pinchot wrote regarding Algonquin tribes he encountered: "Centuries before the Conservation policy was born, here was Conservation practice at its best. The natural resources on which these Indians depended . . . were being handled with foresight and intelligence."²¹³ More recently, John Ragsdale, Jr., has described the Hopi Indian society as a veritable symbol of sustainable, "stable-state" existence: "In the traditional society of the Hopi . . . the basic focal point was not expansion, but stability, balance, and harmony with the harsh and demanding environment of the Arizona desert. The individuals and institutions of Hopi society aspired toward homeostasis."²¹⁴

In sum, federal policy should encourage and assist tribes that are interested in developing legal regimes according to their traditional ways, which could result in the cultivation and preservation of non-economic tribal values such as a focus on sustainable land management; a holistic perspective regarding the earth and humanity's place on it; and cultural values like communitarianism. These non-economic values might also contribute positive externalities well beyond the borders of Indian country.

IV. PRACTICAL CHALLENGES AND OPPORTUNITIES

Leaving theory behind, there are various practical challenges facing tribes wishing to take advantage of the potential economic and non-economic benefits of more fully recognizing their customary land law. Section A examines some of these challenges, as described by legal experts working in the field. Section B considers some of the present-day opportunities for broader recognition of customs of land use rights. Lastly Section C examines the unique situation in Hawaii, where the Native Hawaiians are in a potentially ideal position to adopt a formal system of use rights based on customary law, due to proposed congressional legislation which promises to lay the foundations for the creation of a new Native Hawaiian governing entity.

NUCLEAR INFO. & RES. SERV. (Feb. 15, 2001), <http://www.nirs.org/factsheets/pfsejfactsheet.htm>.

213. GIFFORD PINCHOT, *BREAKING NEW GROUND* 25 (1947).

214. Ragsdale, Jr. II, *supra* note 161, at 442.

A. *Practical Challenges to Recognizing Tribal Customs of Land Use Rights*

A primary challenge faced by tribes in reaping the potential benefits of broader recognition of customary land tenure is the fact that vast amounts of former reservation land are currently in private hands, held by both Indians and non-Indians, sometimes in a checkerboard pattern of ownership throughout the boundaries of the reservation.²¹⁵ In 1997, Indian tribal trust land comprised about 45.7 million acres, compared with over 10.1 million acres of individually held allotments still in trust.²¹⁶ In some cases large swaths of land within a reservation are held by non-Indians in fee.²¹⁷ Without legislation providing more complete sovereignty over former reservation land, which is unlikely, the only way for some tribes to consolidate a land base for effective administration of their laws is to purchase the land. Some tribes can afford to pursue land acquisition, but many others are far too cash-poor.²¹⁸

Another challenge to expanding recognition of customary land use rights is exemplified by the experience at Southern Ute, where tribal land is held as an assignment by five to ten family groups or clans, according to traditional home sites.²¹⁹ Subsurface rights to these lands were reserved by the tribe.²²⁰ However, when oil companies wanted to drill under certain assigned lands, the companies at first went to the assignees and paid those individuals for the right to drill.²²¹ The assignees had no compensable interest in the subsurface, but they did potentially face the inconvenience of surface impact.²²² The tribe solved the problem by allocating to the affected assignees part of the “surface use compensation” paid by the drilling company, although controversy remained over how much should be given to assignees, and whether it should differ according to whether the land at issue was undeveloped or improved upon.²²³

215. See GETCHES ET AL., *supra* note 16, at 10, 22.

216. *Id.* at 22.

217. *Id.*

218. WILKINSON, *supra* note 16, at 337.

219. Telephone Interview with Thomas Shipps, Partner, Maynes, Bradford, Shipps & Sheftel (Sept. 16, 2010). Shipps has represented the Southern Ute tribe since 1979.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

An underlying challenge facing tribes seeking to enjoy the potential benefits of relying on their traditional customs of land use is, of course, whether the customs can be meaningfully incorporated at all in a modern context, when subsistence practices cannot wholly sustain a society. John Fredericks III, an attorney and member of the Mandan, Hidatsa, and Arikara Nation of North Dakota, points out that there is a fundamental inconsistency between land rights in service of supporting a community through subsistence uses and generating wealth through commercial development of the land.²²⁴ The reality of the modern world makes an economy based exclusively on traditional subsistence uses problematic—if not impossible—and likely necessitates other land uses such as the commercial development of natural resources.²²⁵ While traditional customs of land tenure served to reinforce Indian value systems, it is an open question whether these customs can be meaningful in the context of land uses that include modern forms of resource exploitation. The answer will surely vary from tribe to tribe.

This Comment proceeds according to the possibility that traditional tribal relationships to the land can persist despite the necessity of commercial land uses that generate economic growth for modern tribes and that perhaps the traditional relationships to land can, through broader recognition of customary land rights, help tribes develop new uses that are economically productive but not destructive to the land. With this vision in mind, the following section examines some of the opportunities appearing in the present-day that allow tribes to expand their traditional customs within the modern context.

B. Present-Day Opportunities

Some commentators had previously viewed the Bureau of Indian Affairs (“BIA”), which traditionally wielded “tremendous power over Indian resource allocation,”²²⁶ as the biggest hurdle facing tribes in their quest for self-sufficiency. Transaction costs for tribal development skyrocketed whenever tribal decisions had to be approved by the BIA, and “[l]imits on alienation, leasing, and bequests [made] it difficult for tribes and

224. Telephone Interview with John Fredericks, III, Partner, Fredericks, Peebles & Morgan (Sept. 23, 2010).

225. *Id.*

226. ANDERSON, *supra* note 30, at 167.

individual Indians . . . to organize their property into efficient units of production.”²²⁷

However, much has changed. For example, as recently as the 1990s, it was necessary for a BIA official to endorse the White Mountain Apache Land Board’s decisions,²²⁸ whereas now, BIA involvement is only “advisory.”²²⁹ Another example of major changes in federal Indian policy is the role of the Department of Housing and Urban Development (“HUD”). According to Thomas C. Wright, HUD’s Director of the Office of Loan Guarantees, who works with Indian tribes and individuals to get lending secured for Indian homebuyers, some tribes are beginning to use their assignment provisions to provide securable land for their members to use in applying for mortgage financing.²³⁰ Based on an opinion letter to the Mashantucket Pequot tribe generated by the Interior Department Solicitor’s Office in 2005,²³¹ HUD proceeds under the view that as long as land assignments do not act as an encumbrance on the “master lease” from the tribe to the tribal housing authority, such assignments may be used to get title insurance for lending purposes.²³² Tribal land assignments require no approval by the Interior Department because they are “temporary use” rights assigned by a tribe to tribal members.²³³

One way this development is good for Indians is that, unlike leases, land use assignments have no finite term and less overall restrictions. Wright emphasizes that a tribe must “have its house in order” to take advantage of this development.²³⁴ The first Pequot home loan through HUD, grounded upon a land assignment, was executed over the summer of 2010, so the process is very new.²³⁵ Other tribes are discussing the model, and Wright predicts that a technical advancement, allowing tribes direct access to view titles via an electronic BIA

227. *Id.* at 167–68.

228. Cooter & Fikentscher II, *supra* note 42, at 519.

229. White Mountain Apache Land Code, § 2.1 D (2005), *available at* <http://www.wmat.nsn.us/Legal/Land Code.pdf>.

230. Telephone Interview with Thomas C. Wright, Director, Office of Loan Guarantee, U.S. Dept. of Hous. & Urban Dev. (Sept. 24, 2010).

231. Letter from Christopher B. Chaney, Assoc. Solicitor, Div. of Indian Affairs, U.S. Dept. of the Interior, to Henry J. Sockbeson, Office of Legal Counsel, Mashantucket Pequot Tribal Nation (May 10, 2005) (on file with University of Colorado Law Review).

232. Telephone Interview with Thomas Wright, *supra* note 230.

233. Letter from Christopher B. Chaney, *supra* note 231, at 2.

234. Telephone Interview with Thomas Wright, *supra* note 230.

235. *Id.*

database, will further promote growth in tribal control of land use for housing needs and homeownership in particular.²³⁶ Lenders are apparently still trying to figure all of it out, but Wright notes that HUD has already shifted into a role of educating private lenders and government staff, as well as Indian purchasers who often face a steep learning curve when it comes to the intricacies of home ownership.²³⁷ In general, Wright sees his role as facilitating an “interdependent partnership” between HUD and tribes, and that HUD “tries to make things as easy as possible” for tribes in configuring tribal policies in order to maximize mortgage lending to Indians by outside parties.²³⁸

With respect to its more traditional role of issuing block grants to tribal housing authorities, HUD attorney Melissa Pingley reports that the “monitoring” (or oversight) responsibility is still a part of her job, but in a reduced form.²³⁹ HUD is out of the business of approving leases issued by the tribal housing authorities, and primarily seeks compliance with the basic policies set out in the Native American Housing Assistance and Self-Determination Act of 1996 (“NAHASDA”).²⁴⁰ HUD also conducts “negotiated rulemaking” with a committee of tribal leaders, pursuant to NAHASDA, through which the specific regulations governing application of the Act are drafted and accepted.²⁴¹

The opportunities to expand tribal customs of land use rights represented by the shifting landscape of federal agency policy are profound. However, none of these shifts can quite compare to the singular opportunity Native Hawaiians may soon have: the chance to form a new sovereign government.

C. *The Special Opportunity of Native Hawaiians*

Native Hawaiians have had no formal political identity since U.S. agents illegally overthrew Hawaii’s Queen Lili’uokalani in a power grab in 1893.²⁴² Now, after years of po-

236. *Id.*

237. *Id.*

238. *Id.*

239. Telephone Interview with Melissa Pingley, Attorney, Region 8 Office of Counsel, U.S. Dept. of Hous. & Urban Dev. (Sept. 20, 2010).

240. 25 U.S.C. §§ 4101–4243 (2006).

241. Telephone Interview with Melissa Pingley, *supra* note 239.

242. Act of Nov. 3, 1993, Pub. L. No. 103-150, 107 Stat. 1510 (1993) (joint resolution apologizing to Queen Lili’uokalani and acknowledging that the acts of U.S. agents in Hawaii in 1893 were “illegal”).

litical negotiation, the Native Hawaiian Government Reorganization Act (“Akaka Bill”)²⁴³ represents an unprecedented opportunity for a Native American population to form a new governing entity. The Bill, if enacted, would recognize Native Hawaiian sovereignty through a process resulting in federal recognition of Native Hawaiians as a distinct community, akin to Indian tribes, and the creation of a Native Hawaiian government designed to co-exist with the State of Hawaii.²⁴⁴ While ethnologically distinct from Mainland Indians,²⁴⁵ Native Hawaiians have experienced similar displacement and have lived with enormous and unjust hardships for over a century.²⁴⁶ Many congressional enactments have been passed providing benefit programs for Native Hawaiians, taking it as given that the Indian Commerce Clause of the U.S. Constitution provides federal authority to regulate the affairs of Native Hawaiians.²⁴⁷ As of this writing, the Bill remains well-supported, but did not clear the Senate during the 111th congressional session due to Senator Akaka’s resistance to making amendments requested by the sitting Governor and Attorney General of Hawaii.²⁴⁸

Native Hawaiians had a complex and stable land tenure system prior to Western contact that incorporated a form of use rights and recognized no absolute private ownership.²⁴⁹ Traditionally, the high chief (*ali’i ‘ai moku*) of a Native Hawaiian kingdom would distribute land to lower chiefs, who in turn distributed it to their followers, all subject to “revocation at will.”²⁵⁰ Within the well-defined boundaries of a slice of land

243. H.R. 2314, 111th Cong. (2010).

244. GETCHES ET AL., *supra* note 17, at 925–26.

245. Kainoa Horcajo, *Hawaiian History*, OFF. OF HAWAIIAN AFF., <http://www.oha.org/pdf/HwnHistoryTimeline.pdf> (last visited Sept. 26, 2010) (describing Hawaiian descendents as Polynesian).

246. See SHAWN MALIA KANA’IAUPUNI ET AL., *INCOME AND POVERTY AMONG NATIVE HAWAIIANS* (2005).

247. *Native Hawaiian Government Reorganization Act of 2009: Hearing on S. 1011 Before the S. Comm. on Indian Affairs*, 111th Cong. (2009) (statement of Sam Hirsch, Deputy Assoc. Att’y Gen., U.S. Dept. of Justice).

248. See, e.g., Erin Kelly, *Native Hawaiian Bill Passed by U.S. House, Awaits Senate Vote*, HONOLULU ADVERTISER (Feb. 24, 2010), <http://the.honoluluadvertiser.com/article/2010/Feb/24/ln/hawaii2240339.html>; Gordon Y.K. Pang, *Lingle, Bennet Objections Stand*, HONOLULU ADVERTISER (Feb. 24, 2010), <http://the.honoluluadvertiser.com/article/2010/Feb/24/ln/hawaii2240340.html>. The Governor is concerned that the Bill currently affords full native sovereignty by default, which would kick in prior to final negotiations.

249. MacKenzie, *supra* note 48, at 3–4.

250. *Id.* (describing that the land could be taken back at any time).

called an *ahupua'a*, the followers of the local chiefs had “liberal” use rights to the natural resources, regulated by rules designed for conservation.²⁵¹ Even the high chief did not own the land, but served as a kind of “trustee” of the people who, notably, were free to move to another *ahupua'a* if they disliked the local chieftain.²⁵²

While Native Hawaiian customary law is formally recognized as part of the common law of the State of Hawaii,²⁵³ the new Native Hawaiian government would have the ability to thoroughly incorporate customary law, especially with respect to land tenure. Under provisions of the current Bill, a nine-member Commission of Native Hawaiians appointed by the Secretary of the Interior will prepare a provisional membership roll.²⁵⁴ The adult membership will then elect an interim Council and vote on a constitution, and once officers are elected under the constitution, the Secretary of the Interior will certify or “reaffirm” the Native Hawaiian government.²⁵⁵ The new entity will enter into three-way negotiations with the State of Hawaii and the U.S. government to establish land boundaries and jurisdictional parameters.²⁵⁶

The framework set out by the Akaka Bill could put Native Hawaiians in a position to learn from the experience of mainland Indians, and to develop a formal, codified land tenure system expressly incorporating native Hawaiian customs of land use rights.²⁵⁷ For example, the Native Hawaiian government would have the prerogative to put the entirety of its land into federal trust, or not. Depending on the outcome of the three-way negotiations, the Native Hawaiian government may be able to exercise broad civil and criminal jurisdiction over its territory and members.²⁵⁸ Once the Interior Secretary certifies the new government, Native Hawaiians could presumably also have the opportunity to negotiate the extent to which their decisions must be reviewed by the BIA.

251. *Id.*

252. *Id.* at 4–5.

253. *Pub. Access Shoreline Haw. v. Haw. Cnty. Planning Comm'n*, 903 P.2d 1246, 1258 (Haw. 1995) (declaring that the Hawaiian Constitution stipulates that “customary and traditional rights” are protected as Hawaiian common law).

254. GETCHES ET AL., *supra* note 17, at 926.

255. *Id.*

256. *Id.*

257. Depending on what lands are ceded back to the Native Hawaiians, the new government may have to negotiate how to handle non-native landowners.

258. GETCHES ET AL., *supra* note 17, at 926.

While tribes on the mainland must overcome the resistance of entrenched interests to alter the landscape of property law now operating in Indian country, Native Hawaiians may soon have an unprecedented opportunity to incorporate their customs into the organic laws of a new sovereign government within the United States. Native Hawaiian customary land tenure, and the Hawaiian political condition,²⁵⁹ is largely analogous to that of mainland Indian tribes. Hopefully, if the Native Hawaiians have the promised opportunity to form a new government, they will carefully consider the economic and non-economic values inherent in their customs of land use rights, as analyzed in this Comment, and make a powerful choice to place these customs at the center of their political and legal identity as a new nation.

CONCLUSION

Nations, courts, and international human rights tribunals are increasingly coming to the conclusion that “[i]n many cases . . . land policy will best be served by recognizing and guaranteeing customary land tenure arrangements.”²⁶⁰ Indigenous peoples developed workable land tenure systems over millennia. This Comment has attempted to show how tribal customs of land use rights can be economically efficient even in a modern context and can simultaneously help preserve Indian cultural identity by cultivating core, non-economic values inherent to the Indian worldview. Indian land use is also tied to local ecology in a way almost unknown to European colonizers and their descendants. By encouraging and supporting tribes to breathe life into their traditional customs regarding the land, the earth may become healthier, which would be of great benefit to all human populations. Tribes have a long way to go in undoing the harm caused by the legal systems forced on indigenous groups under the guise of paternalistic benevolence. Broader recognition of their customs of land use rights may be one factor that helps Indian tribes become, once again, strong, self-sufficient communities.

259. *Id.* at 917.

260. Thomas T. Ankersen & Thomas K. Ruppert, *Defending The Polygon: The Emerging Human Right To Communal Property*, 59 OKLA. L. REV. 681, 684 (2006) (citing KLAUS DEININGER, WORLD BANK GRP., *LAND POLICIES FOR GROWTH AND POVERTY REDUCTION* xlv (2003)).