Live, Work, Govern Using Diné Fundamental Law

On the following pages is a law journal article published by the American Bar Association in *The Urban Lawyer,* which is the national law journal on local government law and urban legal affairs. ©2025, Vol. 53, No. 1.

It is a collaborative effort of retired Navajo Nation public servants, and law students and lawyers whose fields are indigenous law and policy, cooperative law, and sustainability development law.

INDEX

Introduction ..... 18 - 23
I. Matriarchies and Diné Fundamental Law..... 23 - 33
II. Disentangling Diné Culture from Reservation Leases and Permits .....33 – 41
III. Navajo Nation Local Governance Act .....41 – 50
IV. Integrated Resource Management Plans Based on a Tribal Vision ..... 50 – 66
V. Developing Unique Entities ..... 66 – 73
VI. Relatedness of Everything .....71 – 76
VII. Off-Reservation Characteristics to Be Avoided .....76 – 78
VIII. Tribal Land Use Assignments and Customary Trusts.....78 – 81
IX. Navajo Nation Wholly Owned Entities .....81 – 85
X. Private Incorporated Entities .....85 – 87
XI. Cooperatives .....87 – 91
XII. Infrastructure, Energy, and Water .....91 – 96
XIII. Funding for Unique Tribal Structures.....96 – 99
Conclusion .....99 – 100

Live, Work, Govern Using Diné Fundamental Law

Herb Yazzie, Raymond Deal, Josephine Foo, Michael Hamersky, Roman Bitsuie, Gloria Dennison, Thomas Bourgeois, Therese Tuttle, Samantha Blend, Lauren Palmer & Elena Bonetti*

*Herb Yazzie served as Chief Justice of the Navajo Nation Supreme Court from 2005 to 2015 and formerly was Navajo Nation Attorney General and Chief Legislative Counsel.

Raymond Deal is a Marine Veteran and Diné Hataałi Association certified traditional counselor.

Josephine Foo served as attorney in the Office of the Chief Justice, Navajo Nation Supreme Court for eight years and is Executive Director of Indian Country Grassroots Support.

Michael Hamersky is the Climate Change and Land Use Policy Fellow at the Elisabeth Haub School of Law at Pace University, where he received his LLM in environmental studies. He is also an adjunct professor at Fordham University School of Law, where he received his JD.

Roman Bitsuie is a former Navajo Nation Council delegate and served as Executive Director of the Navajo-Hopi Land Commission office for eighteen years and Coordinator of the Navajo Peacemaking Program for six years.

Gloria Dennison is a matriarch and community leader from Naschitti.

Tom Bourgeois is Director of Policy Analysis at the Pace Land Use Law Center and Senior Advisor to the United States Department of Energy's New York–New Jersey Onsite Energy Technical Assistance Partnership.

Therese Tuttle has specialized in the law of cooperative corporations for over 23 years. She represents and works with cooperatives in the areas of agriculture, housing, energy, food, and employee-owned businesses.

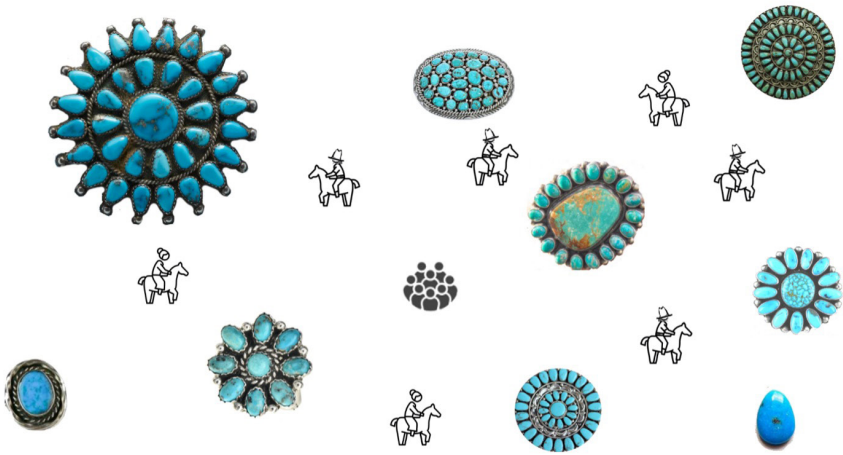
Samantha Blend is a recent graduate of the Elisabeth Haub School of Law at Pace University where she obtained an advanced certificate in environmental law. She was the Editor-in-Chief of the *Pace Environmental Law Review*.

Lauren Palmer is a student at the Elisabeth Haub School of Law at Pace University. She is a member of the *Pace Environmental Law Review* and is a legal scholar at the Pace Land Use Law Center.

Elena Bonetti is a lawyer who graduated from the University of Bologna (Italy). She recently received her LLM from the Elisabeth Haub School of Law at Pace University.

Thank you, Crystal Deschinny and Tamara Hilmi Sakijha.

This article is made possible by the generous support of the American people through the United States Department of Agriculture (USDA) via an award from the National Cooperative Business Association CLUSA International (NCBA CLUSA) to Indian Country Grassroots Support in collaboration with the Elisabeth Haub School of Law at Pace University. The article's contents are the responsibility of the award recipients and do not necessarily reflect the views of USDA, the United States Government, or NCBA CLUSA.



Introduction

Turquoise has long been used in Diné (Navajo) jewelry, arranged in clusters. When worn by women, they proclaim their familial status as matriarchal leaders of many generations. Men and women leaders in a unit may wear clustered jewelry, with the matriarch having the most ornate arrangement to show her status. The matriarch is responsible for disciplining, nourishing, and ensuring harmony through passing down generational knowledge of how their unit has approached living, working, and self-governing. Riders, called pointers (*naalchidi*), would connect the units. Units spoke with and learned from one another through these riders who are both men and women.

The inner workings of each unit are each unique and not discussed outside Diné families. They are considered to be sacred knowledge, not to be shared with outsiders, for many, many reasons

linked to nearly 175 years of broken promises of friendship, tranquility, prosperity, and support by the United States, which it seemed, was just to lull tribal members into peacefulness while the real plan was to drive them out. In 1863, the units were destroyed wholesale in a U.S. Army-led campaign. The Diné people in every community that could be found were rounded up, and those surviving brutal captivity returned to a highly regulated reservation in which Diné land-based cultural life has been steadily dismantled, generation by generation, for now 150 years.

This article is about how the unique Diné units may be revived using the same legal framework that dismantled them, with the legal profession taking the lead from indigenous law. The article's primary task is to begin a conversation on culturally faithful structures and entities that can be innovated using existing legal tools, without compromising indigenous laws.

The Navajo Treaty of 1850 promised the Diné people protection and "permanent prosperity and happiness" if the Diné allowed the United States to establish a military and trading presence through an agency office, forts, and trading posts in their region.[1] The first soldier fort was built at Fort Defiance in 1850, and the first trading post was built adjacent to Fort Defiance. Practically from the moment of their establishment, U.S. military and trading presence seemed to exist to ensure the dismantling of all traces of Diné civilization. Destruction was relentless, one Diné unit at a time in the "troubled period," *náhondzoodáá'*,[2] and then all units rapidly in 1863, when the U.S. Army cleared out all Diné, and other area tribes, in a brutal scorched earth campaign, torching homes and farms, destroying all waterholes, taking all livestock "when every living being became an enemy that finished in death," *t'aa ałtso anaa' silii'*.[3]

After near-starvation and a promise that they would be safer and well-fed under U.S. Army protection, thousands of Diné surrendered at Fort Defiance in the winter of 1863 and were force-marched over 300 miles to a makeshift "reservation" at Bosque Redondo adjacent to Fort Sumner. Bosque Redondo came to be called *H'wéeldi* or the place of horrors. Nearly 10,000 Diné were

1. Treaty Between the United States of America and the Navajo Tribe, Sept. 9, 1849, 9 Stat. 974.
2. Nancy C. Maryboy & David Begay, *The Navajos of Utah*, *in* The History of Utah's American Indians 280 (Forrest S. Cuch ed., 2000).
3. *Id.*

imprisoned at *H'weeldi* for five years, and fewer than two-thirds survived.[4]

The original lands of the Diné—Dinétah—are vast. Dinétah is the sacred area encompassing a large area of northwestern New Mexico, southwestern Colorado, southeastern Utah, and northeastern Arizona, including the great rivers—the Green River, Colorado River, Little Colorado River, and San Juan River. Dinétah is generally marked by the four Sacred Mountains corresponding to the four cardinal directions—Blanca Peak to the east, Mount Taylor to the south, San Francisco Peaks to the west, and Hesperus Mountain to the north.[5] There are two other sacred peaks—Gobernador Knob where Changing Woman (the Matriarch) came into being, which is the heart of Dinétah; and Huerfano Mountain *Dził Ná'oodiłii*, the home of *Áłtsé Hastiin* (First Man) and *Áłtsé Asdzą́ą́* (First Woman), which is the only peak of all the sacred peaks that lies inside the current federally established reservation. Dinétah is the place of emergence, where the Twins Monster Slayer and Born-for-Water played, a blessing from the Holy People. Within this area, the land is also described by sacred sites, such as the sacred female mountain, Black Mesa, *Dziłíjiin*; the sacred male mountain, *Ch'óshgai*; the head of *Diné bikeyah*, the male Navajo Mountain, *Naatsis'áán*; and the protective head of the cradleboard, Rainbow Bridge, *Tsé'naa Na'ní'áhí.* Dinétah has the literal translation of "Among the People," meaning relationships and blessings, not boundaried territory.

> Land did not belong to humans in the beginning, and we always acknowledge that. The homelands are blessings for us, yet we do not own them. Unlike how non-Indigenous people approach land, land is not property, nor are the resources within land to be commodified. Land is the giver. If we take care of it, the land gives us back everything.[6]

The destruction of Diné communities by the United States, and the establishment of the boundaried Navajo reservation together with numerous private and governmental land parcels, effectively terminated the free movement and open practice of Diné civilization.

4. *Id.*

5. The cardinal directions are always recited following the path of the sun, *A shábik'ehgo.*

6. Dinétah, *Dine Customary Land Management*, INDIAN COUNTRY GRASSROOTS SUPPORT (2022), https://dinelanduse.org/custom/#dinetah (quoting multiple Diné elders).

Diné are fiercely independent, highly individualistic yet also invested in belonging to units. *T'áá hwó' ají t'éego* is translated as "it's up to you, your individual efforts, hard work, and determination." More apt is "it's up to us." This involves all of us, including Mother Earth working with us, and every living being who is aware that actions have an effect on the balance of one another. This includes speaking with civility, and always managing our resources with an understanding that others will need to use them after us. *T'áá hwó' ají t'éego* also means "you decide; you decide whether to comply, you decide whether to be self-sufficient, you decide whether to learn." Once a decision is made, it is *Ííshjąshį' bihwedínoota,'* "let's try this. Let's see where it takes us," or "if it is to be, it is now up to me/us." The duty of individuals to choose to act in balance with other beings, and to arrange for life in an integrated manner, is fundamental.

Herb Yazzie was Chief Justice of the Navajo Nation Supreme Court for more than a decade. In his journeys across the Navajo Nation, he is invariably asked if Diné civilization—manifested through its values and principles (*bitsé siléí*)—can be revitalized in place of reservation laws that were put in place by the U.S. federal government more than a century ago and that today have even been adopted by the Navajo Nation's own tribal government. In the late 1990s, Yazzie had been part of a task force assembled by Edward T. Begay, the Speaker of the 19th Navajo Nation Council, to explore engrossing *bitsé siléí* into modern tribal law.[7] Other group members included Laura Wallace, Henry Barber, Mike Mitchell, and the late Albert Hale. In 2002, the Navajo Nation Council added a remarkable chapter to Title 1 of the Navajo Nation Code (N.N.C.), entitled "The Foundation of the Diné, Diné Law and Diné Government," with the verbal *bitsé siléí* not included in the writing, but plainly declared as "The Foundation of Diné Law," *Diné Bi Beehaz'áanii Bitse Siléí*.[8] *Beehaz'áanii* means "this is what holds it together" and *bitse siléí* means "principles." This foundational portion of the 2002 law, pointing to the verbal *bitsé siléí,* is widely referred to as the Diné Fundamental Law, hereinafter referred to as DFL in this article.

7. Kenneth Bobroff, *Diné Bi Beenahaz'áanii: Codifying Indigenous Consuetudinary Law in the 21st Century*, 5 Tribal L.J. 1, 4 (2005).

8. Navajo Nation Council, Res. No. CN-69-02 (2002); *see* Diné Bi Beehaz'áanii Bitse Siléí, Declaration of the Foundation of Diné Law, Navajo Nation Code Ann. tit. 1, § 201 (cited within Navajo Nation as 1 N.N.C. § 201).

Invariably, Yazzie would explain that the enacted acknowledgment of the *bitsé siléí* points the way for the people themselves to create their own local governance tools. When asked what a governing system under DFL would look like, he explained that it is whatever each community decides it to be, so long as the values and principles calling for relational balance among living beings, the *bitsé siléí*, are at their foundation. The governing systems should include the roles and knowledge built up across generations, especially the familial systems that are the center of Navajo Nation existence.

The Diné phrase for its traditional unit is *t'ááłá' k'ǫ'diltłi'dóó biyaadahoo'á'igíí*, which means "reared around one fire" or sometimes translated as "immediate family," which has no correlation to the same phrase in English. This familial group, including its child members, has "Diné interests," *bídadéét'i'igíí*, in the management or governance of the group and land as a whole. The federal government's use of blood quantum[9] to define tribal membership was not traditionally used. You would be a member of a clan that embraced you, no matter your blood quantum. The foundation is on mutual choice. A modern Diné government—central or local—based on such a foundation has not yet been given an opportunity to form.

The word "government" is unexpectedly difficult to explain. It is a catchall word that means different things depending on the purpose for which the government was formed. The think tank Nagrika, which creates knowledge to enable citizens in small cities to shape "unique, authentic, and resilient cities,"[10] writes, "Governance is when someone guides us, helps in regulating ourselves, and gives us a structure to operate within."[11]

Driving across the Navajo Nation, one does not easily find matriarchal-centered units or clusters or rings of settlements surrounded by farms and livestock. One will see scattered single-family homes, often of shabby construction and trailers with no paved roads leading to them, alongside housing projects, with rarely any signage for local enterprise, gardening or farming, or even

9. *See Tribal Enrollment Process*, DEP'T OF THE INTERIOR, https://www.doi.gov/tribes/enrollment (last visited June 4, 2024).

10. *About Us: How Do We Do It?*, NAGRIKA (2024), https://www.nagrika.org/about.

11. *Nagrikal: Citizens Writing for Small Cities, Governance as Concept*, NAGRIKA (2024), https://www.nagrika.org/nagrikalarticles/governanceconcept.

traces of grazing livestock. Decades of exploitation have left deep scars that crisscross the beautiful canyons and plains. Unseen and operating in shadows, separated by land use regulations that work against Diné clan bonds, matriarchal units informally persist.

We briefly discuss the Diné people's pre-colonized way of life and examine how their historical trauma has culminated in a reservation system that is inconsistent with Diné Fundamental Law. Additionally, we discuss existing legal tools and structures—such as integrated resource management plans, unique tribal entities, and cooperatives—to analyze how existing legal mechanisms can be utilized without compromising the immutable character of DFL.

I. Matriarchies and Diné Fundamental Law

Traditional Diné law recognizes the matriarch-led group as the primary member unit alongside other units of Five-Fingered Beings. Pointers, *naalchidi*, rode frequently between the units, who would only temporarily hold those roles. Matriarchs embody mutual nurturing; *naalchiidi* embody problem-solving beyond the communal group sphere. Such roles in Diné culture are dependent on ability to perform. There is no entitlement to these roles. The matriarch's role is to ensure the physical wellness, cohesion, and capable functioning of the unit as a team, which includes training other matriarchs who help her and who may replace her in future. The ultimate nurturer of everyone in the unit, the matriarch would further function as the unit's capable disciplinarian. Groups arrange themselves, and choose their leaders—traditionally, with women at the center. A well-functioning unit may have multiple matriarchs whose children are raised together and continue teamwork in their generation, *ahił ná'aníish,* always in informal arrangements without governmental support, as the matriarchy is not a legally recognized structure (yet).

In 1980, the Navajo Nation Supreme Court (NNSC) emphasized the matriarchal role in keeping a unit together, requiring that land use permits remain in the hands of the mother, who was the nurturer of the children and was actually using the land.[12] In 2007, the court explained that Diné women have an elevated role and authority. They are "central to the home and land base. They are the vein

12. Johnson v. Johnson, No. A-CV-02-79, 1980 Navajo App. LEXIS 14, at *9 (Navajo Apr. 11, 1980).

of the clan line . . . . This is why the women are attached to both the land base and the grazing permits."[13] Elders emphasize that matriarchal authority is not gender discrimination. It is simply a role that is taken on that must embody complex qualities.

Under DFL, you are a member of a clan that embraces you, no matter your blood quantum. Relations are by mutual choice. Smaller groups may form, distinct from the matriarch. For intergroup problem-solving, the communal unit, rather than individuals, would be the member unit with *naalchidi* speaking for them. In 1978, the NNSC affirmed that the Diné "family" or familial unit are members of a household, whether or not related by blood.[14]

The crucial role of women is expressed in the principles established by White Shell Woman and are commonly referred to as *Yoolgaii Asdzaan Bi Beehazaanii*. These principles include *Iina Yesdahi* (a position generally encompassing life; heading the household and providing home care, food, clothing, as well as child bearing, raising, and teaching); *Yodi Yesdahi* (a position encompassing and being a provider of, a caretaker of, and receiver of materials things such as jewelry and rugs); *Nitl'iz Yesdahi* (a position encompassing and being a provider of and a caretaker of mineral goodness for protection); and *Tsodizin Yesdahi* (a position encompassing spirituality and prayer). For the most part, Navajos maintain and carry on the custom that the maternal clan maintains traditional grazing and farming areas.[15]

A notion that emphasizing matriarchs might be seen as discrimination between genders stems from a view of the role as also a property owner, in which land use permits are viewed, under Anglo American concepts, as personal or real property and not what they traditionally are—a familial duty and a unit role. Navajo Nation tribal statutes have long conformed to Anglo-American definitions of property and family, in spite of cultural differences. They have unnecessarily internalized the colonized conception of family and land commodification while, in practice, Diné families resist making wills concerning leases and permits, and are hesitant to probate their familial leases and permits upon the death of an elder. Such probate will inevitably result in fragmentation. Not conforming to

13. Riggs v. Attakai, No. SC-CV-39-04, 2007 Navajo Sup. LEXIS 15, at *4–5 (Navajo June 13, 2007).
14. Estate of Benally v. Benally, 1 Nav. R. 219, 219 (Navajo July 7, 1978).
15. *Riggs*, 2007 Navajo Sup. LEXIS 15.

legalities inevitably leads to a myriad of problems in the family's future use of their land.

The reason for tribal government taking on Anglo American concepts at the expense of tribal culture may be traced to the Navajo Treaty of 1868 (1868 Treaty). Signed by twelve Diné men assumed by the United States to be chiefs or headmen, the tribal signors pledged that the tribe would "compel their children, male and female, between the ages of six and sixteen years, to attend school" to "insure" their civilization.[16] It was not immediately grasped how this treaty provision would be used to ethnically cleanse Diné culture and language.

The *naalchidi* Manuelito was one of the 1868 Treaty signatories. When after its signing thousands of Diné survivors at *H'wéeli* gathered to begin their return journey to the portion of Dinétah to which they would be confined, Manuelito is said to have raised his arm westward, saying:

> See where my arm is extended. We are going back to our ways of life. What we have heard from the federal government is that we are going to learn their ways. We are going to learn their language, and it is written in the Treaty. But one thing I want you to understand, we must never forget our Navajo ways, our language, and our ceremonies. This is what connects us to our Navajo world.[17]

After they reached the newly established Navajo reservation, the Indian Agent, backed by the U.S. Army, began snatching Diné children and transporting them hundreds of miles to U.S. government or Christian missionary-run boarding schools. The system of boarding schools was an unsafe system with "genocidal impact" that sought to ethnically cleanse Native American culture and language under a policy to "kill the Indian, and save the man."[18] In one

16. Treaty Between the United States of America and the Navajo Tribe of Indians, June 1, 1868, 15 Stat. 667 [hereinafter 1868 Treaty].

17. Interview with Raymond Deal, Traditional Counselor, Diné Bá Álchíní Yił Ádaaní Navajo Family Voices (Feb. 29, 2024).

18. A phrase in the speech of Captain Richard Henry Pratt, this line was delivered in 1892 during the National Conference of Charities and Correction, held in Denver, Colorado. In that speech Pratt described his philosophy of assimilation, which had been central to the development of the Carlisle Indian School (founded in 1879) and other boarding schools across the country and which aimed to "civilize" and "Americanize" the Indian. *Official Report of the Nineteenth Annual Conference of Charities and Correction* 46–59 (1892), *reprinted in* Richard H. Pratt, "The Advantages of Mingling Indians with Whites," Americanizing the American Indians: Writings by the "Friends of the Indian" 1880–1900, at 260–71 (Cambridge, Mass.: Harvard University Press, 1973).

year, five of six Diné children sent to the U.S.-run Industrial School in Carlisle, Pennsylvania died, including Manuelito's own son.[19] After years away, Diné boarding school returnees were unfamiliar to their own families, having lost their language and even changed their manner of relating and thinking.[20] They formed associations to support each other, convinced that they needed to lead the way to "civilize" their own people.[21] Generations of young people have asked their elders how they allowed this ethnic cleansing to happen. A frequent response is that it was intended to protect Diné children amid the fear that the calvary would come back. The modern reservation era has seen loss of hope and language across generations, with many present elders part of the boarding school generation.

The 1868 Treaty imposed individual male adult-centered schemes of reservation land holdings on reservation communities, authorizing the Indian agent to issue individual certificates of land holdings only to adult men that would be recorded in a "Navajo Land Book."[22] In the Allotment Era from 1887 to 1934, reservation land subdivided into square plots carrying "trust patent"[23] certificates, lasting up to twenty-five years, that could be converted into patent-in-fee or outright ownership, were issued to individual men.[24] On the Navajo reservation, allotment losses resulted in a "checkerboard" of land parcels consisting of allotments, tribal trust, private, railroad, and state lands across nearly all of the Eastern Navajo Agency.[25] These drove matriarch-centered arrangements further into the shadows.

Oil was discovered on the reservation soon after it was formed, followed by discovery of immense beds of fire clay, gypsum, iron ore, borax, bituminous coal, uranium, and natural gas wells. The reservation boundaries thereupon expanded by Executive Order and Acts of Congress to its present size of 23,000 sq. miles. Federal regulations encouraged reservation-based exploration and mining with no required reciprocal investment in community life.[26]

19. Maryboy & Begay, *supra* note 2, at 291.
20. *Id.* at 292–93.
21. KATHLEEN P. CHAMBERLAIN, UNDER SACRED GROUND (2008).
22. 1868 Treaty, *supra* note 16, arts. V, VI.
23. 43 C.F.R. § 2532.2.
24. 25 U.S.C. § 348.
25. *See* 25 U.S.C. § 5102 (noting that any of the existing periods of trust on tribal lands were extended and continued until otherwise directed by Congress).
26. CHAMBERLAIN, *supra* note 21, at 12.

The infrastructure needs of the United States on the reservation were prefigured into the 1868 Treaty. The signors promised that the tribe would not oppose "railroads, wagon roads, mail stations, or other works of utility or necessity" as deemed by the United States, yet also treated these as infrastructure for use by the United States, not the tribe.[27] Infrastructure was installed for federal governmental or business use; for example, the strip mines at Black Mesa, Arizona, had electricity, water, and roads, but this infrastructure never extended to the surrounding communities.[28] The reservation has large trunk roads with federal agency and business-built tributary roads serving population hubs, with otherwise few paved roads, limited electricity, and even less available water-utility service beyond the federal/business infrastructure system.[29] Families live in single-family housing projects or, otherwise, in challenging circumstances—often off-road or without services—across the Navajo Nation.

In 1923, the Bureau of Indian Affairs (BIA) established a tribal council solely to approve oil exploration leases. Tribal members supported by the BIA to the council were invariably boarding school returnees who could be counted on to be assertively pro-mineral exploration and mining.[30] Traditionally minded Diné on the tribal council objected, saying that "land is not a commodity."[31] However, all voted to approve mineral lease applications despite no requirement of the mining companies to grow community infrastructure. This was due to dependence on funds from mineral royalties and bonuses to even meet and function as a government. Oil drillers were also known to have "bored holes indiscriminately to capture all they could. Waste was rampant."[32]

Rose Yazzie described how her family and surrounding family units were required to relocate to make way for the Peabody Coal

27. 1868 Treaty, *supra* note 16.

28. *See* Heather Tanana & Warigia Bowman, *Energizing Navajo Nation: How Electrification Can Secure a Sustainable Future for Indian Country*, Brookings (July 14, 2021), https://www.brookings.edu/articles/energizing-navajo-nation-how-electrification-can-secure-a-sustainable-future-for-indian-country.

29. *Id.*; Clare Carlson, *The Colorado River and Environmental Justice for the Navajo Tribe*, Santa Clara Univ.: Markkula Ctr. for Applied Ethics (Aug. 17, 2023), https://www.scu.edu/environmental-ethics/resources/the-colorado-river-and-environmental-justice-for-the-navajo-tribe/#:~:text=Historically%2C%20the%20Navajo%20people%20have,issue%20for%20the%20Navajo%20tribe.

30. Chamberlain, *supra* note 21.

31. *Id.* at 16.

32. *Id.* at 13.

Mine at Black Mesa and then struggled for ten years to obtain electricity with no help from Peabody. Her family is still without a pipeline for running water. To reach her home, for over fifty years she passed under hills of toxic coal mine sludge, whose coal gasses fill the air like fog. In 2019, Peabody Coal Mine ceased operations at Black Mesa after depleting the coal and vast quantities of underwater aquifers.[33] With Peabody's closure, the sludge hills have been mostly abated, but layers of coal dust persist in Black Mesa homes, and road and water access remain challenging.[34] Meanwhile, Rose has seen her children move off-reservation, needing better conditions for their own children.

Today, mineral resources are much depleted, with only some unused Navajo aquifers and helium remaining. In 1979, the largest nuclear spill in the United States occurred on the Navajo Nation, when a United Nuclear Corporation dam at Church Rock failed, spilling ninety-four million gallons of radioactive uranium waste into the Puerco River.[35]

Dinétah is a living being with whom generations-long relationship is sustained, not a commodity that can be ceded, surrendered, held, or exchanged like property. *Diné nihi keyah*, or *Diné bikeyah*, is simply wherever one's moccasins touch the ground between the Sacred Mountains. Through the imprint, color, and style of a moccasin, a relationship is asserted with the land, showing respect for the color of the soil and all the stars in the universe. Land, itself, is without boundaries, only existing in relation to the universe and all beings. This approach to Dinétah and all living beings is fundamental.

Communal stewardship is a primary value not only in Diné units, but in all indigenous communities. On the Navajo Nation, as on other tribal reservations, such stewardships exist in spite of legacy federal regulations, which dismantle communal arrangements and have not provided legal frameworks to sustain them.[36] This includes

33. Arlyssa D. Becenti, *As Coal Mines Depleted a Navajo Nation Aquifer, Feds Failed to Flag Losses, Report Says*, ARIZ. CENT. (Aug. 29, 2023), https://www.azcentral.com/story/news/local/arizona/2023/08/29/report-blames-government-peabody-mining-co-coal-mines-depleted-black-mesa-aquifer/70672711007.

34. The strip mining has ceased, but the family still lives with coal dust, which hangs in the air and must be wiped from the table every morning.

35. Linda M. Richards, *On Poisoned Ground*, SCI. HIST. INST. MUSEUM & LIBR. (Apr. 22, 2023), https://www.sciencehistory.org/stories/magazine/on-poisoned-ground.

36. *See Native Americans in the United States of America*, MINORITY RTS. GRP. (2023), https://minorityrights.org/communities/native-americans.

physically clustering homes and activities, as well as communal livestock herding by seasonal cycles, which the United Nations Educational, Scientific and Cultural Organization (UNESCO) has termed "transhumance" as practiced worldwide. Navajo transhumance persists underground in the Chuska Mountain communities. In 2023, UNESCO designated transhumance an intangible cultural heritage.[37] Generational arrangements and understanding between communities for stewardship, including "transhumance," supported "live, work, govern" ways of life that were effective and brought surpluses to associative groups self-arranged around local beneficial land use.

We bear in mind that in 2021, the White House Council on Environmental Quality and the White House Office of Science and Technology Policy, expressed their joint commitment to elevate indigenous traditional ecological knowledge (ITEK) in federal policy decisions and directed federal agencies to include ITEK in their policies, describing ITEK as "a body of observations, oral and written knowledge, practices, and beliefs that promote environmental sustainability and the responsible stewardship of natural resources through relationships between humans and environmental systems."[38] The Biden-Harris White House acknowledged that "[t]ribal and [n]ative communities have stewarded these lands since time immemorial . . . . Their voices and their expertise are critical to finding solutions to address the climate crisis, an issue that disproportionately affects Tribal and Native communities."[39] In 2022, after a period of consultation with tribes and tribal communities, the White House released a new government-wide guidance on recognizing and including ITEK in federal policies, management, and

37. *See Transhumance, The Seasonal Droving of Livestock*, UNESCO Intangible Cultural Heritage (2023), https://ich.unesco.org/en/RL/transhumance-the-seasonal-droving-of-livestock-01964.

38. Eric S. Lander, President's Science Advisor and Director, Office of Science and Technology Policy, & Brenda Mallory, Chair, Council on Environmental Quality, Exec. Office of the President, Memorandum on Indigenous Traditional Ecological Knowledge and Federal Decision Making (Nov. 15, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/11/111521-OSTP-CEQ-ITEK-Memo.pdf.

39. White House Commits to Elevating Indigenous Knowledge in Federal Policy Decisions (Nov. 15, 2021), https://www.whitehouse.gov/ostp/news-updates/2021/11/15/white-house-commits-to-elevating-indigenous-knowledge-in-federal-policy-decisions/#:~:text=%E2%80%9CTribal%20and%20Native%20communities%20have,affects%20Tribal%20and%20Native%20communities.

decision-making as a means to "fulfill federal trust responsibilities and recognize tribal sovereignty and self-governance."[40]

The U.S. Supreme Court has emphasized that Indian tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local self-government.[41] A trio of early U.S. Supreme Court cases that acknowledged the doctrine of discovery and the federal government's treaty-based trust responsibility also established the doctrine of inherent tribal sovereignty.[42]

In its most basic sense, inherent tribal sovereignty asserts that tribes are free to honor and preserve their cultures and traditional ways of life. Even if by treaty they are no longer "possessed of the full attributes of sovereignty," tribes remain a "separate people, with the power of regulating their internal and social relations"[43] and "have power to make their own substantive law in internal matters."[44]

International law also broadly recognizes indigenous rights to self-determination,[45] especially indigenous rights to make governance choices about their retained lands and resources according to their own land tenure systems.[46] Globally, ITEK is equal, and not subservient or complementary, to Western ecological practices.[47] International law has also sought to protect with particular emphasis on "due recognition to indigenous . . . land tenure systems."[48]

40. Memorandum for Heads of Federal Departments and Agencies: Guidance for Federal Departments and Agencies on Indigenous Knowledge (Nov. 30, 2022), https://www.whitehouse.gov/wp-content/uploads/2022/12/OSTP-CEQ-IK-Guidance.pdf. *See also* Memorandum of January 26, 2021: Tribal Consultation and Strengthening Nation-to-Nation Relationships, 86 Fed. Reg. 7491 (Jan. 26, 2021).

41. Worcester v. Georgia, 31 U.S. 515, 559 (1832).

42. Denise-Marie Ordway, *What's Tribal Sovereignty and What Does It Mean for Native Americans?*, JOURNALISTIC RES. (July 18, 2021), https://journalistsresource.org/politics-and-government/tribal-sovereignty-native-americans; *see Tribal Governance: Marshall Trilogy*, UNIV. OF ALASKA FAIRBANKS, https://www.uaf.edu/tribal/academics/112/unit-1/marshalltrilogy.php# (last visited June 4, 2024).

43. United States v. Kagama, 118 U.S. 375, 381–82 (1886).

44. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978).

45. *See* G.A. Res. 61/295, art. 3 (Sept. 13, 2007) (recognizing "right to self-determination," including in "economic, social and cultural development") [hereinafter UN-DRIP].

46. *See* Jessica A. Shoemaker, *Transforming Property: Reclaiming Indigenous Land Tenures*, 107 CALIF. L. REV. 1531, 1549 (2019).

47. *See* Agreement Under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biology Diversity of Areas Beyond National Jurisdiction (June 19, 2023).

48. *See* G.A. Res. 61/295, art. 27 (Sept. 13, 2007) ("States shall . . . giv[e] due recognition to indigenous people's laws, traditions, customs, and land tenure systems.").

As the twentieth century ended, members of Navajo Nation tribal government took it on faith that the Tribe did have such powers. When enacting the DFL at Title 1 of the Navajo Nation Code, the Navajo Nation Council found that DFL was "immutable" and provided "sanctuary for the Diné Life Way."[49]

Herb Yazzie recollects that the DFL—written in English with a Diné language section—was intended to point to the verbal instructions of the Holy Ones without specifying them in writing. Much of the written DFL frames the "rights and freedoms" of the Diné using American legal and governmental concepts not based on relationships. According to Yazzie, the thought was that the written DFL may be improved later with the participation of the people, who would be given voice by the legally trained. In other words, the written words were a placeholder until the legal profession evolved sufficiently towards more humanistic understanding in order to play its proper, human role. The Diné language portions assert Diné identity as a people.

Ádóone'é niidlíinii, Nihinéí',

Nihee ó'ool íił,

Nihi chaha'oh,

Nihi kék'ehashchíín.

Díí bik'ehgo Diyin Nohookáá Diné nihi'doo'niid.

Kodóó dah'adíníísá dóó dah'adiidéél.

Áko díishjįįgi nitsáhákees, nahat'á, iiná, saad, oodlą',

Dóó beehaz'áanii ał'ąą ádaat'éego nihitah nihwiileeh,

Ndi nihi beehaz'áanii bitsé siléí nhá ndaahya'áá t'ahdii doo łahgo ánéehda.

Éí biniinaa t'áá nanihi'deelyáhąą doo níłch'i diyin hináah nihiihdaahya'ąą ge'át éigo,

T'áá Diné niidlįįgo náásgóó ahool'á.[50]

49. Navajo Nation Council, Res. No. CN-69-02 (2002).
50. Accordingly, we are identified by:

    Our Diné name,
    Our clan,

The central concepts of DFL are *k'é* (relationships, a deep feeling of responsibility to others and the duty to live in harmony with them) and *hózhǫ* (balance, but specifically a state of being in which an individual's obligations are met in the way required by DFL towards spirit, others, and the natural world, including sacred sites and waterways, all being an integrated whole). It is not possible to separate these elements.

Together, *k'é* and *hózhǫ* integrate relationships into the obligation to maintain wellness of all beings. In 2002, the Navajo Nation Council instructed that tribal government "must learn, practice and educate the Diné on the values and principles of [DFL]."[51]

The challenges facing lawyers who seek to assist development of indigenous law on reserved indigenous lands are substantial. Oral law, and even written multicultural, multilingual laws in other countries, are not included in American legal training. Law schools do not train lawyers to uphold the verbal over written laws, especially written laws that include imperative features like "shall" or "must," which are standard, identifiable sources of law. American law students are trained on written constitutions, statutes, administrative regulations, and common law.[52]

Even more of a challenge for lawyers is the complex land use management schemes required on American reserved indigenous land masses, and specifically on the Navajo Nation, which is discussed in the next section.

The immutable portions of the DFL "are not man-made law and may not be 'enacted' by individuals or entities or the Navajo

---

> Our language,
> Our life way,
> Our shadow,
> Our footprints.
> Therefore, we were called the Holy Earth-Surface-People.
> From here growth began and the journey proceeds.
> Different thinking, planning, life ways, languages, beliefs, and laws appear among us,
> But the fundamental laws placed by the Holy People remain unchanged.
> Hence, as we were created with a living soul, we remain Diné forever.

Diné Bi Beehaz'áanii Bitse Siléí, Declaration of the Foundation of Diné Law, NAVAJO NATION CODE ANN. tit. 1, § 201.

51. Navajo Nation Council, *supra* note 49 (passing in a near unanimous vote of forty-five for, one abstain, and four against).

52. *See* ROBIN WELLFORD SLOCUM, LEGAL REASONING, WRITING, AND OTHER LAWYERING SKILLS ch. 2, at 15–16 (3d ed. 2011).

Nation Council, they may simply be acknowledged by our man-made laws."[53]

Twenty-two years later, lawyers still do not understand how to use the DFL, or even what it is.[54] Writing in the Navajo Times in 2022, Herb Yazzie said,

> There is no doubt that lawyers have been in charge of us, to the extent that we do not recognize our way of life in our own tribal laws. In almost every instance, the lawyers are unfamiliar with Diné customary daily life—our ceremonies, our relational arrangements, our stewardship role.
>
> Without knowledge of our arrangements, lawyers who draft our laws and advise our leaders cannot uphold us. Meanwhile, our leaders rely on [the lawyers'] "expertise."
>
> There is an insight that I have from my 50 years of being advised by lawyers who impress upon us the need for compliance with laws. There are many who believe their job is to press human beings into existing boxes. Overall, lawyers lack imagination. They fulfill their contractual duties.
>
> What the lawyers do not realize is the extent to which they control and limit us without asking us in a manner that would help decolonize our thinking. The limitations imposed by various interpretations of laws prevent our communities from even daring to express how the preservation of our way of life, our government, and our land use should be done.[55]

II. Disentangling Diné Culture from Reservation Leases and Permits

The modern Navajo Nation is the size of West Virginia, with special conditions imposed by federal law on specific areas as they were added to the reservation over time. While there has been a central tribal government since 1923, different federal agencies have ultimate oversight for each incrementally added reservation land mass, depending on how and why each area came to be part of the

53. Office of the Navajo Nation President & Vice-President v. Navajo Bd. of Election Supervisors (Shirley v. Morgan), No. SC-CV-02-10, 2010 Navajo Sup. LEXIS 15, at *29 (Navajo June 2, 2010), *25 (citing Navajo Nation Code Ann. tit. 2, § 203(G)).

54. At a February 23, 2024, Law and Order Committee meeting of the Navajo Nation Council, Elaine Henderson, former Coordinator of the Navajo Nation's Peacemaking Program, described how lawyers still do not know what traditional law is: "[T]o this day . . . lawyers . . . ask us what is traditional law . . . to this day, that's where we're at." Navajo Nation Council, *Law and Order Committee's Leadership Meeting*, YouTube 58:15 (Feb. 23, 2024), https://www.youtube.com/watch?v=PzcQKAxG1fQ&ab_channel=NavajoNationCouncil (discussing challenges facing the tribal court system in an inter-program day-long work session).

55. Herb Yazzie, *Finding a Structure Based on Diné Life,* Navajo Times (July 11, 2022), https://navajotimes.com/opinion/essay/guest-column-finding-a-structure-based-on-dine-life.

reservation. The BIA has ultimate responsibility over "Big Navajo" (a nickname given to lands reserved by the 1868 Treaty, by later Executive Orders, and by the 1934 Arizona Boundary Act) as well as satellite community areas of Alamo, Tohajiilee, and Ramah. The Bureau of Land Management (BLM) and the Federal Indian Mineral Office (FIMO) are responsible for allotments, located primarily in the Eastern Navajo Agency "checkerboard." The Office of Navajo-Hopi Indian Relocation (ONHIR), answerable directly to Congress since 1988 and now winding down, long administered lands taken into trust for the Navajo Nation under the 1974 Navajo-Hopi Land Settlement Act. The State of Utah administers, and collects mineral royalties, on strips of Navajo reservation land in Southern Utah. Depending on the area, tribal member users and occupants may have only surface rights; have surface and subsurface rights; may or may not keep livestock; or may otherwise be limited to very small homestead areas.[56]

Overlaid on this complexity has been the imposition of the single-use individually-held lease and permit system. Federal law provides a customary law option for tribal land uses and does not mandate leases and permits for reservation tribal members. However, farming and grazing are subject to permit restrictions for conservation reasons unless the Tribe obtains regulatory waivers, including through methods discussed in Section IV. The BIA used leases and permits as the sole method of land use management for every purpose and everyone on the Navajo Nation. When the Tribe took over lease and permit management from the BIA in the early years of the twenty-first century, it did so without exploring customary alternatives for its members. The early perception was that BIA recorded leases would attract banks and investors, which has not happened.

Prior to the Civil Rights era, only adult males considered heads of households could hold reservation leases and permits, and then only in their individual names. Diné families are restricted in the manner in which they may use their land. For example, families cannot legally pursue business and live on the same land, as each type of land use requires a separate lease or permit. This system has become so calcified that Diné often resort to underground

56. *See Land Base Formation Timeline*, INDIAN COUNTRY GRASSROOTS SUPPORT (2022), https://dinelanduse.org/history.

economies and illegal businesses rather than seeking real reform from policy makers. DFL being inherently non-confrontational, the reforms necessary to live, work and govern pursuant to DFL would require agreement rather than confrontation—a meeting of minds among tribal policy makers, lawyers, and communities on how to effectuate reforms.

The first known issuance of single use, time-limited leases for reservation land use was via the 1920 Tribal Mineral Leasing Act, which facilitated oil explorations.[57] Later, in the 1930s, the United States began requiring grazing permits across tribal and public lands, setting limits on livestock carrying numbers under a belief that this system would reduce over-grazing and save other parts of the continent from future Dust Bowls. In 1955, the Long-Term Leasing Act at 25 U.S.C. § 415 formalized the reliance on time-limited BIA-approved leases on restricted Indian lands for a variety of purposes, with length of the lease dependent on the use purpose: ninety-nine years for business or agricultural uses; seventy-five years for public, religious, educational, recreational, or residential uses if such term is provided for in tribal regulations; and twenty-five years renewable one time for mineral exploration, development, or extraction.[58] Ensuing regulations detailed when leases and permits are necessary, enabling customary law to otherwise be used through undefined "tribal land assignments" or similar instruments that would authorize community land uses under tribal laws.[59] While tribal land assignments under tribal law provides the greatest potential for tribal envisioning ingenuity, such alternative methods of using land have never been pursued by the Navajo Nation.

The Navajo Leasing Act of 2000 (2000 Act) amended 25 U.S.C. § 415 (e) by conferring on the Navajo Nation the discretionary privilege to manage its own leases without need for BIA approval for each lease, provided that the tribe enacted tribal leasing regulations that were consistent with federal regulations and approved by the BIA. Intent on self-governance, the Navajo Nation established conforming tribal regulations for business leasing in 2006 and for all other surface leases, except grazing, in 2014, both duly approved by

57. *See* 25 U.S.C. § 415 (noting that tribal land can be leased for specific uses including "the development or utilization of natural resources in connection with operations under such leases" for a term not to exceed twenty-five years).

58. *Id.*

59. 25 C.F.R. § 162.006(b).

the BIA.[60] The result is that the Tribe has effectively taken on the responsibilities of the BIA under tribal laws that mirror BIA regulations supplemented by some cultural elements that do not conflict with BIA established notions of individually-held leases. In 2008, the Congressional Budget Office determined that the 2000 Act provided no federal funding, since it contained "no intergovernmental mandates."[61] The absence of federal funding for the Navajo Nation's self-management of leases and permits has meant management costs are passed on to the land user, including responsibility for cadastral, anthropological, and environmental surveys that can soar to a few thousand dollars for individuals seeking leases and permits for any purpose.[62]

In 2012, the Helping Expedite and Advance Responsible Tribal Home Ownership Act of 2012 (HEARTH Act) amended 25 U.S.C. § 415 (h) by extending to all tribes the unfunded privilege provided to the Navajo Nation in the 2000 Act.

Tribal stakeholders and experts have reported a general lack of commercial credit on tribal lands due to land use restrictions, with most tribal lands able to be used as loan collateral only in certain circumstances or with federal permission.[63] As a public land of the federal government with special tribal trust status, the reservation has conservation restrictions that prevent collateralization of land[64] under both federal and tribal laws.[65] The Navajo

60. *See* U.S. DOI BIA, APPROVAL OF THE NAVAJO NATION GENERAL LEASING REGULATIONS OF 2013, CO-53-13 (2014) (noting the leasing process for activities not including grazing).

61. CONG. BUDGET OFF., COST ESTIMATE FOR S. 2665 NAVAJO NATION TRUST LAND LEASING ACT OF 2000, S. 2665 (Oct. 2, 2000).

62. The Navajo Nation offered bitter testimony on its immense costs to Congress, informing the House Committee on Natural Resources that the Navajo Leasing Act had "only transferred the costs and burdens of compiling and approving the lease information without the benefits." *Helping Expedite and Advance Responsible Tribal Homeownership Act or the HEARTH Act*: *Hearing on H.R. Before the H. Comm. on Nat. Resources*, 111th Cong. 111-39 (2009) (statement of Arvin Trujillo, Exec. Dir., NNDNR).

63. U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-464, AGRICULTURAL CREDIT NEEDS AND BARRIERS TO LENDING ON TRIBAL LANDS 2 (2019).

64. *How to Finance a Tribal Business*, U.S. DEP'T OF THE INTERIOR: INDIAN AFFS., https://www.bia.gov/service/starting-business/finance-tribal-business (last visited June 4, 2024).

65. *See, e.g.*, National Historic Preservation Act, 16 U.S.C. §§ 470–470x-6 (NHPA); Archeological Resources Protection Act, 16 U.S.C. §§ 470aa-470mm (APRA). For tribal conservation laws, see Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001–3013 (NAGPRA); *see also* Navajo Nation Cultural Resource Protection Act, NAVAJO NATION CODE ANN. tit. 19 (NNCRPA).

Nation Environmental Policy Act (NNEPA),[66] which supplements NEPA, recognizes that "protection, restoration and preservation of the environment is a central component of the philosophy of the Navajo Nation" and contributes to maintaining harmony and balance between humankind and nature.[67]

Diné land use familial units today exist informally, and only when there is consensus across individual permit holders and familial members. The unit is without legal form and is governmentally unsupported and unrecognized. The Navajo Nation has not provided clarity to the "customary trust" advocated for by its high court, perhaps because such a legal entity exists nowhere else in the world, nor is "trust" an apt term for the Diné familial unit. Diné traditional roles and interest in land use are extralegal, incredible as it may seem, on the Diné people's own territory.

The existing reservation lease and permit scheme limits and controls human presence and footprint on the Navajo Nation's own community land. Use and occupancy doesn't generationally flow, and instead is legally treated as time and use-limited, at best life estates transferable through "probate" tribal court processes that struggle to perpetuate uninterrupted generational familial land on the one hand, and limitations against generational wholeness on the other hand. It must be specially noted that business leases may not be probated and, instead, revert to the Navajo Nation upon decease or expiration. Business improvements are separately disposed of when leases and permits expire, either reverting to the tribe or removable for sale where provided for in a lease.[68] The requirement for leases and permits to be in the names of individual adults, the different time limits attached to different land use lease purpose, as well as complex conditions that must be met before lease issuance (e.g., conservation planning and restrictions) means that leases and permits are issued by single-use purpose and are slow to issue. The notion that one's time on ancestral land is time-limited by law if business is conducted on that land also discourages community-business site leasing. This discourages

66. Navajo Nation Code Ann. tit. 2, § 1921.

67. *Id.*

68. 25 C.F.R. § 162.415 requires business leases to specify ownership of permanent improvements on the site. The Tribe addressed this requirement in the Navajo Nation Uniform Business Site Leasing Regulations of 2008. Federal law imposes no requirement on lessees to clear business sites of deteriorating improvements when their leases expire, invariably resulting in unsightly eyesores and fires on abandoned sites.

families who have built dwellings and farm buildings on multigenerational land from engaging in business.

Families are often fractured by disputes over whose name will be on a lease or permit. Additionally, family members living in off-reservation towns and cities regularly obtain reservation leases and permits to hold as their personal stake, with no present plan to beneficially use the land. As a result, permittable land is now difficult to find, driving young people from the reservation.[69] It is also not uncommon for farm permits to be many miles from the farmer's homesite lease area with no ability to build a home on the farm permitted area, leaving farm equipment and facilities unprotected and existing in isolation from livestock, homes, and businesses.

Regulatory limitations place incredible burdens on the practice of Diné land-based culture. The regulations may be structural or holdover paternalism from days when the federal government viewed their treaty-based trust responsibility as similar to the relationship between a guardian and a ward.[70] Restrictions have been in place for so long that, even in the present era of tribal self-determination,[71] tribes cannot disentangle them and continue to build policies around them. The BIA has since redefined their trust responsibility and expressly disavows any guardian-ward relationship with tribes, stating on its website that "[t]he Federal Government is a trustee of Indian property, not a guardian of all American Indians and Alaska Natives."[72] Tribes and the United States continue to dispute the scope of the trust responsibility.[73] For example, the U.S. Supreme Court recently held in *Arizona v. Navajo Nation* that "[t]he 1868 treaty establishing the Navajo Reservation reserved necessary water to accomplish the purpose of the Navajo Reservation but did not require the United States to take affirmative steps to secure water for the Tribe."[74] The United States, as trustee,

69. *See Young Navajo Leave Reservation Life Behind to Seek Jobs*, VOA: LEARNING ENGLISH (June 30, 2011), https://learningenglish.voanews.com/a/navajo-nation-sees-a-shrinking-population-124815939/114500.html.

70. *E.g.*, STEPHEN L. PEVAR, THE FEDERAL-TRIBAL TRUST RELATIONSHIP: ITS ORIGIN, NATURE, AND SCOPE, CA WATER PLAN UPDATE 2009, at 3 (2009).

71. *See* 25 U.S.C. §§ 5301–5310.

72. *See Frequently Asked Questions*, DEP'T OF THE INTERIOR: INDIAN AFFS. (Aug. 19, 2017, 2:55 PM), https://www.bia.gov/faqs/are-american-indians-and-alaska-natives-wards-federal-government.

73. *E.g.*, United States v. Jicarilla Apache Nation, 564 U.S. 162 (2011).

74. Arizona v. Navajo Nation, 599 U.S. 555 (2023) (holding that the United States did not have an affirmative treaty or trust obligation to identify and account for Navajo Nation water rights in the Colorado River).

continues to oversee the Navajo Nation's management of its property through numerous restrictions.

The restricted nature of reservation land limits what local tribal community planning bodies perceive they have the power to address. In the Navajo Nation Code, every individual, Chapter, or entity, other than the tribal government or its wholly owned entities, must first obtain a land withdrawal designation prior to use. If the intention is to develop, then leases must be obtained, and only then is infrastructure addressed.[75] This process creates a nether region, in which expensive infrastructure is built one lease at a time. Meanwhile, small-time lessees feel isolated and unseen. Some federal housing assistance programs use the term "leases," which creates an impression that leases are necessary to access funding.[76] Additionally, the BIA has decided that homesite or residential leases should be given "categorical exclusion" from expensive environmental impact statements as long as a lease contains four dwellings or less on no more than five acres.[77] Yet, such leases increasingly separate family members from one another and discourage cluster living. The present system also prevents the integration of homes with farms and livestock.

The NNSC—long the custodians of Diné culture—believe that Diné communities must be relieved of the lease and permit system. In 1987, NNSC judges created the "Navajo customary trusts" with the intent to recharacterize leases and permits without running afoul of federal regulations.[78] In 1991, a frustrated NNSC engaged in a frank discussion over such trusts in *Begay v. Keedah,* explaining that the "Navajo customary trust" was created by judges to speak about the true communal or group nature of permits.[79] The "customary trust" was a judicial rejection of leases and permits with respect to Diné community stewardship. Asserting the communal nature of Navajo land tenure, the court stated that the federally invented lease or permit is not a form of land title in which there are individual rights at all. The court understood that leases

75. Navajo Nation Council Res. No. RDCJN-33-15, § 5 (2015).

76. *See, e.g.*, Housing Improvement Program, 25 C.F.R. § 256.10 (2015).

77. *See* Bureau of Indian Affairs., Justification for Establishing a Categorical Exclusion for Scattered Single Family Homesites; *see also* National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (2018) (codified as amended at 42 U.S.C. §§ 4321–4434).

78. Estate of Benally*,* 1987 Navajo Sup. LEXIS 18 (July 31, 1987).

79. Begay v. Keedah, No. A-CV-09-91, 1991 Navajo Sup. LEXIS 17 (Nov. 26, 1991).

and permits had no role in the Diné universe. The court stated that "Navajo judges knew they would have to supply a justification to get [BIA] officials to honor their decrees,"[80] and "understood the concepts of communal land use and grazing permit tenure well. They also understood that the Navajo Indian agent and later the BIA agency superintendent operated using a different set of rules."[81]

Diné communities are aware of profound disorder due to improper relations with each other, with land, and with all beings. They are aware of blessings when caring for the land. Disorders are spoken of again and again at governmental and community meetings that discuss what needs to be done to make government work. Rarely do those responsible for governmental planning understand the possibilities of tools that may be used to design their own units and govern pursuant to DFL. The primacy of "stewardship" would drive different outcomes and require different planning tools than those imported from outside the Navajo Nation. Communal management of land and its resources could result in a land use and local self-governance system that truly fosters a "circular economy"—a change in emphasis from supporting large companies in seeking insatiable output-based profits, to economies that promote "a flourishing web of life, so that we can thrive in balance."[82]

The Navajo Nation Bill of Rights recognizes that unenumerated rights are retained by the people.[83] The ability of the people to arrange their communal groups as they choose may be just such an unenumerated right.[84]

Under the Navajo Nation Local Governance Act discussed further below, Chapter-based volunteer community land use planning committees (CLUPCs) meet regularly to discuss community land use plans (CLUPs). Studies on CLUPs show that they are frequently limited in scope in a way that impacts the effectiveness of the plans.[85] Limitations include CLUP visions specific to the planning committee rather than the full Chapter, CLUP implementation by government entities rather than the Chapter itself, and a lack

80. *Id.* at *11.
81. *Id.* at *10.
82. KATE RAWORTH, DOUGHNUT ECONOMICS: SEVEN WAYS TO THINK LIKE A 21ST-CENTURY ECONOMIST, (2017).
83. NAVAJO NATION CODE ANN. tit. 1, §§ 1, 3.
84. Office of the Navajo Nation President & Vice-President v. Navajo Bd. of Election Supervisors, *supra* note 53, at *43.
85. *See* KELLEY RUTLEDGE, A PATHWAY TO REGAINING POWER OVER ENERGY, ENVIRONMENT, AND THE ECONOMY ON THE NAVAJO NATION, 50, 56–58 (Univ. of Calgary 2023) (on file with authors).

of representation of Diné traditional values in CLUPs.[86] Individual Chapter CLUPCs may further feel constrained by the lack of a unifying tribal vision that allows local land use and governing control. The CLUPCs mostly address land withdrawn for public use,[87] or designate business zoning, but have no mandate to help plan individually issued lease and permit areas, such as homesite leases, farm permits, and grazing permits. The result is no planning focus on individual permit infrastructure.

In 2018, numerous communities across the Navajo Nation, including regional bodies like the Western Agency Council (WAC) (comprising eighteen Chapters), voiced objections to new Navajo Nation Homesite Lease Regulations[88] that had been enacted to receive BIA-approval for tribal self-management of leases. The new regulations ignored generational settlement and kinship, treating homesites as if they were no more than rentals subject to use and size restrictions that were even more severe than the federal government. In a resolution issued March 17, 2018, the WAC called for a foundational approach, finding that "the Regulation of the use of Diné Bikéyah must be holistically planned, enable continuation of the Diné way of life, and must be premised upon land use principles, laws and teachings embedded in Diné bi beenahaz'áanii." The WAC further found that consensus among the Chapters must be reached for a

> foundational document for use of Diné Bikéyah according to principles, laws and teachings in accordance with Diné bi beenahaz'áanii, to be drafted by consensus at the local level to truly reflect the values, goals and desires of the Diné, which will serve as the foundational document for all land use laws, said document to be approved by an initiative or a referendum.[89]

III. Navajo Nation Local Governance Act—An Overly Timid Step Towards Reclaiming Diné Indigenous Governance

Prior to the BIA's establishment of a Tribal Council in 1923, no single leader was given the power to speak for all communities.[90] The

86. *Id.*

87. *See, e.g.*, Navajo Nation Council Res. No. RDCJN-33-15 (2015) (delegating land withdrawal authority to the Navajo Land Department and approving related regulations).

88. Navajo Nation Council Res. No. RDCO-74-16 (2016), http://nnld.org/docs/homesite/Homesite%20Lease%20Regulations.pdf.

89. Western Agency Council Res. No. WNAC18-03-NB8 (2018), https://dinelanduse.org/wp-content/uploads/2023/03/No.WNAC18-03-NB8.pdf.

90. *See* Maryboy & Begay, *supra* note 2, at 277.

matriarchal system was driven underground following return from captivity at *H'wéeldi*. However, generational stories attest that the communal matriarch units have persisted in guarded secrecy while Anglo American concepts, boundaries, and methods were imposed without regard for cultural patterns.

In practice, the federal government has used the doctrine of inherent tribal sovereignty to evade governmental responsibilities, including responsibility to provide reservation communities with a standard of living comparable to off-reservation communities or to ensure the survival of tribal culture. In *United States v. Lara*,[91] the U.S. Supreme Court reaffirmed inherent tribal sovereignty while rejecting federal governmental responsibility to ensure its laws and policies are consistent with local tribal needs, stating that "the [g]overnment's Indian policies, applicable to numerous tribes with diverse cultures, affecting billions of acres of land, of necessity would fluctuate dramatically as the needs of the [United States] and those of the tribes changed over time."[92] Such a holding fundamentally oppresses the doctrine of inherent tribal sovereignty and has resulted in uncertainty among tribal communities and governments regarding the tribal "powers of local self-government" acknowledged since 1896.[93]

The BIA divided the Navajo reservation into five administrative agencies and 110 local communities named "Chapters." The tribal council consisted of representatives from the five agencies and met once annually. From 1937 to 1989, the unitary tribal council was led by a chairman, a system that halted due to a crisis involving public funds and the death of a law enforcement officer. In 1989, the unitary council system was temporarily restructured into a three-branch structure via amendments to Title 2 of the Navajo Nation Code, called simply the "Title 2 Amendments." The three-branch structure was intended to give way to a permanent form of government that the people, themselves, would choose. Modeled on the federal government, the present tribal government is finding its structure static, rather than responsive; slow-moving, rather than the swift decision-maker needed to locally govern.

Formed to provide the "glue" for the union of the United States, the U.S. federal government initially generated much of its income

91. United States v. Lara, 541 U.S. 193 (2004).
92. *Id.* at 202.
93. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) (citing Talton v. Mayes, 163 U. S. 376 at 384 (1896)).

through disposal of land. Article 4, Section 3 of the U.S. Constitution[94] provided this authority over federal lands. As the United States expanded west, the doctrine of discovery[95] provided the nation with exclusive rights to sell, transfer, and exchange lands possessed by tribes but not yet settled by Europeans. When treaties were signed that confined tribes to reservations, the U.S. Supreme Court held that the treaties imposed a "trust responsibility"[96] on the United States to provide "fiduciary" or "guardian to ward" services according to what was promised in a written treaty, while not requiring the United States to perform the functions of an actual government. In short, trust responsibility services reflect treaties from more than a century ago that are frozen in time, written by the United States with a view to control, delimit, and enclose Indigenous American communities—falling far short of establishing or enabling a beneficial, functioning government capable of ensuring communities' access and use of their own land and resources, and their own security and stability, according to the communities' own evolving wishes and needs. To the present day, U.S. government insists on self-defining the parameters of their trust responsibility, resisting tribal governmental efforts to play an important role in that definition, which the Navajo Nation profoundly believes is their sovereign right.

As a unifying entity removed from geographic communities, the U.S. government has inflexible, rather than creative, functions. To appear dependable and accountable, its government structure is complexly compartmentalized and filled with internal firewalls. It has been likened to "a giant sedimentary rock, with layers upon layers of programs and regulations that have built up over time . . .

94. The property clause reads: "The Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ." U.S. Const. art. IV, § 3, cl. 2.

95. *See* Johnson v. M'intosh, 21 U.S. 543 (1823) (holding that when a tract of land has been acquired through conquest and the property of most people who live there arose from the conquest, the people who have been conquered have a right to live on the land but cannot transfer title to the land).

96. The "trust responsibility" is "the undisputed existence of a general trust relationship between the United States and the Indian people." *See American Indians and Alaska Natives—The Trust Responsibility*, Admin. for Native Americans: An Off. of the Admin. for Children & Families, https://www.acf.hhs.gov/ana/fact-sheet/american-indians-and-alaska-natives-trust-responsibility#:~:text=The%20%27trust%20responsibility%27%20is%20a,concepts%20in%20federal%20Indian%20law (last visited June 4, 2024); *see, e.g.,* Seminole Nation v. United States, 316 U.S. 286 (1942); United States v. Mason, 412 U.S. 391 (1973); Morton v Mancari, 417 U.S. 535 (1974).

and . . . so little coordination between them . . . ."[97] Far from a governmental structure designed to locally govern, the federal government has been able to cost-effectively administer national parks and military reservations—land areas with limited human footprints. However, governing reservation communities with changing and growing population needs has been so difficult and cost-prohibitive that the federal government has pursued ending or rolling back its trust responsibility.

The federal government has actively pursued the breakup of reservations, first in the Allotment Era (1887–1934), followed by Indian Termination in the 1940s to 1960s whose intent was that "tribes should no longer be tribes, never mind that they had been tribes for thousands of years. . . . If you can't change them, absorb them until they simply disappear into the mainstream culture."[98] Termination was followed by the Indian Relocation Act in 1956, which forcibly relocated thousands of working-age Native Americans to cities.[99] When faced with rising activism against such policies, the federal government began its present policy of tribal self-determination and self-government with the 1974 enactment of Public Law 93-638, the Indian Self-Determination and Education Assistance Act (ISDEAA).[100] A core feature of the ISDEAA is a new ability to delegate federal trust responsibility duties to tribes through "638 Contracts," allowing the federal government to save personnel, facility, and administrative costs while appearing to support tribal sovereignty.

Legal scholars have described the ISDEAA as offering a dichotomy of choice for tribes.[101] The federal government continues to dictate the scope of the trust responsibility even where tribal governments have assumed the burden of providing such services. Tribes who take on 638 Contract duties extensively, like the

97. *Reservation Government Structures*, INDIAN CNTY. GRASSROOTS SUPPORT (revised Jan. 30, 2024), https://dinelanduse.org/govt.

98. Ben Nighthorse Campbell, *Opening Keynote Address: Activating Indians into National Politics*, *in* AMERICAN INDIAN NATIONS: YESTERDAY, TODAY, AND TOMORROW 2–3 (George P. Horse Capture, Duane Champagne & Chandler C. Jackson eds., 2007).

99. Also known as the Adult Vocational Training Program, Pub. L. 959, 70 Stat. 986 (1956).

100. *See* 25 U.S.C. §§ 5301–5310; *Introduction to Self-Governance Authority,* SELF-GOVERNANCE COMMUNICATION AND EDUCATION TRIBAL CONSORTIUM (2024), https://www.tribalselfgov.org/introduction-to-self-governance-authority.

101. *See, e.g.*, Danielle Delaney, *The Master's Tools: Tribal Sovereignty and Tribal Self-Governance Contracting/Compacting*, 5 AM. INDIAN L.J. 309, 313 (2017).

Navajo Nation, find themselves simply stepping into the shoes of the federal government, essentially becoming federal agents whose primary duties are to ensure compliance with federal trust responsibilities that they play no role in defining. The substantial funds that come with 638 Contracts presently fund a huge portion of tribal government.

The Navajo Nation government centrally manages nearly all its 638 Contract programs, which in 2021 brought in $100 million and employed over 5,000 people. Attorneys in the Navajo Nation Department of Justice and the Navajo Nation Comptroller ensure compliance with 638 Contracts, which are presently a critical sustained funding source for tribal government. Prior to the ISDEAA, the primary source of tribal funds had been through mining royalties and bonuses, which remain an important funding source. The Navajo Nation government continues to rely on extractive business payments as its primary approach to obtain income for services on the reservation, even though such income has historically been inadequate. In earlier boom periods, funds were provided to build community "Chapter" houses, but subsequent funding streams were insufficient to maintain them. Over the years, the federal government has prioritized revising rules to accommodate the extraction companies, which enables ready tribal governmental access to extraction-related payments.[102] Across differently regulated and separately managed federalized areas, the Navajo Nation government has tried to function as a single government, enacting laws that attempt to unify the different land areas and communities who live in them.

The Navajo Nation has had to address its own internal activism centered on the form of government adopted in 1989, which was intended to be temporary. The push for local governance resulted from the Diné people's call for reform in government, as the Diné people felt unserved by the bureaucracies of a centralized tribal government.[103] A Government Restructuring Task Force including Albert Hale, Morris Johnson, Herb Yazzie, and Louis Denetsosie explored what seemed the only logical reform that would uphold Diné culture—maximizing self-government at the community level. Communities were dissatisfied with being unseen and unserved by

102. Chamberlain, *supra* note 21.

103. Michelle L. Hale, *The Navajo Local Governance Act (LGA): A Help or Hindrance to Grassroots Self-Government?*, 42 Am. Indian Culture & Rsch. J. 91, 91 (2018).

their own government, which was far away in Window Rock with seemingly no ability to address their own local needs.[104] 638 Contract funds never seemed to create local benefits nor were they spent responsively to local needs. 638 Contract personnel answered to Window Rock, which seemed to answer to the federal government. Local communities had no direct voice. After generations of BIA administration, for better or worse the Chapter system now stood in for communities. Familial matriarchal units were not legal communities in their own right.

The task force established a Government Development Commission leading to a proposed Local Empowerment Act intended to establish Chapters as a local governing system supported by the public treasury, with authority over most, if not all, local matters. [105] In 1998, The proposed Local Empowerment Act was never enacted. In 1998, the Local Governance Act (LGA) was passed in its place.[106]

Planning for the LGA included the hopes and dreams of generations of Diné. Local governance would empower local, establish local systems that would employ the doctrines of *k'é* and *hózhǫ*, thereby honoring and restoring a sense of traditional governance.[107] The hope for autonomous communities spread across the Diné vast territory permeated the planning.[108] Local governance would reverse the rapid decline of local life experienced since conquest by the United States.[109] It would end the oversight of central tribal government over local matters, and it would streamline processes for improved local decision making, policy implementation, and the delivery of services.[110] As former Navajo Nation President Albert Hale said regarding the LGA's intent, "The power comes from the people, not from Window Rock and not from Washington D.C.'"[111]

104. Bill Donovan, *Census: Navajo Enrollment Tops 300,000*, NAVAJO TIMES (July 7, 2011), https://navajotimes.com/news/2011/0711/070711census.php#google_vignette.

105. Herb Yazzie, personal recollection of the author as a member of the Government Restructuring Task Force (February 22, 2024).

106. NAVAJO NATION CODE ANN. tit. 26, §§ 1–2005, as amended.

107. Hale, *supra* note 103, at 91–92.

108. CLYDE KLUCKHOHN ET AL., THE NAVAHO (1946 Harvard Fellows copyright, 1962).

109. Andrew Curley et al., *Local Governance and Reform: A Conceptual Critique of Regionalization and the Title 26 Taskforce*, DINÉ POL'Y INST. 2 (2016), https://www.dinecollege.edu/wp-content/uploads/2018/04/DPI_v2LocalGovernance_Title26.pdf.

110. *Id.*

111. Press Release, Navajo Nation Division of Community Development: Chapter Summit Empowers Navajo Chapters, Provides New Ideas (1994).

Agreeing with Hale, the NNSC made power from the people a fundamental principle of Navajo Nation common law.[112]

Chapters were formed by the BIA, out of ignorance of community life and a pressing administrative need for population counts. Because communities closed themselves off from federal authorities, interacting with the Indian Agent through *naalchidi*, outsiders could not see how the communities functioned. In 1922, the Leupp Indian Superintendent arbitrarily divided the five BIA agencies into numerous "Chapters," which now number 110.[113] Each adult Diné must choose and register at one Chapter in order for a census to be obtained.

The Navajo Nation did not formally recognize Chapters until the 1950s.[114] By then, Chapters had become an accepted notion, relied on for meetings which took place outdoors, under trees,[115] until brick and mortar Chapterhouses were built in the second half of the twentieth century using extraction-based royalty and bonus revenue.[116] Chapters often provide the only gathering space. For a hundred years now, communities have used Chapters to gather, to share public information, and to express themselves through resolutions. Such Chapter resolutions have only advisory effect.[117]

The entire Chapter system was shut down during the lengthy COVID-19 pandemic surge on the reservation. The closure lasted nearly two years and was an immense hardship, as programs that would convene at Chapters—for example, to coordinate volunteer youth to help clear obstructions from irrigation ditches, to give and take information, and to locally administer some benefits—could not do so during COVID-19.

With Chapters being the only option, the LGA Task Force based local governance on Chapters, assuming that Chapters could speak for their unseen communities and have a historical connection to

112. Office of the Navajo Nation President & Vice-President v. Navajo Bd. of Election Supervisors, *supra* note 53, at *74–76.

113. Robert E. Young, Political History of the Navajo Tribe (Navajo Community College Press 1978).

114. David E. Wilkins, The Navajo Political Experience (Rowman & Littlefield, 4th ed. 2013).

115. *See, e.g.*, *History of the Courts of the Navajo Nation*, Navajo Courts (Feb. 11, 2003), https://courts.navajo-nsn.gov/history.htm (showing historical pictures of Shiprock Chapter meeting).

116. Michael Parrish, *Local Governance and Reform: Local Empowerment*, Diné Policy Inst. 1, 11 (2018). https://www.dinecollege.edu/wp-content/uploads/2018/04/Local-Governance-and-Reform-Local-Empowerment.pdf.

117. *Id.* at 10.

local history and culture.[118] The text of a 1995 version of the LGA described its purpose as "to recognize governance at the local level" and provide local "governmental authority with respect to local matters consistent with Navajo law, including custom and tradition."[119] The written purpose is broad, unambiguous, and supportive of indigenous cultural practice.

On December 21, 1995, this version of the LGA was presented to the Navajo Nation Council together with a cautionary memorandum from the tribe's attorneys that called attention to multiple issues concerning control, liability, and funding. In 1996, the Navajo Nation Council ultimately resolved that the proposed legislation could not pass due to "many major deficiencies" relating to the alleged "fiduciary responsibilities and lawful authorities of the Navajo Nation Council and its standing committees."[120] The Navajo Nation Council objected to losing control over matters related to resource management, home site leasing, approval of ordinances, and provision of insurance coverage.[121] They observed that an increase in local government autonomy would result in a "depressed financial and fiscal situation leaving the Navajo Nation Government without sufficient financial and fiscal support."[122] While acknowledging the Diné interest in attaining self-sufficiency and local control over local matters,[123] the conclusion was that any grant of local control would be a "premature delegation of authority to the Navajo Chapters."[124]

The 1995 proposed LGA was set aside while the Navajo Nation Council directed its standing committees to consider far more limited local powers,[125] including (i) incremental delegation of authorities; (ii) no decrease in programs related to police protection, education, social services, and health services, as well as protection of natural resources; and (iii) the efficient and effective implementation of 638 Contracts.[126] Grave concern arose over how local governance would be paid for, since nearly all tribal public funds came directly to Window Rock from 638 Contracts, franchise leases, and

118. Hale, *supra* note 102, at 91– 92.
119. NAVAJO NATION CODE ANN. tit. 26, § 1(B)(1).
120. Navajo Nation Council Res. No. CJA-1-96 (1996), https://www.nndcd.org/wp-content/uploads/2021/03/CAP-34-98.pdf.
121. *Id.* at Whereas Section 3(A).
122. *Id.* at Whereas Section 3(C).
123. *Id.* at Whereas Section 6.
124. *Id.* at Whereas Section 3(E).
125. *Id.* at Resolution 1.
126. Navajo Nation Council Res. No. CJA-1-96 (1996).

extraction payments. As the reservation was trust land, no property taxes could be levied. Even state schools operating on the reservation depended on alternative subsidies provided by power plants. There was also paternalistic concern about local ability to properly account for expenses, the assumption being that stringent checks and balances were needed at all levels of local accounting to prevent certain abuse. The standing committees recommended adoption of a "five-point management system" that a Chapter must master to become a "certified Chapter" prior to any implementation of local control.[127] Additionally, the committees recommended continued oversight by the Resources and Development Committee of the Navajo Nation Council over practically all local matters pertaining to land use, including zoning.[128]

These recommendations—effectively withholding local decision-making authority from Chapters—were incorporated into the final 1998 LGA. Even more problematic for funding purposes was the final LGA's classification of Chapters as "political subdivisions" of the Navajo Nation.[129] In Anglo law, the "subdivision" designation distinguishes a state from bodies like cities and counties beneath it. The Federal Emergency Management Agency (FEMA) defines "political subdivision" as "a unit of government created by and under the authority of a higher level of government,"[130] meaning an absence of independence. The Internal Revenue Service (IRS) defines "political subdivision" as a separate entity from the higher government that created it. Under this definition, the political subdivision is subject to ongoing controls, not simply through an approved plan of operations (like tribal enterprises), which means the absence of the benefit of obtaining direct funds as a component governmental unit.[131]

The ISDEAA, which sets forth the terms of 638 Contracts,[132] does not designate political subdivisions as eligible 638 Contract entities. The "subdivision" designation creates a barrier for Chapters to directly implement 638 Contract programs and access 638 Contract funds.

127. Navajo Nation Code Ann. tit. 26, §§ 101–102 (1998).

128. *Id. §* 2004(D).

129. Laurance D. Linford, Navajo Places: History, Legend. Landscape (2000).

130. *Political Subdivision*, FEMA, https://www.fema.gov/glossary/political-subdivision#:~:text=A%20unit%20of%20government%20created,political%20subdivisions%20of%20the%20state (last updated Mar. 19, 2021).

131. *See* Definition of Political Subdivision, 81 Fed. Reg. 8870 (Feb. 23, 2016) (to be codified at 26 C.F.R. pt. 1).

132. 25 U.S.C. § 5329(15)(B).

The entity designation also affects how allocations are generally received by Chapters, whether or not certified, as Chapters are not part of the three tribal governmental branches (Public Entities).[133] Neither are they corporations whether or not wholly owned by the tribe (Private Entities),[134] which means that Chapters must submit proposals to compete for project-based funds and also must provide assurances that proposed projects can be timely completed, a high bar for Chapters with little funds to hire proposal writers and project managers.

Local empowerment to determine local matters was part of the "solemn compact with the People [that] . . . the People [would] choose the final structure of government."[135] In 2023, Navajo Nation Council Delegate Otto Tso, representing To'Nanees'Dizi Chapter on the Resource and Development Committee, pressed for urgent alternative solutions.[136] One such alternative may arise from a unified tribal vision.

IV. Integrated Resource Management Plans Based on a Tribal Vision

The federal government manages a variety of public lands including tribal reservations, national parks, and military reservations. All have a restricted inalienable character, meaning no ownership-based property taxes are generated. Managing public lands that generate no property tax income means constant administrative needs to keep down administrative costs or find alternative methods of generating income that would also uphold conservation mandates that run with all federally managed public lands, both tribal and non-tribal. Since the 1960s, federal land managers have relied on an integrated land use approach on non-tribal public lands, while encouraging reservation-based tribes to adopt such an approach on reservations. However, only recently has tribal integrated management planning received federal financial and technical support. An added incentive, discussed below, has been the potential for regulatory waivers for tribes that adopt agriculture-related integrated resource management plans.

U.S. military bases worldwide are often located on "military reservations" managed in the United States and across the world by the

133. *See, e.g.*, NAVAJO NATION CODE ANN. tit. 5, § 202(O).

134. *See id.* § 202(N).

135. Office of the Navajo Nation President & Vice-President v. Navajo Bd. of Election Supervisors, *supra* note 53, at *43.

136. *See* Press Release, Office of the Speaker, Navajo Nation Council (Oct. 18, 2020) (Tso pressing for "change" regarding the Office of Navajo Government Development and modification of the LGA).

U.S. Department of Defense (DOD). Wilderness surrounding the bases are normally managed by the U.S. Department of the Interior (DOI). The federal government owns, leases, or possesses 26.1 million acres of military reservation land worldwide. In 1960, Congress passed the 1960 Sikes Act,[137] enabling the DOD and DOI to jointly conserve and generate income from domestic military lands on a "multiple use, sustainable yield" basis. Thus, surrounding forests could be responsibly culled, processed, and sold, or surrounding land leased for farming or ranching, to upkeep the military base and its community while safeguarding important plants and wildlife. An Integrated Natural Resource Management Plan (INRMP) served as the basis for interagency cooperation and general planning for base communities and wildlife conservation. Generally, the INRMP was a master governing document for the base, containing a high-level plan for sustainable base quality of life.

The 1994 Indian Self Governance Act[138] extended the INRMP concept to public lands previously owned by Tribes and now managed by the federal government, lands that consist of over 250 million acres, including national parks and conservation areas, enabling their cooperative and collaborative co-management between federal agencies and tribes.[139] Prior to this Act, in 1988, the concept extended, on a discretionary basis, tribal reservations through the BIA IRMP Initiative, with a tribal planning document called an Integrated Resource Management Plan (IRMP).[140]

137. 16 U.S.C. §§ 670–670(f). The Sikes Act requires military installations to adopt an Integrated Natural Resource Management Plan (INRP) that serves as a comprehensive plan addressing the management of natural resources. This initiative recognized the multiuse capability of the land used for military installations. In a way, those lands were preserved from outside activity because they were reserved for military use. INRPs present an opportunity to establish conservation strategies and incorporate conservation efforts into military plans for the land. *See generally Guidelines for Coordination on Integrated Natural Resource Management Plans,* U.S. Fish & Wildlife Serv. (2015), https://www.fws.gov/sites/default/files/documents/INRMP-Guidelines-with-Pollinator-Addendum-and-Disclaimer.pdf; *see also Integrated Natural Resource Management Plans: Roadmaps to Conservation for Today's Military Installations*, Wildlife Mgmt. Inst. (June 2019), https://wildlifemanagement.institute/outdoor-news-bulletin/june-2019/integrated-natural-resource-management-plans-roadmaps-conservation.

138. Indian Self Governance Act of 1994, Pub. L. No. 103-413 (amending 25 U.S.C. §§ 5301–5310); *Federal Land Cooperative and Collaborative Partnerships with Tribes Background Documents*, U.S. Dep't of the Interior: Indian Affs., https://www.bia.gov/guide/federal-land-tribal-partnership-documents (last visited June 4, 2024).

139. *Id.*

140. Bureau of Indian Affs., Guidelines for Integrated Resource Management Planning in Indian Country 16 (2001).

Any tribal IRMP needs to take into account permanent, historically traumatized growing communities with strong internal desires to settle in clusters to support their weakest members and strengthen themselves. Tribal reservations have teeming multigenerational communities whose needs change from generation to generation. Nearly all adults have, or are applying for, a homesite lease or permit, which is a costly and time-consuming process for vacant unconnected land. The tribe generates income from residents through sales tax.[141] High levels of reservation poverty and unemployment make further fees and taxes a hardship, but a great depth of human capital exists, immense intelligence and innovation ability waiting to step up and take care of their own communities.[142]

The BIA describes the IRMP as a "powerful expression of tribal sovereignty" and a strategic "statement of tribal resource and land management," which provides a basis for reservation management[143] that "ties the reservation's natural environment together with the tribe's social values."[144] These definitions reflect the IRMP's purpose to provide documented, comprehensive policies used to approach resource management to serve defined tribal values, direction, and interests.[145] The BIA initiative guidelines acknowledge that a tribe's resources include not only natural resources but also the tribe's culture and its people,[146] and an IRMP would contain the tribal vision for desired future resource conditions on the reservation.

Implementing an IRMP with a tribal vision would be a meaningful step toward increased self-governance for the Navajo Nation. However, risks and considerations must be kept in mind when developing an IRMP. First, to ensure that the IRMP, as well as the values and vision provided in the plan, truly reflects the needs of the Diné, consultants with no cultural understanding should not be engaged to develop the IRMP. Second, funding sources must be acquired to fully support the work involved with the IRMP. Finally, IRMPs are a tool provided by the BIA, which ultimately is also responsible for approving IRMPs. An IRMP should not be drafted by the same body that approves it. To incorporate DFL in an IRMP, tribal communities themselves must be engaged in the planning.

141. NAVAJO NATION CODE ANN. tit. 24, §§ 601–624.
142. Interview with Crystal Deschinny, former Director, Navajo Nation Division of Economic Development, for this article (March 23, 2024).
143. BUREAU OF INDIAN AFFS., *supra* note 140, at 1-1.
144. *Id.*
145. *See id.* at 1-2,1-3.
146. *Id.* at 1-2.

Once a unifying tribal vision is developed, Community Land Use Plans (CLUPs),[147] authorized by the LGA, may be used to express local visions. CLUPs establish individual Chapter visions and "project future community land needs . . . based upon the guiding principles and vision as articulated by the community."[148] Community planners should feel empowered to provide integrated plans that encompass all lands and infrastructure in their community. At this time, CLUPs exclude homesites and land-use permit areas, treating those areas like off-reservation private property to possibly be self-developed or receive private capital. The truth is, those areas are not private property. The permit system constrains formation of clustered legal entities with even the shadow of self-development and stewardship ability. Each permittee is restricted to an isolated invisible journal in generational poverty.

If IRMP implementation is intentional and prioritizes DFL, the IRMP can serve as a tool to bypass certain federal regulations in favor of resource management processes that better align with the Diné Life Way. Establishing a unified tribal vision would align an IRMP with a larger and future-focused intention for the entire Navajo Nation.

The importance of integrated planning to the future of reservation resources has long been a theme recognized throughout Indian Country. Although sparking considerable interest among tribes from the beginning, this BIA initiative lacked the financial or staff capabilities to broadly support the development of IRMPs. In 1993, an internal assessment found that BIA policy for the development of IRMPs "has not generally been successfully implemented" due partly to "a lack of clear examples of the purpose, content, and use of these plans, a relatively low priority for their development in the BIA, and the absence of adequate funding and resource management expertise."[149] Additionally, existing regulations are so restrictive that any tribal or local planning visions would be merely pipe dreams unless the regulations can be waived. An opportunity to waive regulations is included in the American Indian Agricultural Resource Management Act (AIARMA),[150] which authorizes tribes to develop an Agricultural Resource Management Plan (ARMP).

147. For a detailed survey and analysis of CLUPs, see Rutledge, *supra* note 85.
148. Navajo Nation Code Ann. tit. 26, § 2004(B).
149. *See* Bureau of Indian Affs., *supra* note 140, at 1-6.
150. 25 U.S.C. §§ 3701–3746.

To provide statutory direction for IRMPs, and possibly redress the limitations of the BIA initiative, Congress enacted the National Indian Forest Resources Management Act (NIFRMA) in 1990[151] and AIARMA in 1993, which contained the additional incentive of regulatory waivers. Consultation with tribes on implementation of AIARMA began in 1994.[152] Tribes objected to an initial proposed rule for agricultural land leasing through AIARMA in 1996,[153] and final rules were not implemented until 2001.[154] The *Indian Affairs Manual* provided guidance.[155] Funding remained an issue for nearly thirty years. In 2019, the BIA-Navajo Region finally received $2.6 million from BIA Central Office to implement a Navajo Nation ARMP reservation-wide, and The Navajo Nation Fish and Wildlife Department amended its 638 Contract to include the development of a Navajo Nation ARMP.

The BIA initiative was driven from within the DOI, while NIFRMA and AIARMA statutorily changed the approach to resource management from single use to a whole system-integrated, cooperative approach with the possibility of full-fledged community participation. AIARMA provides that land management activities must follow tribal resource management plans (including IRMPs and ARMPs).[156] NIFRMA establishes additional guidance for IRMPs and an additional resource management plan type—a forest management plan.

Title 25, Chapter 1, Subchapter H of the Code of Federal Regulations (C.F.R.) details the BIA's evolving processes in managing restricted Indian land, including tribal trust land and allotment land, which still leave culture-centered processes as unfunded options for tribes.[157] 25 C.F.R. Part 162 generally regulates leases and permits for all tribes and was comprehensively revised in 2013 to provide greater tribal self-determination and to add provisions for wind and solar energy systems. Promulgated before these federal

151. 25 U.S.C. §§ 3101–3120.

152. BUREAU OF INDIAN AFFS. W. REG'L OFFICE, AIARMA AND THE BIA'S AGRICULTURAL LEASING AND PERMITTING REGULATIONS 3 (2016), https://in.nau.edu/wp-content/uploads/sites/73/2018/08/Webb-NAU-AIARMA-and-the-Ag-Leasing-Regulations-November-2016-ek.pdf.

153. *Id.*

154. *Id.*; *see* 25 C.F.R. § 162.

155. *See* BUREAU OF INDIAN AFFS., INDIAN AFFAIRS MANUAL: AGRICULTURAL RESOURCES MANAGEMENT PLANNING (Sept. 9, 2014), https://www.bia.gov/sites/default/files/dup/assets/public/raca/manual/pdf/54%20IAM%203%20Ag%20Resource%20Mgmt%20Planning_FINAL_signed%20w.%20footer_9.28.20.pdf.

156. 25 U.S.C. § 3712(a).

157. 25 C.F.R. §§ 150.1–183.18.

revisions, the Navajo Nation's tribal leasing regulations may now contain unnecessary restrictions.[158]

A. IRMP Empowerments and Limitations

Three main federal statutes implicated by IRMPs are the National Environmental Policy Act (NEPA), the AIARMA, and the NIFRMA.[159] AIARMA allows waivers to federal regulatory requirements without any specific limitation for a DOI-approved ARMP, other than that ARMP terms and implementation may not violate federal law or conflict with the BIA's trust responsibilities. The BIA defines its trust responsibility as "a legally enforceable fiduciary obligation on the part of the United States to protect tribal treaty rights, lands, assets, and resources, as well as a duty to carry out the mandates of federal law with respect to American Indian and Alaska Native tribes and villages."[160] AIARMA broadly defines the ARMP as simply "the plan" that provides "identified holistic management objectives that include quality of life . . . and may include any previously adopted tribal codes and plans related to [listed] resources."[161] The definition is broad and should cover all resources used for production, including cultural and social resources. Incorporation of other tribal plans emphasizes the importance of IRMPs and CLUPs.

No prescribed method exists for creating an IRMP, although guidelines are suggested by the Native Land Information System[162] and the BIA.[163] Tribes should feel free to develop their own IRMPs and ensure that the plan does not sit unimplemented, but rather

158. *See Code of Federal Regulations*, Indian Country Grassroots Support (2022), https://dinelanduse.org/fedregs.

159. Bureau of Indian Affs., *supra* note 140, at 17–18; *see Confederated Tribes of the Colville Reservation, Integrated Resource Management Plan*, Coville Tribes 9 (2015), https://static1.squarespace.com/static/56a24f7f841aba12ab7ecfa9/t/5b982d76352f53b1ab915b93/1536699802464/CTCR+2015+IRMP+online+2018-08-14.pdf.

160. *What Is the Federal Indian Trust Responsibility?*, U.S. Dep't of the Interior: Indian Affs. (Nov. 8, 2017), https://www.bia.gov/faqs/what-federal-indian-trust-responsibility.

161. 25 U.S.C. § 3703(11). NIFRMA provides a less extensive definition of an IRMP as "a document, approved by an Indian tribe and the Secretary, which provides coordination for the comprehensive management of such tribe's natural resources." 25 U.S.C. § 3103(15).

162. *ARMP-IRMP Planning Portal: IRMP Process*, Native Land Info. Sys., https://nativeland.info/armp-irmp-data-portal/getting-started (last visited June 4, 2024).

163. *See* Bureau of Indian Affs., *supra* note 140, at 27.

acts as a living document that is monitored and updated as needed. IRMPs are meant to be the controlling document on which all other plans (including ARMPs), projects, and decisions are based.

It is possible for a community to adopt an ARMP[164] or similar planning document prior to an IRMP; however, it is preferable to adopt an IRMP first so that more specific planning documents can align with the IRMP, rather than adjusting specific planning documents to a subsequent IRMP. No matter the order, once a community has implemented an IRMP, the ARMP or other planning documents should be created or updated to align with the vision and goals in the IRMP.[165]

Regulatory waivers under AIARMA can be powerful local governance tools. Specifically, AIARMA provides that the DOI may waive any regulation or DOI policy that "conflicts with the objectives of the [ARMP] or with a tribal law . . . unless such waiver would constitute a violation of a Federal statute or judicial decision or would conflict with [the DOI's] general trust responsibility under Federal law."[166] This potential waiver is essential to keep in mind during IRMP development so that the IRMP may be set up appropriately to allow for management of agricultural land that aligns with Diné values. AIARMA also allows innovative tribal solutions for determining who can obtain agricultural leases and permits by allowing tribes to establish tribal policies that manage highly fractionated allotment land.[167] The only other limitations would be those imposed by the Navajo Nation under its own laws, which the tribe can independently waive, revise, or remove, something that the BIA recommends so that a tribal vision is not unduly restricted by the tribe itself.[168]

IRMPs provide a great deal of flexibility for communities to implement a variety of provisions that are most beneficial for them.[169] Elements found in five tribal IRMPs surveyed for this article include the following: (i) a tribal resolution initiating the IRMP planning process; (ii) a tribal vision statement; (iii) the history of

164. *E.g.*, *Colville Confederated Tribes, Agricultural Resource Management Plan for the Colville Reservation* (2015), https://static1.squarespace.com/static/56a24f7f841aba12ab7ecfa9/t/586eb7c8d2b8570a7b0d7382/1483651083778/Agricultural+Resource+Management+Plan+2015.pdf.

165. *See* 25 U.S.C. § 3103(5) (provision in NIFRMA stating that a Forest Management Plan must reflect and be consistent with an IRMP).

166. 25 U.S.C. § 3712(c).

167. 25 U.S.C. § 3715(b).

168. BUREAU OF INDIAN AFFS., *supra* note 140, at 63.

169. *See id.* at 18.

the reservation; (iv) the need for the IRMP; (v) identification and protection of cultural and historical resources; (vi) utilization of agriculture resources and infrastructure to address conservation; and (vii) prioritizing sustainable energy resources.[170]

While IRMPs cover all tribal reservation lands, ARMPs apply to "Indian agricultural lands," which include most if not all restricted land other than forests and specifically include "farmland and rangeland . . . that is used for the production of agricultural products, and Indian lands occupied by industries that support the agricultural community, regardless of whether a formal inspection and land classification has been conducted."[171]

AIARMA specifies what an ARMP must contain[172] and states that such plans "shall govern the management and administration of Indian agricultural resources and Indian agricultural lands by the [BIA] and the Indian tribal government."[173] NIFRMA provides that any forest management plan must be "consistent with an [IRMP]."[174] As discussed in the Introduction, a federal governmental effort is underway to incorporate ITEK into federal decision-making.[175] This plan is powerful, as it provides authority to close the gap between legacy federal methods of resource management on the reservation and the Diné Life Way.[176] Note that the federal government has long since reformed its management approaches toward integration off reservation.

B. AIARMA and Navajo Transhumance

In December 2023, "transhumance" was inscribed by UNESCO as an "intangible cultural heritage"[177] after ten European countries recognized transhumance as a national heritage of each of their countries. Previously, the practice was recognized as "the seasonal migration of herds along the migratory routes in the Mediterranean area and in the Alps."[178] After noting that the practice was also a

170. *See also* Bureau of Indian Affs., *supra* note 140, at 130–38; Native Land Information System, *supra* note 162.
171. 25 U.S.C. § 3703(1).
172. *Id.* § 3711(b)(1)(C).
173. *Id.* § 3711(b)(2).
174. *Id.* § 3103(5).
175. *See* Lander, *supra* note 38.
176. *Possibilities for Stewardship*, Indian Country Grassroots Support (2022), https://dinelanduse.org/steward.
177. *See Transhumance, The Seasonal Droving of Livestock*, *supra* note 37.
178. *From Alps to Mediterranean: UNESCO Recognizes the Cultural Heritage of Two Transhumance Traditions*, Food and Agriculture Organization of the

deeply rooted global practice, UNESCO's 2023 inscription recognized transhumance as a global practice that has a vital role in cultural heritage and socio-economic sustainability.[179]

UNESCO recognizes two types of transhumances: horizontal transhumance, which is practiced in flat plains regions, and vertical transhumance, which is practiced in mountainous areas.[180] Both are present on the Navajo Nation. UNESCO recognizes that communal droving sustains cultural and social networks and sacred spaces, reduces carbon and waste, and preserves land and water[181] through a deep awareness of the environment and the ecological balance between humans and nature.[182] These concepts very much align with *k'é* and *hózhǫ*. Since UNESCO's recognition, several Italian regions have enacted laws to protect transhumance by emphasizing culture, natural resources, and environmental sustainability.[183] European Union projects also aim to protect transhumance. For example, the European Regional Development Fund's CamBio Via 2014–2020 project creates protected areas, parks, and historical sites along the transhumance routes to ensure the practice is unimpeded.[184] The Navajo Nation should consider similar innovative methods through the primacy of DFL. (As discussed later in Section VIII on the Navajo Nation, such routes might be simply designated tribal parks, customary trusts, or conservation rights-of-way.)

Seasonal herding on the Navajo Nation is a treasured and necessary traditional practice. In the old days, herds would be gathered as one and would separate simply when called by their separate

---

UNITED NATIONS (Sept. 12, 2023), https://www.fao.org/pastoralist-knowledge-hub/news/detail/en/c/1673041/#:~:text=This%20submission%20was%20an%20extension,Austria%2C%20Greece%2C%20and%20Italy.

179. *See UNESCO Recognizes the Cultural Significance of Two Transhumance Traditions*, MOUNTAIN P'SHIP (Jan. 17, 2024), https://www.fao.org/mountain-partnership/news/news-detail/en/c/1675721/#:~:text=2024,between%20geographical%20or%20climatic%20regions.

180. *Transhumance*, UNESCO: COMMISSIONE NAZIONALE ITALIANA PER L'UNESCO (Mar. 29, 2024), https://www.unesco.it/it/iniziative-dellunesco/patrimonio-culturale-immateriale/la-transumanza.

181. *See Rethinking Transhumance*, GEORGOFILI INFO (Oct. 27, 2022), https://www.georgofili.info/contenuti/ripensare-la-transumanza/23198.

182. Maria Novella Topi, *Transhumance Becomes a UNESCO Heritage Site: Italy Holds the Record for Registrations in the Agri-Food Sector*, ONUITALIA.COM: IL GIORNALE ITALIANO DELLE NAZIONI UNITE (Nov. 12, 2019), https://www.onuitalia.com/2019/12/11/transumanza.

183. Legge regionale Veneto 30 novembre 2021, n. 32, in Boll. Uff. Reg. Veneto July 27, 2020, n.113 (It.); L.R. (legge regionale) Basilicata, n.54; L.R. Lombardia 25 luglio 2022, n.14, July 28, 2022, n.30 (It.).

184. *CamBio VIA: The Project*, INTERREG: MARITTIMO-IT FR-MARTIME, https://interreg-maritime.eu/web/cambio-via/progetto (last visited June 4, 2024).

herder families.[185] As a communal herd, herders would drove them across the plains, foothills, and higher valley regions of the Chuska Mountains. Such communal herd movement may still occur informally but, officially, happens one individual authorization at a time through tailing permits.

Ancestors' voices are everywhere on the reservation, offering solutions that need to be implemented. For centuries, family units have jointly herded their sheep to winter camps in the Chuska Mountains against federally imposed permits. With UNESCO's recent inscription that transhumance is an intangible world heritage, laws have been passed to sustain the practice, particularly in Europe. In Italy's Molise region, "transhumance" involves "a vast network of passages shaping and preserving much of the landscape" where "the sheep decide when to leave,"[186] similarly true for traditional herding on the Navajo Nation. The world is now recognizing the value of traditional practices, though voicing recognition often comes too late, and mere recognition is never enough. American science has defaulted for nearly a hundred years to livestock confinement, rather than natural animal instincts, and has yet to confirm that livestock reduction and confinement actually achieves conservation goals. For local Diné communities, the reverse is true—Mother Earth, separated from her creatures, mourns the loss of vibrant, responsibly related life.

IRMPs and ARMPs can have a significant impact on preserving Navajo transhumance, which is currently restricted by both federal and tribal grazing regulations. It is strongly recommended that the Navajo Nation consider asserting "transhumance" as its own national heritage by recognizing the practice of traditional communal droving, including transhumance in a unifying tribal vision, and completing the conversation about grazing regulatory reform pursuant to DFL.[187]

Presently, two federal grazing regulations exist for the Navajo Nation: regulations for Navajo Partitioned Lands (NLP)[188] and general regulations for the reservation.[189] These regulations are complemented by the tribal Navajo Nation Grazing Act,[190] which

185. Ray Deal, Recollection of Family Story Passed Down Orally (Mar. 7, 2024).

186. Megan Williams, *An Ancient Practice at Peril*, CBC Radio One (May 26, 2023), https://www.cbc.ca/radiointeractives/features/an-ancient-practice-at-risk.

187. *See* Navajo Nation Code Ann. tit. 3, § 707 (2010).

188. 25 C.F.R §§ 161, 168.

189. *Id.* § 167.

190. *See* Navajo Nation Code Ann. tit. 3, § 707.

the tribe has been trying to reform since 2000.[191] The federal grazing regulations' objectives for the Navajo Nation include preserving the reservation's forage, land, and water or restoring these resources if they have deteriorated and "increasing responsibility and participation of the Navajo people, including tribal participation in all basic policy decisions, in the sound management of one of the Tribe's greatest assets, its grazing lands.[192] As if to drive home that tribes should use AIARMA's authorized waivers, the federal grazing regulations allow for waiver if "a provision of this part conflicts with the objectives of the agricultural resource management plan . . . or with a tribal law . . . unless the waiver would either: (a) constitute a violation of a federal statute or judicial decision or (b) conflict with BIA's general trust responsibility under federal law."[193] Both regulations further emphasize that the ARMP will "define critical values of the tribe and its members and provide identified resource management objectives."[194]

After BIA's Livestock Reduction program on the reservation in the 1930s resulted in the slaughter of more than 250,000 sheep, goats, and horses, grazing regulations are like a third rail in Navajo Nation politics. Livestock reduction, followed by the first grazing regulations in 1937, wiped out Diné livestock-based community support and surplus-based economies. Since then, Diné ranchers have struggled on the reservation, while ranching on "tribal ranches"—private off-reservation land purchased by the Navajo Nation using public funds—have thrived, regulation free. Stymied by bureaucracy, individual trailing paths, and the bitterness of permit holders, meaningful reform is not expected without both community and political will.[195]

191. *See, e.g.*, *Proposed Navajo Rangeland Improvement Act of 2014*, NAVAJO NATION DEP'T OF AGRIC., https://agriculture.navajo-nsn.gov/Portals/0/Range%20and%20Farm%20Management%20Webpage/NRL%20Improvement%20Act%202014%20PP.pdf?ver=AbJ5ARzVukIFTvCznvRqhw%3D%3D (providing an example of a redraft effort for the NNGA that was never finalized) (last visited June 4, 2024).

192. NAVAJO NATION CODE ANN. tit. 3, § 707.

193. 25 C.F.R. § 161.5.

194. *Id.* § 161.200(4); NAVAJO NATION CODE ANN. tit. 3, § 875(A)(23).

195. *See* Laura Paskus, *Corruption and Tragic History Paralyze Range Reform on the Navajo Reservation*, HIGH CNTY. NEWS (Aug. 19, 2002), https://www.hcn.org/issues/issue-232/corruption-and-tragic-history-paralyze-range-reform-on-the-navajo-reservation. BIA's regulations provide that "[a]ll movements of livestock other than trucking from buying areas to loading or shipping points must be authorized by Trailing Permits issued by the District Grazing Committees on the approved forms." 25 C.F.R. § 167.14.

Transhumance is no less than the Diné communal way of life. The tribe must fully envision transhumance, and the communal participation and support needed for its practice, to realize a slew of empowerments. At minimum, a transhumance vision should include communal abilities to:

1) Herd on a seasonally identified path.
2) Maintain camps or housing on sites along that path.
3) Form transhumance groups of the members' own choosing.
4) Create local governments in which transhumance groups are members.

BIA range management plans currently cover specified range units in the Navajo Partitioned Lands.[196] These plans, developed by the BIA in consultation with the Navajo Nation, address "conservation practices, including grazing control and range restoration activities."[197] The range management plan includes, *inter alia*, "development for cooperative funded projects," "cooperation in the implementation of range studies," and "special land uses."[198] Other parts of the reservation are divided into grazing districts that need conservation plans.[199] Navajo Nation law further provides for range-unit establishment and planning by District Land Boards across all reservation lands solely under tribal law.[200] Range management plans and conservation plans could independently identify, set aside, and support communal transhumance.

Grazing and trailing permits are part of a complex land use management system involving homes and rights-of-way. Tribal regulations allow homesites to be carved from grazing permit land in a complicated process involving consents, application with proper surveys, environmental and cultural clearances, and any necessary easements (rights-of-way) and evaluations. Homesites and squats diminish grazing land size and may even render the area unfit for free roaming livestock.

The current structure and use of grazing permits does not allow for traditional communal management of livestock and grazing lands. Grazing permits are limited by geography, meaning that the

196. 25 C.F.R. § 161.202.
197. *Id.* § 161.203.
198. *Id.*
199. Navajo Nation Code Ann. tit. 3, § 942.
200. *Id.* § 934.

permittee may only utilize one range area for grazing livestock.[201] Restrictive regulation of grazing has led to overgrazing in certain areas and has prevented more sustainable and traditional grazing practices, such as transhumance.[202] IRMP and ARMP development is also critical for reforming this practice and allowing plans for clusters with wide undisturbed areas for grazing and trailing.

C. Tribal Vision Statements

According to BIA guidelines, an IRMP should contain the tribe's "vision for their reservation."[203] A tribal vision is "a statement guided by the values of those creating it,"[204] meant to carry "the values of the tribe and its members with a strong emotional content from which goals and objectives are derived."[205] A vision is otherwise defined as a "shared destination to which we wish our actions to take us which carries emotional power and commitment."[206] In Indian Country, components of the vision are based on cultural issues that reflect traditional values.[207] The tribal vision should be developed early in the IRMP process[208] and drive the subsequent implementation steps and the creation of the IRMP.[209]

Described below are two outstanding examples of tribal visions, developed by the Nez Perce Tribe and Red Cliff Band of Lake Superior Chippewa, for their IRMPs.

Nez Perce Tribe. The IRMP vision statement of the Nez Perce Tribe in Idaho is a page long and lists what the tribe envisions for their homeland, a statement that prioritizes holistic solutions and is followed by a list of initial actions the tribe expects will be necessary to carry out the provided vision.[210] The concluding paragraph states:

201. Ezra Rosser, *Reclaiming the Navajo Range: Resolving the Conflict Between Grazing Rights and Development*, 51 CONN. L. REV. 953, 968 (2019).

202. *Dangerous Desertification on the Navajo Nation*, EARTHACTION (Mar. 15, 2012), https://www.earthaction.org/2012/03/dessertification-navajos.html.

203. *See* BUREAU OF INDIAN AFFS., *supra* note 140 (highlighted version: https://dinelanduse.org/wp-content/uploads/2022/03/IRMP.pdf).

204. *Id.* at 90.

205. *Id.* at 97.

206. *Id.* at 83.

207. *Id.* at 5–9.

208. *Id.* at 82.

209. *Id.* at 85.

210. NEZ PERCE TRIBE, INTEGRATED RESOURCE MANAGEMENT PLAN iii–iv (2023).

> [I]t shall be the policy of the Nez Perce Tribe to prioritize the holistic stewardship of our natural and cultural resources to sustain and enhance opportunities for traditional cultural practices and the exercise of our Treaty-reserved rights. This emphasis is intended to be strategic in nature and provide for commercial resource uses and landscape development as important secondary management goals. Commercial uses of the Tribe's resources and landscape development should be undertaken in ways that do not hinder, on an overall basis, the Tribe's efforts to conserve our natural and cultural resources to sustain and enhance traditional opportunities for current and future generations of *Nimiipuu*.[211]

Red Cliff Band. The IRMP of the Red Cliff Band also includes a one-page vision statement that envisions the future of the tribe where:

- All living things are in a natural balance.
- There are few negative impacts to the natural systems.
- The reservation provides sustainable environmental and economic goals.
- All alienated lands within the Reservation boundary are subject to Tribal control and the original Tribal land base and lands adjacent to the Reservation are being sought for reclamation.
- Environmentally sustainable natural resource management, development, housing, and infrastructure needs are addressed for all Tribal members.
- Traditional, historical, and cultural areas are set aside, preserved, and restored for the education of our youth and the preservation of our Life Way.
- High priority is placed on a healthy environment in accordance with a strong natural resources base for future subsistence of all Tribal members.[212]

The Red Cliff Band's IRMP outlines goals for the tribe to consolidate leases for tribal members to build homes so that the homes are better suited to connect to resources, such as wells and septic systems, as well as electric and phone connections.[213] This IRMP consolidates and streamlines the leasing process. Though not a direct waiver of federal regulations, it is an example of how an IRMP may be used to increase access to resources despite existing regulations.

211. *Id.* at iii.
212. Red Cliff Band of Lake Superior Chippewa, Integrated Resource Management Plan 10 (2006).
213. *Id.* at 68–69.

The Navajo Nation also has an IRMP that is limited to a portion of the reservation, the Former Bennett Freeze Area (FBFA), which is part of a 2.5-million-acre area within the reservation's exterior boundaries long disputed by the Navajo and Hopi tribes. In 1974, Congress passed the Navajo-Hopi Land Settlement Act,[214] pending final settlement of the dispute. Terms of the Act are strict. Lands taken into trust for the Navajo Nation under the Act must be used solely for the benefit of relocated Navajo who, at the time of enactment, were residing on lands partitioned to the Hopi. The Navajo Nation Human Rights Commission observed that the Act appeared to be "structured to allow corporate mining companies [to] exploit valuable subsurface minerals,"[215] including coal mines that have depleted the Navajo Aquifer,[216] the only source of drinking water for 50,000 Diné in fourteen communities in Black Mesa. FBFA development was forced to cease from 1966 to 2009. This freeze impacted thousands of Navajo people who lived in the area.[217] Impacts continue to be felt, as only "24% of the houses in the area are habitable, almost 60% do not have electricity, and the majority do not have access to potable running water."[218]

Upon settlement in 2008, a recovery plan for the FBFA was developed. To implement the recovery plan, citing AIARMA as its authority, in 2015 the BIA began drafting an IRMP for the FBFA (the FBFA-IRMP) under an agreement with the Navajo Nation, which was finalized in December 2023.[219] The BIA claimed that the FBFA-IRMP would incorporate "values-driven resource management decisions based on public input" with no structural changes in stewardship that would involve communities themselves.[220] However, the FBFA-IRMP does not address community stewardship at all and instead contains a brief, generic vision statement

214. Navajo-Hopi Land Settlement Act, Pub. L. No. 93-531, 88 Stat 1712 (Dec. 22, 1974).

215. NAVAJO NATION HUM. RTS. COMM'N, THE IMPACT OF THE NAVAJO-HOPI LAND SETTLEMENT ACT OF 1974, P.L. 93-531 ET AL., at i (2012).

216. Becenti, *supra* note 33.

217. *About the Bennett Freeze*, NAVAJO THAW IMPLEMENTATION PLAN (2019), https://navajothaw.com/about-the-bennett-freeze.

218. *Id.*

219. *Current Status of the Integrated Resource Management Plan (IRMP)*, U.S. DEP'T OF THE INTERIOR INDIAN AFFS., https://www.bia.gov/regional-offices/navajo/western-navajo-agency/environmental-assessment/irmp (providing Associated Documents that show the Final FBFA IRMP was finalized on Dec. 21, 2023) (last visited June 4, 2024).

220. *Id.*

addressing recovery of the FBFA "with preserved Diné culture and traditions."[221]

The FBFA-IRMP is essentially an interagency operational document, drafts of which were presented at twenty-five Chapter meetings. Meaningful community stewardship involvement is absent, something IRMPs were intended to achieve. The FBFA-IRMP likely was placed in the hands of officials without sufficient traditional knowledge. Essentially, it is what should not happen in the future.

The absence of a tribal vision leaves communities at the mercy of outside forces that do not know the tribe and may not have their interests in mind. According to Herb Yazzie:

> Every Diné knows that the lack of a vision has deepened our colonization and made things worse for all Diné. A unified vision—for what the Navajo Nation will look like for our children and future generations—is the only way to decolonize our thinking . . . . Law-making without a comprehensive tribal vision puts inordinate power into the hands of lawyers who advise our elected leaders and our courts. When we are unable to plan our own reality, the lawyers are the ones who tell communities what can and cannot be done within the existing framework of laws that come from somewhere else. Yet, these same lawyers would admit that the power currently exercised by them, can and should be in the hands of our communities, so long as we can agree on a foundational vision that serves as the basis of all laws. Such a foundational vision would be the basis for reform of all present tribal laws and the creation of future laws. Such a vision would be an expression of our sovereign authority as a Nation.[222]

D. Local Governance Restructuring Through IRMPs and ARMPs

Generally, on public lands, communities are static bodies whose presence is temporary as workers pursue a time-limited project or assignment on those lands. Any management approach for such communities should not be imposed on permanent and growing, multigenerational tribal communities, yet this is what has happened.

Tribal communities do not want to be passive stakeholders. They want to be fully involved stakeholders. Their generational stake in water, agriculture, forests, community resources, and more[223]

221. *Final Integrated Resource Management Plan for the Former Bennett Freeze Area*, Navajo Nation Division of Nat. Resources & US Dep't of the Interior BIA 12 (Dec. 21, 2022), https://www.bia.gov/sites/default/files/dup/inline-files/2022.12.21_fbfa_irmp_final_1.pdf.

222. Herb Yazzie, *Finding a Structure Based on Diné Life,* Navajo Times (Mar. 19, 2024), https://navajotimes.com/opinion/essay/guest-column-finding-a-structure-based-on-dine-life.

223. 25 U.S.C. § 3703(11).

requires their full-fledged participation. In persistently difficult environmental conditions, tribal communities want and need to be self-sufficient and self-sustaining.

The size of Navajo Nation since 1968 has incrementally increased over time by Executive Order and Acts of Congress, with each addition carrying unique federal use restrictions. The mix of land base types and restrictions on the Navajo Nation makes a reservation-wide IRMP challenging, but one can be created, especially with an emphasis on local governance with central tribal government support. An IRMP may provide for unique governance and the formation of associative structures and entities with DFL as their foundation.

V. Developing Unique Entities

The LGA allows certified Chapters to adopt an "alternative form of Chapter governance" based upon models provided by the Resources and Development Committee of the Navajo Nation Council.[224] "Alternative form" is defined as "giv[ing] a new design, function or organization to the existing Chapter government."[225]

Governance models grow out of local conditions and local needs. A tribal reservation with often severe restrictions impacting familial systems, as well as land uses, requires local government models that are purposed to empower the reservation.

Traditional governance grows out of tribal culture in patterns that historically suit self-sustaining rural areas across the world—"live, work, govern." DFL, at its core, addresses community survival and social order in ways that make sense to communities who share Mother Earth.

Pressures of accountability, income generation, and access to funds are unique to reservation entities. Unique tribal structures need legal frameworks that allow these structures to function in the modern world without impeding "live, work, govern"—a government that lives and works as it governs, according to the patterns that it enables.

The goal (and also measurement) is the best "protective" entity to gather stakeholder associations, be they family of choice, which

224. NAVAJO NATION CODE ANN. tit. 26, § 103(E)(6).
225. *Id.* § 2.

enable leaders and teams to function and thrive at local levels. The fundamental freedom is needed to quickly arrange shelter, nourishment, mediate disputes, and care for members and sacred sites. The entity best suited for these purposes, and that can generate income and also perform government functions within a community may need to be a unique legal incorporated entity that is able to implement DFL.

Below are common characteristics of corporations and a discussion of how they can be used to create local governance entities consistent with LGA and DFL intent:

Corporate Structure. Creating tribal entities that are founded on DFL is not out of reach. However, it requires a novel approach to the formation, structuring, and decision-making of the entity. When using elements of formal business structures, they should not interfere with the principles of DFL, thereby creating new, innovative entities that uncompromisingly allow the Diné to adhere to numerous practices consistent with DFL while not conflicting with federal law. Some solutions would need the ability to locally govern, and others will not. All will need the ability to bring in investments, collaborations, and partners, either with each other or from outside.

The pressures to follow a system that diminishes the customs and traditions of indigenous people are long past and may even be considered "legacy" pressures that no longer apply. The time to prioritize Diné customs and traditions has come.

Due to shareholders and investors, the default corporate governance structure reflects conceptions of private governance based on maximizing shareholder returns. Charitable or "non-profit" entities, or incorporated government entities, can instead focus on providing social benefits.

The structure of the economy itself is undergoing great changes as Mother Earth is increasingly stressed by human activity. The World Economic Forum is pressing for a more resilient, sustainable economy, which it believes means a move away from shareholder capitalism toward a "stakeholder" global economy that "works for progress, people, and planet."[226] Unfettered profits-based capitalism is increasingly inappropriate in light of climate change.

226. *See What Is Stakeholder Capitalism?*, World Econ. F. (Jan. 22, 2021), https://www.weforum.org/agenda/2021/01/klaus-schwab-on-what-is-stakeholder-capitalism-history-relevance.

While separate organizational structures for governance, family, and business may be normalized in Anglo-based governmental systems, a single community-based structure would serve many circular economy functions, especially when communities need to be self-sufficient.[227]

The instinct may be to look for innovative guidance derived from how other tribes have approached their tribal governments. However, the Navajo Nation is in a unique situation. It has asserted its traditional oral law as its immutable law, passed down orally since time immemorial, and encoded in this acknowledgment.[228] Communities rely on its tribal government to elevate DFL, while the tribal government relies on legal advisors to whom the DFL is too foreign to understand.

The people and government of the Navajo Nation deeply treasure their language, traditional knowledge, ceremonies, and community systems that are centered on matriarchs and matrilineal lines. The combination of these characteristics means that there may be no good example of other tribes putting forward governance solutions that will fit neatly for the Navajo.

A 2008 *Tribal Business Structure Handbook* strongly recommended that tribes adopt established for-profit business structures that minimize investment risk through conformance to business norms to encourage outside investment.[229] Likewise, some economic development experts[230] recommend tribal corporations to incorporate in Delaware to be more attractive to outside capital investments, while acknowledging that such entities create the risk of an implied waiver of sovereign immunity and the risk of loss of control over tribal assets.[231] However, these discussions sidestep tribal

227. *See Diné Customary Land Management*, INDIAN CNTY. GRASSROOTS SUPPORT (2022), https://dinelanduse.org/custom.

228. NAVAJO NATION CODE ANN. tit. 1, §§ 201–206.

229. KAREN J. ATKINSON & KATHLEEN M. NILLES, TRIBAL BUSINESS STRUCTURE HANDBOOK I-1 (2008).

230. *See* Evan Way, *Raising Capital in Indian Country*, 41 AM. INDIAN L. REV. 167 (2016).

231. *Id.* at 185–87 (noting examples of loss of tribal sovereign immunity); *e.g.*, Baraga Prod., Inc. v. Comm'r of Revenue, 971 F. Supp. 294, 296 (W.D. Mich. 1997) ("[A] corporation has been held to be entitled to the same sovereign immunity as the Indian Tribe when it is organized under tribal laws; it is controlled by the Tribe; and it is operated for government purposes."), *aff'd sub nom*. Baraga Prod., Inc. v. Mich. Comm'r of Revenue, 1998 U.S. App. LEXIS 17498, at *1–3 (6th Cir. July 23, 1998); Cohen v. Little Six, Inc., 543 N.W.2d 376, 379 (Minn. Ct. App. Feb. 13, 1996) ("[A] corporation organized under tribal laws, controlled by the tribe, and

culture, instead of giving culture the central role it needs to have. Additionally, the Navajo Nation has its own corporations code and sovereign methods of chartering legal entities wholly owned by the tribe that will be discussed in later sections.

An opportunity exists for the Navajo Nation to create a framework, free from the limitations of the individual based lease and permit system, that truly embodies the principles of DFL. If successful, there are several options, including (a) recognizing communal, rather than individual, relationships with land; and (b) replacing community leases and permits entirely with tribal land assignments to allow flexible exchanges so that communal land clusters may form. This is not an exhaustive list of options.

Perpetual Existence. Corporations have perpetual existence and survive beyond the life of an individual. This continuance provides for succession planning and preservation of operations beyond a single generation. This also means the entity remains unchanged when their steward passes on. Perpetuity is one of the reasons why Navajo judges created the Navajo customary trust, so that unfragmented homesteads on which multiple uses are practiced would remain unchanged from generation to generation. Diné settlements never changed when a matriarch passed on, as she was only a steward, similar to a corporation's chief executive officer. Accordingly, a local governance entity must have perpetual existence.

Limited Liability. Incorporation reduces personal risk for individual members, as it limits individual liability for most corporate actions. If individuals act in a reckless or intentionally wrongful manner, they could be liable for those acts. This is consistent with DFL, which expects actions in accordance with *k'é* and *hózhǫ*.

Roles Established in Bylaws. Corporate roles and how they relate to each other are set forth in bylaws. Bylaws are necessary to establish members' rights and ensure that individuals work within their responsibilities, thereby minimizing risk. Bylaws set forth boundaries for the relationships between members and between the entity and members. Talk of "rights" often creates generational conflict within some Diné families as it has an adversarial connotation. However, there is no doubt that written definitions of roles

operated for governmental purposes can assert the tribe's immunity as a defense."), *aff'd mem.*, 561 N.W.2d 889 (Minn. 1997); Wright v. Colville Tribal Enter. Corp., 147 P.3d 1275, 1280 (Wash. 2006) ("[A] tribe may waive the immunity of a tribal enterprise by incorporating the enterprise under state law, rather than tribal law.").

are needed. Corporate agreements, such as bylaws, can provide for roles that are not determined by financial investment or for achieving maximum profit but instead are directed toward advancing the mutual benefit of the group in conformance with DFL.

Two essential roles are that of a rainmaker and a knowledge keeper who is a disciplinarian of DFL. The rainmaker, likely tribal government, ensures that the local governance entity has sufficient support and resources, thereby functioning like peacetime *naalchiidi*. The knowledge keeper ensures that DFL is understood, ceremonies are conducted properly, and sacred sites are maintained properly.

Corporate Membership and "Customary Trusts." Local governments should have the ability to allow for fluid individual membership, while requiring and incentivizing familial systems, or associations of choice, to identify and organize their communal units for permanent identification. This ability is already discussed under Navajo Nation law through multiple references to "customary use areas" in the Navajo Nation Code and common law.[232] The customary land use area is a template for traditional communal stewardship that Navajo judges overlaid with the concept of Navajo customary trusts.

Local government should be empowered to clarify the purpose of Navajo customary trusts to fulfill their intention to assert the true communal or group nature of land use permits with respect to Diné community stewardship. A customary trust's purpose will vary based on multiple factors, including distinctive geographical and clan-based characteristics. Based on their unique local knowledge, members themselves will decide on that purpose depending on, *inter alia*, the nature of the land being stewarded, and the purposes for which members wish to utilize it.

The notion that land that is not beneficially used may be "owned" in absentia is not a DFL value. Continuous or seasonal use of land marked that area as a unit's customary use area, respected by surrounding units. Such use was permanently interrupted in 1863 upon the driving out followed by captivity at *h'wéeldi,* which left huge areas permanently vacant.[233] Much customary land remains permanently unclaimed by ancestral clans who never returned. Modern

232. *See* NAVAJO NATION CODE ANN. tit. 3, §§ 907(B)(3), 172(F), 710(B)(4).

233. *H'wéeldi—The Long Walk*, INDIAN COUNTRY GRASSROOTS SUPPORT (2022), https://dinelanduse.org/hweeldi.

Tribal law sets these areas aside, as if the ancestral clans will return and resume their previous land use relationships. In 1986, the Navajo Nation Supreme Court observed that "every acre of land on the reservation not reserved for a special purpose is a part of someone's customary use area."[234] Areas that once existed through continuous or seasonal use now exist nearly like Anglo American concepts of reserved land, fixed and vacant, in a manner never contemplated by the Holy Ones. Local governments should recognize these areas as the relationships that they are, rather than as geographic boundaries.

Finally, a word on present Chapter membership. Local Chapters presently have no direct registration role for members. Registration is performed, controlled, and recorded centrally through the Navajo Election Administration.[235] Chapter membership is fluid, with adult members choosing their Chapter primarily for voting purposes no matter where they may live. Local governance entities should have fluid membership. This will allow tribal members freedom to relate to each other and to land for as long as necessary and depart when appropriate. Notwithstanding their fluid membership, entities should be organized with matrilineal familial groups at their core.

Currently, children are not counted as Chapter members. This is contrary to traditional law, which considers every human being, including children, as having a say in what resources are used, terming it as "traditional interest" for want of a better word.[236]

Access to Insurance. Corporations may purchase insurance as a collective entity, thereby obtaining insurance even in instances where individual participants may not have access on their own. A local governance entity must be able to purchase collective insurance on behalf of its members.

Access to Capital. Access to capital and the creation of an investor-friendly environment, by minimizing investor risk through adoption of traditional corporate structures, has long been the conventionally accepted path for economic development on tribal lands.[237] However, "economic development" on the reservation is better understood as the creation of surplus for the community as a whole, rather than the creation of profit for individuals.

234. *In re* Estate of Wauneka, No. A-CV-26-84, 1986 Navajo Supp. LEXIS 1, *10 (Navajo 1986).

235. *See* Navajo Election Admin. (2022), https://navajoelections.navajo-nsn.gov.

236. Indian Country Grassroots Support, *supra* note 6.

237. *See* 25 U.S.C. § 5123(a); Atkinson & Nilles, *supra* note 229, at III-10-11.

The word "profits" is largely rejected within Diné communities, while "income generation" or "surplus" is better accepted. Ensuring the future means returning to a system of social ownership that can restore abundance and focus on those activities that are essential for maintaining human life, mitigating climate change, and saving the planet.[238] There is abundant human capital that the Navajo Nation can depend on to innovate, based upon a firm foundation of DFL. Barriers simply need to be peeled away towards a "multiple use, sustainable yield" approach.

Organization of smaller-scale local entities on a cooperative basis with net proceeds distributed on the basis of use, rather than on the basis of investment, could provide a path to a different type of economic development that respects tribal culture. These structures may require less intensive capital investment, while rendering significant non-economic benefits such as resource conservation and preservation of traditional cultural roles, family structures, and beliefs.

Written Records and Institutional Memory. Corporations normally require written records of agreements and operations. Through such records, corporations ensure that their organizational experience and culture are passed down. Local governance entities should consider the same.

Dispute Resolution. Corporations sometimes have dispute resolution procedures for their members that do not rely on external adjudicating bodies. Established business norms allow disputes to be resolved internally through specific processes set forth in member agreements. This is consistent with DFL. The LGA authorizes local governance entities to choose and implement a dispute resolution process but provides neither funding nor guidance.

DFL relies on traditional peacemaking, which combines disciplined instruction and talking out, *baa yáti',* to reach a sustained resolution that is good for the disputants and the whole community. The peacemaking presently used in the Navajo Nation courts is very different. Designed in 1991 to conform to the Anglo standard, court-based peacemaking is no more than a voluntary option that requires a court order to give resolutions effect. Meanwhile in U.S. courts today, mediation is increasingly mandatory in disputes involving families. Local governance entities should be enabled to

238. *See* KOHEI SAITO, SLOW DOWN: THE DEGROWTH MANIFESTO (2024).

require traditional peacemaking as the first option for all disputes, especially those involving familial land use.

Corporate Purpose and Recognition of DFL. DFL is not understood in the legal profession and among planners. Because DFL is viewed as immutable, it must be given primacy in the operations of tribal corporate entities by being made explicit as a corporate purpose. Diné entities will need to adjust standard business norms and reset investor expectations through written bylaws and agreements to support the primacy of DFL. This undertaking may seem daunting but is entirely possible, as seen in the shift in focus from shareholders to innovative stakeholder structures, as advocated for by the World Economic Forum.[239]

Deference to traditional local control and multigenerational stewardship of land may be articulated as a corporate purpose. Recognition of local control of land use might be better viewed as a subset or result of embedding DFL in a corporation's charter. The best conservation and sustainability practices would be achieved through enabling local communities to select the appropriate area themselves based on the activities to be performed there, rather than on arbitrary geographic boundaries imposed on them by tribal government.

VI. Relatedness of Everything Under Diné Fundamental Law

The Navajo Nation has been devastated by the impacts of climate change, with drought particularly impacting the Diné's health, livelihoods, and ability to practice their traditional way of life.[240] Studies commissioned by the federal government have concluded that "[s]elf-determination is key to implementing effective resilience strategies that meet the needs of Indigenous communities," such as the Diné.[241] Drought has devastated the entire reservation, with ranchers being particularly hard hit. Many sheep ranchers must now remove sheep more frequently than in earlier years to allow ecosystems to restore themselves, while others have shifted to raising

239. *See* World Econ. F., *supra* note 226.

240. N. Ariz. Univ., Navajo Nation: Dune Study Offers Clues to Climate Change Impacts (2008), https://www7.nau.edu/itep/main/tcc/docs/tribes/tribes_NavajoNation.pdf.

241. U.S. Glob. Change Rsch. Program, Our Changing Planet: The U.S. Global Change Research Program for Fiscal Year 2023 (2023): Allison R. Crimmins et al., U.S. Glob. Change Rsch. Program, Fifth National Climate Assessment ch. 16 (2023), https://nca2023.globalchange.gov/Chapter/16.

cattle, which are harder on grass and require the introduction of non-native plants for feed, resulting in further ecological disruption.[242] Further, climate change is damaging the Diné's significant sacred sites.[243] Whether it be harm to traditional grazing practices or cultural sites, Diné problems require Diné solutions, and policy makers need to utilize DFL principles when formulating strategies to address the climate crisis.

Both indigenous and non-indigenous land managers have recently emphasized including ITEK as part of their climate initiatives.[244] ITEK is particularly valuable due to indigenous peoples' close ties to local ecosystems.[245] Considering that the Diné have cared for and interacted with Dinétah and beings nurtured within Dinétah for millennia, it is local Diné communities who are in the best position to make decisions relating to their land. Even the DOI, through its Climate and Traditional Knowledge Workgroup, has acknowledged the importance and value of tribal knowledge in informing a tribe's internal land management practices and policies.[246] Specifically, ITEK needs to be utilized to ensure that climate adaptation and mitigation strategies are effective and culturally appropriate.[247]

In addition to the DOI, the Status of Tribes and Climate Change Working Group has published a seminal report concluding, *inter alia*, that ITEK is a fundamental and interwoven tool for understanding and responding to climate change.[248] Diné Traditional Law states that "leaders . . . ensure the rights and freedoms of generations yet to come."[249] Diné Natural Law states that "life, air, light/fire, water and earth/pollen . . . must be respected, honored

242. N. ARIZ. UNIV., *supra* note 240.

243. JULIE NANIA ET AL., CONSIDERATIONS FOR CLIMATE CHANGE AND VARIABILITY ADAPTATION ON THE NAVAJO NATION 17, 152 (2014), https://www.bia.gov/sites/default/files/dup/assets/public/pdf/idc2-060732.pdf.

244. *See* JOHN A. PARROTTA & RONALD L. TROSPER, TRADITIONAL FOREST-RELATED KNOWLEDGE: SUSTAINING COMMUNITIES, ECOSYSTEMS AND BIOCULTURAL DIVERSITY (2012).

245. *See* CLIMATE CHANGE AND INDIGENOUS PEOPLES IN THE UNITED STATES: IMPACTS, EXPERIENCES AND ACTIONS (Julie Koppel Maldonado et al. eds., 2013).

246. *Climate and Traditional Knowledges Workgroup*, GUIDELINES FOR CONSIDERING TRADITIONAL KNOWLEDGES (TKS) IN CLIMATE CHANGE INITIATIVES (2014), https://climatetkw.wordpress.com/about.

247. *Id.*

248. *The Status of Tribes and Climate Change Report (STACC)*, STACC 2021—ITEP (2021), https://sites.google.com/view/stacc2021-itep/home.

249. NAVAJO NATION CODE ANN. tit. 1 § 203 (2010).

and protected," and that "[i]t is the duty and responsibility of the Diné to protect and preserve the beauty of the natural world for future generations."[250] The reminder of Diné identity in the DFL, used since time immemorial by the *naalchiidi*, sets forth the critical thought, though not spelled out in English words, that the relationship with the natural world is more than protection and preservation; this relationship is proper and balanced use in the present for the wellness of all beings through *k'é* and *hózhǫ*.[251] It is essential that policy makers heed DFL's direction in addressing the climate crisis.

Policy makers formulating climate strategies need to do more than simply reach out to local tribal communities for their input to utilize local knowledge. It is insufficient merely to consider DFL in crafting climate solutions. Resources must be dedicated to build and retain capacity at the local level to manage and adapt resources and infrastructure to climate change. A culturally appropriate system for sharing the responsibilities of the journey must be established throughout childhood education and as part of local workforce development, involving Diné and others, especially those at the BIA Navajo Region office and tribal government. Such education and human development can mitigate inequality issues throughout the reservation, while maintaining local cultural integrity.[252] The Fifth National Climate Assessment noted that expanded support for local tribal communities is crucial to achieve the self-determination necessary to respond to climate change.[253] Elevating DFL means committing the funds necessary to ensure that its principles are actually shared by those with policy-reform authority and that it is implemented in practice.

A key DFL principle involves recognizing the interconnectedness of beings, including their ecological systems. Recognition of this interconnectedness also can achieve multiple objectives.[254] For example, systems that allow floating above or combining plots of

250. *Id.* § 205.
251. *Id.* § 201.
252. The Status of Tribes and Climate Change Working Group, The Status of Tribes and Climate Change Report 11 (Marks-Marino ed. 2021) [hereinafter STACCWG].
253. Dominique M. David Chavez et al., Tribes and Indigenous Peoples, Fifth National Climate Assessment ch. 16 (2023), https://nca2023.globalchange.gov/Chapter/16.
254. STACCWG, *supra* note 252, at 12.

land to permit multiple uses can help mitigate the impacts of climate change while also allowing communal life and work. As discussed in Section IV above, integrated land management is the path forward. Accordingly, the lease and permit system, as applied to permanent communal-minded communities, needs to be revised, perhaps even abandoned, to enable integrated land management practices consistent with DFL.

Assisting local Diné communities' transition from fossil fuels must be made a priority for policy makers. Transitioning away from fossil fuels and towards renewable energy will ensure regenerative, multigenerational stewardship consistent with DFL.[255] The devastation from the short-term profit-seeking inherent to fossil-fuel extraction has no place in the future and must be left in the past. Instead, policy makers must incorporate DFL principles when developing future energy infrastructure, as more fully discussed in Section XII below. The transition from fossil fuels will ensure a multigenerational energy source that respects the universe, Mother Earth, and Father Sky.

VII. Off-Reservation Characteristics to Be Avoided.

A. "Political subdivisions"

When the Navajo Nation received $1.9 billion in American Rescue Plan Act (ARPA) funds during the COVID-19 pandemic,[256] some funds could be allocated directly to tribal governmental programs, but none could be allocated to Chapters due to their "political subdivision" designation. While tribal programs could receive direct allocations, Chapters had to submit project proposals and compete for ARPA funds.

Their present political subdivision status prevents Chapters from performing 638 Contract services. It is also a primary reason why staff hired directly by certified Chapters do not automatically qualify for the tribe's pension plan and why certified Chapters must purchase insurance or pay extra to join Navajo Nation insurance policies.

255. *Id.* at 13.

256. *See $1.9 Billion in ARPA Funds Land in Navajo Nation Coffers*, NAVAJO TIMES (May 29, 2021), https://navajotimes.com/reznews/1-9-billion-in-arpa-funds-land-in-navajo-nation-coffers.

B. "Regionalization"

In 2016, a Title 26 Task Force formed by the Navajo Nation Council proposed eliminating funding for Chapters entirely and, instead, establishing twenty-two "regions," each run by three commissioners, replicating a type of off-reservation local government that contains nothing of Diné Life Way. The proposal's rationale was to decrease costs, cut down delays caused by lengthy Chapter discussions, and give region commissioners broad business development authority over the region's land use. The task force also discussed relocating off-grid homesites to a kind of "main street" in the region seat, which would be cheaper and simpler to plan and fund than the dispersed homesites that exist today.

Regionalization was rejected outright by the Eastern and Ft. Defiance Agency Councils[257] and was noted across communities for its lack of inclusion of community voices and DFL, especially consideration of *k'é*.[258] In 2016, the Navajo Nation Council's attempt to put the proposal to a referendum vote was vetoed by President Russell Begaye. The Title 26 Task Force erred in multiple ways, including ignoring local communities and culture.

C. Non-integration of "Economic Development" with Housing and Conservation by Communities Themselves

Perhaps because the federal government is compartmentalized, reservation land uses and tribal funding opportunities are similarly compartmentalized. Tribal government and communities lack opportunities to pursue projects that address business, housing, and conservation stewardship in the integrated manner of pre-reservation Diné settlement life. "Economic development," as defined by funders and lawmakers, may not be consistent with the communities' wishes, which are to sustain families, communities, and the Diné Life Way. Substantial housing funds through the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA)[259] sought to do the right thing by requiring tribal housing project construction to

257. *See* Leonard Tsosie, *Regionalization: Think Before You Stamp It Out*, Navajo Times (Feb. 11, 2016), https://www.facebook.com/photo?fbid=238737696458828&set=a.202645686734696.

258. *See* Curley et al., *supra* note 109, at 2.

259. *See* Cong. Rsch. Serv., R44261, The Native American Housing Assistance and Self-Determination Act (NAHASDA): Issues and Reauthorization Legislation in the 114th Congress (2017).

include infrastructure (roads, electricity, water, and even community centers). However, on a mostly rural reservation of large size and severe use restrictions and where infrastructure by itself may require multiple years to build out at great expense through external vendors, capacity is lacking to enable spending and building within statutory deadlines.[260] Finally, as stated earlier, communities have been given neither urgently needed authority nor financial support to participate in intra- or inter-community stewardship efforts.

VIII. Tribal Land Use Assignments and Customary Trusts

Tribes have attempted to create unique tribal structures to address certain problems that have arisen from the lease and permit system. However, courts are still unsettled on how such tribal structures can exist while not conflicting with federal law.

Communal Tribal Land Use Assignment. Individually issued community-use leases and permits (other than grazing) are not mandated by federal law. A range of land agreement options are exempt from mandatory leasing under 25 C.F.R. § 162.006(b), including "[t]ribal land assignments and similar instruments authorizing uses of tribal land" under tribal law. A "tribal land assignment" is broadly defined as "a contract or agreement that conveys to *tribal members* or wholly owned tribal corporations any rights for the use of tribal lands, assigned by an Indian tribe in accordance with tribal laws or customs."[261] The regulatory wording that tribal land assignments can be given to "tribal members," in the plural, leaves open possibilities for communal tribal land assignments.[262] Tribal land assignments do not require federal approval and are not subject to significant BIA oversight.[263] The "tribal law or custom" alternative to leases and permits is real and not long ago was addressed by the Ninth Circuit.

In 2014, the Tribal Council of the Chemehuevi tribe in Arizona created "land deed assignments" under tribal law that gave tribal members ownership-like rights akin to outright fee simple ownership. This development encouraged tribal members to return home

260. *See To Build a Home: The Navajo Housing Tragedy*, AZ CENTRAL (2017), https://www.azcentral.com/pages/interactives/navajo-housing/.

261. 25 C.F.R. § 162.003 (emphasis added).

262. Note that a tribal land assignment is not an "assignment" as understood under Anglo law, which would be an agreement between a lessee and an assignee.

263. *See* Shoemaker, *supra* note 46, at 1560.

after the reservation emerged dry from the flooding of Lake Havasupai when Parker Dam was built. The "land deed assignment" was intended to provide members with deeds to obtain mortgages.[264] The Ninth Circuit liked this approach, calling it "reasonable," but disallowed it because it looked too much like outright land ownership. However, the court strongly implied that tribes should try other kinds of tribal land assignment that did not go as far.[265]

The Ninth Circuit listed only two federal statutory restrictions on tribal land assignments: (i) the Indian Non-Intercourse Act of 1834 at 25 U.S.C. §177, which prohibits outright conveyance "from any Indian nation or tribe of Indians" except by treaty, and (ii) 25 U.S.C. § 81, which requires DOI approval for any agreement that "encumbers Indian lands for a period of 7 or more years."[266] The regulatory definition of "encumber" provides some examples of contracts or agreements that may be "encumbrances" but generally leaves this determination to the secretary's designee on a case-by-case basis.[267]

A communal tribal land assignment option for communal use and stewardship, as the ancestors intended, might be an overlay across leases and permits or even be incentivized to replace leases and permits. A tribal land assignment option could be specially worded to provide responsibilities for use and stewardship without encumbering land.

Customary Trusts. As discussed above in Section II, the concept of "customary trust," proposed in 1991 by the Navajo Nation Supreme Court (NNSC) would create a stewardship through a named customary trustee that could be a matriarch who keeps a family unit together and ensures communal use of land. A customary trust might be created through communal tribal land assignments or simply associations that do not involve the land itself. This option would require engaged discussion.

A structure that incorporates or integrates the government, family, and business organizational functions of a matriarchy and *naalchiidi* may not be easy to create, but it is possible, especially in this era of ITEK and climate change. With some creativity, structures normally used in non-tribal legal systems can be adapted to suit the needs of the Diné people. An incorporated or cooperative system

264. Chemehuevi Indian Tribe v. Jewell, 767 F.3d 900, 901–02 (9th Cir. 2014).
265. *Id.* at 909.
266. *See id.*
267. 25 C.F.R. §§ 84.002, 84.005, 84.006.

of local governance, which can hold land, is a possible option to achieve this outcome and need not be restricted to Chapters as a managing model. These are discussed below in Section XI. The Diné Policy Institute has emphasized the importance of communities themselves locally managing shared resources and being provided "the authority to manage their shared resources with other communities."[268]

Given the communal mandates of DFL, the formal frameworks necessary for "governing" at the local level must be fully participatory types of "live, work, govern" integrated entities or structures that have independent sustained access to funds. A foundational tribal vision needs to provide the high-level framework for local "live, work, govern" framework design and use. Elders use the instructional analogy of a good ball of yarn, which holds its shape when properly wound but also must be properly unwound; otherwise no matter how well made, the ball of yarn will become tangled and not fit for use. The story of the yarn is part of the DFL.

The NNSC has expressed that BIA regulated leases conferring individual rights are incompatible with the true communal or group nature of Diné land use.[269] The Navajo Nation ignored the expressions of its own high court when, in 2014, it exercised privileges provided by Congress under the 2000 Navajo Leasing Act and established tribal leasing regulations mirroring the BIA regulations. In so doing, the Navajo Nation may have become the agent of its own cultural undoing. The compartmentalized leasing system is also incompatible with the now decades-long move towards integrated resource management that should encourage relationships structured around collective Diné clans and other associations, while not conflicting with federal and tribal law.

Communal associations, however they are formally organized or named, must be empowered to utilize the land for integrated multipurposes, including homes, business, farming, or grazing. Land use by such groups should not be limited to single purpose land use parcels. Flexibility to integrate and multiuse will result in the land being used more efficiently and for its most beneficial purposes, according to shifting challenges and needs. The Navajo Nation can, and should, move towards integrated multi-uses for group units

268. *Land Reform in the Navajo Nation: Possibilities of Renewal for Our People*, DINÉ POLICY INST. 1, 62 (2018), https://www.firstnations.org/publications/land-reform-in-the-navajo-nation-possibilities-of-renewal-for-our-people.

269. *Begay v. Keedah,* 1991 Navajo Sup. LEXIS 17.

rather than individual leases, encompassing homes, livestock and businesses, and which should also include the ability to combine resources with other entities or third parties.

The present federal policy era of tribal self-determination, which commenced with the ISDEAA, acknowledges that prolonged federal oversight of reservations has hindered, rather than enhanced, self-determination and governance.[270] Federal Indian policy has not prohibited tribes from asserting their own community land use arrangements for decades, while invalidating any outright "purchase, grant, lease, or other conveyance of lands,"[271] or certain lengthy encumbrances of land,[272] unless first agreed to by the United States.

Local communities are best positioned to determine how to utilize and preserve local resources under an integrated-use tribal vision that would ensure that local frameworks do not violate any federal law. Certainly, enabling tribal communities to work together to conserve and generate income from integrated use lands would extend the "multiple use, sustainable yield" concept using ITEK. Encouraging local land use decisions that sustain culture is essential in protecting the land from exploitative practices, which historically were authorized by policy makers, not the impacted communities.

Federal law restraining contracts for the conveyance or encumbrance of tribal lands[273] should not impact the ability of communal stewardships to otherwise enter into collaborative contracts with third parties to temporarily join stewardships in an integrated multiuse approach to community land; however, such collaborations must be expressly supported by the tribe through its tribal vision as discussed earlier in Section IV.

IX. Navajo Nation's Wholly Owned Entities

The Navajo Nation wholly owns independent legal entities, which may be federally chartered or created by the Navajo Nation itself. An entity wholly owned by the tribe may be provided sovereign immunity and federal tax exemption, although they are not guaranteed and can be waived.[274] Tribally owned entities that have purely

270. 25 U.S.C. § 5301(a).
271. 25 U.S.C. § 177.
272. *See* Sikes Act, *supra* note 137.
273. 25 U.S.C. § 81.
274. Atkinson & Nilles, *supra* note 229.

economic purposes and that do not perform governing functions do not qualify for sovereign immunity.[275]

The federal courts consider several factors in ascertaining a tribal organization's eligibility for sovereign immunity, including assessing the corporation's ability to bind tribal assets, the governance structure linking the tribe and the corporation, the purpose of the corporation (whether governmental or commercial), its legal separation from the tribe, and alignment with federal policies promoting tribal self-determination.[276] Generally, courts are more inclined to grant immunity given a strong interconnection between the tribal government and the corporation.[277]

Both the tribe and its entities are eligible to enter into 638 Contracts.[278] Under ISDEAA's tribal self-governance regulations, a "tribal organization" includes "the recognized governing body of any Indian Tribe [and] any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization."[279] Any entity, including local governance entities that meet this ISDEAA's definition of "tribal organization," would be eligible to administer 638 Contract programs.

Federal Charter Under Section 17 of the Indian Reorganization Act. Section 17 of the 1934 Indian Reorganization Act (IRA) provides that an entity wholly owned by the tribe may be federally chartered to enable tribes to engage in revenue-generating functions. It states:

> The Secretary of the Interior may, upon petition by any tribe, issue a charter of incorporation to such tribe: *Provided*, That such charter shall not become operative until ratified by the governing body of such tribe. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law; but no authority shall be granted to sell, mortgage, or lease for a period exceeding twenty-five

275. S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Cmty., 674 P.2d 1376, 1382 (Ariz. Ct. App. 1983) (noting Gila River Farming venture as a subordinate economic entity of the tribe and not part of its corporate entity).

276. *Id.*

277. *Id.*

278. ATKINSON & NILLES, *supra* note 229, at II-2; *see also*, 25 U.S.C. §§5301—5310.

279. 25 U.S.C. § 5304(l).

> years any trust or restricted lands included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.[280]

Broadly drafted, Section 17 leaves plenty of room for a tribe's innovation. Entities chartered under Section 17 generally are referred to as "Section 17 corporations" (Section 17s). A significant drawback to forming a Section 17 is the time-consuming process involving negotiations, tribal resolution, federal government approval, and charter drafting. Additionally, Section 17s can be dissolved or suspended only by an act of Congress, and Section 17 charters are difficult to amend. Thus, once formed, the entity is essentially permanent. Navajo Nation Section 17s are wholly owned by the tribe, with the people of the Navajo Nation as shareholders.

Section 17 authority over real property means these entities may hold, manage, and regulate land without need for delegation of authority, which is powerful for local governance. The ISDEAA defines "real property" as "any interest in land together with the improvements, structures, and fixtures and appurtenances thereto."[281]

Section 17s provide the best structure for enterprises with extensive external dealings, such as the Navajo Nation Oil and Gas Company (NNOGC), which owns and operates oil and gas interests,[282] and Naat'áanii Development Corporation (NDC), organized in 2018 as an economic driver "to find new ways of diversifying revenues, creating jobs, and simplifying doing business on the Navajo Nation"[283] A Section 17 organized for the purpose of being an economic driver is similar to how DFL embraces local *naalchiidi* collaborating to create surplus for community benefit.

Tribal Enterprises. Independent legal entities wholly owned by the tribe and organized pursuant to plans of operation enacted by the Navajo Nation are termed "tribal enterprises." They have an independent board of directors with the tribal president typically designated an *ex officio* board member.[284] Normally, this organization works best for entities that have less external dealings and that

280. *See* 25 U.S.C. § 5124 (codifying Section 17 of the IRA).

281. 25 C.F.R. § 900.6.

282. *About Us*, Navajo Nation Oil & Gas Co. (2017), https://nnogc.com.

283. Rima Krisst, *Haaji Naat'áanii Corp.?*, Navajo Times (Dec. 14, 2018), https://navajotimes.com/biz/haaji-naataanii-corp.

284. *See, e.g.*, Navajo Tribal Utility Authority (NTUA) and Navajo Engineering and Construction Authority (NECA), *Background*, Navajo Eng'g & Constr. Auth. (2024), https://www.navajo.net/about/background; Navajo Nation Code Ann. tit. 5, § 1971 (2010).

provide services on the reservation. Unlike Section 17s, authority over real property must be delegated to the tribal enterprise by the Navajo Nation. Therefore, tribal enterprises are accountable to the Diné people.

Possibilities for Local Tribal Governance. Local tribal governance entities on the Navajo Nation may be organized under various means, including the above tribal entities, which would allow access to 638 Contracting for local services, local holdings of energy assets, and local methods of managing tribal members' land. Local governance modeling need not proceed on the assumption that the present form of tribal government and its entities is absolute.

The Navajo Nation could consider creating an entity for the sole purpose of ensuring that DFL is correctly interpreted and applied throughout all matters on the reservation, including in the context of any future LGA discussions. Entities already exist that are tasked with (i) creating an environment conducive to developing businesses on the Navajo Nation,[285] (ii) assisting communities in becoming self-sufficient and self-governing entities,[286] and (iii) evaluating all aspects of the existing government structures in the Navajo Nation.[287]

There is practically no limit to the innovations that may be put in place for local governance. DFL being "the very foundation" of Navajo tribal law,[288] local governance entities may be formed for the express purpose of governing local customary or incorporated groups organized to use land consistent with DFL.[289] There is no evident reason why a unique entity that fits a "live, work, govern" mission for local communities cannot be innovated in such a manner.

Flexibility is key to effective reform,[290] and the Navajo Nation can think innovatively to return local governance to the Diné people. After generations of failed colonized bureaucracy, it is time

285. NAVAJO NATION DIV. OF ECON. DEV., https://navajoeconomy.org (last visited Apr. 20, 2024).

286. NAVAJO NATION DIV. OF CMTY. DEV., https://www.nndcd.org (last visited Apr. 20, 2024).

287. OFF. OF NAVAJO GOV'T DEV., https://ongd.navajo-nsn.gov (last visited Apr. 20, 2024).

288. Off. of the Navajo Nation President & Vice-President v. Navajo Bd. of Election Supervisors, *supra* note 53, at *30.

289. *See* John C. Hoelle, *Re-Evaluating Tribal Customs of Land Use Rights*, 82 U. COLO. L. REV. 551, 562–63 (2011).

290. *See e.g.,* Shoemaker, *supra* note 46, at 1589–1606.

to adapt the tools, but not necessarily the substance, of the colonizer, bearing in mind that both tools and substance are also always evolving within their own localities.

X. Private Incorporated Entities

This section briefly discusses private entities organized for profit, nonprofit, or a mixture of profits and social benefit. Whether organized pursuant to Navajo Nation or state law, none would be suitable as models for local governance entities at this time, as discussed below.

Navajo Nation Corporation Code entities. Private entities operating on the Navajo Nation may be chartered or domesticated under the Navajo Nation Corporation Code (NNCC) at Title 5 of the Navajo Nation Code.[291] The NNCC is entirely based on "the American Bar Association's Model Business Corporation Act, Model Close Corporation Act and Model Code, and the various agricultural cooperative acts of several states."[292] In its only reference to custom, the NNCC requires that interpretation of the NNCC "shall give the utmost respect in deciding the meaning and purpose of [the NNCC] to the unique traditions and customs of the Navajo people."[293] The NNCC likely was modeled tightly on off-reservation entities to lessen risk for investors, who rely on business norms. Thus, it is not possible to base local governance entities that are consistent with DFL on the NNCC.

State-chartered corporations. Organized under state law and later domesticated on the Navajo Nation, state-chartered corporations are common. States impose specific restrictive provisions on these entities by statutory design, and they vary greatly by state. However, like the NNCC, state law restrictions also make using this approach to local governance entity formation unfeasible for creation of unique tribal structures consistent with DFL.

Nonprofits. Nonprofits may be organized under state or Navajo Nation law. Nonprofit corporations are created and operated for charitable or socially beneficial purposes rather than returning a profit to investors.[294] These types of corporate organizations are

291. Navajo Nation Code Ann. tit. 5, § 3100 *et seq* (2010).
292. *Id.* § 3100(B).
293. *Id.*
294. Will Kenton, *Nonprofit Organization (NPO): Definition and Example*, Investopedia (Mar. 3, 2024), https://www.investopedia.com/terms/n/non-profitor

similar to other corporations in their formation, but when organized for charitable purposes, nonprofits receive tax exempt status under 501(c)(3) by demonstrating to the IRS that their operations further a charitable purpose.[295] Established nonprofits across the Navajo Nation provide incalculable services that the Navajo Nation, Indian Health Services (IHS), and schools are unable to provide. For example, the Johns Hopkins Center for Indigenous Health in Shiprock, New Mexico, provides home health screenings and parent support.

Rather than creating a corporation solely for profit, a nonprofit working towards community and environmental benefit strongly aligns with DFL. However, depending on nonprofits for basic services that should normally be provided through community governing bodies can impede self-sustainability. Additionally, nonprofits must comply with strict and restrictive IRS rules for maintaining and running the corporation, including the inability of shareholders to directly benefit from the corporate operations.[296] These restrictions make this type of corporate structure inappropriate for self-governing tribal organizations, since such organizations preclude private benefit to individual members.

Benefit corporations. B corps, or benefit corporations, are state law-based, for-profit corporations that combine profit seeking with altruistic purposes. These entities are subject to a certification process to demonstrate their societal and environmental performance.[297] While these for-profit corporations allow their boards of directors to adopt a broader view of the corporation's purpose and to focus on social and environmental performance, as well as financial performance, they fail to mandate that the benefit corporation's board of directors adopt a defined concept of sustainable resource utilization. B corp. incorporation requires approval by B Lab, a third-party, non-profit corporation through a certification process that lasts months or possibly years, depending largely on whether a corporation already possesses a system for measuring its social and environmental impacts.[298] It is unknown whether B Lab

ganization.asp.

295. *Id.*

296. *Id.*; *Inurement/Private Benefit: Charitable Organizations*, IRS (Dec. 27, 2023), https://www.irs.gov/charities-non-profits/charitable-organizations/inurement-private-benefit-charitable-organizations.

297. *An Introduction to B Corp Certification*, B LAB: UNITED STATES & CANADA, https://pardot.bcorporation.net/CertificationOverview (last visited Apr. 20, 2024).

298. Greg Daugherty, *B Corp: Definition, Advantages, Disadvantages, and Examples*, INVESTOPEDIA (May 18, 2023), https://www.investopedia.com/b-corp-7488828.

would recognize a corporate mandate to adhere to DFL as enabling certification.

XI. Cooperatives

The International Co-operative Alliance (ICA) defines a cooperative as "an autonomous association of persons united voluntarily to meet their common economic, social, and cultural needs and aspirations through a jointly owned and democratically controlled enterprise."[299] Cooperative corporations are generally more flexible than regular corporations because cooperative corporations are designed to fulfill purposes other than providing a return on capital investment. This means that cooperatives would venture into providing services in difficult or undeveloped markets. For this reason, cooperatives are used to provide electricity at cost to most of the rural United States and to provide collective processing and marketing services at cost to many U.S. farmers.[300] The "at cost" cooperative principle means that no profit is obtained at the corporate level; instead the individual users benefit through sharing of costs based on their use and for the collective benefit.[301] This flexibility and clarity of purpose in non-monetary terms enable collective decision making for community benefit. More easily than non-cooperative corporations, cooperative corporations can be designed to take on roles and more readily adhere to DFL. The "diversity of cooperatives is kaleidoscopic, and their variability is literally infinite."[302]

Cooperatives and Local Governance. The 1936 Oklahoma Indian Welfare Act (which applied the 1934 IRA to Oklahoma tribes) allowed the DOI to grant a federal cooperative charter to a qualifying Oklahoma "Indian Cooperative Association."[303] The purpose was to enable Oklahoma tribes without a reservation to choose their membership and associate as a federally recognized tribe that could

299. Kimberly A. Zeuli & Robert Cropp, Cooperatives: Principles and Practices in the 21st Century 1 (2004).

300. *See* U.S. Dep't of Agric. Rural Dev., Understanding Cooperatives: Agricultural Marketing Cooperatives (Jan. 2000), https://www.rd.usda.gov/sites/default/files/CIR45-15.pdf; *see also The Role of Energy Cooperatives in Advancing Clean Energy*, Nat'l Coop. Bus. Ass'n Clusa Int'l (July 1, 2022), https://ncbaclusa.coop/blog/the-role-of-energy-cooperatives-in-advancing-clean-energy.

301. *What Are Cooperatives*, Co-opLaw.org (Aug. 15, 2014), https://www.co-oplaw.org/knowledge-base/what-are-cooperatives.

302. Zeuli & Cropp, *supra* note 299.

303. *See* 25 U.S.C. §§ 5201–5210 (1970).

obtain federal loans for land purchase for its members.[304] For similar reasons, in 1935 Congress set up a capital fund for the Chippewa Cooperative Marketing Association to, *inter alia*, purchase land.[305] Only Oklahoma tribes and the Chippewa tribe were singled out in the IRA for federally chartered cooperation. However, the phrase "cooperative" generally is used elsewhere in the IRA for all tribes,[306] as if Congress expected that some tribes may organize their governments as cooperatives.

States began adopting model cooperative corporation laws for agricultural, electrical, and consumer cooperatives in the 1930s.[307] State-based models with economic or business goals are not likely to support DFL. However, some innovations for service delivery are important to note. In 1935, the federal Rural Electrification Administration (REA)[308] began providing loans to local (state-chartered) cooperatives to extend the electricity grid to rural areas, which investor-based, profit-seeking models were not able to do.[309] By 1953, more than ninety percent of non-reservation farms had electricity provided through local cooperative organizations, and today it is close to ninety-nine percent.[310]

The federal cooperative provision for Oklahoma is a useful starting point for local governance-related models on the Navajo Nation, although the Navajo Nation may well re-define local governance cooperatives from top to bottom using DFL. The federal provision discards several requirements for cooperatives under state laws. State cooperative laws generally have six requirements, while the Oklahoma statute had only three: (a) one vote per member;

304. *Id.* § 5203; Kirke Kickingbird, *Way Down Yonder in the Indian Nations, Rode My Pony Cross the Reservation from Oklahoma Hills by Woody Guthrie*, 29 TULSA L.J. 303, 335 (1993) (providing the historical basis for the Oklahoma Indian Welfare Act and the reasons why it has not been more utilized by indigenous people in Oklahoma).

305. Chippewa Indian Marketing Association, 74 P.L. 281, 49 Stat. 654; 74 Cong. Ch. 551.

306. 25 U.S.C. § 464.

307. *See* U.S. DEP'T OF LABOR, 31 MONTHLY LABOR REV. 100–23 1930).

308. *Executive Order 7037 - Establishing the Rural Electrification Administration*, UC SANTA BARBARA: THE AM. PRESIDENCY PROJECT (May 11, 1935), https://www.presidency.ucsb.edu/documents/executive-order-7037-establishing-the-rural-electrification-administration.

309. *See* Brandon McBride, *Celebrating the 80th Anniversary of the Rural Electrification Administration*, U.S. DEP'T OF AGRIC. (May 20, 2016), https://www.usda.gov/media/blog/2016/05/20/celebrating-80th-anniversary-rural-electrification-administration; *see also* 7 U.S.C. § 904(a) (1936).

310. 7 U.S.C. § 904(a) (1936).

(b) limited returns on capital investment; and (c) distributions based on participation or use. The greater flexibility provided under federal charter helps illustrate that state-defined cooperatives are not the absolute standard. However, any design must ensure that the cooperative does not become a tool used by non-participants to extract profits.

Section 17s and tribal enterprises, as well as models not yet innovated, may certainly take the form of cooperatives.[311] However, tribal laws must be revised to conform with DFL. At this time, DFL is absent from the Navajo Nation Agricultural Cooperative Act (NNACA), which provides for private entity organization subject to the "general corporation laws" of the Navajo Nation.[312]

NNACA provides that such cooperatives may be "not for profit," which in American cooperative law generally means distribution to the members of all net proceeds of the cooperative corporate entity, not that the entity is a charitable organization.[313] The NNACA allows farmers to consolidate their farm and grazing permits under long-term agricultural business land leases,[314] a provision that has never been used due to administrative consequences from such consolidation. A Navajo Nation permit, which otherwise can be handed down, must be beneficially used, meaning some planting or raising of livestock. Business leases revert to the tribe after a number of years. This mandate disincentivizes permit consolidation for agricultural cooperatives.

As currently drafted, the NNACA closely tracks state cooperative codes and is not useful for building unique entities that are able to "live, work, govern." However, it is within the tribe's authority to revise the NNACA to conform to DFL.

Financing. While standard corporate structures provide a well-understood mechanism for rewarding capital investment, reservation poverty means that residents have little capital to invest.

311. 25 U.S.C. § 464.

312. Navajo Nation Code Ann. tit. 5, §§ 3402, 3425 (2010).

313. *See, e.g.*, Mo. Rev. Stat. § 351.1147 (2023); N.M. Stat Ann. § 76-12-3(E) (2021) (cooperative associations deemed to be nonprofit corporations and noting that the primary objective is profit only for members as producers or users of products purchased); N.M. Stat Ann. § 53-4-1(A) (cooperative associations are deemed nonprofit corporations); Utah Code Ann. § 3-1-2(10)(b) (2010) (cooperative associations deemed to be nonprofit corporations, inasmuch as their primary object is not to pay dividends on invested capital, but to render service and provide means and facilities by or through which the producers of agricultural products may receive a reasonable and fair return for their products).

314. Navajo Nation Code Ann. tit. 5, § 3405(H) (2010).

This is analogous to the situation that rural farmers who needed electricity faced in the 1930s. At that time, the newly created Rural Electrification Administration (REA) provided low-interest loans to rural electric cooperatives.[315] The REA combined two essential elements to secure the provision of electricity to rural residents who were unable to invest: (a) locally owned cooperatives able to receive low-interest federal loans and (b) a federal loan program enabling start-ups.[316] Profits are never the purpose. Following repayment of REA loans, the rural electric cooperatives provide electricity to their users at cost.[317]

States allow outside investors (and members themselves) to invest in a cooperative, so long as their return on investment is limited.[318] Those wishing to invest in reservation communities range from profit seekers to philanthropic programs aiming for social impact benefits. There is no reason why a tribal cooperative statute could not combine economic and social impact benefits as goals. Dependence on business norms must not come at the cost of cultural practice.

DFL presumes that generations will "radically reinvent."[319] There is no doubt that the tribe will be able to merge economic and social benefits in associations that they create as both stakeholders and shareholders. It is time to adapt the colonizers' instruments in ways that will work, rather than merely defining "rights"

315. McBride, *supra* note 309.

316. 7 U.S.C. § 904; *see Electric Programs*, U.S. DEP'T OF AGRIC.: RURAL DEV., https://www.rd.usda.gov/programs-services/electric-programs (last visited Apr. 20, 2024).

317. *See, e.g.*, N.M. STAT. ANN. § 62-15-20 (1978); ARIZ. REV. STAT. ANN. § 10-2067 (2024); TEX. UTIL. CODE ANN. § 161.059 (2023); *see also History: The Story Behind America's Electric Cooperatives and NRECA*, NRECA (2024), https://www.electric.coop/our-organization/history (explaining that the majority of rural electrification began with loans through the REA lending program); Michael Seto & Cheryl Chasin, *General Survey of I.R.C. 501(c)(12) Cooperatives and Examination of Current Issues*, IRS EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TEXT 178 (2002), https://www.irs.gov/pub/irs-tege/eotopice02.pdf.

318. *See, e.g.*, MISS. CODE ANN. § 79-19-31 (2020) (stating cooperative may not pay more than eight percent interest on common or preferred stock per year); NEB. REV. ST. § 21-1302(2) (2021) (providing that dividends shall not exceed eight percent per year); N.M. STAT. ANN. § 76-12-7(H) (2021) (establishing that dividends may not exceed eight percent annually); N.M. STAT. ANN. § 53-4-22 (2021) (stating interest-dividends shall not exceed fifteen percent per year and shall be noncumulative); UTAH CODE ANN. § 3-1-11(2) (2020) (stating that dividends in excess of eight percent per year on actual cash value of consideration received by the association may not be paid on common stock or member capital but they may be cumulative).

319. MARSHA WEISIGER, DREAMING OF SHEEP IN NAVAJO COUNTRY xi (2011).

and "obligations" as member agreements do now. New agreements might simply define the stake as *k'é* and *hózhǫ*.

XII. Infrastructure, Energy, and Water

The Navajo reservation has immense infrastructure and energy needs.[320] Infrastructure investment is normally guided by benefit-cost analysis (BCA), a systematic process for identifying, quantifying, and comparing expected benefits and costs of an investment, action, or policy. Developing energy and infrastructure while incorporating DFL, however, requires adherence to the following non-exhaustive criteria: (i) being communally centered, (ii) accounting for generational effects, (iii) prioritizing group welfare at the top of the hierarchy, (iv) ensuring stewardship of "Mother Earth" and "Father Sky," and (v) establishing an initial surplus that accumulates over time. Centering energy and infrastructure development around these criteria will result in action plans and roadmaps that depart markedly from the typical management plans delivered in American municipalities.

These essential criteria may present challenges, but less obvious are the opportunities that such criteria may unlock. Infrastructure deployment in accord with DFL guides us towards outcomes that are critical to addressing the existential threat of climate change. Below, this section describes several situations in which employing DFL is not only well aligned with essential modalities for repairing and stewarding Mother Earth but also is more effective in getting things done.

A. Designing Circular Economy Solutions

A communally centered entity may be far better positioned to act in accordance with the "circular economy" (CE) framework because of this entity's ability to aggregate activities across private property lines and its focus on group surplus, rather than profit maximization that accrues to an individual, corporation, or similar entity. Increasing interest in adopting CE models exists, as CE is included in national climate pledges.[321]

320. *See* Tanana & Bowman, *supra* note 28.

321. Alana Craigen, *For a Truly Circular Economy, We Need to Listen to Indigenous Voices*, UNDP (Nov. 11, 2021), https://www.undp.org/blog/truly-circular-economy-we-need-listen-indigenous-voices.

Development with a CE lens, however, is often halted or impeded by the exercise of individual property rights. DFL is centered around the communal management of land rather than parcels under private ownership. Furthermore, DFL instructs us to use the land for communal welfare, not for the maximization of individual welfare of parcel owners. The management of land conveys an obligation to preserve human-ecosystem relationships, referred to as "cultural ecosystem services," which has been defined as "the nonmaterial benefits people obtain from ecosystems through spiritual enrichment, cognitive development, reflection, recreation and aesthetic experience, including . . . [k]nowledge systems . . . [a]esthetic values . . . [and s]ocial relations."[322] Policy makers should consider such cultural ecosystem services when making decisions related to energy infrastructure development.

B. Creating Micro-Energy and Infrastructure Districts

The U.S. Department of Energy (DOE) defines a microgrid as "a group of interconnected loads and distributed energy resources within clearly defined electrical boundaries that acts as a single controllable entity with respect to the grid. A microgrid can connect and disconnect from the grid to enable it to operate in both grid-connected or island-mode."[323] Microgrids illustrate how application of DFL directs us to distinctly different outcomes as compared to the *status quo* case. Microgrids have uncovered the complexities of cooperation in the sharing of electric and thermal energy by unaffiliated business entities. Organizing proximate locations to communally share heat, hot water, cooling, and power may be the best solution. However, acting out of an individual interest that ends at the property line, each site takes account of private benefit, ignoring and foregoing community benefits. Microgrids predominantly have taken root in the single owner—single campus business model[324] Compared to single-owner campuses, multiuser microgrids (MUMs)

322. WALTER V. REID ET AL., ECOSYSTEMS AND HUMAN WELL-BEING: MILLENNIUM ECOSYSTEM ASSESSMENT 40 (2005).

323. Dan T. Ton & Merrill A. Smith, *The U.S. Dep't of Energy's Microgrid Initiative*, 25 ELEC. J. 84, 84 (2012) (citing Microgrid Exchange Group, which is comprised of an ad hoc group of individuals working on microgrid deployment and research).

324. A "single-owner" campus style project is exemplified by college/universities, hospitals campuses, and military bases. *See* DAN LEONHARDT ET AL., PACE ENERGY AND CLIMATE CTR., MICROGRIDS & DISTRICT ENERGY: PATHWAYS TO SUSTAINABLE URBAN DEVELOPMENT 4–5 (2015).

face many challenges.[325] However, organizing entities in a manner that embraces communal management of land and resources may mitigate the problems often associated with MUMs.

Communally centered development incorporates a holistic approach more consistent with DFL. The largest users of power, such as hospitals and supermarkets, share excess with lesser users of power, such as residences. Power generation creates heat. At a stand-alone power plant, heat is a waste product that must be dissipated to air or water bodies. In a district, heat is no longer a waste product. Instead, it provides heating, hot water, and cooling for residences and businesses. Resiliency is created by controlling power generation since excess local power can maintain necessary critical services during an outage.

Navajo Nation policy makers could look to the DOE Office of Electricity Microgrid's research and development program, which is a comprehensive portfolio that develops and implements microgrids to improve grid reliability and resiliency and helps communities better prepare for future weather events and transition toward a cleaner energy future with affordable and equitable microgrids.[326]

C. Prioritizing Group Welfare to Capture Ancillary Benefits

Economic rents have been defined as "the payment (imputed or otherwise) to a factor in fixed supply."[327] A growing body of literature argues that modern economies are suffering from excessive economic rents, defined as returns based on the control over, or ownership of, a scarce asset.[328] Prioritizing group welfare as a fundamental principle will diminish destructive rent seeking behavior markedly. Where ownership of assets is held in common, assets are deployed according to processes that arrive at a consensus by all affected parties, not just the party that holds title to the scarce asset. Such a structure should be explored by Diné communities since consensus decision making is valued in DFL.

325. *Id.* at 5.

326. *Microgrids R&D (MGRD) Portfolio of Activities*, U.S. Dep't of Energy: Off. of Elec., https://www.energy.gov/oe/microgrids-rd-mgrd-portfolio-activities (last visited Apr. 20, 2024).

327. New Palgrave Dictionary of Economics (Macmillan Publishers Ltd. ed. 2018).

328. Mariana Mazzucato et al., *Mapping Modern Economic Rents: The Good, the Bad and the Grey Areas*, 47 Cambridge J. Econ. 507, 507 (2023).

When energy investments are made, there are often effects, both positive and negative, that cannot be captured by the investor. For example, investment in clean water and sanitation services is one of the most important factors that positively impacts public health, even though this positive impact is not necessarily captured by the investor.

Similarly, energy districts and microgrids with power, heating, and cooling provide more than just energy services to the communities that they service. Microgrids provide a higher degree of energy resiliency, allowing for the continuous provision of heating, cooling, and power during power outages due to natural or man-made disasters. With climate change, more frequent, more intense, and longer lasting power outages are anticipated due to adverse weather events. It is often difficult to "price" the value of keeping a healthcare center open and operating, thereby keeping vulnerable populations safe. A local microgrid may reduce the costs and improve the operation of a nearby utility grid. Yet, that benefit is almost never compensated. Applying DFL to energy development will widen the lens, looking beyond benefits that can be monetized.

D. Communal Decision Making to Capitalize on Funding Opportunities

Communities must have ready access to material information and must act for the benefit of all members. Furthermore, local communities must be able to execute binding arrangements in a timely manner. Crucially, communities must be able to interact, nimbly and with alacrity, across their geographic boundaries to achieve the best outcomes.

It is essential to seize the moment here, with respect to water and energy infrastructure design and development. There has never been a more opportunistic time for re-imagining development according to DFL. The imminent Water Rights Settlement Agreement, the availability of funding from the 2021 Bipartisan Infrastructure Law (BIL), and the Inflation Reduction Act of 2022 (2022 IRA) provide unprecedented resources for resilient and sustainable communities to develop energy infrastructure now.

For example, the U.S. Department of Agriculture Rural Development Utah announced up to $76.5 million to help with costs of the Red Mesa Tapaha Solar Farm, which was inaugurated in

August 2023.[329] Most of the power generated will be sold off-reservation to customers in California and Utah, providing a significant source of revenue for Navajo Tribal Utility Authority (NTUA) and the people of the Navajo Nation.

Additionally, the DOE recently allocated $8 million to assist with electrification of 300 homes,[330] which could benefit the nearly 14,000 Diné families who remain without electricity.[331] This work will be conducted by Native Renewables, a nonprofit indigenous led organization that installs off-grid solar with battery storage to provide power to families on the Navajo and Hopi reservations.[332] Electrification presents significant challenges, but NTUA's stated goal is to connect 500 to 1,000 homes annually, which would reach all homes in fifteen to thirty years.[333]

This is a favorable time for infrastructure development. The 2022 IRA provides entities with no tax liability, such as Section 17s and tribal enterprises, with the ability to receive direct payment or to sell tax credits to third parties.[334] This new benefit, combined with federal investments in transmission services, should provide entities within Navajo Nation with the opportunity to utilize their communal energy resources in innovative ways that were previously stymied by unequal access to tax incentives and the energy grid. The communal organizations that design, build, operate, and maintain these resources should create structures and plans that facilitate the accumulation of a surplus over time that will, in turn, support self-governing cultural patterns consistent with DFL.

329. Tim Vandenack, *Navajo Nation Solar Power Plant, Meant to Help with Electrification, Gets Federal Financing*, KSL.com (Mar. 30, 2024), https://www.ksl.com/article/50965108/navajo-nation-solar-power-plant-meant-to-help-with-electrification-gets-federal-financing.

330. Tim Vandenack, *Navajo Nation, Hopi Reservation in Line for $8M in Federal Funds to Aid with Home Electrification*, KSL.com (Mar. 4, 2024), https://www.ksl.com/article/50935016/navajo-nation-hopi-reservation-in-line-for-8m-in-federal-funds-to-aid-with-home-electrification.

331. Amy Fischbach, *Mutual Aid Without a Storm: The Light Up Navajo Project*, T&D World (Sept. 21, 2023), https://www.tdworld.com/overhead-distribution/article/21269791/mutual-aid-without-a-storm-the-light-up-navajo-project.

332. *See Empowering Native Communities*, Native Renewables, https://www.nativerenewables.org/ (last visited Apr. 20, 2024).

333. Fischbach, *supra* note 331.

334. Gail Binkly, *Coming to Blows: Tribal Infighting Delays Navajo Wind Development*, High Cnty. News (Apr. 22, 2009), https://www.hcn.org/issues/41-7/coming-to-blows.

E. Considering Mother Earth

The Diné perspective is that human beings are one with Mother Earth, Father Sky, and all beings in the universe; there is no distinction other than the obligation on the Diné, as Five-Fingered Beings with a well-ordered understanding of life, to make sure all beings are in good relations (*k'e*) and in an actively nurtured balance (*hózhǫ*).

XIII. Funding for Unique Tribal Structures

Although beyond the scope of this article, both the 2022 IRA and 2021 BIL provide clean energy project funding to Section 17s, tribal enterprises, and tribally chartered corporations.[335] As described above in Section XI, rural development was predicated on federal low interest, non-recourse loans made to cooperative entities. It is worth noting that the 2022 IRA and 2021 BIL both authorize these types of loan programs for cooperatives, a business structure that is particularly well suited to tribal purposes. Tribal members are encouraged to stay abreast of ongoing developments.

Tribal cooperative structures can access grants, loans, and guaranteed loans from the USDA[336] and other federal departments. On December 6, 2023, President Biden issued an Executive Order[337] requiring federal agencies to consider the unique needs of tribal nations at every stage of program administration. Agencies are required to examine their programs and, to the extent possible under existing law, ease access for tribal nations, potentially through regulatory changes.

Previously, USDA's Rural Development agency conducted a tribal consultation to consider how tribal entities could more easily access the Rural Business Development Grant Program (RBDG).[338] The RBDG is intended to provide funds for rural economic

335. *See Funding for Tribes in the Inflation Reduction Act*, WHITE HOUSE, https://www.whitehouse.gov/cleanenergy/tribes/ (last visited Apr. 20, 2024); *Access to Capital Clearinghouse*, U.S. DEP'T OF THE INTERIOR: INDIAN AFF'S., https://www.bia.gov/atc (last visited Apr. 20, 2024).

336. *See* U.S. DEP'T OF AGRIC.: RESOURCE GUIDE FOR AMERICAN INDIANS & ALASKA NATIVES, U.S. DEP'T OF AGRIC.: OFFICE OF TRIBAL RELATIONS (2022), https://www.usda.gov/sites/default/files/documents/usda-resource-guide-american-indians-alaska-natives.pdf.

337. Exec. Order No. 14112, 88 Fed. Reg. 86021 (Dec. 6, 2023).

338. Rural Business Development Grant (RBDG) Regulation: Tribes and Tribal Business References to Provide Equitable Access, 88 Fed. Reg. 86,566 (Dec. 14, 2023).

development generally and, specifically, to small and emerging rural businesses through "business opportunity"[339] and "enterprise"[340] grants. Governmental entities, tribes, and non-profit organizations qualify to apply[341] on behalf of beneficiary organizations, including tribal entities.[342] Some cooperatives are also eligible applicants.[343] During the consultation, USDA asked, "Does your tribe have any *unique organizational structures* for your enterprises that we should consider to finalize these changes?"[344] While no responses were provided, the agency clarified that "tribal government arms and instrumentalities and democratically elected tribal organizations when registered as nonprofits [are] eligible direct RBDG applicants and program beneficiaries."[345] This clarification was made in response to a comment requesting that eligible tribal entities include Tribal organizations, which encompass the tribe's governing body and any legally established organization that is "controlled, sanctioned, or chartered" by the governing body.[346] A "Tribal organization" also includes an organization that is "democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities."[347] For-profit tribal entities do not qualify as applicants for the RBDG program but may be the grant's ultimate beneficiaries.

Historically, tribes were not able to access the Value-Added Producer Grant (VAPG),[348] another program administered by USDA

339. Generally, business opportunity grants are for economic development and business planning, feasibility studies, various types of technical assistance, and fees for professional services. 7 C.F.R. § 4280.417(a).

340. Generally, enterprise grants are for real estate acquisitions, construction and building modernization and repairs, loans and revolving loan funds, distance learning, technical assistance, and professional services. *Id.* § 4280.417(a)(2).

341. 7 U.S.C. § 1932(c)(2); 7 C.F.R. § 4280.416(a)(2-3); 7 C.F.R. § 4280.403 (regulation defining Indian Tribes, Tribal Governments, and/or Federally Recognized Tribes as "Any Indian or Alaska Native tribe, band, nation, pueblo, village or community as defined by the Federally Recognized Indian Tribe List Act (List Act) of 1994 (Pub. L. 103-454).").

342. *See* 7 C.F.R. § 4280.403; *see* 7 C.F.R. § 4280.417.

343. 7 C.F.R. 4280.417.

344. Rural Business Development Grant (RBDG) Regulation: Tribes and Tribal Business References to Provide Equitable Access, 88 Fed. Reg. 86,566, 86567 (Dec. 14, 2023) (emphasis added).

345. *Id.* at 86,568.

346. 25 U.S.C. § 5304(l).

347. *Id.*

348. 7 U.S.C. § 1627(c); 7 C.F.R. §§ 4284.901–4284.962; *see also* Value-Added Producer Grant Program Clarification of Tribal Entity Eligibility, USDA Rural

Rural Development, that helps farmers increase their income by funding the development, creation, and marketing of value-added products by agricultural producers.[349] To be eligible for a VAPG, the applicant must be an "Independent Producer," "Agricultural Producer Group," "Farmer or Rancher Cooperative," or "Majority-Controlled Producer-Based Business Venture."[350] Each of these eligible applicants is made up of a majority of Independent Producers as either owners or members.[351] An Independent Producer is an individual or an entity that is solely owned and controlled by Agricultural Producers,[352] and Agricultural Producers are generally defined as involved in the day-to-day labor, management, and field operations involving the agricultural commodity or having a legal right to harvest the agricultural commodity.[353]

The definition of "Agricultural Producer" precluded tribes from accessing the program because a tribe represents all of its members, not just those involved with the commodity.[354] A 2012 unpublished USDA Rural Business Cooperative Service Administrative Notice acknowledges the cultural uniqueness inherent in tribal governments and structures and concludes that "Federally Recognized Indian Tribes," and their instrumentalities, subdivisions, agencies, and tribal corporations may be able to apply for VAPG on behalf of all tribal members under the Tribe's direct regulatory control.[355] When the agricultural activities are carried out by the tribe or tribal entity for the benefit of the entire tribe, each tribal member, including those that do not perform agricultural functions, is an Agricultural Producer because each member owns and has financial control of the operation through the tribe.[356]

Under the current regulations, tribes and tribal entities are no longer subject to the general definition of "Agricultural Producer." The preamble to an update of the program regulations states that

Business Cooperative Service (Aug. 16, 2012) (unpublished Administrative Notice No. 4670).

349. 7 C.F.R. § 4284.901.

350. *Id.* § 4284.920(a).

351. *Id.* § 4284.902.

352. *Id.*

353. *Id.*

354. Value-Added Producer Grant Program Clarification of Tribal Entity Eligibility, USDA Rural Business Cooperative Service (Aug. 16, 2012) (unpublished Administrative Notice No. 4670).

355. *Id.*

356. USDA Rural Business Cooperative Service (Aug. 16, 2023) (unpublished Administrative Notice).

the USDA Rural Business Cooperative Service will determine, on a case-by-case basis, whether tribes and tribal entities qualify as Agricultural Producers for purposes of the regulations because of their "unique structures."[357] The January 2024 Notice of Funding Opportunity encourages tribes and tribal entities to consult with their local USDA State Office, the USDA Rural Development Tribal Relations Team, and the program application toolkit for further guidance on whether the tribes and tribal entities are eligible to apply as an Agricultural Producer.[358]

The USDA provides a number of examples of tribal entities that can access the VAPG program, including a tribal council or agency, Section 17s, and tribal corporations.[359] Under the tribal corporation example, a for-profit corporation producing crops or livestock on land that it leases or owns is an eligible applicant because this corporation receives all the benefits from its value-added process and those benefits ultimately accrue to the tribe.[360] These examples are not intended to be an exhaustive list; other tribal structures may be eligible.

The regulations provide additional flexibility to tribal entities that is not available to other applicants. For example, tribes can use grants made available under Section 103 of the ISDEAA,[361] while other applicants may not use matching funds provided by the federal government.[362] As a "Socially Disadvantaged Farmer or Rancher," a tribal applicant is eligible to access a special funding set aside[363] and may score higher than other competing applicants.[364]

Conclusion

Diné Fundamental Law is the basis by which the Navajo Nation can reclaim its Life Way and return to its stewardship of Mother Earth

357. Value Added Producer Grant, 80 Fed. Reg. 26788, 26,791 (May 8, 2015).
358. Notice of Funding Opportunity for the Value-Added Producer Grants for Fiscal Year 2024, 89 Fed. Reg. 2919, 2921 (Jan. 17, 2024) (VAPG NOFO).
359. Value-Added Producer Grant Program Clarification, *supra* note 354.
360. *Id.* at 7.
361. Notice of Funding Opportunity for the Value-Added Producer Grants for Fiscal Year 2024, 89 Fed. Reg. 2919, 2925–2966 (Jan. 17, 2024).
362. 7 C.F.R. § 4284.931(b)(4)(iv).
363. *See id.* § 4284.923(a)(2); *see also* Notice of Funding Opportunity for the Value-Added Producer Grants for Fiscal Year 2024, 89 Fed. Reg. 2919 (Jan. 17, 2024).
364. Notice of Funding Opportunity for the Value-Added Producer Grants for Fiscal Year 2024, 89 Fed. Reg. 2919, 2925–2966.

through combining "live, work, govern" functions. The structures and entities discussed above must be adapted to shoulder the principles of Diné Fundamental Law, but this undertaking can be done. A unifying tribal vision that emphasizes independent local governance and the foundational character of Diné Fundamental Law is central to this reform.

The *status quo*, especially the lease and permit system and limitations on local governance, have failed the Diné people. As we face climate change, and with the present emphasis on ITEK, *now* is the time to innovate. The options put forward are far from exhaustive.

On August 5, 2024, Indian Country Grassroots Support held an intergenerational, interactive forum entitled *Live, Work, Govern Using Diné Fundamental Law*. A survey of the forum's attendees, which included three former Navajo Nation Attorney Generals, a current Deputy Attorney General, and dozens of Diné land users and their families, confirmed that a majority of the attendees believed that Diné Fundamental Law should be included in planning for future generations. Additionally, a majority of attendees believe that *bilagáana* (Anglo American) law can support Diné Fundamental Law. The takeaway was clear: incorporating Diné Fundamental Law in future planning is important to the Diné people, and Anglo-American law can play a needed supportive role in effectuating Diné Fundamental Law in tribal governance and policy making.

The writers of this article are Diné elders, an energy planner, lawyers, and emerging lawyers who are starting an urgent conversation. We have to try. We have to explore. We have to seek innovative solutions.