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Making Resources, Making Management

Jacquelyn Amour Jampolsky
University of Colorado, Boulder

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Making Resources, Making Management

Jacquelyn Amour Jampolsky*

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I. INTRODUCTION

Any discussion of property law necessarily assumes that property exists, in some independent medium, capable of being adjudicated. This may appear to be an obvious assertion, however “property” as a cognizable legal construct is actually quite new.¹ Although communities have been practicing complex systems of access and control since time immemorial, the earliest reference to property as a principle of law can only be traced to the late seventeenth century works of John Locke.² We are all familiar with the arguments of John Locke in his *Two Treatises of Government*, but perhaps less familiar with the historical context in which Locke was writing.³

Locke wrote in response to the growing unrest in the British countryside resulting from the systematic enclosure of the commons.⁴ The enclosures, beginning in the late fourteenth century but peaking in the late seventeenth century, were a process by which wealthy individuals physically—and often violently—fenced off parcels of the agrarian commons to exclude the rural class

* Jacquelyn Amour Jampolsky earned her J.D. and Ph.D from the University of Colorado, Boulder, where she served as the Wyss Fellow for the Getches-Wilkinson Center for Energy, Natural Resources, and the Environment while participating in this symposium. She currently practices American Indian law with Berkey Williams LLP, in Berkeley, California. Jacquelyn would like to thank Rachel Salcido and the Global Center at McGeorge School of Law for hosting this symposium, and of course Professor John Sprankling for inspiring such rich discussion. She would also like to thank Celene Hawkins, Terry Knight, Lynn Hartman, and the Ute Mountain Ute Tribe for supporting this research.

1. STUART ELDEN, *THE BIRTH OF TERRITORY* 305 (2013).

2. *Id.*

3. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 114 (Peter Laslett ed., 1963) (referring to his argument that individuals can secure ownership to land by working it).

4. ELDEN, *supra* note 1, at 306–07.

in order to raise sheep and sell wool on an increasingly international market.⁵ The writings of Locke, later Blackstone, and consequently the common law, established a legal concept of property that both justified and protected individual ownership in land while simultaneously providing a metric for valuing it in terms of money.⁶ Thus, any understanding of property or environmental management today must acknowledge how resources came to be viewed as manageable commodities—properties valued on the market.⁷

In other words, the idea that resources are “individually manageable things” requires that they be executable of the same bundle of rights attributed to other properties as dictated by the common law. This is important because if we let go of the assumption that property exists—or that natural resources exist outside their broader legal or regulatory framework—it opens up new questions about how resources are created as properties and what other effects those processes may have.

This essay briefly examines the processes by which resources are created as properties through management. Specifically, it draws from my doctoral research working with the Ute Mountain Ute Tribe of Southwestern Colorado on their Integrated Resources Management Plan (IRMP), a federally funded resource management plan conducted on the reservation.⁸ In analyzing the processes of resource making, this essay also highlights the inherent conflicts between traditional concepts of ecological management and the dominant property paradigm. Although the examples I discuss are specific to the IRMP of the Ute Mountain Ute Tribe, these processes and planning efforts are analogous to resource management planning regimes across state, federal, and municipal landscapes.

II. MAKING RESOURCES

In my work with the Ute Mountain Ute Tribe on the composition of their IRMP, I participated in distilling a vast, unified, and interrelated landscape of social, cultural, and ecological phenomenon into a recognizable set of resources to be managed. This process of “making resources” manifested through writing, discussing, and planning, as well as through site visits and fieldwork. This broad planning effort can be categorized into three major steps: visualizing, or the process of making certain resources legible; separating and classifying, or

5. KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* 36–42 (Beacon Press ed., 2001).

6. *Id.*

7. For further discussion on this point, see Jacquelyn A. Jampolsky, *Property, Sovereignty & Governable Spaces*, 34 J.L. & INEQ. 1 (forthcoming 2016).

8. This research was based on nearly two years of participant observation: first, working with the Ute Mountain Ute Tribe, and then six months in 2013 living near and working daily on the reservation with the tribal government.

removing certain resources from others by distinguishing difference; and finally valuing, or assigning unique values with money and through management priorities.

A. *Visualizing*

The first step in writing any resource management plan is to break down and simplify the landscape to make the myriad of interrelated natural and cultural resources visible.⁹ For a tribal IRMP, this first step is mandated by the Bureau of Indian Affairs Guidelines and includes conducting a broad GIS survey of all of the reservation's resources and mapping where they are on the landscape.¹⁰ Compiling information about tribal resources through GIS data and map-making is one of the primary purposes and a tangible result of the IRMP.¹¹ Using GIS technologies to survey Native lands places Indigenous resources within the "typical set of cartographic abstractions that treat the world as an object comprised of spaces—polygons manipulated in a GIS—that are universally definable in terms of a set of points, lines, and polygons defined by latitude and longitude, scale and projection."¹² This translates the complex immateriality of vast cultural, ecological, and spatial relationships into cognizable chunks of data that can be mapped according to Western property concepts.¹³ At the same time, visualizing resources through technology assigns singular tribal ownership over a particular process or thing, producing it as an alienable and ownable resource.

Consider surveying Ancient Puebloan cultural sites as an example. Before moving into the iconic cave dwellings seen in Mesa Verde National Park, the Ancient Puebloan people lived in homesites on top of mesas.¹⁴ It is well known that these sites are prevalent on the Ute Mountain Ute reservation.¹⁵ Typically though, Ancient Puebloan homesites consisted of a great room, or kiva, which is a circular architecture surrounded by above floor rooms, a midden, or trash site, and other surface structures depending on the time of occupation.¹⁶

9. DON HALL, BUREAU OF INDIAN AFFAIRS, GUIDELINES FOR INTEGRATIVE RESOURCE MANAGEMENT PLANNING IN INDIAN COUNTRY 4-37-40 (2001).

10. *Id.*

11. Interview with Tribal Government Employee in Towaoc, Colorado (Sept. 15, 2013) [hereinafter Interview B].

12. Joel Wainright & Joe Bryan, *Cartography, Territory, Property: Postcolonial Reflections on Indigenous Counter-Mapping in Nicaragua and Belize*, 16 CULTURAL GEOGRAPHIES 153, 155 (2009).

13. BUREAU OF INDIAN AFFAIRS, A TRIBAL EXECUTIVE'S GUIDE TO INTEGRATED RESOURCE MANAGEMENT PLANNING 2 (Feb. 2005) [hereinafter BIA].

14. UTE MOUNTAIN UTE CULTURAL RESOURCES MANAGEMENT PLAN 2140 (2013) (on file with the author).

15. I cannot divulge any more specificity of the sites due to the sensitive nature of cultural resources.

16. UTE MOUNTAIN UTE CULTURAL RESOURCES MANAGEMENT PLAN, *supra* note 14.

I participated in documenting three major archeological units on the reservation during my time working with the Tribe. We used GPS¹⁷ data to map individual family units into a village or district by dropping a point at the center of each kiva, and then connecting lines between the coordinate points to map the village or district.¹⁸ After mapping the district, we dated the site by ‘tagging,’ or taking a semi-circular transect about twenty feet long at each midden,¹⁹ collecting between 100-200 pottery shards, and sorting those shards in phases according to their characteristics. Our sorting process consisted of separating corrugated and smooth, painted and non-painted, mineral paint and organic paint, and thin triangulated and thick squared rims. Each characteristic is associated with a different temporal occupation based on archeological research. We then counted up the respective piles for the archeologists to make calculations using predetermined formulas about the time period of the entire site according to the percentage of shard characteristics and their associated use period. Dating places the site within the broader timeline of Ancient Puebloan inhabitancy in the region. This accentuated the process of geographic abstraction, by discerning thousands of years of history through piles of pottery shards, the majority of which were less than an inch in diameter.²⁰

Through the process of mapping and dating, we created this particular site as Ancient Puebloan. Although the physical evidence exists, the site was once an undefined part of the broader landscape. By manipulating GPS data through GIS, we used technology to visualize this site by documenting it and attaching that vision to a particular story about how the space had been. This process produces both past and present space on the reservation, while creating a cultural property as a distinct resource for the Tribe to manage.

There are two primary purposes of visualizing the site in this way that reflects the broader property narrative. First, it is “to do just that . . . to map it.”²¹ There are no plans to excavate or do further research. The primary objectives are to generate data about the site, to map the individual units and larger village, and to catalogue it as part of the IRMP for the Tribe’s internal use. Second, once the site is visualized as a resource, it becomes eligible for listing as a Traditional Cultural Property with the National Registry under the National Historic Preservation Act (NHPA).²² In this way, the operation of federal law animates the

17. A GPS, or Global Positioning System, collects spatial data by satellite navigation. BLACK’S LAW DICTIONARY (10th ed. 2014).

18. Field Visit A to Towaoc Colo. (July 24, 2013) [hereinafter Field Visit A]; Field Visit B to Towaoc, Colo. (Aug. 27, 2013) [hereinafter Field Visit B]; Field Visit C to Towaoc, Colo. (Oct. 21, 2013) [hereinafter Field Visit C].

19. A midden is “a refuse heap.” MIDDEN, MERRIAM WEBSTER, available at <http://www.merriam-webster.com/dictionary/midden> (on file with *The University of the Pacific Law Review*).

20. Field Visit A, *supra* note 18; Field Visit B, *supra* note 18; Field Visit C, *supra* note 18.

21. Field Visit C, *supra* note 18.

22. National Historic Preservation Act, 16 U.S.C. § 470 (2012); PATRICIA PARKER & THOMAS F. KING, U.S. DEP’T OF THE INTERIOR, GUIDELINES FOR EVALUATING AND DOCUMENTING TRADITIONAL CULTURAL

purpose of materializing the site as a resource. By visualizing sites as cultural properties, the IRMP establishes ownership over those properties to the Ute Mountain Ute Tribe by placing it within the reservation boundaries and on tribal land.

B. Separating and Classifying

In addition to visualizing resources by surveying and compiling GIS data, the IRMP requires that each resource be separated and classified according to legal and ecological management norms.²³ This reflects the second major step to property making. Resources must be categorized and differentiated to accord with management practices and monetary value.

Separating and classifying resources in the IRMP is the underlying and definitional format of the document. The purpose of this is to create a planning document that allows the Tribe to establish proposed actual plans for resource management, “which grants the Tribe access to a whole bunch of federal monies to do those things,” presumably through grants.²⁴ During my tenure with the Tribe, the Tribe asked me to review and re-write the first draft of the IRMP while the contractor took an extended leave. The contractor writes IRMPs for tribes almost exclusively, and shared the boilerplate step-by-step formula I was to follow that comports with the BIA Guidelines.

Primarily, the contractor directed me to separate and classify each individual resource that had been either mismatched or “conflated” in the original draft and create a “goals and objectives matrix,” or outcome based management plan, for each separate resource.²⁵ This was a tiered process. For example, I first had to distinguish between the resource and the resource use. BIA Guidelines define each aspect of the resource in the following way:

Resources of Value—Resources considered by the tribe as being important for cultural, historical, and economic reasons. The resources of value will be different for each tribe.

Resource Uses—Actions that take place which utilize a resource. Uses can be spontaneous or planned.²⁶

One way this played out in the IRMP was through rangeland and grazing management. The IRMP identifies “rangelands” as a resource of value, with

PROPERTIES (1998), available at <http://www.nps.gov/nr/publications/bulletins/pdfs/nrb38.pdf> (on file with *The University of the Pacific Law Review*).

23. BIA, *supra* note 13, at 9.

24. Meeting with Contractor in Durango, Colo. (Aug. 7, 2013) [hereinafter Meeting]

25. *Id.*

26. BIA, *supra* note 13, at 8.

“grazing” as its resource use.²⁷ “Livestock,” however, is also listed as a resource of value in the IRMP, with “economic revenue for individual members and the Tribe” as the primary resource use.²⁸ “Agriculture” is also listed as a resource of value, as well as a use of rangelands.²⁹ This is the type of conflation the contractor asked me to clarify. Grazing and agriculture were each considered resource uses of rangelands, the resource of value, so that the Tribe could establish a specific goal, objective, and plan for rangeland management that directly addresses grazing and agriculture as resource uses.

The rhetorical separation between resources as objects, and the practice of resource use, mimics the dominant property paradigm and produces tribal resources as property. Resource management reflects an exercise of rights afforded to *real* property owners. By separating and classifying Ute Mountain Ute resources from resource uses, the IRMP creates real property rights by producing resources as real property. This affirms the right for the Tribe to manage those properties as the owner, forming the basis of resource management on the reservation.

The rhetorical process of separating and classifying resources as property is actuated as a physical process on the landscape. Re-consider the rangeland example. Rangeland comprises the majority of the reservation and refers to “non-cultivated land that produces native, or reseeded, vegetation and is managed for livestock grazing.”³⁰ Of the more than 561,957 acres classified as rangeland, the IRMP classifies about 436,850 as suitable for grazing, based on an ecological assessment by the USDA in 1966.³¹ This classification defines how specific lands can be used. Based on those classifications, those lands are further separated into individual grazing units.³² Each unit is then fenced, actually separating the rangeland into discernable blocks, and then permitted, classifying each unit in terms of its ecological condition and separately mandating how it can be used.³³ This is specifically enacted on the landscape, resulting in areas where tribal members can graze their cattle and where they cannot, producing rangeland as real property on the reservation.³⁴

But this is not how the Tribe views the landscape at all. For the Ute Mountain Utes, everything is related and everything is related to property.³⁵ In meetings and discussions about resource uses and management, the membership

27. UTE MOUNTAIN UTE INTEGRATED RESOURCES MANAGEMENT PLAN 75 (2013) (on file with the author) [hereinafter IRMP].

28. *Id.*

29. *Id.* at 126–39 (2013).

30. *Id.* at 127.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. Interview with Tribal Elder in Towaoc, Colorado (July 16, 2013) [hereinafter Interview A].

does not manifest any definitive separation between resources, or natural and cultural resources. Rather, they express something more akin to a sliding scale of significance based on how the members view the place or resource in question. Concerns are equally spiritual as they are economic, and those importances dwarf the fabricated boundaries established in the management regime. At the same time, the Tribe and membership clearly understand the importance of producing and adhering to these classifications for the purpose of securing their rights against the broader state or surrounding settlers, and for getting more funding through the IRMP.³⁶

C. Valuing

Another primary goal of the IRMP “is to tie all decisions which affect a tract of land together so that each decision’s impact is weighed against all others.”³⁷ For the Ute Mountain Ute, this means establishing a set of internal priorities based on how the Tribe values each resource, primarily to guide decisions about development. By weighing decisions about resource use against each other, the IRMP assigns both internal intrinsic, and ultimately monetary value to individual resources. This produces those resources as properties within the broader property paradigm by making them fungible.

A major use of the GIS data surveying all the resources on the reservation is to create “conflict maps” that compare the presence of different resources and resource uses overlapping and potentially conflicting on the landscape.³⁸ By mapping resource conflicts, the Tribe can then direct management decisions based on the comparative values of the overlapping resources. But these maps do not just reflect potential conflicts; they also produce them. The conflict maps demarcate the physical location of resources with homogenous lines and polygons that visually separate traditionally interrelated systems of viewing the landscape as a singular socio-spatial continuum. Through conflict maps, the IRMP defines the types conversations that take place on the reservation.

In meetings about resource management at Ute Mountain Ute, conversations about use conflicts are almost always about competing economic values. The conversation about large resource extraction projects, namely whether and where such a project would take place, invariably pits the potential for economic gain for the Tribe against individual economic gain for tribal members.³⁹ The IRMP animates this discussion by visualizing resource conflicts for the Tribe to assess whether a particular parcel is suitable for extraction by comparing the economic value of developing the land with the ramifications for tribal members. For

36. Interview B, *supra* note 11.

37. BIA *supra* note 13, at 1.

38. IRMP, *supra* note 27.

39. I cannot disclose the particular type of extraction projects due to the sensitive nature of project development.

example, surface extraction may disturb surface grazing rights, or conversely, expanding grazing rights could interfere with other potential development projects on the same lands. This process literally assigns monetary value to individual resources by calculating proposed and comparable economic gain, producing them as fungible and alienable properties in a market-based economy. This forces the Tribe to choose between pursuing economic development on behalf of the Tribe versus the tribal members, which invariably leads to more conflicts regardless of which choice the Tribe makes.

Property law understands properties as valued by money, where remedies for infringement generally results in pecuniary remuneration. However, the inadequacy of the market-based model to address the multiple and non-pecuniary values of property is a common source of debate among property scholars.⁴⁰ The shortfall of the market-based approach to property largely fails to encompass the non-fungible values all people associate with certain properties, and proves especially inadequate for Native people.⁴¹ “Even in cases where American Indian land claims were later vindicated, particularly in cases that required compensation for the taking of treaty-recognized lands, the tribes refused to accept payment.”⁴² For Native people, certain properties are so important they become inextricable to individual identity and Native peoplehood as communities.⁴³

Ute Mountain Ute is no exception. Debates about resource management equally weigh tribal and individual economic potential against the importance of culturally significant resources in terms of both place and practice. In fact, in meetings about resource development, the cultural importance of certain sites generally trumped economic potential. Thus, although the general assessment of value—fungible or not—produces resources as property cognizable within the dominant paradigm, the Tribe’s decisions to sometimes value the non-marketability of certain resources above economic gain demonstrates the dual nature of tribal resource planning through the IRMP that is both corrosive of traditional understandings of property and constructive of new ones.

III. SOME THOUGHTS ON TRIBAL RESOURCE MANAGEMENT

Outside the Native context, it is likely safe to say that most people do not view landscapes in terms of individual resources or properties. They see a watershed, not acre-feet of surface water; they see a forest, not timber reserves;

40. See, e.g., Margaret Radin, *Property and Personhood*, 34 STANFORD L. REV. 957 (1982); Kristen A. Carpenter et al., *In Defense of Property*, 118 YALE L.J. 1022 (2009); GREGORY ALEXANDER & EDUARDO M. PEÑALVER, AN INTRODUCTION TO PROPERTY THEORY (2012).

41. Carpenter et al., *supra* note 40, at 1048.

42. *Id.* at 1049.

43. See generally *id.*; Angela Riley, *Straight Stealing: Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69 (2005).

they see mesas, not shale deposits. This cultural incongruence between resource management planning and relationships with landscapes is especially salient for many Native peoples, however, whose entire cultural identity may rely on a very different understanding of human environmental interactions.

Most critiques of state-centric resource management planning in tribal communities thus rely on the incompatibility of the property framework and indigenous environmental practices. They argue that engaging in Western resource management is largely antithetical to traditional practices and may do more harm than good.⁴⁴ But that view assumes that the tribe or community engaging in co-management or other state-collaborative resource planning, such as producing an IRMP, does not understand the deleterious effects of engaging in a Western management regime before they engage in it.

At Ute Mountain Ute, I encountered no one, within the tribal government or otherwise, who failed to recognize the problematic potential of property-based resource planning through the IRMP. In fact, most people seemed to concede to the irony, if not the inadequacy of it all. Interviews and informal discussions about the IRMP and other state or federally-funded projects always tracked a dualistic understanding about their potentials and effects, a sort of “yes, we are doing it” but “no, it is not necessarily a good fit for Ute traditions and culture.”

By recognizing that the tribal engagement in state-centric systems of resource management is not so much misinformed but rather deliberate, calculated, and directed changes the type of questions we ask about the efficacy of resource planning. It asks us to think about why communities are doing it anyway. This shifts a research agenda away from questions analyzing how the United States may be using property to push an Anglo-management agenda and further assimilate the Tribe into mainstream culture and governance, and towards how the Tribe may be engaging in this framework to reverse, or at least mitigate such efforts.

At Ute Mountain Ute, one reason the Tribe participated in the IRMP is because, like other collaborative agreements, it brings grant money to the Tribe. Although the Tribe does not profit directly from the grant, grants provide the funding to develop the IRMP, and generate jobs on the reservation and opportunities for future grant projects based on the plan.⁴⁵ The IRMP will create a library of data, which will aid in tribally driven management structures and decisions in the future. Furthermore, the IRMP improves tribal infrastructure essential for engaging in negotiations with state and federal agencies.⁴⁶ However “federal” and “Anglo,” these infrastructures increase the legibility and therefore legitimacy of the Tribe within the political framework of the United States, and

44. See PAUL NADASDY, HUNTERS AND BUREAUCRATS POWER, KNOWLEDGE, AND ABORIGINAL-STATE RELATIONS IN THE SOUTHWEST YUKON (2009).

45. Meeting, *supra* note 24.

46. Interview B, *supra* note 11.

moreover are essential for acting as rights-holders within the dominant framework at all.⁴⁷

IV. AN INTERIM CONCLUSION ON PROPERTY

This essay is not meant to defend federally funded resource management programs on reservations nor the utility of property for securing Native rights more generally. Instead, it seeks to challenge the idea that property or resources exist outside the legal, regulatory, and technical instruments that define them. The hope being that by showing how resources—and properties more generally—are created, legal scholars and advocates may be inspired to find new ways of using properties within or outside the broader framework of the law.

Property is not a function of the law alone; it is enacted, sustained, and made malleable based on people's relationships and spatial reactions to it.⁴⁸ Thus, although a resources approach to environmental management affirms essential rights to manage and exclude as a propertied subject, the spatial and social enactments of managing those resources demonstrate that property-based research management does much more than that. The Ute Mountain Ute Tribe's engagement in the IRMP demonstrates that property can be seen as replicative of the status quo, but by generating, re-generating, and re-appropriating the dominant framework, property can also be used to unsettle spaces and subvert the dominant hegemony.⁴⁹

47. For further discussion on this point, see Jampolsky, *supra* note 7.

48. See, e.g., Sarah Keenan, *Subversive Property: Reshaping Malleable Spaces of Belonging*, 19(4) SOCIAL & LEGAL STUDIES 423 (2010); Sarah Keenan, *Property as Governance: Time, Space And Belonging In Australia's Northern Territory Intervention*, 76(3) THE MODERN L. REV. 464 (2013).

49. Keenan, *Subversive*, *supra* note 48; Keenan, *Property*, *supra* note 48; see also Jampolsky, *supra* note 7.