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## A Philosophy of Hope and a Landscape of Principle: the Legacy of David Getches's Federal Indian Law Scholarship

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# A PHILOSOPHY OF HOPE AND A LANDSCAPE OF PRINCIPLE: THE LEGACY OF DAVID GETCHES'S FEDERAL INDIAN LAW SCHOLARSHIP

REBECCA TSOSIE\*

*In this essay, Professor Tsosie documents two important aspects of David Getches's work in the field of federal Indian law. First, Professor Tsosie observes that David Getches was a strong proponent of guiding principles and a consistent structure in the law. Consequently, he was one of the first scholars to observe the ways in which the contemporary Supreme Court was "remapping" the field of federal Indian law, apparently in service of the Court's commitment to states' rights and the protection of mainstream values. David noted the dangers of this "subjectivist" approach and urged a return to the foundational principles of federal Indian law, which recognize the historic political relationship between Indian nations and the United States and the continuing sovereignty of Indian nations. Secondly, David Getches had a great deal of love for the lands and peoples of the West, including the landscape of the Colorado Plateau, which inspired Professor Tsosie's remarks at the Symposium. David understood the relationship between indigenous peoples and the land as encompassing an "ethics of permanence," and he believed that traditional indigenous land ethics could provide the necessary counterweight to the dominant society's exploitive "ethic of opportunity" and foster*

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\* Professor of Law and Willard H. Pedrick Distinguished Research Scholar, Sandra Day O'Connor College of Law, Arizona State University. This essay is a longer version of the remarks that Professor Tsosie presented at *A Life of Contributions for All Time: Symposium in Honor of David H. Getches* at the University of Colorado Law School in Boulder, CO (April 26–27, 2012). Professor Tsosie would like to thank the Dean and faculty of the University of Colorado Law School for sponsoring this outstanding conference, as well as Jeanne Whiteing, Carole Goldberg, and Matthew Fletcher, who co-presented on the panel devoted to David's Indian law scholarship. Professor Tsosie also thanks the members of the University of Colorado Law Review and the Native American Law Students Association for their tremendous assistance with all aspects of the Symposium. Finally, Professor Tsosie is very grateful to David Gay and Tara Mospan, librarians at the ASU Ross-Blakely Law Library, for their excellent and timely assistance in gathering sources relevant to the comments presented in this essay.

*a more sustainable framework for the management of public lands. In these ways, David's federal Indian law scholarship offered "a philosophy of hope and a landscape of principle," and both features mark his important and enduring legacy in the field.*

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## INTRODUCTION

I am very thankful and honored to be part of this conference celebrating the life and work of David Getches. As I thought about my remarks today, several memories of David came into my mind. He was someone who had a profound impact upon me, as he did on so many people. I first met him when I was in my final year as an undergraduate at UCLA, where I had the good fortune to study with my mentor and fellow panelist, Professor Carole Goldberg, who was one of David's good friends and colleagues. In his characteristically kind and supportive manner, David was one of the faculty members who encouraged me to attend law school. His work influenced me as a law student, and later as a law professor. I respected and appreciated his careful and thoughtful voice, and I marveled at his scholarly mind. I saw his influence in the lives of Native people when I served on the Board of the Native American Rights Fund. Most recently, I had the privilege to serve along with David Getches and Charles Wilkinson as a member of the Board of Directors of the Grand Canyon Trust ("GCT"). David's dedication to that organization was legendary and spanned many years, long before I ever became a member.

The last time I saw David was at a GCT board meeting. I had no idea that he was ill. He always brought so much depth to our discussions and was a constant positive force within our group. We discussed energy policy and environmental protection. We recalled the beauty of the land on the Colorado

Plateau, its windswept canyons and its red and sandy hues. David had spent a great deal of time upon these lands, and he loved this place, which is very powerful, yet somehow fragile in a modern world committed to “development.” David understood the cultural value of this landscape, not only to the Native people who belong to these lands, but to all of the different people who come to this place, with their own needs, their own values, and their own understanding of what the land represents. It was this memory of David that inspired me to write this essay on the legacy of David’s Indian law scholarship.

At the outset, I want to thank Sarah Krakoff and Charles Wilkinson for organizing this amazing conference, and also give a special thanks to Sarah for generously sharing this photo of the Colorado Plateau as the beautiful backdrop for my presentation. I also want to thank my distinguished colleague, Professor Matthew Fletcher, also a fellow panelist, who recently designed a rich agenda for the 2012 Federal Bar Association Indian Law Conference built around the theme of “mapping,” giving me much to think about.<sup>1</sup> There are many spirits that are part of the landscape that we call the Colorado Plateau. It is a landscape that inspired David, and it is the landscape that inspired this essay, which uses David’s scholarship as a lens to map our field of federal Indian law, the physical and cultural landscape that informs our field, and our future, which is dedicated to protecting the sovereignty of Native people on these lands. We were and are united in that appreciation of a sacred landscape that endures generation after generation and embodies the circles of life within a universe that is far more complex than we will ever know.

## I. MAPPING THE FIELD: THE CONNECTIONS BETWEEN KNOWLEDGE AND PLACE

The landscape of the Colorado Plateau reflects a central truth: knowledge is deeply embedded within places. Jim Enote, another colleague on the Board of the GCT and the Director of the Zuni Pueblo’s A:shiwí A:wán Museum, recently curated a

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1. Professor Fletcher served as a conference co-chair, along with Venus McGhee Prince, Patrice Kunesh, and Andrew Adams III. I thank all of them for the excellent theme and set of presentations at the Federal Bar Indian Law Conference. *Mapping Indian Law and Policy*, Fed. Bar Ass’n, 37th Annual Indian Law Conference (Apr. 19–20, 2012).

wonderful exhibit of Zuni map art, depicting the relationship of the Zuni people to the sacred lands within the Grand Canyon and associated places.<sup>2</sup> Through these stunning visual images, observers come to understand that for the Native peoples who belong to the lands on the Colorado Plateau, there is a great deal of knowledge “intertwined with the places where people have lived and the lands they have repeatedly traversed over many centuries.”<sup>3</sup> As Leslie Marmon Silko has noted in the context of Pueblo cultures, the oral narratives that are part of these places act as “maps” of the physical and cultural worlds that people share, binding communities together and facilitating their survival.<sup>4</sup> However, what happens after these lands are “settled” by other nations and other peoples? What happens when the indigenous peoples who share this cultural landscape are removed to other lands within other states? As Jim Enote observes:

[O]ver the past 500 years we have been remapped. Our names of places and their meanings have been all but eliminated from mainstream use. In their place we’ve been given a new set of maps, with a new set of names that reflect other values and ways of seeing the world that has been our home for generations.<sup>5</sup>

Building on Jim Enote’s observation, as well as the theme of the recent Federal Bar Association Indian Law Conference, I want to suggest that David’s scholarship illuminated another “remapping” that is taking place, this one, of course, within the field of federal Indian law. As we all know, David understood the importance of guiding principles and a consistent structure in the law, and he saw federal Indian law in its original inception as having those attributes. David was one of the most articulate critics of the Supreme Court’s “new subjectivism” in the field of federal Indian law, which started with the

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2. I was fortunate to view the exhibit at the Museum of Northern Arizona in spring of 2011 and to hear Jim Enote’s narrative about Zuni artists who created the works within the exhibit. Mr. Enote was also a speaker at the 2012 Federal Bar Conference.

3. Jennifer McLerran, *Mapping Memory*, in A:SHIWI A:WAN ULOHNNANNE: THE ZUNI WORLD 10, 10 (Jim Enote & Jennifer McLerran eds., 2011).

4. *Id.* (citing Leslie Marmon Silko, *Landscape, History, and the Pueblo Imagination*, 57 *ANTAEUS* 83 (1986)).

5. Jim Enote, *A:shiwi on A:shiwi: Zuni on Zuni*, in A:SHIWI A:WAN ULOHNNANNE: THE ZUNI WORLD 4, 4 (Jim Enote & Jennifer McLerran eds., 2011).

Rehnquist Court and continues to the present day. His 1996 article, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, made the important observation that the Supreme Court had in fact assumed the role formerly conceded to Congress, carefully limiting tribal sovereignty through its constrained readings of tribal jurisdictional authority.<sup>6</sup> The result of this new “subjectivist approach” was to sever “tribal sovereignty from its historical moorings, leaving lower courts without principled, comprehensive guidance.”<sup>7</sup> In his article, David encouraged a return to the foundational principles of federal Indian law, which he felt would be possible if some of the newer justices on the Court would assume “intellectual leadership in Indian cases.”<sup>8</sup>

However, by 2001, when David wrote *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice, and Mainstream Values*, he had accepted the reality that the Court was committed to its subjectivist path, and he suggested that the more important question was to assess “where Indian law may be headed.”<sup>9</sup> David realized that our field was being “remapped” by the Supreme Court, and not in a way that reflected the original principle that Indian nations had the sovereign right to reach agreement with the United States on the terms of their political relationship. Instead, the judicial branch was unilaterally taking the power to determine the contours of that relationship, and David understood that it was necessary to understand their motivations for doing so. In other words, what would the “coordinates” of the new “map” look like? David suggested that it was necessary to “look beyond Indian law to search for and test trends and directions evinced by the Court’s decisions in other fields and assess whether they offer guidance on the future of Indian law.”<sup>10</sup> After a fascinating and provocative exploration of the Court’s jurisprudence, David concluded that three consistent trends could be determined from the record of wins and losses in the Court: “Virtually without exception, state interests prevail;

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6. David Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573 (1996).

7. *Id.* at 1573.

8. *Id.* at 1652.

9. David Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 268 (2001) [hereinafter Getches 2001].

10. *Id.*

attempts to protect specific rights of racial minorities fail; and mainstream values are protected.”<sup>11</sup> He further pointed out that nearly every Indian law case directly implicated one of these interests, and therefore, these trends appeared to explain recent decisions in Indian law. This time, David’s prognosis was a bit more grim: “Absent a judicial rediscovery of Indian law, Congress will have to legislate to correct the Court’s misadventures.”<sup>12</sup>

That powerful realization launched a scholarly discourse among federal Indian law scholars, including many present today, about: the tensions between judicial and congressional “plenary power;” legal realism; the tensions between tribal and federal perspectives on self-determination; the meaning of inherent sovereignty; and a plethora of other topics.<sup>13</sup> I will not attempt to summarize this considerable body of scholarship, and will only say that the robust discourse more than proved the central truth of David’s observation about the role of the current Supreme Court as a “change-maker.”

In particular, David’s 2001 article illuminated the central problems with the Court’s approach and also the values that the Court was using to decide Indian law cases. First, David observed that the Court’s approach to Indian law was essentially an “activist” approach, which lacked any “inherent philosophical content.”<sup>14</sup> The lack of any identifiable philosophy, coherent policy, or set of principles deeply troubled David because it indicated that the Court was acting purely on the basis of its power to instantiate the justices’ own “values and preferences.”<sup>15</sup> The Court turned its back upon the established principles of Indian law in a way that lacked integrity or even a basic sense of justice.

According to David, the Rehnquist Court was most interested in “considering and weighing tribal rights in the context of modern circumstances.”<sup>16</sup> In his view, this reflected a

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11. *Id.*

12. *Id.* at 269.

13. There is a complex body of scholarship within federal Indian law that is not easily sorted into theoretical camps, although the authors of one of the leading Indian law textbooks have done an admirable job of describing some of these perspectives in this manner. See ROBERT T. ANDERSON, BETHANY BERGER, PHILIP P. FRICKEY & SARAH KRAKOFF, *AMERICAN INDIAN LAW: CASES AND COMMENTARY* 945–51 (2nd ed. 2010). In this work, the authors associate David Getches with the “foundationalist scholarship” within the field. *Id.* at 946.

14. Getches 2001, *supra* note 9, at 291.

15. *Id.* at 298.

16. *Id.* at 303.

commitment to “pragmatism,” or the notion that the judiciary is capable of deciding what result best conforms to “society’s current values.”<sup>17</sup> Of course, as he further observed, this approach assumes that the judiciary has the intellectual ability and cultural sensitivity to understand the full range of consequences that will ensue from its opinion. And it was this assumption that seemed most problematic in the context of federal Indian law because, as David noted, the Court would first have to understand that tribal governments are sovereigns that predate the U.S. Constitution and have been in a political relationship with European sovereigns and then the United States for their entire history.<sup>18</sup> They would also have to confront a significant “cultural divide” in their attempt to locate the best “legal answer” to a factual circumstance. As David noted, no member of the Court shares any of the values or experiences found within tribal communities, and yet, the Court’s decisions operate “on people distinguished by their cultures” and their unique institutions, and people “shaped by different histories.”<sup>19</sup>

David identified the values that the Court was using to decide its Indian law cases and found that the Court’s decisions in fact reflected certain broad, collective attitudes of the political, social, and cultural majorities within the United States. Thus, across the board, the Court “tends to disfavor claims of racial minorities[,] . . . protect the interests of states, and . . . promote mainstream values.”<sup>20</sup> Not surprisingly, tribal interests could be seen to contravene each of these commitments, and thus, “Indian law has become a crucible for forging a larger agenda.”<sup>21</sup> The examples that David gave illustrate the point. In *Nevada v. Hicks*, the Court stretched to find a justification to disclaim tribal authority to adjudicate an alleged civil rights violation by state law enforcement officials who conducted a search of a tribal member’s home on tribal land.<sup>22</sup> Remarkably, the Court found that “[s]tate sovereignty does not end at a reservation’s border.”<sup>23</sup> In *Seminole Tribe v. Florida*, the Court invalidated the provision of the Indian Gaming Regulatory Act authorizing tribes to sue recalcitrant

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17. *Id.*

18. *Id.* at 304.

19. *Id.* at 305.

20. *Id.* at 317.

21. *Id.* at 329.

22. 533 U.S. 353 (2001).

23. *Id.* at 361.



states in federal court to obtain an order compelling the state to negotiate a gaming compact in good faith.<sup>24</sup> The Court overruled its earlier decision in the *Union Gas* case to find that Congress lacked the constitutional authority to abrogate the states' sovereign immunity, which is protected by the Eleventh Amendment, and interpreted the Indian Commerce Clause power to be coextensive with the Interstate Commerce Clause power.<sup>25</sup> The Court's analysis served its states' rights agenda, in the process ignoring the fact that the complex political relationship between Indian nations and the United States was structurally set apart by the Framers in much the same way as is the federal government's foreign affairs power.

David also pointed out the Court's discomfort with sustaining the special treatment of Native Americans under domestic law. David pointed to *Rice v. Cayetano* as a prime example of the Court's purported "color-blind approach" to racial justice.<sup>26</sup> In that case, the Court held that the state of Hawaii, which administers the share of the proceeds of the "ceded lands trust" allocated by federal law for the benefit of Native Hawaiians, could not conduct a "Natives-only" election to administer that trust without violating the Fifteenth Amendment.<sup>27</sup> The Court ignored the relevant political history, including the United States' own violation of international and domestic law in annexing the lands by joint resolution after the Hawaiian Monarchy was overthrown by a group of American insurgents backed by U.S. Marine.<sup>28</sup> Instead, the Court offered a paternalistic acknowledgement that "the culture and way of life" of the Native Hawaiians has been "engulfed by a history beyond their control," and therefore, the state of Hawaii has a duty to "seek . . . political consensus" based on a shared purpose: namely that "[t]he Constitution of the United States, too, has become the heritage of all citizens of Hawaii."<sup>29</sup>

Finally, David discussed a series of cases favoring the perceived supremacy of majoritarian values, perhaps best illustrated by the infamous case of *Employment Division v.*

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24. 517 U.S. 44 (1996).

25. *Id.*

26. Getches 2001, *supra* note 9, at 343 (citing *Rice v. Cayetano*, 528 U.S. 495 (2000)).

27. *Rice*, 528 U.S. 495.

28. Rebecca Tsosie, *Engaging the Spirit of Racial Healing Within Critical Race Theory: An Exercise in Transformative Thought*, 11 MICH. J. RACE & L. 21, 32, 32 n.11 (2005).

29. *Rice*, 528 U.S. at 524.

*Smith*.<sup>30</sup> In *Smith*, the Court decimated the First Amendment Free Exercise balancing test by finding that the state was free to apply its “neutral laws” (in this case, criminalizing the use of peyote, including by Native practitioners) even if the effect was to foreclose the religious practice of a minority religion.<sup>31</sup> According to the Court, this did not pose a constitutional issue, but rather was an “unavoidable consequence of democratic government.”<sup>32</sup> The Court further found that any harm to “religious practices that are not widely engaged in” is justifiable, because the alternative—protecting freedom of conscience for all by selectively issuing exemptions—would promote “anarchy” and make the judges arbiters of society’s interests as weighed against the “centrality” of an individual’s religious belief.<sup>33</sup>

The Court’s overt disregard of its own precedent on religious freedom, as well as its blatant favoring of majoritarian values to the detriment of minority religions, provoked a strong outcry from many groups, leading Congress to pass the Religious Freedom Restoration Act (“RFRA”).<sup>34</sup> The Court ultimately invalidated RFRA as applied to the states, thus continuing its states’ rights agenda.<sup>35</sup> The statute continues to apply to federal actions and to the administration of federal lands. Today, the substantive issue for Native peoples—whether RFRA is more protective than the First Amendment, for example, in relation to sacred sites protection on federal lands—is still open at the Supreme Court level. In *Navajo Nation v. U.S. Forest Service*, dealing with the Forest Service’s decision to allow a ski resort to use reclaimed wastewater to manufacture artificial snow on the San Francisco Peaks, the Ninth Circuit found that RFRA is no more protective than the First Amendment, returning Native litigants to the world of *Lyng*.<sup>36</sup> Other courts have expressed a different view,<sup>37</sup> and the issue will probably come to the Court

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30. *Emp’t Div. v. Smith*, 494 U.S. 872 (1990).

31. *Id.*

32. *Id.* at 890.

33. *Id.*

34. *See* Pub. L. 103-141, 107 Stat. 1488 (1993) (codified at 28 U.S.C. § 1988 & 42 U.S.C. § 2000bb-4).

35. *See* *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (holding that Congress lacked power under Section 5 of the Fourteenth Amendment to limit state authority that might impair religious practice).

36. 535 F.3d 1058 (9th Cir. 2008) (en banc) (citing *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988)).

37. *See, e.g., Comanche Nation v. United States*, No. CIV-08-849-D, 2008 WL

in the near future.

David's critique of the Supreme Court's federal Indian law jurisprudence identified the new coordinates of the "cultural frontier" that the Supreme Court is forging. In this process, as David demonstrated, the Court is "remapping" the field of federal Indian law, disclaiming the political principles that have long defined the political relationship of Indian nations to the United States, ignoring the legal principles that articulated this relationship as Indian nations were incorporated into the political boundaries of the U.S. as separate nations, and paving over the cultural principles that comprise the heart of Native self-determination. There is a deep cultural conflict implicated by this process of remapping, as the next section of this essay demonstrates.

## II. MAPPING THE WEST: THE IMPORTANCE OF HISTORICAL CONTEXT AND INTERCULTURAL CONFLICT

For this discussion, I will return to the physical landscape of the Colorado Plateau, specifically its location in another place, which we call "the West." The West occupies a central place in the imagination of many Americans, and it is the subject of a set of narratives that informed the manifest destiny of the United States and sanctioned the country's creation as a new nation carved out of a foreign landscape. The mythology of the American frontier and the settlers who came to these lands, displacing indigenous peoples and annexing lands from the Atlantic to the Pacific coasts, is a vivid image in the cultural memory of America. I wanted to revisit what David had written about this place, and so I reread his 1990 essay, *A Philosophy of Permanence: The Indians' Legacy for the West*.<sup>38</sup> In that essay, David notes that Indians "survived on the American continents for thousands of years based on a pervasive set of cultural values integrating human life with other forms of life."<sup>39</sup> David maintained that these same values continued to guide Indian nations in the modern era, and he claimed that these values are "crucial for the future of a region

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4426621 (W.D. Okla. Sept. 23, 2008) (unreported decision enjoining federal defendants from commencing construction on a military installation pending examination of impacts to Comanche practitioners who sought to protect sacred site near Medicine Bluffs in Oklahoma).

38. David Getches, *A Philosophy of Permanence: The Indians' Legacy for the West*, 29 J. WEST 54 (1990) [hereinafter Getches 1990].

39. *Id.* at 54.

where resource issues are intertwined with economic and social survival.”<sup>40</sup> In particular, the most valuable legacy of these enduring values is “a philosophy of permanence.”<sup>41</sup> Within this philosophy, human actions are limited by the obligation to ensure that the natural world maintains a healthy balance. In some cases, he said, this would mean that the human drive to exploit natural resources would be constrained by an ethic of conservation. The central idea of a philosophy of permanence, after all, is that the rights of the current generation are limited by the responsibility to future generations.

David’s article presents a careful historical analysis of tribal environmental values, which documents that Indian nations practiced environmental science and developed sustainable agricultural and fishing practices, as well as a sophisticated understanding of medicine plants and herbs. David pointed out that these systems of knowledge continued to guide modern tribal governments, such as the Pyramid Lake Paiute, as they fought for recognition of tribal water rights sufficient to maintain the fish resource of Pyramid Lake. David also acknowledged that Indian nations are not adverse to using natural resources, and some tribes, such as the Navajo Nation, were in fact building an energy economy out of their coal and gas resources. David’s essay was written just as tribes were authorized to manage environmental programs on the reservation, and he saw this drive toward environmental self-determination as entirely consistent with the philosophy of permanence. The destructive leasing practices encouraged by the federal government in the 19<sup>th</sup> and early 20<sup>th</sup> centuries had harmed the reservation environment, and by asserting sovereign authority over mining and commercial activity, tribal governments were ensuring that more prudent stewardship practices would occur.<sup>42</sup> David also noted that tribal governments, such as the Mescalero Apache Tribe were managing fish and wildlife resources with a conservation ethic in mind.

David concluded the essay in his characteristically hopeful

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40. *Id.*

41. *Id.*

42. See also Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225 (1996) (discussing the legacy of the nineteenth and early twentieth century federal policies promoting leasing on tribal lands, as well as the resurgence of indigenous land ethics within modern tribal environmental management programs).

manner, noting that, for the first time, Westerners had begun to develop a more suspicious view of resource development, particularly forms of development that would “insult or diminish their notion of the West.”<sup>43</sup> David noted the burgeoning national effort to preserve wilderness, including wild and scenic rivers and national parks. David claimed that a sense of reverence for the land was developing among many Americans and that this could become a driving force for policy innovations if embraced by politicians, educators, and religious leaders. If this occurred, “the West finally could throw off the unrealistic and destructive dream of eternal expansion and stop tolerating those engaged in a rootless quest for the next conquest.”<sup>44</sup> This would be an “evolutionary step” toward realization of the Indians’ ethical ideal of permanence.<sup>45</sup>

What David advocated in this article is an intercultural understanding of value and sustainability in the management of our shared lands and resources in the West. The ethic of permanence would become our guiding philosophy for the management of environmental and cultural resources, and the ethic of opportunity that had driven westward expansion and resources exploitation in the West would gradually give way to a more sustainable view of our relationship to the land and to future generations.

Note, however, that the dichotomy represented by indigenous and Anglo-American land ethics embodies a deeper conflict in cultural narratives. As Historian Patricia Limerick observed, the dominant narrative in the United States questions “how long human beings have lived in North America.”<sup>46</sup> Some archaeologists contest the claim that Indians are the “original” peoples of the lands in North America, advancing theories that suggest that Indians are just “earlier” immigrants to these lands, perhaps crossing the Bering Strait, or perhaps constituting the “second wave” of human inhabitation in the “New World.”<sup>47</sup> The latter theory is

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43. Getches 1990, *supra* note 38, at 67.

44. *Id.*

45. *Id.*

46. Patricia Nelson Limerick, *Here to Stay*, 10 WILSON Q. 99, 100 (1986).

47. See, e.g., Editorial, *Who Owns the Past?*, SCI. AM., Apr. 2012, at 9 (arguing that the Native American Graves Protection and Repatriation Act is too favorable to Native claimants and that scientific values are being compromised as a result); see also Duane Champagne, *A New Attack on Repatriation*, INDIAN COUNTRY TODAY MEDIA NETWORK (Apr. 9, 2012), <http://indiancountrytodaymedianetwork.com/2012/04/09/a-new-attack-on-repatriation-107181> (Dr. Champagne is a Native

bolstered by claims that ancient skeletal remains, such as those of the Kennewick Man in Washington, do not bear any physical or genetic resemblance to modern day Indian populations.<sup>48</sup>

Not surprisingly, the “question of who settled the Americas” continues to be one of the “most contentious issues in human prehistory.”<sup>49</sup> If Native peoples are, as they assert, the original occupants of these lands, and if they in fact belong to these lands, then justice is best served by a respectful political relationship between Indian nations and the United States. Justice in this view is “equity” between nations. On the other hand, if Native peoples are just another “immigrant” group (albeit from a much earlier time), then justice is best served by ensuring that individual Indians have an “equal right” to participate in the American democracy. Under this view, justice is served by “equality of opportunity” for all American citizens within American democracy. The operative theory here is that all citizens agree to a shared set of constitutional values, and “equality under the law” is the only requirement for justice to be served.

David’s federal Indian law scholarship demonstrates his belief that federal Indian law was structured to preserve justice between nations. The political relationship was the guiding force for the construction of laws that validated tribal sovereignty within the American federal system. However, the Supreme Court’s most recent jurisprudence adopts the second narrative. Under this reading, state sovereignty is paramount,

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sociologist at the University of California, Los Angeles, who criticizes the attempt of scientists to block repatriation of ancestral human remains to contemporary tribes and observes that “the time has come for more multicultural, government-to-government negotiations about repatriation that aim to address both scientific and indigenous values”); see also Rebecca Tsosie, *Privileging Claims to the Past: Ancient Human Remains and Contemporary Cultural Values*, 31 ARIZ. ST. L. J. 583, 599, 621–24 (1999) (discussing the competing scientific theories about the “peopling of the Americas”).

48. The newest case on this topic is *White v. University of California*, which was filed by a group of scientists in a California Superior Court in an effort to preclude the repatriation of ancestral human remains by the University of California to the Kumeyaay Nation, a coalition of twelve Native American tribes who are affiliated with the lands where the so-called “La Jolla Skeletons,” dated to approximately 10,000 years ago, were excavated. *White v. Univ. of Cal.*, No. C12-01978 (N.D. Cal. Apr. 20, 2012), available at <http://dockets.justia.com/docket/california/candce/3:2012cv01978/254098/>; see also *Bonnichsen v. United States*, 367 F.3d 864, 871–72 (9th Cir. 2004). The University has petitioned for removal to federal court. See *White*, No. C12-01978 (N.D. Cal. Apr. 20, 2012).

49. See Ann Gibbons, *The Peopling of the Americas*, 274 SCI. 31, 31 (1996).

and minorities should not be given any "special" rights within the American legal system. Native Americans, like all Americans, are perceived to share a common heritage under the U.S. Constitution.

While David Getches identified the "cultural frontier" created by federal Indian law within American constitutional jurisprudence, historian Patricia Limerick identified the "symbolic frontier" of the West within American consciousness. Limerick claims that "[c]onquest forms the historical bedrock of the whole nation, and the American West is a preeminent case study in conquest and its consequences."<sup>50</sup> Limerick asserts that there is a moral burden for the West comparable to the moral burden placed upon the South in the wake of the Civil War. The South evokes "failure" in the minds of many Americans because of its brutal legacy of slavery and its vehement denial of civil rights to African Americans even after the Constitution was amended. Similarly, in the West, one can see a "lingering injustice that an invading, conquering people did, and are still doing, to the resident native peoples and ethnic minorities." That conquest has two aspects: first, a competition for natural resources, which left white Americans holding the majority of the land and profits within the region; second, a competition for cultural dominance "which has made the white way of life and point of view the only legitimate one."<sup>51</sup> Using this lens, a different form of failure takes place as white property owners lose "the very property they won to the forces of environmental deterioration," and as they lose cultural dominance "to the resurgence of minority self-confidence and influence." If the West loses its "self-esteem," Limerick argues, so does "the white majority of the entire American nation."

If Limerick is correct, then the activist agenda of the Supreme Court within federal Indian law makes perfect sense as a bulwark against failure for the white majority of the American nation. Of course, on the lands of the Colorado Plateau, this "social, environmental, and legal history" is alive and well, as the final section of this essay reveals.

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50. PATRICIA NELSON LIMERICK, *THE LEGACY OF CONQUEST: THE UNBROKEN PAST OF THE AMERICAN WEST* 27-28 (1987).

51. Donald Worster et al., *The Legacy of Conquest, A Panel of Appraisal*, 20 W. HIST. Q. 303, 305 (1989).

### III. MAPPING THE FUTURE: THE PHILOSOPHY OF HOPE

I return to the memory that inspired this essay, which was based on the last conversation I had with David at our board meeting of the GCT. The current issues on the Colorado Plateau still involve a conflict between the dominant society's "ethic of opportunity" and the indigenous peoples' "ethic of permanence." Unfortunately, this conflict between ethics is not localized according to the respective identities of the parties who assert interests in these lands, which makes the work of an organization like the GCT quite challenging. A simple commitment to "environmental preservation" may, in fact, be perceived as antagonistic to tribal governments who favor development. It is also overly simplistic to imagine that by favoring the view of a particular tribal government, this serves the interests of all tribal governments. In fact, there are multiple, conflicting sovereign interests present on the Colorado Plateau, represented by several federal agencies, the States of Arizona and Utah, and several tribal governments. Each of these governments represents the interests of constituent citizens, and each must interact with the others in a way that promotes their respective interests, and hopefully, respects the integrity of the landscape. It is not always clear, however, that the integrity of the landscape is perceived to be the paramount goal.

The Grand Canyon National Park and its adjacent lands are by now widely recognized as being a unique and precious resource for the entire country, meaning that aesthetic and recreational interests are valued and, in fact, serve as the basis for tourism in this area. There are many Indian nations that claim a cultural affiliation with these lands, including the Havasupai Tribe (whose reservation is at the bottom of the Grand Canyon), the Hualapai, the Navajo Nation, the Hopi Tribe, and the Zuni Pueblo. There are, as Jim Enoté has stated, many stories associated with this landscape, some of them represented by rock carvings on the canyon walls and sandstone cliffs. There are also prayers, ceremonies, sacred springs, sacred sites, burial sites, and migration trails throughout the Plateau. Some of these spiritual and cultural values are visible to outsiders, but most are not. They are "real" in the lives and consciousness of the Native people who belong to these lands, but they are also embedded in a landscape that holds considerable material value.



The lands that comprise the Colorado Plateau have been and always will be part of the American drive for energy dominance. In that sense, they have considerable economic and commercial value. There are rich deposits of uranium, coal, and gas on these lands. The water resources associated with this landscape are vital to the survival of the communities and species that are indigenous to these lands. However, the water also fuels development, including the Central Arizona Project, which delivers affordable energy to huge cities in the Southwest, including Phoenix, Las Vegas, and Los Angeles.<sup>52</sup> These resources also deliver the water promised to tribes in the southern portion of the state, such as the Gila River Indian Community, which finally succeeded in obtaining a congressionally authorized water settlement, enabling the community to utilize its legal water rights.<sup>53</sup> In short, in 2012, the development agenda of some tribal governments is at odds with the cultural values of land-based indigenous communities throughout the region. Tribal political sovereignty sometimes clashes with tribal cultural sovereignty, and the disparate land ethics create a sense of chaos and confusion within many indigenous communities.<sup>54</sup>

It was this clash of values and interests on the landscape of the Colorado Plateau that occupied the last conversation I had with David Getches at our GCT board meeting. David was an avid proponent of tribal sovereignty and he did not favor a paternalistic attempt by non-Indian environmentalists to instruct tribal governments on what they “ought” to do. On the

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52. See generally *INDIANS & ENERGY: EXPLOITATION AND OPPORTUNITY IN THE AMERICAN SOUTHWEST* (Sherry L. Smith & Brian Frehner eds., 2010).

53. Arizona Water Settlements Act, Pub. L. 108-451, 118 Stat. 3478 (codified in scattered sections of 43 U.S.C.); see also *Once-Mighty River Hurt by Drought, Pollution, Growing Water Demand*, ASSOCIATED PRESS (Aug. 9, 2006), <http://www.uswaternews.com/archives/arcsupply/6oncerive8.html>; see also Shaun McKinnon, *Mines, Farms Put Gila River on Life Support Despite Lack of Regulation, Some Trying to Restore River to its Natural Beauty and Wonder*, ARIZ. REPUBLIC (Aug. 9, 2006), <http://www.azcentral.com/specials/special06/articles/0809rivers0809NEW.html>

54. The distinction between political and cultural sovereignty is important to understanding the complexity of indigenous rights claims, both within domestic U.S. law and within international human rights law. See Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POLY REV. 191 (2001). The term “cultural sovereignty” is used to describe the core of tribal inherent sovereignty, which is defined according to an internal tribal construction of values, rather than the dominant society’s account of the powers of a “domestic dependent nation” under U.S. law.

other hand, David truly respected the traditional leadership of tribal governments, and he had worked with elders and traditional leaders in Alaska, California, Arizona, and the Pacific Northwest. David understood the value of traditional indigenous land ethics, not just for indigenous peoples, but for everyone, because they were the only ethical system founded upon a “philosophy of permanence.” In that sense, indigenous land ethics could provide the necessary counterweight to the dominant society’s exploitive ethic of opportunity.

It is interesting to note that David began his essay, *A Philosophy of Permanence: The Indians’ Legacy for the West*, with the famous quote attributed to Chief Sealth from 1855:

This we do know: the earth does not belong to man, man belongs to the earth. All things are connected like the blood that unites us all. Man did not weave the web of life, he is merely a strand in it. Whatever he does to the web, he does to himself.<sup>55</sup>

In my opinion, David’s life and his work were dedicated in service of that central idea: we are all related because we share the central feature of being living beings on a landscape that must nurture all of us. This observation is increasingly important in an era of climate change because we can see the effects of an international governance system in which sovereign nation-states can engage in any level of development, unconstrained by the impacts of their emissions on others. We see the interconnections of the global biosphere, including the forests, the oceans, and the atmosphere, none of which obey a “territorial” dividing line corresponding to the sovereign lands claimed by the nation-states. When things shift, the attendant floods, fires, and hurricanes affect hundreds of thousands of people across national boundaries. And finally, we see the interconnections of human beings throughout the world, observing the deadly pathways of disease epidemics and food safety concerns caused by an increasingly mobile and interdependent global society. In 2012, the words of Chief Sealth enjoy ample scientific documentation as a matter of fact.

So, what does that portend for our collective future? Here, I want to draw on the words of another esteemed scholar, the late Vine Deloria, Jr., who wrote of “religion” as being “a force

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55. Getches 1990, *supra* note 38, at 54.

in and of itself” that called for the “integration of lands and peoples in harmonious unity.”<sup>56</sup> In his widely acclaimed book, *God is Red*, Deloria wrote:

Who will find peace with the lands? The future of humankind lies waiting for those who will come to understand their lives and take up their responsibilities to all living things. Who will listen to the trees, the animals and birds, the voices of the places of the land? As the long-forgotten peoples of the respective continents rise and begin to reclaim their ancient heritage, they will discover the meaning of the lands of their ancestors. That is when the invaders of the North American continent will finally discover that for this land, God is red.<sup>57</sup>

Of course, any reference to “religion” in association with governance or public land management is certain to remove the utility of the idea from public discourse. So, I will take the liberty of recasting this statement as a set of ethical principles. In fact, as we sit here today, at this conference, there is another conference taking place at the University of Arizona in Tucson. Professor James Anaya, who is also the U.N. Special Rapporteur on the rights of indigenous peoples, is holding a consultation with indigenous leaders and representatives from communities throughout the U.S.-Mexico border region. One of the points of discussion will center around the meaning of Article 25 of the U.N. Declaration on the Rights of Indigenous Peoples, which was adopted by the U.N. General Assembly in 2007.<sup>58</sup> Article 25 provides that, “Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.”<sup>59</sup>

I want to suggest that the reference in Article 25 to a “distinctive spiritual relationship” between indigenous peoples and their traditional lands reflects the ethical principles of respect, responsibility, and relationship that are pivotal to the

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56. VINE DELORIA, JR., *GOD IS RED: A NATIVE VIEW OF RELIGION* 292 (2d ed. 1994).

57. *Id.*

58. G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Oct. 2, 2007).

59. *Id.* at Art. 25.

realization of a “philosophy of permanence.” The notion of respect between nations is central to achieving justice, and the notion of responsibility—to the land and its resources, to all living beings, and to the future generations—is pivotal to our collective survival. By acknowledging these relationships and their attendant responsibilities, David suggested that we could move into a more productive and beneficial mode of land management that could serve our mutual interests into the future. David also identified the key components of the institutional changes that must take place by promoting the development of governmental capacity to effectively manage lands and resources, and by promoting the education of students and policymakers about the need to transition from an “ethic of opportunity” to an “ethic of permanence.”

Vine Deloria also favored an enhanced direction for education, and he went further to suggest that we should overcome the intellectual barriers that were imposed by the respective academic disciplines that informed Western rationalist epistemologies. Deloria wrote:

We are actually in the midst of a “Dark Age” of intellectual activity. The Darwinian-Freudian-Marxist synthesis that has dominated the century has long since come apart but Americans refuse to admit it. We have a duty to move beyond it—ethic demands of personal integrity require it—but I see almost no one willing to undertake such a task—or even nibble at the edges of the current synthesis to begin a critique.<sup>60</sup>

In short, David Getches and Vine Deloria both recognized that the economic lens that fueled European colonialism and westward expansion in the United States now cripples our effort to deal effectively with the challenges of the future. If the foundational principles of federal Indian law, which require justice between nations, are conjoined with the emerging principles of indigenous rights as a matter of international law, we may have the opportunity to expand our understanding of how to live on the lands of the Colorado Plateau. I invite us to consider the narratives that ought to guide us on this journey, including our understanding of sacred places, the ancestral

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60. Vine Deloria, Jr., *Thinking in Public: A Forum*, 10 AM. LITERARY HIST. 1, 25 (1998).

connections to territory, and the right of future generations to experience the beauty and power of these unique lands. I invite us to adopt a broader understanding of what it will take to “adapt” to the challenge of climate change on the lands of the Colorado Plateau, and how our various epistemologies will either promote adaptation or destroy our ability to adapt. And, finally, I would invite us to describe the philosophies that will inform our journey. Are we going to limit ourselves to the mechanistic, scientific, and economic models that have informed “development” as it exists today? If so, our ability to adapt will be conditioned by its economic feasibility, as we currently assess those models. Or will we finally transcend those limited notions of our relationship to these lands and understand the vibrant, spiritual essence of a sacred landscape? Where the land is damaged, we are damaged. Where the land needs healing, it is our obligation to ensure that it is healed.

Robert Yazzie, the eminent former Chief Justice of the Navajo Nation Supreme Court, wrote that “Navajo concepts of justice are related to healing because many of the principles are the same.”<sup>61</sup> Chief Justice Yazzie described the fundamental law of the Navajo People as “something that is absolute and exists from the beginning of time,” and which was given to the Navajos by the Holy People “for better thinking, planning, and guidance.”<sup>62</sup> The system that Chief Justice Yazzie describes links the destiny of human beings to each other and to the land in a principled way. The principles are important because they identify when harm has occurred, and they also help reveal what is necessary to set things right. At the heart of the matter is the observation that all transgressions require correction, whether the consequences of the act are intended or not.<sup>63</sup>

To understand these ethical constructs as a system of law is pivotal to the utility of the principles as a mechanism to achieve intercultural justice. As a matter of American constitutional theory, “religion” cannot come into the public sphere as “law.” In fact, religion often dominates American politics, as demonstrated by the continual outcry against

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61. Robert Yazzie, *“Life Comes From It”: Navajo Justice Concepts*, 24 N.M. L. REV. 175, 180 (1994).

62. *Id.* at 175.

63. *Id.* at 188 (noting that “[t]here are always consequences from wrongful acts” and that “harm must be repaired”).

women's reproductive rights as well as the position that gay partners ought to have a right to marry.<sup>64</sup> Thus, religion has a profound impact upon the law because of its influence on American politics. However, the formalistic view that religion must be separated from the "law" poses a continual challenge for Native peoples seeking to protect their sacred sites on public land and removes an entire category of knowledge from public policymaking. Yet if the essence of a human life has a sacred dimension, as most would agree, then we must be very concerned about our collective future within a society that does not allow us to acknowledge spiritual values or spiritual harms. In fact, Chief Justice Yazzie also observed that many social problems on the reservation today, including domestic violence, substance abuse, and criminal activity, all share a common origin, which is "loss of hope."<sup>65</sup> Chief Justice Yazzie described the loss of self-respect and attendant loss of hope as a "disease of the spirit."<sup>66</sup> Without healing this disease, it would be difficult to overcome the harms caused by these social problems.

We have only to look at the social indicators throughout the United States to understand that the problems noted by Justice Yazzie are commonplace in communities throughout the country. They are not unique to reservation communities. Is it possible that, as a global society, we are experiencing a loss of hope? The Occupy Wall Street movement suggested a profound degree of disaffection with American capitalism, and the various political extremists that have dominated the media tend to promote an equal degree of doubt that elected officials have the best interests of Americans at heart. Many Americans think it is hopeless to do anything to avoid climate change or to secure a better life for the future generations to come. Contrast this dismal picture with the sense of inspiration and renewal that we experience when we come to places like the Grand Canyon and other national parks. These are the places that many people return to year after year as a means of renewing their spirits and witnessing something greater than the limitations of an ordinary life. I think that David wanted us to

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64. See, e.g., *California Ban on Same-Sex Marriage Ruled Unconstitutional*, ARIZ. REPUBLIC (Feb. 7, 2012), [http://www.azcentral.com/arizonarepublic/news/articles/2012/02/07/20120207ruling-california-gay-marriage-ban-due-today.html?n\\_click\\_check=1](http://www.azcentral.com/arizonarepublic/news/articles/2012/02/07/20120207ruling-california-gay-marriage-ban-due-today.html?n_click_check=1).

65. Yazzie, *supra* note 61, at 177.

66. *Id.*

remember that this sacred landscape embodies a philosophy of hope and a set of principles that foster sustainability, permanence, and life itself. To me, that is the central legacy of his scholarship.

#### CONCLUSION

This magnificent conference has illuminated the tapestry of a remarkable life, making apparent the many aspects, commitments, and qualities David possessed in a way that is now visible to all of us who knew him, as well as those who only knew of him. It has been a privilege to honor David Getches, his life, his words, his family, and his work. Thanks to all of you who have come to this place in a spirit of love for this incredible man, who was our colleague and our friend. Together we have shared our experiences, our stories, and our memories, and in this moment, David Getches's legacy lives on. Indeed, his legacy will thrive in our own determination to remember and to make sure that others remember what he gave to us: a philosophy of hope and a landscape of principle.