

Property Rights Foundation of America[®]
Founded 1994

A U.N. and Tribal Takeover

Lawrence A. Kogan, Esq.
Kogan Law Group
New York, N.Y.

**Twentieth Annual National Conference on
Private Property Rights
October 22, 2016
The Century House, Latham, N.Y**

Peter and Carol, thank you, again, for asking me back to provide you all with a bit of fearful entertainment because that's how I can only categorize what I'm about to tell you.

I took great interest in hearing the discussions beginning this morning regarding all the many ways that the federal and state governments have been creative in impairing property rights, either expressly through outright eminent domain or indirectly through regulatory and other proclamations and executive agency actions that may not be in print but which they infer from that which is in print. I have literally served on behalf of cowboys out West, farmers and ranchers living on federal irrigation projects that were developed by the Army Corps of Engineers in the early Twentieth Century. Two of the projects, one of which is in Montana — I've been out to northwest Montana for the last year and a half, which is a truly beautiful state. Now I understand why they call it the big sky state because everything takes up the sky when you drive by it, especially in the western part of the state. But these people live on and around a federal Indian reservation. Things that you would read in storybooks maybe you would get some Civil War history in middle school about it.

And then I've also represented an irrigation district and a county in southern Oregon and northern California of which the irrigation district is one of twenty-two irrigation districts sitting on a federal irrigation project that spans both states, also built by the Army Corps and/or the Bureau of Reclamation which is an Interior department division. They're surrounded by Indian reservations and they've got rivers that have fish. Surprising. In each case there are claims by the federal government, theories based on Clean Water Act, water quality, total maximum daily load, which is the technical term TMDL for the amount of pollution that a given designated waterbody can sustain without breaching the Clean Water Act provisions.

Then you also have the Endangered Species Act where you can either have an endangered species classification or you could have a threatened species classification. In each of these cases, in each of these regions, they have been asserted in regard to several different species that either swim in the lake in Oregon known as the Upper Klamath Lake, which is itself central Oregon, or down the Klamath River, or in Montana up in the Flathead Lake and down the Flathead River. The Flathead River is important because it ties into the Columbia River system,

which is, I think, the second or third largest ecosystem in the U.S. total, when you consider all of them.

In each of these cases these rules and regulations have been asserted by the federal government as an excuse to curtail water to farms and ranches and to keep the water instead flowing down the river so the fish could swim without anxiety. In addition to these regulations they also have this notion that the federal government owes a legal and fiduciary responsibility to 567 federally recognized tribes. 567, 365 of which have formally recognized reservations. Now, when you look into the rabbit hole of federally recognized tribes you are looking at a fiction of government to government dealing. They treat the tribes as a sovereign entity. Which means that they are respected as a government. The problem is that the government is dependent on U.S. Congress for money. You go back to the 1900's with Justice Marshall and the Supreme Court is known as the Marshall Trilogy where he elaborates the concept of a government to government relationship between the U.S. Government, and all these different Indian tribes and a federal trust obligation borne by the United States, owed to each of these tribes, to protect, promote, sustain, their trust assets. Trust assets are pretty much natural resources, artifacts, water, and forest being among the most important. And lands. So, you've heard of Bureau of Land Management [BLM] raiding states for land in order to control those areas of the state as federal properties. You see the EPA using Clean Water Act and BLM using Endangered Species Act to sustain federal control. This is not state control versus the individual, which there is a bit of that, but it's also federal control over the individual. These trust assets are considered to be spiritual, cultural, and religious. Now, you would think that a federal government or even a state government promotes the spiritual, cultural, and religious — especially the religious interests — of a given group of people at the expense of everybody else? One concept that would pop into your mind is racial discrimination. Starting back in the Nixon era they came up with the concept of benign racial discrimination. Benign racial discrimination doesn't require strict judicial scrutiny. All it needs is the agency that promotes the rule that favors the tribe at the expense of everybody else, all they need to do is show a rational relationship between the rule and the policy. That's it. Minimal threshold of evidence and the policy is sustained. For any other group they would have to go through strict judicial scrutiny, facts and evidence, costs and benefits, balancing for each party.

Here, out West, they don't have to do that. The gentleman over here in western Pennsylvania was concerned that they're trying to drive agriculture out from the valley. You're absolutely correct. But it's not just your valley. It's pretty much any valley they can get a hold of. Out West, western agriculture production, you know, is rather significant in size. And what they're trying to do, consistent with U.N. sustainable development, also, because that's where the Wildlife and the environmental protection comes in, is to create these biozones which everyone has known for a long time exist which have been brought in through the White House starting with the Clinton Administration and essentially mandated through directives sent through the executive agencies which then issue rulings that are then enforced on private landowners. It is this notion of un-occupying or unsettling the settled lands. So, the federal government back in the Nineteenth Century adopted policies to settle the West. They were afraid of the French and the Canadians swooping in from Canada and they were afraid of the Mexicans and the Spanish swooping in from Latin America. So, what they did was they created... obviously they had

treaties with Indians when the cowboys and the soldiers went out West. And these treaties had exchange for ceded aboriginal and ancestral lands in exchange they granted the tribes reservations. These reservations are not titled reservations because the U.S. Government always retained title to the reservations. These were held in trust by the U.S. Government for the benefit and occupancy of the tribes. They had defined boundaries. But the Indians were not necessarily agriculturally oriented. They were fishermen, hunters, and gatherers, supposedly, depending upon their historic claims. And as a result the federal government — Congress — enacted the Dawes Act, a series of land settling acts including the Homestead Act to bring Easterners out West, to give them a plot of land, to help assimilate the Indians through showing what private property ownership was all about. That was considered to be the most American of actions: own private property, work the land. So, they created these allotments and these allotments were given to non-tribal members for the most part, and also to tribal members that wanted a go of it. Because, however, the federal government did not believe that the tribal nomadic cultures were competent to know what to do with these allotments, they gave a period of twenty-five years before they would determine whether to perfect the allotments into titled state lands for which taxes were paid on and if they didn't then they would revert back to the trust of the tribe. Now, remember these tribal communities were nomadic and communal. They weren't individual-based as the principles of our nation were based. So, what would happen is the tribes would end up failing at agriculture because they were not acculturated that way and they would sell off the allotments to more white settlers. And in some cases they didn't really mind how their own allotments were divided up and they became... as the families grew, each family had a small share of the same allotments so they became somewhat fractionated. When they tried to sell them they weren't worth very much; settlers gobbled them up and made a killing on the transfers. A lot of these reservations became almost fifty or seventy-five percent white-settler managed or owned, the allotments.

So, the tribes were somewhat disenfranchised, to say the least, in their own minds concerning what land they received in exchange for all those lands they were giving up. Now, when I use the word "aboriginal" and I use the word "ancestral" these are magic words to the federal government today as a matter of federal policy because the federal policy is to restore to these tribes their prior territories, their prior aboriginal and ancestral lands. And they're now going about doing this through various mechanisms throughout the Department of Interior and most recently also now the Department of Agriculture through U.S. Forest Service.

The game, at least in the minds of the White House is to implement an international document. It's not hard treaty, it's a soft law declaration. It's the United Nation's declaration on the rights of indigenous peoples. Is Columbus Day here yet Indigenous People's Day in New York?

Audience member: No.

Mr. Kogan: Out West they've already changed it. In Oregon, which is a Communist state, they have already changed it. And I think also in Montana. And Montana is run by a Democratic governor but a Republican attorney general. Its legislature is dominated, I think, 57% or 43% Republicans. But the Republicans are name-only Republicans, they're not Conservatives. In Oregon they are dominated by the Democrats. In Washington State I understand and Idaho they're dominated by Republicans. The question is whether in Idaho and Washington State they

can actually make them act like Conservatives. But just know that ancestral and aboriginal lands under this declaration are being pushed globally. All countries are obligated if they sign on to this soft law declaration, which has no legal binding force or effect by itself unless the country that's signing it brings it home through their executive agencies and sets it forth through federal, state, and local levels.

Well, Bush 43 did not like this declaration and he was pushed by the Conservative lobby not to sign. But Obama — that's another story. Obama not only embraced the declaration, he gave them a signing statement of many pages showing how he's going to implement it, and, basically, by giving Indian tribes back their land in federal government settlements. You may remember the Bruce Babbitt scandal during the Nineties where the tribal trust accounts, which are supposed to be filled with monies that Congress appropriates out of a need of guilt and reparations, well, those monies, somehow, never made it into the hands of the tribes because the federal government used it and leveraged against it for other reasons. They ran out of funds, so they used it and moved it to their own coffers. The whole big settlement known as the Cobell settlement, in part, was to pay back the tribes for all the money they didn't get.

That's one way that the Obama Administration is ceding to this notion of restoration of aboriginal lands and ancestral claims to lands and natural resource in order to promote what they would call "Indian self-determination." And Indian self-determination is kind of a free-market term, which began, I think, during the Nixon Administration to take the Indian governments off the federal government rolls. The only problem is you can't make somebody independent just by calling them independent. You can't make them self-governing by calling them self-governing. They have to know how to do it and it has to be facilitated.

But, when you deal with this U.N. declaration, which, by the way, has an interesting acronym — it's UNDRIP. So, drip by drip they basically employ these concepts to diminish private property rights out West.

One of the ways in which they do this is to look back at Indian treaties. Indian treaties, you would think, are sacrosanct. They are a legal obligation of the U.S. government, but they only say certain things. So, between the federal executive agencies under this Obama Administration and through the liberal Ninth Circuit Court, Federal Circuit, which is, pretty much entirely the West, would we say the Ninth Circuit covers most of the western states, the courts have provided a judicial doctrine of deference to tribal interpretation of treaties, in addition to another doctrine of tribal court exhaustion. If you ever get caught in a dispute with an Indian, you will find it very difficult to spend your money wisely. You'll be stuck in a rabbit hole of tribal court for many different levels until you emerge at a federal court level. But with federal court deference to tribal interpretation of treaties, it's not just what the treaty says that matters, the judges there have some sort of clairvoyance to read into the minds of the tribes two hundred years ago, a hundred fifty years ago, their most aggressive negotiating position on those treaties. And that is the deference, that is the interpretation the Ninth Circuit federal courts provide to a reading of a treaty. They also interpret these treaties as reflecting the tribe's intent at that time to reserve other rights not expressly stated. They went into the treaty reserving their right to go off into other parts, other lands, that they had ceded beyond the bounds of the reservation to go hunt, gather, and fish. But when they start talking about fish, that means that they have to insure that

the water is of a certain quality, of a certain flow, and is not diverted to other uses so that they can honor their cultural, religious, and spiritual right to fish, which the courts honor as a reserved or an implied or an inferred treaty right.

Now, in the irrigation projects that I'm talking about this is exactly what's happening. The courts in the Ninth Circuit have inferred from some few Supreme Court decisions dating back to 1908 and 1905, these reserved rights. 1908 is the Winters decision which basically said that the tribes were entitled to only so much water off the reservation and on the reservation that would meet its self-sufficiency needs to operate the reservation as it was intended to be operated by the tribes. Again, a little bit of clairvoyance and ordaining of what the tribal councils and federal government then had thought. In addition, they believe that the Winans decision, which was 1905 in the Supreme Court that basically inferred what use the tribes would make of off-reservation resources. So, they can go way off the reservation in order to insure that the watershed is properly stewarded. They can go off the reservation for miles to insure that the water is not diverted in a way that would curtail their exercise of the spiritual, cultural, and religious rights.

In Montana, they have something known as the Confederated Salish and Kootenai Tribe, which is the tribe in northwest Montana from the Continental Divide to the western border of the state with Idaho, a group of tribes because they were not all one tribe at the time that they lost their battles with the U.S. Army, but they merged several tribes and the SCKT or the Confederated Salish Kootenai Tribe has negotiated and has been long fighting in court to reclaim those aboriginal and ancestral lands. This tribal water rights settlement is with the State of Montana, the U.S. Department of Interior, and the tribe.

Now, I have to take a step back to digress a little bit because water rights out East are not the same as water rights out West. Out East we have an abundance of water. In many states there aren't any rules for using your water. You don't even get charged for your water use especially at well. Out West they also don't get charged very much either but there's a different doctrine. There's a different presumption and that presumption is that water out West is in scarcity. And because water out West is in scarcity, they developed over the last several hundred years a prior appropriations doctrine, which is pretty much like in patent law. The first to file on a use of water in a given area, a given stream, river or estuary, for a specific purpose approved by the state for however long a period of time within the year, that first to file for that particular use, time and scope of time, gets the water first in case of scarcity. When water runs abundantly, there isn't a problem. Everybody gets some. But when water is in short supply, as in the case of a drought or a low precipitation year, these rules start to kick in.

Now, you could always track the water that's claimed back to a given date in time based upon the filing. If you were to take an Indian allotment through transfer and you can trace it back to chain of title to an Indian you would get the priority date of Indian treaty that covers the reservation on which the allotment sits. If, on the other hand you were a homesteader, usually you'd only have it from the early Twentieth Century. And then again, if you weren't vigilant in filing your water rights with what they call a special court of adjudication for water or water boards in each of these states, you would tend to lose that water use. And if you stop using it you generally lose the use.

But the tribes have a different rule. The tribes have a rule that the federal government and the courts in the Ninth Circuit have developed over years known as priority date of time immemorial. Time immemorial means, tied to ancestral aboriginal, it means pre-European settlement era. This whole push to restore to tribal governments and members their sacred lands, waters and other resources ties back to an unwillingness to any longer to recognize the discovery era in this country. Pre-European settlement era which is what this UNDRIP talks about. This is around the world. They are rejecting U.N. enlightenment era principles. They're basically saying history didn't happen. And they're unwinding and unsettling the West in the process. They want to move people off the lands by getting to the water. They dry up the water, the land values plummet. This includes surface water as well as ground water. When the states and the feds want to get to your right to use both types of water, they'll come up with a fictional connection between the two, geologically, and then you have to go fight it in court. The burden of proof is reversed. And if you've read anything or recall anything that I said in prior presentations before the Property Rights Foundation of America, all of this is based on sustainable development, precautionary principle reversal of burden of proof, dropping of thresholds for evidence that the government must meet in order to establish the burden against you, the individual. You're guilty until proven innocent, which is basically the European regulatory model. It's not the American regulatory model. It's not the American legislative model. It's not the American judicial model, at least until the Obama Administration.

So, going back to Montana, you live on or you're a cowboy, a rancher, or a farmer, you live on a federal Indian reservation. The irrigation project was built by first by Army Corps and then shifted over to Bureau of Indian Affairs. Army Corps, you would think, is an objective agency that doesn't favor one party over the other, but the Bureau of Indian Affairs, by a long stretch, is biased in favor of the tribes. It's that racial preference that's benign discrimination that they're allowed and actually promoted to fulfill. So, if the tribe in this particular case — I wish I had some pictures to illustrate this but I apologize for not bringing them. If you think of Montana, two-thirds of the state east of the Continental Divide is pretty much flat pasture. West of the Continental Divide it's surrounded by mountain ranges. And the water flows usually. The snow pack and the watershed comes from the mountain area and flows downstream and usually the way the Army Corps design these irrigation projects which are open-canal based which is originally intended to be flood irrigation where they just flood the land with water and it seeps through into the aquifers below the ground and that's where people get their ground water from. But the water was collected into reservoirs on the reservation and the reservoirs were periodically emptied. Originally, synchronized with the irrigation season. Later on they put in electric pumps. Then they also built dams at the top of the reservation to hold the water and to generate electric power because really they needed electric power back then.

So, in Montana they have two dams, one up at the top of the state known as the Hungry Horse Dam. Now, Montana is one of the most, if not the most, water abundant states in the country. It has two major river systems. One is the Missouri River which flows east and the other is the Columbia River which flows west. They provide a significant amount of the electricity in the Northwest. That electricity is administered by the Department of Energy's Bonneville Power Administration, known as the least-cost wholesaler of electricity in the Northwest.

But with the Obama Administration, an agency with a particular agency mission such as the providing of cheap electricity can be used and has been used to buy up lands — private lands — for placement into this trust for the benefit of Indians. Now, when lands get placed into a reservation or otherwise get placed into trust, the state and local counties don't get paid taxes. The federal government doesn't pay taxes to the states. They lose a major source of revenue. So, a lot of these small towns are starting to go bankrupt. That's what's happening on the Flathead Indian Reservation in Montana.

The other part of this is the fact that the Indians — the CSKT — have also been given the right to manage the retail side of the electricity infrastructure and they deliver electric on the reservation. Now, if you have a problem with your electricity provider, you usually have some type of procedure and you ultimately could and would deal with the company, at least in the East. Out West you deal with the federal government and specifically you deal with the Bureau of Indian Affairs because it owns it. If they want to curtail electric to make your life miserable so that you want to move off, if they want to curtail water from going into the project from that lake above or from the mountains and the reservoirs, they can move that water straight into the river to save the fish and they have legal justification.

So, because of the disputed claims over that water between the irrigators and the tribes over the course of years — and please remember that the tribes have been paid time and again for the lands that they ceded in return for the reservation and for the homestead lands that were taken from the reservation thereafter — they're looking now to go back and get to the water that's tied to the lands. So, this CSKT tribe had threatened lawsuits for years. The federal government and the State of Montana have a policy of arriving at settlements because the litigation can be quite expensive. But a problem with doing that is that you give up your day in court. You give up your day before judges where you could try to persuade them that the law that the federal government is using is wrong law and that you have better law and better facts than the opposition. But with this CSKT tribal water right settlement they create a new administrative body to adjudicate water claims on the reservation. So, you lose your day in court. There's no more water court adjudication.

In the old irrigation projects and when the dams were built the waters that flowed down the river from the watershed were considered state waters that each citizen of the state enjoyed use of in a non-consumptive way as well as a consumptive way. There's two types of rights: consumptive and non-consumptive. The dam operator at that time, which was a private party, had to use the water to spin the turbines to generate the electric. In Montana, and even in Klamath Basin, when those dams there were built the licensees of the dams had to either pay the farmers and ranchers money for that non-consumptive water right or, which happened instead, was they were given in-kind compensation. And that in-kind compensation was low-cost power. Five cents a kilowatt hour. Now, can you imagine if you only had to pay that for your homes? They don't understand \$500, \$600 bills a month for electric, seriously. They don't know what it's like to get metered for water and they're whining about that because "that's not the way the West was."

But in the case of Montana that I'm dealing with, that low-cost block of power has since ended and it's being litigated in the administrative agency known as FERC — Federal Energy

Regulatory Commission, which oversees the dam licensing. Because that dam was the first dam in the country which is a black start dam which means it doesn't need electricity to start up if the power grid goes down which means it's a national security asset. That dam was transferred to the Indian tribes. And they were transferred using this racial preference. These tribes did not have to meet the regulatory requirements otherwise imposed on any acquirer of a dam. They didn't have to show that they had met safety requirements of the state for the dam. They didn't have to show pretty much of anything. And guess what? This dam license had been altered back during the Reagan Administration. James Watt did this, a nice, fine Republican gave the dam away, basically, thirty years ago. And it was like a springing interest in a trust. Meaning after thirty years goes by — and normally when you make a trust for your children or your grandchildren you have certain specifications. The trust assets will move to the beneficiary only after certain conditions are met. The only condition on this beneficiary realizing the asset was thirty years and the date of selection when they wanted to get it. No requirements otherwise. They didn't have to remain sober. They didn't have to eat fruits and vegetables. They didn't have to do anything. So, you have a major black start dam that the farmers and ranchers actually paid for through their taxes through federal repayment contracts that go back in history that they would just gift it over to the dam. And the water that could be used by the dam can be sold to any third party. The settlers will lose most of that low-cost block of power. Their power rates are going to go up. And the only one they have to scream to is the Bureau of Indian Affairs, which really means you have no recourse. No legal recourse at all.

Klamath Basin. Different scenario. Klamath Basin a federal irrigation project surrounded by Indian reservations. Also built by the Army Corps and actually by the Bureau of Reclamation, which is another division of Interior Department. Same type of situation except that they have deceptively disguised a tribal rights water settlement as four separate agreements, as separate silos, so to speak. So, one agreement, basically, removes four perfectly operational hydropower dams that generate electric. Another one, basically, gives tribes priority — time immemorial priority — over water use and diverts that water use from the irrigation project, and the farmers and the ranchers lose in low precipitation or drought years. Same situation. I was representing clients in both those areas. I was more involved for a longer period of time on a day-by-day basis in Klamath. I would go out there for eight days every month to protect my clients who were three members of a five-man board of directors from harassment from the other two, plus all of their patrons that were supporting them, plus the federal Bureau of Reclamation harassing them, plus the tribes pressuring them to sign on to these Basin agreements. They're basically pressuring them. I came in to negotiate a financing contract with the Bureau of Reclamation, which the irrigation district was obliged under their operations and maintenance contract with the bureau to repair. \$12 million. They were disguising it as a \$7 million project. Now, if you had a finance agreement with a bank would you allow the bank to impose on you a loan with no repayment, no fixed repayment term? Where they can adjust the repayment term according to your bank account? That was one of the conditions. The other condition was if you don't pay on time or you don't perform the operation and maintenance of the infrastructure that you're responsible for they can come in and take it all back. That means you're just only a tenant on your own land. You own fee title on the land under Oregon or California law but ultimately they control how you exercise that property right by limiting or totally eviscerating your right to receive water delivery for the year. That's what we were dealing with in Klamath. I tried to help them with

not only the contract. I get bounce-back by the bureau. I get the minority board members putting newspaper articles out. I have a biased newspaper that puts me on the front page every day that I'm dividing the community and that I am damaging the relationship with the bureau. The bureau basically says "jump" and they all ask "how high?" This is no exaggeration. The Bureau of Indian Affairs does the same thing in Montana and they ask "how high?" These guys are afraid — these men and women are afraid — and look over their shoulder at every turn because they're afraid that either the tribes will try to harass them or their fellow community members. It's a breakdown in community. The feds split the communities up in order to establish their federal policies.

I know I'm short of time. I just wanted to give you a window in to how the federal government operates through different agencies using different federal policies to eviscerate property right ownership — private property right ownership — so that you all don't have a say with your votes that you need to cast in the coming month. But you do have a say. You do have litigation opportunities. There are ways to stop certain things. You can use the environmental levers that the environmental community uses. Citizen's suits can be pursued by private property owners if you have enough showing of economic harm and you can show that the government didn't do what it's supposed to do under the federal regulations. In addition, you have public advocacy. And as this gentleman here said, you have to scream loud, you have to scream far and wide, and you have to continue to scream far and wide because you can't trust what your politicians in Washington or your state legislatures will do. A Republican doesn't mean anything more than a Democrat. The only difference between the two of them is the head and the tail. That's about it. And I got to meet a lot of them over the years because I warned them about all of this European-style regulation coming in.

I thank you for your attention. I appreciate that you're still awake and you all have a good evening.