Private Law for Land Back

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This Article describes the emerging role of private entities in returning land and land access to Indigenous peoples. Indigenous peoples have long advocated for the return of Indigenous lands, including through the Land Back movement. While many calls for Land Back have focused on public lands and government actors, this Article describes how private entities, private lands, and private law can support Land Back. This Article examines private, nonprofit land conservation organizations (land trusts) as a case study of the role of private entities in returning private land and land access to Indigenous peoples. Based on original research, including interviews and a review of private land documents, this Article makes several contributions to the literature. First, it categorizes private law tools currently being used in collaborations between land trusts and Indigenous peoples to return land and land access: fee simple land return, easements and profits, and licenses and contracts. This is the first Article to examine novel private law tools for Indigenous land access, including cultural access easements and agreements, harvest permits for culturally significant plants, and land invitations. Second, this Article argues that private law can support decolonization and describes how private law tools for land return and land access can reflect decolonization principles. In the process, private law tools for land return have the potential to support a stewardship model of property law. Third, this Article describes the absence of major legal barriers for land trusts to return land and land access to Indigenous peoples. It then suggests two areas of public law reform to support the return of land and land access: tax incentives and changes to state and federal funding programs for land conservation. Overall, this Article encourages private entities and landowners—under the direction of and in collaboration with Indigenous peoples—to return land and land access to Indigenous peoples.

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INTRODUCTION

> Our land is intrinsic to who we are, it's our identity. The greatest gift is to have our land back.[1]

Since the beginning of European colonization of the now-United States, settlers and colonial governments have dispossessed Tribes and Indigenous peoples of 99 percent of their land base.[2] Settlers and governments took control

[1]Bonney Hartley, Stockbridge Munsee-Mohican Community Historical Preservation Manager. *The Long Journey Home*, STOCKBRIDGE-MUNSEE COMMUNITY & OPEN SPACE INSTITUTE, https://storymaps.arcgis.com/stories/4b5d61785b064ff49ceff158e05e89fb [https://perma.cc/YUA4-HLDQ].

[2]Justin Farrell et al., *Effects of Land Dispossession and Forced Migration on Indigenous Peoples in North America*, 374 SCIENCE *1, *1 (2021). This Article uses the terms "Native" and "Indigenous" to

of this land over centuries, through a combination of violence, contracts, treaties, and other means. The federal government enacted policies to remove Indigenous peoples from their land, privatize Indigenous land, and end federal recognition of some Tribes.[3] Indigenous peoples have long advocated for the return of Indigenous lands through direct action and legal action.[4] The recent Land Back movement calls for the return of Indigenous lands to Indigenous peoples, including return of land, land stewardship, and land sovereignty.[5] Federal,[6]

describe Indigenous peoples but uses "Indian" in the legal and historical context of "Indian Country." *See* Gregory Ablavsky & W. Tanner Allread, *We the (Native) People?: How Indigenous Peoples Debated the U.S. Constitution*, 123 COLUM. L. REV. 243, 248 n.22 (2023). This Article acknowledges "Native Nations" may be a preferred term, but this Article uses the term "Tribes" to encompass the range of Tribal recognition statutes—federally recognized, state-recognized, and unrecognized Tribes. *See* Twyla Baker et al., *How to Talk About Native Nations: A Guide*, NATIVE GOVERNANCE CTR. (May 27, 2021), https://nativegov.org/news/how-to-talk-about-native-nations-a-guide/ [https://perma.cc/MU2D-5Y6Y]; *Tribal Leaders Directory*, BUREAU OF INDIAN AFFS., https://www.bia.gov/service/tribal-leaders-directory/federally-recognized-tribes [https://perma.cc/324T-9TX9]; Elizabeth Reese, *The Other American Law*, 73 STAN. L. REV. 555, 557 n.2 (2021) (describing distinct place of federally recognized Tribes in U.S. legal system). This Article acknowledges the complexities and critiques of federal and state recognition processes for Tribes. *See* RECOGNITION, SOVEREIGNTY STRUGGLES, AND INDIGENOUS RIGHTS IN THE UNITED STATES 1, 5–8 (Amy E. Den Ouden & Jean M. O'Brien eds., 2013) (describing how "[f]ew issues are as fractious in contemporary [I]ndigenous affairs in the United States as the official recognition of the separate political status of Tribal peoples by external governments"); *see generally* BRIAN KLOPOTEK, RECOGNITION ODYSSEYS: INDIGENEITY, RACE, AND FEDERAL TRIBAL RECOGNITION POLICY IN THREE LOUISIANA INDIAN COMMUNITIES (2011) (analyzing the complexities of federal recognition for the Tunica-Biloxi Tribe, the Jena Band of Choctaw Indians, and the Clifton Choctaw Tribe and impacts on social and political structures and identities).

[3]*See* Vanessa Racehorse & Anna Hohag, *Achieving Climate Justice Through Land Back: An Overview of Tribal Dispossession, Land Return Efforts, and Practical Mechanisms for #LandBack*, 34 COLO. NAT. RES. ENERGY & ENV'T L. REV. 175, 178–82 (2023) (summarizing history of forced dispossession of Indigenous land). *See generally* ALLAN GREER, PROPERTY AND DISPOSSESSION: NATIVES, EMPIRES AND LAND IN EARLY MODERN NORTH AMERICA (2018) (describing how settlers used property formations to dispossess Indigenous peoples and exert control over the land).

[4]*See generally* JEFFREY OSTLER, THE LAKOTAS AND THE BLACK HILLS: THE STRUGGLE FOR SACRED GROUND (2011) (detailing Lakota efforts to regain lands, including through long-running litigation in federal court); Wenona T. Singel & Matthew L.M. Fletcher, *Power, Authority, and Tribal Property*, 41 TULSA L. REV. 21 (2005). *See* Nikki A. Pieratos, Sarah S. Manning & Nick Tilsen, *Land Back: A Meta Narrative to help Indigenous People Show Up as Movement Leaders*, 17 LEADERSHIP 47, 52, 55–56 (2021) (describing call for land return during American Indian Movement in the 1960s and protests in 2020 to return the Black Hills to the Lakota, catalyzing the Land Back movement); *LANDBACK*, NDN COLLECTIVE, https://landback.org/manifesto/ (last visited Jan. 25, 2025) [https://perma.cc/4LTS-EJHC].

[5]*See* Pieratos, Manning & Tilsen, *supra* note 4, at 52; NDN COLLECTIVE, *supra* note 4; *see also* Troy A. Rule, *Preserving Sacred Sites and Property Law*, 2024 WIS. L. REV. 129, 138–40 (2024) (listing several examples of voluntary conveyances of private land to Tribes); *see generally* Racehorse & Hohag, *supra* note 2 (detailing principles and instances of Land Back).

[6]*See* Press Release, *Three Million Acres of Land Returned to Tribes Through Interior Dep't Land Buy-Back Program for Tribal Nations*, U.S. DEP'T OF THE INTERIOR (Dec. 4, 2023); *see generally* Audrey Glendenning et al., *(Some) Land Back . . . Sort of: The Transfer of Federal Public Lands to Indian Tribes since 1970*, 63 NAT. RES. J. 200 (2023) (collecting federal statutes transferring land to federally recognized Tribes); *see also* Kevin K. Washburn, *Landback as Federal Policy*, 72 UCLA L. REV. 1 (2025) (describing Land Back as part of federal policy).

state,[7] and local[8] governments in the United States have recently returned land to Indigenous peoples, including almost three million acres returned to Tribes through the Department of Interior's Land Buy-Back Program, which ran from 2012 to 2022.[9] Tribes have also been purchasing tracts of their ancestral lands, including with support from state and federal funding programs and private grants.[10] Recent advocacy and scholarship have focused on the role of governments in land return to Indigenous peoples, including the leadership of Tribal governments.[11]

This Article, however, focuses on the emerging role of private entities and private landowners in supporting Land Back. Many private entities have begun to publicly recognize their role and complicity in Indigenous land dispossession. In some cases, they have taken action to address that role. For example, some institutions have issued land acknowledgments describing how they operate on Indigenous peoples' homelands or detailing how their institution has benefitted from Indigenous land dispossession.[12] This Article analyzes

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[7]*See, e.g.*, *Over 40 Acres of Ancestral Land Returned to Native American Tribe*, OFF. OF GOVERNOR GAVIN NEWSOM (Dec. 1, 2023), https://www.gov.ca.gov/2023/12/01/over-40-acres-of-ancestral-land-returned-to-native-american-tribe/ [https://perma.cc/66XJ-4686]; Gabriel J. Sánchez et al., *Minnesota is Returning 1,400 Acres of Land to the Upper Sioux Community*, NPR (Sept. 6, 2023, 5:02 PM), https://www.npr.org/2023/09/06/1197987638/minnesota-is-returning-1-400-acres-of-land-to-the-upper-sioux-community [https://perma.cc/AW73-AJLD]; Karen Garcia, *Shasta Indian Nation to get Homeland Back in Largest Land Return in California History*, L.A. TIMES (June 19, 2024 4:24 PM), https://www.latimes.com/california/story/2024-06-19/california-to-return-2800-acres-to-shasta-indian-nation [https://perma.cc/59JH-VQ66].

[8]*See, e.g.*, Izzy Bloom, *How a California Tribe Fought for Years to Get Their Ancestral Land Back in Eureka*, KQED (Nov. 3, 2023), https://www.kqed.org/news/11966087/how-a-california-tribe-fought-for-years-to-get-their-ancestral-land-back-in-eureka [https://perma.cc/599K-NECK]; Orlando Mayorquin, *Oakland Plans to Return 5 Acres of City Park to Indigenous Groups, One of First Cities to do so*, USA TODAY (Sept. 12, 2022, 7:52 PM), https://www.usatoday.com/story/news/nation/2022/09/12/oakland-return-indigenous-land/8063119001/ [https://perma.cc/95GP-9CAC].

[9]U.S. DEP'T OF THE INTERIOR, *supra* note 6; *see generally* Racehorse & Hohag, *supra* note 3, at 194–208 (describing land back by federal, state, and local governments).

[10]*See, e.g.*, *Land Back: How Two Tribes are Re-Acquiring and Leveraging Community Forests*, FIRST NATIONS DEV. INST., https://www.firstnations.org/stories/land-back-how-two-tribes-are-re-acquiring-and-leveraging-community-forests/ [https://perma.cc/TQ39-DRFN]; Press Release, *Klamath Tribes reclaim ancestral lands*, KLAMATH FALLS NEWS (Jan. 14, 2021), https://perma.cc/M6KC-HD5E.

[11]*See* Racehorse & Hohag, *supra* note 3, at 194–212 (discussing the viability of co-management as compared to Land Back); David Treuer, *Return the National Parks to the Tribes*, ATLANTIC (April 12, 2021), https://www.theatlantic.com/magazine/archive/2021/05/return-the-national-parks-to-the-tribes/618395/ [https://perma.cc/A2F5-6JCX]; Laura Taylor & Miriam Jorgensen, *Considerations for Federal and State Landback*, HARV. PROJECT ON AM. INDIAN ECON. DEV. 1 (Oct. 20, 2022), https://ash.harvard.edu/publications/considerations-federal-and-state-landback [https://perma.cc/F5NV-NAL5]; Mel Neal, Note, *Between a Rock and a Hard Place: The Current Situation of the #LandBack Movement and Indigenous-Imagined Futures*, 13 ARIZ. J. ENV'T L. & POL'Y 47, 56 (2022) (outlining Tribes' efforts to "reclaim and exercise greater sovereignty over their lands"); *see generally* Glendenning et al., *supra* note 6 (outlining federal land return).

[12]*See, e.g.*, *Statement of Land Acknowledgment*, ASS'N OF PUBLIC & LAND-GRANT UNIVS., https://www.aplu.org/about-us/land-acknowledgment/ [https://perma.cc/RC5N-B5GZ] (acknowledging that land grant universities benefitted from the seizure of Indigenous lands under the Morrill Act of 1862); Alice Hutton, *Native American Tribe in Maine Buys Back Island Taken 160 Years Ago*, THE GUARDIAN (June 4, 2021, 4:00 AM), https://www.theguardian.com/us-news/2021/jun/04/native-american-tribe-maine-buys-back-pine-island [https://perma.cc/QRL7-FHKL] (the Nature Conservancy describing their "role in the systemic injustice that was inflicted on [I]ndigenous people and therefore a responsibility addressing that"). For examples of private, for-profit companies acknowledging Indigenous land theft, *see The U.S. Was Founded on Stolen Indigenous Land—This July 4, Let's Commit to Returning It*, BEN & JERRY'S (Jul. 2023), https://www.benjerry.com/whats-new/2023/07/stolen-indigenous-land [https://perma.cc/PE2S-KSCV]; *Our Acknowledgment*, PATAGONIA (Sept. 4, 2020), https://www.patagonia.com/stories/our-acknowledgment/story-91580.html [https://perma.cc/SU7N-JT4N]. Some view land acknowledgements without a commitment to action as a performative gesture. *See, e.g.*, Michael C. Lambert et al., *Rethinking Land Acknowledgments*, ANTHROPOLOGY NEWS (Dec 20, 2021), https://www.anthropology-news.org/articles/rethinking-land-acknowledgments/

private, nonprofit land conservation organizations (land trusts) as a case study of private entities going beyond land acknowledgment to actually return land and land access to Indigenous peoples.[13] There are over 1,200 land trusts in the United States that permanently conserve private lands, including through land acquisition or by holding perpetual conservation easements on private lands.[14] In collaboration with Indigenous peoples, some land trusts have returned culturally significant lands to Indigenous peoples and granted Indigenous peoples access rights to private lands for cultural activities. For example, the Trust for Public Land recently announced it would return 30,000 acres of land in Maine to the Penobscot Nation.[15] Research undertaken for this Article identified that, since 2018 alone, land trusts have collaborated with Indigenous peoples to return title to at least twenty parcels of land across eleven states.[16]

There is a compelling rationale for many private entities and landowners to return land and land access to Indigenous peoples, and their engagement with the Land Back movement could be impactful. Private entities and individuals own approximately 60 percent of the land in the United States. And the percentage of private land ownership is even higher in the Eastern United States.[17] As of 2020, land trusts have perpetually conserved almost sixty-one million acres of land across the United States—a land area larger than the state of Idaho and more acres than the trust lands of all federally recognized Tribes

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[https://perma.cc/QM2Q-XF64] ("[A]fter acknowledging that an institution sits on another's land, plans are almost never made to give the land back.").

[13]*See* Sherally Munshi, *Dispossession: An American Property Law Tradition*, 110 GEO. L.J. 1021, 1023 (2022) (describing how "[a]cademic conferences now open with formal ceremonies acknowledging the Indigenous peoples on whose stolen land we convene, but these gestures of 'land acknowledgement' come at a moment when Indigenous peoples themselves demand 'land back'"). Although this Article focuses on land trusts, the framework and legal tools described could also apply to private landowners and other private, nonprofit institutions such as universities and churches. *See* Robert Lee et al., *Land-Grab Universities*, HIGH COUNTRY NEWS (Mar. 30, 2020), https://www.landgrabu.org/ [https://perma.cc/U3Q3-K9S5]; Theresa Ambo & Theresa Rocha Beardall, *Performance or Progress? The Physical and Rhetorical Removal of Indigenous peoples in Settler Land Acknowledgments at Land-Grab Universities*, 60 AM. EDUC. RSCH. J. 103, 133 (2023); *Land Justice Project*, NUNS & NONES, *https://www.nunsandnones.org/land-justice* [https://perma.cc/654P-WXUE] (describing a group of nuns focused on land justice for Black and Indigenous peoples). This Article avoids using the phrase "Land Back" to describe the actions of non-Indigenous private landowners and institutions—instead using phrases like "land return" and "land access." Land Back is a movement led and defined by Indigenous peoples, and this Article does not claim to define the goals of Land Back. *See generally* Pieratos, Manning & Tilsen, *supra* note 4 (highlighting and centering Indigenous peoples as the leaders of the Land Back movement). The title of this Article, *Private Law for Land Back*, reflects that "Land Back" is a widely recognized term and that land return and land access for Indigenous peoples has the possibility to support this movement.

[14]This Article will use the term "land trusts" as an umbrella term for private, nonprofit land conservation organizations that work to permanently conserve private land. Some organizations listed as examples in this Article may not self-identify as "land trusts" but serve a similar function. *About land trusts*, LAND TRUST ALLIANCE, https://landtrustalliance.org/why-land-matters/land-conservation/about-land-trusts [https://perma.cc/E2JF-4UH2] (last visited Jan. 25, 2025); Federico Cheever & Nancy A. McLaughlin, *An Introduction to Conservation Easements in the United States: A Simple Concept and a Complicated Mosaic of Law*, 1 J. L. PROP. & SOC'Y 107, 109 (2015). When the term "land trust" is used in this Article without further specification, it generally refers to non-Native land trusts, the majority of land trusts that exist today. For a description of Native land trusts, *see infra* notes 56–61 and accompanying text.

[15]*Effort Will Result in Historic Tribal Land Return While Creating Vital Public Access to Popular National Monument*, TRUST FOR PUBLIC LAND (Nov. 1, 2023), https://www.tpl.org/media-room/effort-will-result-in-historic-tribal-land-return-while-creating-vital-public-access-to-popular-national-monument [https://perma.cc/55MZ-62WQ].

[16]*See infra* Part 0.

[17]DANIEL P. BIGELOW & ALLISON BORCHERS, U.S. DEP'T OF AGRIC., EIB-178, MAJOR USES OF LAND IN THE UNITED STATES, 2012 42 (2017); *see* NAT'L RES. COUNCIL OF MAINE., PUB. LAND OWNERSHIP BY STATE, https://www.nrcm.org/documents/publiclandownership.pdf [https://perma.cc/S5KX-YRV6].

combined.[18] Indigenous peoples typically have no legal right to access private lands owned by others, even if those lands contain Indigenous sacred, cultural, and ceremonial sites; or culturally significant plants, animals, and medicines.[19] However, private entities and landowners have begun to recognize that their land ownership is built on the dispossession and privatization of Indigenous lands.[20] Alongside government institutions, private entities and landowners seized Indigenous land,[21] advocated for seizing Indigenous land,[22] or have otherwise benefitted from its dispossession and privatization.[23] Activists and scholars have increasingly identified how private entities that have benefitted from Indigenous land dispossession should return land and resources to Indigenous peoples.[24]

This Article makes three contributions to the emerging scholarship on the role of private entities in returning land and land access to Indigenous peoples. First, based on original research, including interviews with over twenty-five land trusts and a review of private land documents, this Article analyzes and categorizes the private law tools currently being used by land trusts and Indigenous peoples for land return and land access. Foundational scholarship

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[18] *Tribal Lands and Jurisdiction*, U.S. DEP'T OF JUSTICE, ENVTL. AND NAT. RES. DIV., https://www.justice.gov/enrd/tribal-lands-and-jurisdiction [https://perma.cc/V7BM-P896]; U.S. DEP'T OF THE INTERIOR, *Frequently Asked Questions*, https://www.bia.gov/frequently-asked-question [https://perma.cc/Z6ED-XPF3] (identifying 56.2 million acres of trust lands); Press Release, *61 Million Acres Voluntarily Conserved in America, 2020 National Land Trust Census Report Reveals*, LAND TRUST ALLIANCE, https://landtrustalliance.org/newsroom/press-releases/61-million-acres-voluntarily-conserved-in-america-2020-national-land-trust-census-report-reveals (Dec. 2, 2021) [https://perma.cc/4KLG-ZVXY]; CONG. RSCH. SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 7 (2020) (listing that Idaho has a total land acreage of 52.9 million acres).

[19] *See* BETH ROSE MIDDLETON MANNING, TRUST IN THE LAND: NEW DIRECTIONS IN TRIBAL CONSERVATION 21 (2011); Janelle Orsi, *Legal Tools for Land Return*, SUSTAINABLE ECON. L. CTR. (Jan. 25, 2023), https://www.shareable.net/legal-tools-for-land-return/ ("[I]n Life, land can be shared without the ritual of legal documents. But under The Law, those informal agreements are not respected, and therefore not protected without the paperwork."); *see generally* Kristi Eaton, *Sioux Tribes Upset Over Sale of Sacred Site in SD*, MPR NEWS (Aug. 18, 2012, 4:30 PM), https://www.mprnews.org/story/2012/08/18/sioux-tribes-upset-over-sale-of-sacred-site-in-sd [https://perma.cc/Z4Z2-ZBB8] (describing sale of private land with sacred, ceremonial site to Lakota, Dakota, and Nakota peoples); Isabella Grullón Paz, *Cave Featuring Native American Wall Art Is Sold to Anonymous Bidder*, N.Y. TIMES (Sept. 16, 2021), https://www.nytimes.com/2021/09/16/us/osage-nation-cave-auction.html (describing sale of private land with an Osage Nation sacred site to anonymous private landowner).

[20] *See supra* note 12.

[21] *See, e.g.*, Dana Hedgpeth, *This Was the Worst Slaughter of Native Americans in U.S. History. Few Remember It*, WASH. POST (Sept. 26, 2021, 7:00 AM), https://www.washingtonpost.com/history/2021/09/26/bear-river-massacre-native-americans-shoshone/ (describing that a portion of the land where white settlers killed Shoshone people and seized their land remains privately owned); Ellie S. Klibaner-Schiff & Jade Lozada, *'Medicine for Harvard': Harvard's Struggles to Repair Relationship with Native American Tribes*, HARVARD CRIMSON (Dec. 4, 2023), https://www.thecrimson.com/article/2023/12/4/indigenous-history-scrut/ [https://perma.cc/6WXX-25J8]; *see generally* GREER, *supra* note 3; *See generally* ALLAN GREER, PROPERTY AND DISPOSSESSION: NATIVES, EMPIRES AND LAND IN EARLY MODERN NORTH AMERICA (2018) (describing how settlers used property formations to dispossess Indigenous peoples and exert control over the land).

[22] *See* Bill Chappell, *The Vatican Repudiates 'Doctrine of Discovery,' Which was Used to Justify Colonialism*, NPR (Mar. 30, 2023), https://www.npr.org/2023/03/30/1167056438/vatican-doctrine-of-discovery-colonialism-indigenous [https://perma.cc/3RLG-UD77]; *see also Doctrine of Discovery*, AM. INDIAN L. ALL., https://aila.ngo/issues/doctrine-of-discovery/ [https://perma.cc/D2R6-YXNU].

[23] For a prominent example, fifty-two land grant universities in the United States—including private land grant universities—were funded by the Morrill Act of 1862, which authorized the transfer or sale of eleven million acres of Indigenous land. *See* Lee et al., *supra* note 13.

[24] *See* Megan Red Shirt-Shaw, *Beyond the Land Acknowledgement: College 'Land Back' or Free Tuition for Native Students,* HACK THE GATES, (Aug. 2020), https://sustainability.stanford.edu/sites/sustainability/files/media/file/redshirt-shaw_landback_htgreport.pdf [https://perma.cc/2QBH-56F9]; Ambo & Beardall, *supra* note 13, at 133.

from about a decade ago focused on how Indigenous peoples have "applied private conservation methods to protect culturally important resources [and] acquire alienated lands," with a focus on fee simple title, conservation easements, and co-management agreements on private land.[25] Research for this Article revealed additional legal instruments being used by land trusts and Indigenous peoples to return land access, including cultural access easements and agreements, harvest permits for culturally significant plants, and land invitations.[26] In addition, this Article is the first to examine (1) the increase in land returns without conservation easements, (2) Tribally held conservation covenants as an alternative to conservation easements on land returns, and (3) efforts to update conservation easement templates to support Indigenous cultural access to privately conserved lands. The Article identifies and analyzes the private law tools currently being deployed under three headings: fee simple land return, easements and profits, and licenses and contracts.

Second, this Article argues that returning private land and land access to Indigenous peoples can be a meaningful way to further decolonization and a stewardship model of property law. The Article further recommends how landowners can shape private law tools to align with and advance decolonization objectives. Given the indispensable role that private law has played in Indigenous land dispossession, there is an irony to leveraging private law to now return land and land access to Indigenous peoples.[27] However, this Article maintains that private law can still have a meaningful role in decolonization.

Third, this Article identifies no major legal barriers for land trusts to return private land and land access to Indigenous peoples. The Article then suggests two changes to public law that would support land return and land access. First, new federal tax incentives modeled on conservation easement tax incentives could support land returns and cultural access easements. Second, reforms to public funding programs for land conservation could make this funding accessible for Indigenous land return and land access.

This Article is grounded in qualitative research conducted by the author from 2021 to 2024. For this research, the author conducted snowballing, semi-structured interviews with over twenty-five different land trusts, including several Native land trusts, with a focus on interviews in the Northeast region of

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[25]MIDDLETON MANNING, *supra* note 19, at 1; Mary Christina Wood & Zachary Welcker, *Tribes as Trustees Again (Part I): The Emerging Tribal Role in the Conservation Trust Movement*, 32 HARV. ENV'T L. REV. 373, 376 (2008); Mary Christina Wood & Matthew O'Brien, *Tribes as Trustees again (Part II): Evaluating Four Models of Tribal Participation in the Conservation Trust Movement*, 27 STAN. ENV'T L.J. 477, 528–31 (2008); Kirsten Matoy Carlson & Robert T. Coulter, *Natural Allies: Conservationists, Indian Tribes, and Protecting Native North America*, *in* TRIBES, LAND, AND THE ENV'T 195 (Sarah Krakoff & Ezra Rosser eds., 2012); Jessica Owley, *Tribes as Conservation Easement Holders: Is a Partial Property Interest Better than None?*, *in* TRIBES, LAND, AND THE ENV'T 176 (Sarah Krakoff & Ezra Rosser eds., 2012).

[26]Wood & O'Brien, *supra* note 25, at 528–31 (describing land acquisition, conservation easements, and co-management agreements as possibilities); MIDDLETON MANNING, *supra* note 19, at 2, 20–23 (describing land acquisition, cultural conservation easements, and some more informal collaborations).

[27]Wood & Welcker, *supra* note 25, at 399; Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022, 1024 (describing the "ironic" revolution that property law is being used by Indigenous peoples to protect cultural resources); *see* K-Sue Park, *Property and Sovereignty in America: A History of Title Registries & Jurisdictional Power*, 133 YALE L.J. 1487, 1493 (2024) (arguing that "colonial territorial jurisdiction followed and became possible *because of* individual settlers' claims to private property" and "property in America was the conceptual and material antecedent to colonial sovereignty" which "depended on the creation of private property to come into being"); DUNBAR-ORTIZ, *supra* note 3, at 35, 46; BRIAN BURKHART, INDIGENIZING PHILOSOPHY THROUGH THE LAND 33–40 (2019) (citing WILLIAM JACOBS, DISPOSSESSING THE AMERICAN INDIANS (1972)) (describing the centrality of private property in settler colonialism and as the source of U.S. policies for removing Indigenous peoples from their land); *See generally* ALLAN GREER, PROPERTY AND DISPOSSESSION: NATIVES, EMPIRES AND LAND IN EARLY MODERN NORTH AMERICA (2018) (describing how settlers used property formations to dispossess Indigenous peoples and exert control over the land).

the United States.[28] The author also interviewed land trusts operating nationwide and reviewed private land documents from the Northeast region and elsewhere in the country. Overall, the author chose to focus the lens of inquiry on land trusts as a case study of private entities' use of private law tools to support Indigenous land return and land access.[29]

While this Article draws on perspectives from Native land trust practitioners and describes the important role of Native land trusts, this Article does not claim to speak for them or for any Tribes or Indigenous peoples.[30] This Article does not prescribe actions for Tribes and Indigenous peoples. Instead, it focuses on land trusts and private entities using private law tools to return land and land access. Moreover, the private law tools described in this Article are meant to be used under the direction and leadership of Tribes and Indigenous peoples and based on their preferences for legal forms for land return and land access. The research underscored that land trusts collaborating with Tribes and Indigenous peoples in ways that respect Indigenous peoples' sovereignty and ways of life is essential to supporting the return of land and land access.

This Article proceeds as follows. Part I of the Article describes collaborations between land trusts and Indigenous peoples, before analyzing three main categories of private law tools for land return and land access: fee simple land return, easements and profits, and licenses and contracts. Part II engages with the literature on decolonization to assess the private law tools outlined in Part I and the role of private law in decolonization more broadly. It further considers how private law tools for land return can shift away from a traditional, Western ownership model of property and toward a stewardship model. Part II then provides considerations for which private law tools to use and

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[28]The interviews for this Article were conducted under Institutional Research Board (IRB) Protocol ID 2000032758, an IRB-exempt study as determined by the Yale Human Research Protection Program IRB. For a description of Native land trusts, *see infra* Part I.A. This research took place on the homelands of the following Tribes and Indigenous peoples: Abenaki, Agwam, Aucocisco, Eastern Pequot, Golden Hill Paugusset, Hammonassets, Maliseet, Mi'kmaq, Manissean, Mashantucket Pequot, Massachusett, Massacoes, Mohegan, Mohican, Munsee Lenape, Narragansett, Nanrantsouak, Naumkeag, Nauset, Nehantic, Niantic, Nipmuc, Nonotuck, Passamaquoddy, Pawtucket, Pennacook, Penobscot, Pentucket, Pequot, Pocomtuc, Pokanoket, Poquonook, Quinnipiac, Schaghticoke, Sicaog, Tunxis, Wabanaki Confederacy, Wampanoag, Wangunks, Wappinger, among other Algonquian peoples. This list is partial and does not list every Tribe or group of Indigenous peoples in the Northeast region, where this research primarily took place. It includes federally recognized and state-recognized Tribes and Indigenous peoples' homelands in the region as shown on the Native Land Digital website. More information about the extent of Tribes' and Indigenous peoples' homelands can be found on individual Tribes' websites and Native Land Digital website. NATIVE LAND DIGITAL, https://native-land.ca/ [https://perma.cc/S5NH-GUY2].

[29]This choice to focus on land trusts further reflects methodological and ethical concerns for a non-Indigenous researcher to research the perceptions of Tribes and Indigenous peoples. *See* bell hooks, *Marginality as a Site of Resistance*, *in* OUT THERE: MARGINALIZATION AND CONTEMPORARY CULTURES 343 (Russell Ferguson et al., eds., 1992) (describing how research may reinforce colonial relationships where marginalized groups are being studied); *see also* LINDA TUHIWAI SMITH, DECOLONIZING METHODOLOGIES 57–64 (3rd ed. 2021) ("[T]he word itself 'research', is probably one of the dirtiest words in the Indigenous world's vocabulary").

[30]The author acknowledges concerns of how research may risk silencing or altering Indigenous voices. *See* hooks, *supra* note 29; Eve Tuck & K. Wayne Yang, *R-Words: Refusing Research*, *in* HUMANIZING RESEARCH: DECOLONIZING QUALITATIVE INQUIRY WITH YOUTH AND COMMUNITIES 223, 226–28 (Django Paris & Maisha T. Winn eds., 2014). As described, *supra* note 29, the author chose to focus on a case study and interviews of land trusts, which are predominantly run by non-Indigenous peoples. In this research, the author interviewed some Native land trusts, and the author maintained confidentiality to support interviewees speaking freely. However, the author also includes quotations from Native land trusts that are publicly available and shares the websites of Native land trusts to emphasize their work in their own words. *See* Appendix A; *see, e.g.*, NATIVE AMERICAN LAND CONSERVANCY, https://www.nativeamericanland.org/ [https://perma.cc/VB5R-7YNY] (last visited Jan. 25, 2025); KOY'O LAND CONSERVANCY, https://colfaxrancheria.com/koyo-land-conservancy [https://perma.cc/9ZKL-33E5] (last visited Jan. 25, 2025).

how to draft the terms of those private law tools to align with decolonization principles.[31] Specifically, the Article recommends land returns without conservation easements, choosing perpetual cultural access easements over cultural access agreements, limiting oversight and restrictions on Indigenous peoples' cultural access to private land, deferring to Indigenous peoples on public access to cultural sites, and supporting Tribal and Indigenous dispute resolution procedures. Part III addresses some legal concerns around private land return and land access for Indigenous peoples and concludes that they are not major legal barriers. This Part then outlines possible public law reforms to provide funding and tax incentives for returning land and land access to Indigenous peoples.

Overall, this Article encourages private entities and landowners, in collaboration with Indigenous peoples, to return land and land access to Indigenous peoples—without urgency but without delay. Land trusts and other private institutions should resist urgency in work with Indigenous peoples—land return is a relational process that should respect Indigenous peoples' notions of time, space, and priorities.[32]

Compared to governments, private entities and landowners face fewer hurdles in returning land and land access to Indigenous peoples. While Congress must authorize the transfer of federal land,[33] private entities and landowners can readily transfer land to Indigenous peoples or encumber their land to support Indigenous cultural access. Unlike government officials, private entities and landowners do not face reelection and the scrutiny of the electorate. As this Article highlights, there are no major legal barriers to a private landowner or a nonprofit with a social justice or land conservation mission from transferring land or land access to Indigenous peoples in the near term.[34] There are a growing number of examples of private entities and landowners returning land and land access to Indigenous peoples, one parcel at a time.[35]

I. PRIVATE LAW TOOLS FOR LAND RETURN AND ACCESS

This Part analyzes private law tools for land return and land access for Indigenous peoples, drawing on examples in practice and building on the existing literature. In the past decade, land trusts have increasingly collaborated with Tribes and Native land trusts using fee simple land return, easements and profits, and licenses and contracts to return land and land access.

A. *Collaborations between Land Trusts and Indigenous Peoples*

In the past few decades, land trusts—private, nonprofit land conservation organizations—have collaborated with Indigenous peoples to return land and land access. Land trusts may seek to collaborate with Indigenous peoples for a variety of reasons, including that both may share interests in protecting natural sites and landscapes and long-term stewardship of the land.[36] Local land trusts

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[31] As described *infra* Part II.C, land trusts should first ask Tribes and Indigenous peoples they are collaborating with for their preferences for legal forms and terms and defer to these preferences. This Article proposes baseline recommendations for land trusts to consider when they are in the position of selecting or drafting private law tools.

[32] *See* Kyle Whyte, *Against Crisis Epistemology*, *in* HANDBOOK OF CRITICAL INDIGENOUS STUDIES 52, 54–57 (Brendan Hokowhitu et al. eds., 2021) (describing how a "crisis epistemology" and urgency in a settler-colonial context can justify swift action to address the crisis "without having to talk about colonial power"); LINDA TUHIWAI SMITH, DECOLONIZING METHODOLOGIES 57–64 (3rd ed. 2021); *see infra* Part 0 (describing principles for land trusts seeking to work with Tribes and Indigenous peoples).

[33] U.S. CONST. art. IV, § 3, cl. 2; Pub. L. No. 94–579, § 704(a), 90 Stat. 2743, 2792 (1976) (requiring procedures for federal land withdrawals and repealing congressional acquiescence to Executive branch land withdrawals from the public domain).

[34] *See infra* Part 0.

[35] *See infra* Part 0.

[36] *See, e.g.*, Carlson & Coulter, *supra* note 25, at 199.

and Tribes and Indigenous peoples may form collaborations organically, building on interpersonal relationships between neighbors living in the same community.[37]

Recently, land trusts have increasingly sought out collaboration with Indigenous peoples to promote land justice and long-term stewardship of the land in line with their organizational missions. As for many institutions, the murder of George Floyd in 2020 sparked a "necessary reckoning" for land trusts about their role in white supremacy and racism in America.[38] Some land trusts began confronting the history of white supremacy and anti-Indigeneity in the broader conservation movement, including their specific role in conserving lands predominantly for the benefit of white, wealthy communities.[39] In addition to learning about Black and Indigenous land dispossession, some land trusts have taken action in recent years: developing diversity, equity, inclusion, and justice programs in their organizations;[40] supporting policy reform to reduce Black land loss;[41] and returning land and land access to Indigenous peoples, among other actions.[42] For example, the Nature Conservancy recently described how "[w]e have a role in the systemic injustice that was inflicted on [I]ndigenous people and therefore a responsibility addressing that."[43]

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[37]*See, e.g.*, MIDDLETON MANNING, *supra* note 19, at xii–xviii (describing the formation of relationships between local land trust leadership and Mountain Maidu neighbors). Many local land trusts interviewed for this Article described interpersonal relationships as a basis for collaboration between their land trust and Indigenous peoples.

[38]Andrew Bowman, *A Necessary Reckoning*, LAND TRUST ALL. (July 24, 2020), https://landtrustalliance.org/blog/a-necessary-reckoning [https://perma.cc/P3ME-W8A4]; David Gelles, *The Sierra Club Tries to Move Past John Muir, George Floyd and #MeToo*, N.Y. TIMES (Jan. 26, 2023), https://www.nytimes.com/2023/01/24/climate/ben-jealous-sierra-club.html.

[39]*See* JESSICA HERNANDEZ, FRESH BANANA LEAVES: HEALING INDIGENOUS LANDSCAPES THROUGH INDIGENOUS SCIENCE 75, 94–95 (2022); Truer, *supra* note 11; DORCETA E. TAYLOR, THE RISE OF THE AMERICAN CONSERVATION MOVEMENT: POWER, PRIVILEGE, AND ENVIRONMENTAL PROTECTION 9, 28 (2016) (describing how the "conservation movement arose against a backdrop of racism, sexism, class conflicts, and nativism" and the "significant roles that wealth, power, and privilege played in the early conservation movement"); Michael Brune, *Pulling Down Our Monuments*, SIERRA CLUB (July 22, 2020) https://www.sierraclub.org/michael-brune/2020/07/john-muir-early-history-sierra-club [https://perma.cc/X6VJ-NC2B] (describing how John Muir, founder of the Sierra Club and conservation leader, made "derogatory comments about Black people and Indigenous peoples that drew on deeply harmful racist stereotypes," and how some early Sierra Club leaders and members were "vocal advocates for white supremacy . . . and eugenics"); Bowman, *supra* note 38 (describing how "while tremendous good has been accomplished under the banner of private land conservation, a portion of our field's origins and some of its practices have been tainted by prejudice, discrimination and intolerance" and "private land conservation has played [a role] in exacerbating inequitable access to land and serving as a bulwark for white privilege and associated wealth"); Levi Van Sant et al., *Conserving what? Conservation Easements and Environmental Justice in the Coastal US South*, 14 HUM. GEOGRAPHY 31, 41 (2021); *see generally* MARK DOWIE, CONSERVATION REFUGEES: THE HUNDRED-YEAR CONFLICT BETWEEN GLOBAL CONSERVATION AND NATIVE PEOPLES (2009) (describing how Indigenous peoples globally have been dispossessed of their land and displaced in the name of conservation); MARK DAVID SPENCE, DISPOSSESSING THE WILDERNESS: INDIAN REMOVAL AND THE MAKING OF THE NATIONAL PARKS (1999) (detailing how Indigenous peoples were removed from now-National Parks).

[40]*See, e.g.*, *Organizational Diversity, Equity and Inclusion*, LAND TRUST ALLIANCE, https://landtrustalliance.org/resources/learn/topics/engaging-community/organizational-dei [https://perma.cc/NNS2-SP6F]; JULIE C. KELLER ET AL., DIVERSITY, EQUITY, AND INCLUSION AT NEW ENGLAND LAND TRUSTS (2022); Sandy Sweitzer, *Working to End Systemic Racism Must be a Critical Component of Land Trusts' Work*, TRIANGLE LAND CONSERVANCY (June 6, 2020), https://triangleland.org/company-news/working-to-end-systemic-racism-must-be-a-critical-component-of-land-trusts-work [https://perma.cc/MM3D-RYMF].

[41]Chelsea Gazillo, *Active policy efforts to address the history of BIPOC land theft in America*, AM. FARMLAND TRUST (Feb. 25, 2021), https://farmland.org/active-policy-efforts-to-address-the-history-of-bipoc-land-theft-in-america/ [https://perma.cc/6HNM-8CL5].

[42]*See First Light*, WABANAKI COMMISSION, https://dawnlandreturn.org/first-light [https://perma.cc/MFR4-G5ZA]; *see also infra* Part 0.

[43]Hutton, *supra* note 12.

In addition to promoting land justice, land trusts have also sought out collaboration with Indigenous peoples to support their organizational missions for long-term land stewardship and conservation.[44] Land trusts are increasingly recognizing the valuable role of traditional ecological knowledge (TEK) in land management.[45] TEK is broadly defined as Indigenous knowledge and practice about the relationships between plants, animals, humans, landscapes, and natural processes in a localized ecosystem, based on direct interaction with that landscape or seascape over many generations.[46] Of course, Indigenous peoples are not a monolith. What many Indigenous peoples and cultures share is focus on, care for, and relationship with the land in the very long term, for many generations.[47] Returning land and land stewardship to Indigenous peoples is directly aligned with land trusts' conservation missions. One land trust interviewed for this research articulated a shared sense of place and mission to protect land:

> I want [collaboration with Indigenous people] to organically evolve out of real places and real relationships and find out why does this place have meaning . . . and how can we support that while also honoring . . . [and] protecting nature for nature's sake.[48]

A Native land trust interviewed for this research further described how a Tribe's interests can align with those of a land trust:

> Sometimes it works just kind of fortuitously . . . where the interests of a land trust . . . align perfectly with a Tribe. And everybody can see it and everybody wants it to happen.[49]

To return land and land access to Indigenous peoples, land trusts have worked with Tribes and Native land trusts. Tribes have the legal status of "domestic dependent nations," and they have inherent sovereignty that predates the U.S. Constitution and is neither granted nor delegated by the United States.[50] The federal government has a trust relationship with Tribes: The government acts as a trustee with the Tribe as its beneficiary.[51] As sovereigns, Tribes enjoy

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[44]Racehorse & Hohag, *supra* note 3, at 209.

[45]*See, e.g.*, Lawrence Atencio, *Revitalizing Indigenous Stewardship with Cultural Burning*, AMAH MUTSUN LAND TRUST (Summer 2020), https://www.amahmutsunlandtrust.org/nls20 (land trust encouraging inclusion of TEK in prescribed fire practices).

[46]Robin Wall Kimmerer, *Native Knowledge for Native Ecosystems*, 98 J. FORESTRY 4, 5 (2000); John J. Daigle, *Traditional Lifeways and Storytelling: Tools for Adaptation and Resilience to Ecosystem Change*, 47 HUM. ECOLOGY 777 (2019); *see generally* TRADITIONAL ECOLOGICAL KNOWLEDGE (Melissa K. Nelson & Dan Shilling eds., 2018).

[47]*See, e.g.*, Robin Kimmerer, *Restoration and Reciprocity: The Contributions of Traditional Ecological Knowledge*, *in* HUMAN DIMENSIONS OF ECOLOGICAL RESTORATION: INTEGRATING SCIENCE, NATURE, AND CULTURE, 257 (David Egan et al. eds., 2011); 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, 228–29 (1996); *See generally* WINONA LADUKE, RECOVERING THE SACRED: THE POWER OF NAMING AND CLAIMING (2005) (identifying land as sacred to many Indigenous peoples).

[48]Interview of Land Trust Staff (Sept. 13, 2022). Per the IRB protocol for this study, all quotes from interviews are published without identifying information to maintain confidentiality of interviewees.

[49]Interview of Land Trust Staff (Aug. 23, 2022).

[50]Michigan v. Bay Mills Indian Community, 572 U.S. 782, 788 (2014) (citing Cherokee Nation v. Georgia, 30 U.S. 1, 2, 17 (1831)); *see also* Johnson v. M'Intosh, 21 U.S. 543, 547–48 (1823) ("[T]he Indian [T]ribes or nations, inhabiting the country north and northwest of the Ohio, and east of the Mississippi, as far east as the river falling into the Ohio called the Great Miami . . . held the country in absolute sovereignty, as independent nations."); Santa Clara Pueblo v. Martinez*,* 436 U.S. 49, 56 (1978) ("As separate sovereigns pre-existing the Constitution, [T]ribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."); United States v. Wheeler, 435 U.S. 313, 323 (1978) ("[T]he Indian [T]ribes have not given up their full sovereignty.").

[51]As William Canby describes in detail, the "relationship *approximates* that of trustee and beneficiary," and the courts will only impose fiduciary duties on the government as part of the trust relationship in

sovereign immunity from suit.[52] Tribes hold one of three statuses in relation to the federal or state government—federally recognized, state-recognized, or unrecognized.[53] Federally recognized Tribes may take land into trust through the Department of Interior Bureau of Indian Affairs (BIA).[54] Federally recognized Tribes can exercise Tribal jurisdiction and taxation powers and are free from state and local taxation.[55]

On the other hand, Native land trusts focus on Indigenous land access, stewardship, and management along with protection of cultural sites and cultural heritage.[56] Native land trusts can "span a spectrum of [T]ribal sovereign control," ranging from "land-holding organizations created by [T]ribes or by consortia of [T]ribes" to "organizations created by and for Indigenous people but having no formal affiliation with a [T]ribe."[57] Importantly, a Native land trust should not be conflated with Tribal government institutions.[58] There are at least twenty-five Native land trusts or similar organizations that exist today.[59] Native land trusts may be particularly important for state-recognized or unrecognized Tribes that may not have another legal entity where they can hold land or may otherwise face state and local property taxes on their land.[60] Native land trusts not only steward Indigenous lands but are also leading the development of novel private law tools for Indigenous cultural stewardship.[61]

Some non-Native land trusts have also made changes to their institutional structures to support land return to Indigenous peoples. Non-Native land trusts have amended their Articles of Incorporation ("Articles") and Bylaws and updated their organizational missions to include supporting Indigenous land

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certain circumstances. WILLIAM C. CANBY JR., AMERICAN INDIAN LAW IN A NUTSHELL 39–56 (7th ed. 2020) (emphasis added) (describing the trust relationship, its evolution, and when courts have found fiduciary duties imposed on the federal government as part of the relationship). *Compare* United States v. Mitchell (*Mitchell I*), 445 U.S. 535, 542 (1983) (holding the General Allotment Act created only a "limited trust relationship" and did not impose fiduciary duties on the government to manage timber resources), *with* United States v. Mitchell (*Mitchell II*), 463 U.S. 206, 225 (1983) (holding the statutes and regulations at issue created "a fiduciary relationship" where "[a]ll of the necessary elements of a common law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds)").

[52]*See* CANBY, *supra* note 51, at 104 (citing Bay Mills Indian Community, 572 U.S. at 782).

[53]*See supra* note 2 (acknowledging complexities and controversy of Tribal recognition processes). Tribes without federal recognition may have some of the same rights that federally recognized Tribes do, such as sovereign immunity or treaty rights, depending on the circumstances. CANBY, *supra* note 51, at 4–5. Overall, "the sufficiency of any given recognition is likely to depend upon the purpose for which [T]ribal status is asserted." *Id.* [51] at 4; *see also infra* note 268 (describing Tribes denied federal recognition and critiques of the federal recognition process). For more about the federal regulations and administrative processes for federal acknowledgement, see U.S. DEP'T OF THE INTERIOR, *Office of Federal Acknowledgment*, https://www.bia.gov/as-ia/ofa [https://perma.cc/X9VK-XQJ3].

[54]Cherokee Nation, 30 U.S. at 42; *see also* 25 C.F.R. § 151.4 (2022); *Trust Land Acquisition (Fee to Trust)*, U.S. DEP'T OF THE INTERIOR, https://www.bia.gov/service/trust-land-acquisition [https://perma.cc/J735-YR79] (describing that "[a]ll *federally recognized* American Indian [T]ribes and individuals are eligible to apply for a fee-to-trust land acquisition") (emphasis added).

[55]*See* CANBY, *supra* note 51, at 81–102, 337–40; *see infra* note 86 and accompanying text.

[56]*See* MIDDLETON MANNING, *supra* note 18, at 224.

[57]Wood & Welcker, *supra* note 25, at 410; Wood & O'Brien, *supra* note 25, at 480. The Ute Land Trust is one example of a land trust formed by federally recognized Tribe. *See* UTE LAND TRUST, https://web.archive.org/web/20230214014541/https://www.utelandtrust.org/.

[58]*See* Wood & O'Brien, *supra* note 25, at 480.

[59]Dataset reproduced in Appendix A.

[60]The state of Vermont recently exempted state-recognized Tribes from paying property tax on land they own, but not all states have such an exemption. Lisa Rathke, *Vermont Governor Signs Tax Exemption Bill for Tribal Lands*, AP (Apr. 21, 2022), https://apnews.com/article/business-legislature-native-americans-property-taxes-vermont-01fa4426fda991ae77bbf68cae671a4d [https://perma.cc/3UHH-22TL].

[61]*See Cultural Preservation,* NATIVE LAND CONSERVANCY, https://www.nativelandconservancy.org/cultural-preservation [https://perma.cc/DR84-PY5B].

stewardship.[62] They have modified their dissolution provisions to support Tribes and Indigenous peoples receiving their assets if the land trust dissolves in the future.[63] Non-Native land trusts have also supported the formation of Native land trusts, providing financial resources, technical support, and fiscal sponsorship for Native land trusts working toward tax-exempt status.[64] Finally, some non-Native land trusts in Maine and Oregon have come together in state-wide umbrella organizations to collectively work toward returning land and land access to Indigenous peoples.[65]

B. Private Law Tools for Land Return and Land Access

In collaboration with Indigenous peoples, land trusts have used private law tools to return land and land access to Indigenous peoples. This Part analyzes three main categories of tools that land trusts have used to return land or land access: fee simple land return, easements and profits, and licenses and contracts. This Part identifies novel private law tools that have emerged since an earlier generation of scholarship on this topic, including new types of easements (cultural access easements and agreements), profits (harvest permits), and licenses (land invitations).[66]

1. Fee Simple Land Return

In the past decade, there has been a growing movement for land trusts to return fee title of land to Indigenous peoples.[67] This Article examines land

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[62]*See* Rob Levin, *First Light, Frequently Asked Questions: Supporting Indigenous Land Relationships—A Legal Analysis*, FIRST LIGHT 13–14, https://dawnlandreturn.org/first-light/resources/navigating-perceived-legal-barriers-land-return [https://perma.cc/5JR3-H6MX]; *First Light Community*, WABANAKI COMMISSION, https://dawnlandreturn.org/first-light/about-first-light/committed-organizations [https://perma.cc/BA4G-AU63] (describing how some Maine land trusts amended their Articles of Incorporation and Bylaws such that "should the organization dissolve, decisions around how to distribute its assets would occur in consultation with the Wabanaki Commission or other Wabanaki entity").

[63]*First Light Community*, *supra* note 62.

[64]*See Fiscal Sponsorship for Nonprofits*, NATIONAL COUNCIL OF NONPROFITS, https://www.councilofnonprofits.org/tools-resources/fiscal-sponsorship-nonprofits [https://perma.cc/NE7A-2NPF]; *see also* NIAMUCK LAND TRUST, https://web.archive.org/web/20240208150717/https://niamucklandtrust.org/ (describing that "NLF is Fiscally Sponsored by the 501(c)(3) organization the Peconic Land Trust"); *Our Vision*, AMAH MUTSUN LAND TRUST, https://www.amahmutsunlandtrust.org/our-vision [https://perma.cc/WLC7-MGHY] (describing that Amah Mutsun Land Trust was fiscally sponsored by Sempervirens Fund, a non-Native land trust, from 2013 until they achieved 501(c)(3) status in 2015); *Shinnecock Land Acquisition and Stewardship Fund*, PECONIC LAND TRUST, https://peconiclandtrust.org/ways-to-give/slasf [https://perma.cc/8GKE-285Y] (describing that Non-Native Peconic Land Trust formed the "Shinnecock Land Acquisition and Stewardship Fund" to support land return and land access for Shinnecock peoples); *Indigenous Land Relationship Fund*, OREGON LAND JUSTICE PROJECT, https://www.oregonlandjustice.org/ilrf [https://perma.cc/XDA4-2CWV].

[65]*See, e.g.*, *The Learning Journey*, OREGON LAND JUSTICE PROJECT, https://www.oregonlandjustice.org/the-learning-journey [https://perma.cc/A5TH-262A] (bringing non-Native land trusts together to "grant legal access, share and return land to Indigenous people"); *This work needs all of us*, FIRST LIGHT, https://dawnlandreturn.org/wabanaki-commission/land-projects [https://perma.cc/Y6NB-W2P2] (describing a collective of non-Native land conservation organizations "across Wabanaki homelands working to relearn the stories of these lands, recenter Wabanaki voices, and return land, money, and decision-making authority to Wabanaki communities").

[66]*See supra* note 27 (describing prior scholarship on land acquisition, conservation easements, cultural conservation easements, co-management agreement, and more informal collaboration).

[67]*See, e.g.*, *Return*, WABANAKI COMM'N, https://dawnlandreturn.org/first-light/lets-work-together/return [https://perma.cc/F3EZ-86JL] (describing how land trusts involved in the First Light initiative in Maine are working toward over twenty land return efforts this year); *Restoring Homelands—Land&People*,

returns where a land trust or private entity owned or raised funds to purchase a parcel of land and then transferred the title of that land to a Tribe or Native land trust.[68] In some instances, land trusts have placed a conservation easement or restriction on the land as part of the land return or returned land that already had a conservation easement or restriction.[69] There have been at least twenty land returns from land trusts to Tribes and Native land trusts since 2018 alone.[70] Table 1, at the end of this subpart, provides examples of such land returns to Tribes. In recent years, land trusts have begun to return land without a conservation easement or other deed restriction.[71]

For one example, the Open Space Institute recently returned Papscanee Island to the Stockbridge-Munsee Community Band of the Mohican Indians (Stockbridge Munsee-Mohican Community), a federally recognized Tribe, and granted a local land trust, Rensselaer Land Trust, a conservation easement on the land.[72] Papscanee Island is located in the Hudson River, known as Mahhicannituck to the Mohican people.[73] The island is named after a former chief, Sachem Papsickene, and has cultural and historical significance as part of the homelands of the Stockbridge Munsee-Mohican Community.[74] The land was taken from them in 1637 by a deed to Kiliaen Van Rensselaer, who then claimed exclusive ownership of the land.[75] As Bonney Hartley, Stockbridge Munsee-Mohican Community Historic Preservation Manager described, "[b]ecause of our traditional views of shared land ownership, our ancestors thought they were participating in a gift exchange and being hospitable to neighbors asking for use of Papscanee Island. They thought they could always return to the land."[76] In 2021, this land return placed the deed to the land back in the hands of the Stockbridge Munsee-Mohican Community.[77]

Recently, land trusts collaborating with Tribes have also sought alternatives to conservation easements on land returns that better respect Tribal sovereignty and self-determination.[78] Federally recognized Tribes enjoy sovereign immunity from suits in state and federal court, unless the Tribe clearly waives its immunity.[79] To make conservation easements or restrictions

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TRUST FOR PUB. LAND, https://www.tpl.org/resource/restoring-homelands151landpeople [https://perma.cc/L55S-PCPW].

[68]Where the land trust returns fee title of land that was donated to them and where the donor claimed a tax deduction, there may be tax implications under 26 U.S.C. § 170(h) and 26 C.F.R § 1.170A–14(c)(2), among other provisions that govern subsequent transfers by a land trust donee.

[69]*See, e.g.*, *Nature Conservancy Transfers Land to Iowa Tribe*, IOWA TRIBE OF KANSAS AND NEBRASKA (May 2, 2018), https://iowatribeofkansasandnebraska.com/news-events/nature-conservancy-transfers-land-to-iowa-tribe/ [https://perma.cc/Y935-MWCJ]; *Rappahannock Tribe Acquires Sacred Site, Ensuring Perpetual Conservation of Tribe's Homeland and Bald Eagle Habitat*, CHESAPEAKE CONSERVANCY (Apr. 1, 2022), https://www.chesapeakeconservancy.org/2022/04/01/rappahannock-tribe-acquires-sacred-site-ensuring-perpetual-conservation-of-tribes-homeland-and-bald-eagle-habitat/ [https://perma.cc/9EJN-HFZV] (describing how the "Chesapeake Conservancy donated the easement to the [United States Fish and Wildlife Service], then donated the fee title to the Rappahannock Tribe").

[70]Based on news and Google searches conducted by the author as of April 2023, with an additional search in December 2024. *See* Appendix A; *infra* Table 1. For additional examples of land return, see Mike Krings, *New site documents #landback, supporting return of land to Indigenous owners*, KU News (Nov. 8, 2023), https://news.ku.edu/news/article/2023/11/08/professors-launch-site-documenting-supporting-landback-return-land-indigenous-owners [https://perma.cc/9T7S-4E2Z].

[71]*See* TRUST FOR PUBLIC LAND, *supra* note 15.

[72]Rensselaer Land Trust is responsible for maintaining public trails on one part of the property, pursuant to the lease on the property held by Rensselaer County. STOCKBRIDGE-MUNSEE COMMUNITY & OPEN SPACE INSTITUTE, *supra* note 1.

[73]*Id.* [1]

[74]*Id.* [1]

[75]*Id.* [1]

[76]*Id.* [1]

[77]STOCKBRIDGE-MUNSEE COMMUNITY & OPEN SPACE INSTITUTE, *supra* note 1.

[78]TRUST FOR PUBLIC LAND, *supra* note 15.

[79]*See supra* notes 52–53 and accompanying text (describing Tribal sovereign immunity).

enforceable against the Tribe, the easement typically includes a clear, narrow waiver of Tribal sovereign immunity.[80] There are past examples of Tribes waiving sovereign immunity to negotiate conservation easements, but some Tribes may not wish to do so.[81]

To begin addressing the shortcomings of conservation easements, land trusts and Indigenous peoples have been moving toward unrestricted land returns—returning fee title of a piece of land where a land trust does not hold any restriction on the land.[82] Of the legal tools described in this Article, unrestricted land returns provide the greatest level of Indigenous self-determination over a piece of land. The Tribe or Native land trust alone holds the land without requirement for public access to the land and without a land stewardship or conservation right held by an outside entity.[83]

However, placing a conservation easement on a land return may have some financial benefits. A conservation easement may reduce the purchase price for the parcel, unlock state and federal funding for land acquisition, and lower the property tax burden on the parcel.[84] Many federal and state funding sources for land conservation, along with private donors, require or prefer a conservation easement or guaranteed public access to the land.[85] In addition, Tribes must pay state and local taxes on land they hold in fee simple.[86] Federally recognized Tribes can alleviate this tax burden by taking the land into trust, but the land must meet regulatory requirements through a process that may take a year or more.[87] In addition to unrestricted land returns, land trusts and Indigenous peoples have begun to consider Tribally held conservation covenants as an alternative to conservation easements. While the literature mentions the possibility of covenants held by third parties on land returns, a recent example highlights the

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[80]Without a waiver of sovereign immunity, the Tribe retains its immunity from suit and a land trust cannot sue the Tribe to enforce the easement. *See* C & L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla., 532 U.S. 411, 412 (2001) (analyzing waiver of Tribal sovereign immunity).

[81]MIDDLETON MANNING, *supra* note 19, at 24, 229 (describing an example where the Jamestown S'klallam Tribe "provided a limited waiver of sovereign immunity, as many [T]ribes do when an easement or other environmental interest has a stake on [T]ribal land"); *see also infra* Part II.C.1.

[82]*See, e.g.*, TRUST FOR PUBLIC LAND, *supra* note 15. In interviews, several land trusts identified that they were no longer placing conservation easements on land returns unless the Tribe requests such an arrangement.

[83]*See infra* Part 0.

[84]Conservation easements typically reduce the value of property and the real property tax burden. *See* John L. Hollingshead, *Conservation Easements: A Flexible Tool for Land Preservation*, 3 ENV'T L. 319, 359–60 (1997).

[85]*See, e.g.*, Carlson & Coulter, *supra* note 25, at 208 (describing the Traditional Seminole peoples' decision not to seek Florida state conservation funding because of public access requirements); CONNECTICUT DEPARTMENT OF ENERGY & ENVIRONMENTAL PROTECTION, COMPREHENSIVE OPEN SPACE ACQUISITION STRATEGY: 2016–2020 GREEN PLAN 95–97 (2016) (generally requiring grant of conservation and public access easement to the state to access funding); Wood & O'Brien, *supra* note 25, at 483, 489; Wood & Welcker, *supra* note 25, at 404; MIDDLETON MANNING, *supra* note 19, at 126 (describing conservation easement as a requirement of National Oceanic and Atmospheric Administration funding for land acquisition).

[86]If a federally recognized Tribe places land into trust, that trust land is immune from state taxation, including property taxes. CANBY, *supra* note 51, at 5 (citing *In re* Kansas Indians, 72 U.S. 737 (1866)); County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251, 270 (1992) (holding that fee land owned by Tribes, even by federally recognized Tribes, is subject to state property taxation).

[87]*Cutting through the Red Tape*, INDIAN LAND TENURE FOUNDATION, https://iltf.org/resources/red-tape/ [https://perma.cc/LZ6N-A9N4]; Christopher E. Babbitt et al., *Rulemaking To Update Land-Into-Trust Process For Tribes And Individual Indians*, WILMERHALE (Dec. 13, 2022), https://www.wilmerhale.com/en/insights/client-alerts/20221213-rulemaking-to-update-land-into-trust-process-for-tribes-and-individual-indians [https://perma.cc/SA22-M4MR] (describing new BIA regulations seeking to make the fee-to-trust process more efficient and less costly); MARIEL J. MURRAY, CONG. RSCH. SERV., R46647, TRIBAL LAND AND OWNERSHIP STATUSES: OVERVIEW AND SELECTED ISSUES FOR CONGRESS 2 (2021).

use of a Tribally held conservation covenant.[88] In 2021, the Confederated Tribes of the Colville Reservation accepted a land return of approximately 8,700 acres encumbered with a restrictive covenant.[89] This covenant is perpetual, does not merge with the title to the land held by the Tribes, and restricts residential, commercial, and industrial use of the land, while permitting minimal recreational use.[90] The covenant states that "the Confederated Tribes of the Colville Reservation will commence and prosecute enforcement action on the part of its members in its Tribal Court system" if the covenant is violated.[91] This covenant has similar effect to a conservation easement, but the Tribes are responsible for enforcing the covenant in Tribal court under Tribal law—the covenant is not held by a non-Indigenous entity.[92] This is still a restriction on a land return, but the Tribes hold both the title to the land and the power to enforce the restrictive covenant.

[88]Wood & Welcker, *supra* note 25, at 403; Wood & O'Brien, *supra* note 25, at 508.
[89]*See* Colville Business Council, *Resolution 2021-102* (2021), https://www.conservationnw.org/wp-content/uploads/2021/05/C19FU5V.pdf [https://perma.cc/HQL6-FUDJ]; *see also* Eli Francovich, *Homesteading Family's Lasting Legacy Realized in Agreement to Return Nearly 10,000 Acres of Habitat to Colville Tribes in Conservation Deal*, THE SPOKESMAN-REVIEW (Oct. 20, 2021), https://www.spokesman.com/stories/2021/oct/20/as-a-homesteading-families-name-dies-off-nearly-10/ [https://perma.cc/88UX-6B6B].
[90]Colville Business Council, *supra* note 89.
[91]*Id.* [89]
[92]*Id.* [89] (describing the covenant as subject to Tribe's Law and Order Code and the Tribe's Fish and Wildlife regulations and policies).

Table 1: Examples of Land Returns from Land Trusts to Tribes since 2018

Tribes Receiving Land	Year	Land Trust(s) Involved	State	Acres
Bois Forte Band of the Minnesota Chippewa Tribe[93]	2022	Conservation Fund & Indian Land Tenure Foundation	Minnesota	28,089
Confederated Tribes of the Colville Reservation[94]	2021	Conservation Northwest	Washington	9,243
Esselen Tribe of Monterey County[95]*	2020	Western Rivers Conservancy	California	1,199
Iowa Tribe of Kansas and Nebraska[96]	2018	The Nature Conservancy	Nebraska	160
Passamaquoddy Tribe[97]	2021	The Nature Conservancy	Maine	140
Penobscot Nation[98]	2023+	Trust for Public Land	Maine	30,000
Ramapo Munsee Lunaape Nation[99]*	2023	Land Conservancy of New Jersey	New Jersey	54
Stockbridge Munsee-Mohican Community[100]	2021	Open Space Institute	New York	156
Yurok Tribe[101]	2021	Trust for Public Land & New Forests (company)	California	2,424

Note: Year and Acres Returned may be approximate, based on news coverage
**Indicates a state-recognized or state-listed Tribe. All other Tribes included in the table have federal recognition.*
+*Indicates a land return has been announced but not yet completed.*

[93] Press Release, *Bois Forte Band Regains Historic Tribal Land*, THE CONSERVATION FUND (June 7, 2022), https://www.conservationfund.org/impact/press-releases/bois-forte-band-regains-historic-tribal-land [https://perma.cc/SD8V-QQSY].
[94] Francovich, *supra* note 89.
[95] *California Indian Tribe Gets Back Big Sur Ancestral Lands,* AP (July 28, 2020), https://apnews.com/article/4786a72a304e29db02055dfa97d65597 [https://perma.cc/5CD7-SKVA].
[96] *Nature Conservancy Transfers Land to Iowa Tribe*, IOWA TRIBE OF KANSAS & NEBRASKA (May 2, 2018), https://iowatribeofkansasandnebraska.com/news-events/nature-conservancy-transfers-land-to-iowa-tribe/.
[97] *Passamaquoddy Tribe Reacquires Culturally Significant 140-Acres of Island in KCI Monosakom (Big Lake), Maine*, DRUMMONDWOODSUM, https://dwmlaw.com/passamaquoddy-tribe-reaquires-culturally-significant-140-acres-of-island-in-kci-monosakom-big-lake-maine/ [https://perma.cc/N8H3-2WKJ].
[98] TRUST FOR PUBLIC LAND, *supra* note 15.
[99] Kristen Ferguson, *Ramapo Nation Reclaims Split Rock Mountain*, LAND TRUST ALL. (Oct. 4, 2023), https://landtrustalliance.org/blog/ramapo-nation-reclaims-split-rock-mountain [https://perma.cc/3XZX-6SRD] (describing that the Ramapo Munsee Lunaape Nation formed the Ramapo Munsee Land Alliance land trust to hold the land); Kate Munning, *Ramapo Nation Reclaims Split Rock Mountain*, THE LAND CONSERVANCY OF N.J. (Jul. 20, 2023) (describing that land return transfer occurred on February 22, 2023), https://www.tlc-nj.org/post/ramapo-reclaim-split-rock [https://perma.cc/CA8E-R2Y9].
[100] STOCKBRIDGE-MUNSEE COMMUNITY & OPEN SPACE INSTITUTE, *supra* note 1.
[101] Press Release, *Nearly 2,500 Acres of Land Returned to the Yurok Tribe*, THE YUROK TRIBE (Apr. 21, 2021), https://www.yuroktribe.org/post/nearly-2-500-acres-of-land-returned-to-the-yurok-tribe [https://perma.cc/W5XJ-7YZD].

2. Easements and Profits

Indigenous peoples may be interested in not only the return of fee title to land but also use and access rights to privately owned land for cultural and ceremonial purposes.[102] Indigenous peoples may seek access to private land to harvest and gather culturally important plants and medicines, hold ceremonies, gather at ancestral sites, and steward the land in accordance with cultural traditions.[103] These access and use rights may be especially important for Tribes and Indigenous peoples with limited or no land base.[104] Moreover, there are many culturally significant sites for Indigenous peoples located on privately owned land, especially in the Eastern and Midwestern United States where most land is privately owned.[105] However, federal and state law provide limited protection for culturally important and ceremonial sites on private land.[106]

Native Land Conservancy, a Native land trust, described the importance of Indigenous cultural access to private lands in New England:

> There are a number of natural cultural resources that are rare and needed by Native American people of New England, such as bulrush reeds or hickory stands. A renewable yet hard to find natural cultural resource may be on your property. We ask to be granted access to these resources with a commitment of the utmost respect for your property to gather seeds or harvest an annual bloom or simply honor the legacy.[107]

To help mitigate issues of Indigenous land access, Tribes and Native land trusts could hold easements to ensure their right to cultural access on private lands. Easements are "nonpossessory interests in land . . . which entitle the easement holder to the right to use the land for a specific, limited purpose."[108] As described below, cultural access rights could be included in a conservation easement or granted in a separate cultural access easement. Typically, these

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[102]*See generally* MIDDLETON MANNING, *supra* note 19.

[103]*See* Brett Ciccotelli et al., *What Does Wabanaki Stewardship Look Like?*, WABANAKI COMM'N (Aug. 8, 2023), https://dawnlandreturn.org/node/35 [https://perma.cc/2QWE-DAUK] (describing examples of Wabanaki cultural land stewardship); Daigle, *supra* note 46 at 779; VINE DELORIA, JR., GOD IS RED 55 (2003) (describing the importance of sacred lands to Indigenous peoples, that "[r]egardless of what subsequently happens to the people, the sacred lands remain as permanent fixtures in their cultural or religious understanding" and "small groups travel to obscure locations in secret to continue [T]ribal ceremonial life").

[104]Over 42 percent of Tribes that have a documented historical presence in what is now called the United States prior to the nineteenth century have no federally- or state-recognized land base at present. Farrell, *supra* note 2, at 3. *See also* Wood & Welcker, *supra* note 25, at 388; Wood & O'Brien, *supra* note 25, at 532 (describing examples of Indigenous cultural activities).

[105]*See* Pamela D'Innocenzo, *"Not in My Backyard!" Protecting Archaeological Sites on Private Lands*, 21 AM. INDIAN L. REV. 131, 133 (1997); NAT. RES. COUNCIL OF MAINE, PUBLIC LAND OWNERSHIP BY STATE, https://www.nrcm.org/documents/publiclandownership.pdf [https://perma.cc/TBR7-QQEX] (indicating that 63 to 99 percent of land by state in the Eastern United States and Midwest is not government owned).

[106]*See*, *e.g.*, D'Innocenzo, *supra* note 105, at 154–55; James Giago Davies, *Sacred Sites on Private Land Still Unprotected*, NATIVE SUN NEWS TODAY (Sept. 29, 2023), https://www.nativesunnews.today/articles/sacred-sites-on-private-land-still-unprotected/ [https://perma.cc/QJ6H-QP3H]; Karly C. Winter, Note, *Saving Bear Butte and Other Sacred Sites*, 13 GREAT PLAINS NAT. RES. J. 71, 77 (2010) (describing how the National Historic Preservation Act requires the federal government to consult Tribes only if federal action would affect a traditional cultural property listed on the National Historic Register). *Cf.* Constance M. Callahan, *Warp and Weft: Weaving a Blanket of Protection for Cultural Resources on Private Property,* 23 ENV'T L. 1323 (1993) (describing lack of protection for Indigenous cultural artifacts on private lands).

[107]RAMONA PETERS, CULTURAL EASEMENTS BY NATURE, NATIVE LAND CONSERVANCY (Apr. 8, 2016).

[108]25 AM. JUR. 2D *Easements and Licenses* § 1.

cultural access easements will be perpetual but could also be granted for a set duration of time (for example, several years).[109] There are several important features of easements that increase the durability of cultural access for easement holders. An easement "cannot be abridged or terminated unilaterally by the owner of the burdened land after it has been granted or otherwise established."[110] As a result, Tribes and Native land trusts who receive a cultural access easement are secure in knowing the access cannot be unilaterally revoked by the private landowner. In addition, the easement right can be enforced through injunction to allow continued use and access as specified in the easement—including against third-party interference or the underlying landowner.[111]

Similarly, Tribes or Native land trusts could hold a *profit à prendre* or a "right of common" permitting them to enter private land and remove specified products of the land, or "fruits."[112] This right is narrower than a cultural access easement and would likely not include rights to assemble or hold ceremonies on the land unless connected to the removal of the product of the land. However, Tribes and Indigenous peoples may seek this right in order to gather culturally important plants.[113] Profits are described in this part of the Article because they are often analyzed as easements by U.S. courts and governed by the same legal principles.[114]

a. Conservation Easements

Indigenous peoples may use conservation easements to gain cultural access rights to land. Conservation easements are nonpossessory interests in land requiring it to be conserved in perpetuity.[115] In particular, Tribes and Native land trusts may seek to hold cultural conservation easements, which place greater emphasis on Indigenous land stewardship and cultural practices.[116] Cultural conservation easements may include restrictions on land from being developed "in a way that would preclude carrying out a ceremony" and "affirm certain land uses, such as tending and harvesting culturally important plants . . . [that] often cannot occur if the property is developed."[117] Cultural conservation easements may be a useful tool due to their cost-effectiveness and durability. It may be easier and less costly for a Tribe or Native land trust to acquire a cultural

[109]*See infra* note 135 and accompanying text.
[110]JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS & LICENSES IN LAND §§ 1:4 (2023); JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY 210–12 (2d Ed. 2005).
[111]*See* BRUCE & ELY, *supra* note 110, §§ 1:4, 8:32, 8:33; RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 8.3 (AM. L. INST. 2000). An easement holder also typically has a takings claim if the government interferes with the property interest. *See* Kristen A. Carpenter, A *Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners*, 52 UCLA L. REV. 1061, 1099 (2005).
[112]*See* 25 AM. JUR. 2D *Easements and Licenses* § 4 (2023); BRUCE & ELY, *supra* note 110, §§ 1:10–1:14.
[113]*See, e.g.*, *UMaine workshop highlights cultural importance of brown ash to Wabanaki tribes, management strategies for emerald ash borer*, UNIV. OF ME. (May 12, 2022), https://umaine.edu/news/blog/2022/05/12/umaine-workshop-highlights-cultural-importance-of-brown-ash-to-wabanaki-tribes-management-strategies-for-emerald-ash-borer/ [https://perma.cc/GGQ2-2UG9].
[114]*See* BRUCE & ELY, *supra* note 110, § 1:9 (citing Lobato v. Taylor, 71 P.3d 938, 951–53 (Colo. 2002); Evans v. Holloway Sand and Gravel, Inc., 106 Mich. App. 70, 78 (1981)).
[115]Cheever & McLaughlin, *supra* note 14, at 108, 121. Conservation easements are authorized by state statutes to run with the land and be enforced as negative easements. *See* Andrew Dana & Michael Ramsey, *Conservation Easements and the Common Law*, 8 STAN. ENV'T L.J. 2, 12–13 (1989).
[116]MIDDLETON MANNING, *supra* note 19, at 17, 122; CULTURAL CONSERVATION EASEMENT, MIDPENINSULA REGIONAL OPEN SPACE, https://www.openspace.org/cultural-conservation-easement [https://perma.cc/7HL3-RD8A] (describing cultural conservation easement held by Amah Mutsun Tribal Band); *Legal Templates*, SUSTAINABLE ECON. L. CTR., https://www.theselc.org/templates [https://perma.cc/DP8P-TCW3] (providing sample "rematriation easement" that is similar to a cultural conservation easement).
[117]MIDDLETON MANNING, *supra* note 19, at 17, 123.

conservation easement than to acquire the land in fee simple.[118] There are also significant federal income, estate, and gift tax incentives for private landowners to donate conservation easements, and conservation easement holders do not have to pay taxes on the underlying property.[119]

Conservation easements have been widely successful in conserving land for conservation and scenic values but are not as frequently used by Tribes to protect Indigenous cultural values on private land.[120] Using cultural conservation easements for Indigenous cultural access to the land has a number of drawbacks and uncertainties. First, state conservation easement-enabling statutes do not uniformly recognize cultural conservation easements, calling into question whether they would run with the land in perpetuity.[121] While the Uniform Conservation Easement Act—a piece of model legislation for state conservation easement-enabling acts—recognizes that easements can be used to preserve "cultural aspects of real property," not all states have adopted this version.[122] Second, other than in California and Oregon, state conservation easement-enabling statutes are not clear as to whether Tribes are permissible holders of conservation easements.[123] In many states, federally recognized Tribes are at least impliedly authorized to hold conservation easements—typically so long as the state recognizes the Tribe as a government body or entity that is "empowered to hold an interest in real property" under state and federal laws.[124] However, in other states, Tribes are expressly or impliedly prohibited from holding conservation easements.[125] Third, it is unclear the extent to which a cultural conservation easement that focuses primarily on promoting Indigenous cultural heritage and cultural activities would be eligible for a federal income tax

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[118]*See* Ellen A. Fred, *Utilizing Conservation Easements to Protect Land and Create Access to Native American Cultural and Ceremonial Gathering Sites*, CONSERVATION PARTNERS (Feb. 25, 2021), https://www.conservationpartners.com/tsnungwe-tribe-cultural-easement/ [https://perma.cc/JB7L-ZV8M] (describing an example where the Tsnungwe Tribal Council expressed that holding fee title to the land was less important than protecting land from development and having a legal right to access the land for ceremonial purposes and gathering).

[119]26 U.S.C. § 170(h); 26 C.F.R § 1.170A–14(c)(2); *see also* Wood & Welcker, *supra* note 25, at 397–98; 26 U.S.C. § 2055(f), § 2031(c). Some states also grant income and property tax deductions to landowners donating a conservation easement on their property. Wood & Welcker, *supra* note 25, at 425 n.388 (citing ELIZABETH BYERS & KARIN MARCHETTI PONTE, THE CONSERVATION EASEMENT HANDBOOK 93, 98–99 (2d ed. 2005); Owley, *supra* note 25, at 186–87 (describing that conservation easement holders do not pay taxes on the underlying property); County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251, 270 (1992) (holding land held in fee simple by Tribes is still subject to state property taxes).

[120]Lawrence R. Kueter & Christopher S. Jensen, *Conservation Easements: An Underdeveloped Tool to Protect Cultural Resources*, 83 DENV. U. L. REV. 1057, 1057 (2006). Out of over 200,000 conservation easements in the National Conservation Easement Database, only six listed in the database are held by Native American Tribes. *Advanced Easement Search*, NATIONAL CONSERVATION EASEMENT DATABASE, https://www.conservationeasement.us/ [https://perma.cc/SZ8N-DFHZ] (describing where easement holder type is listed as Native American, as of January 2024). As of 2011, there were no known examples of Tribes holding cultural conservation easements. MIDDLETON MANNING, *supra* note 19, at 244. *But see* Beth R. Middleton Manning et al., *A Place to Belong: Creating an Urban, Indian, Women-led Land Trust in the San Francisco Bay Area*, 28 ECOLOGY & SOC'Y 1, 1 (2023) (describing that there are "numerous examples of [T]ribes using conservation easements to protect culturally important places" but acknowledging that this movement is particularly well developed in California).

[121]*See* MIDDLETON MANNING, *supra* note 19, at 22.

[122]UNIF. CONSERVATION EASEMENT ACT (UNIF. L. COMM'N 2007); *see* VA. CODE ANN. § 10.1–1009 (2023) (including "historical, architectural or archaeological" values but not cultural values); ME. REV. STAT. ANN. tit. 33, § 476 (2023) (not including cultural values).

[123]*See* Owley, *supra* note 25, at 176–79 (describing states where Tribes can expressly hold conservation easements or impliedly hold conservation easements as well as states like New Mexico where Tribes expressly cannot hold conservation easements).

[124]*Id.* [25] at 178–79.

[125]*See id.* [25] (describing how, in some states, Tribes are impliedly prohibited from holding conservation easements as they are not included on specific lists of governmental holders or government holders are not permitted).

deduction.[126] This may considerably reduce landowners' incentives to donate cultural conservation easements.

More recently, land trusts have updated standard conservation easement templates to better support Indigenous cultural land stewardship and avoid conflicts with granting a cultural access easement to a Tribe or Native land trust on land with an existing conservation easement. One template for Maine land trusts includes that Tribal historic and cultural values can be included in the "conservation purposes" and "conservation values" section of the conservation easement.[127] The template also permits "temporary structures for outdoor ceremony and harvesting of resources important for medicine, craft or ceremony" and "harvesting in open and unforested areas for medicinal, craft and ceremonial purposes . . ." among other provisions that may support Tribal cultural land uses.[128] A template for Massachusetts land trusts—which is now on file with the state as the statewide conservation restriction template—also includes "Indigenous cultural heritage" as a possible conservation value and lists a possible section on "Indigenous Cultural Practices" including "ceremonial uses" and "harvest[ing] plant-life for traditional cultural practices."[129]
Conservation easement templates should also include a statement that cultural access easements, agreements, and licenses may still be granted to Tribes and Indigenous peoples—notwithstanding any restrictions on additional easements, rights of way, licenses, or permits in the conservation easement. A statement to this effect will avoid precluding a future cultural access easement or agreement for Indigenous land access.

Conservation easement template updates are important because they can influence land trusts statewide and beyond. When drafting conservation easements, land trusts tend to follow templates, either from within their organization or from other land trusts operating in the state.[130] Land trusts may also share templates within state or regional groups of land trusts or through the Land Trust Alliance, the national organization of land trusts.[131] When these shared templates include language to support present and future Indigenous cultural access, they may advance Indigenous cultural access to privately conserved lands across the country.

b. Cultural Access Easements

A cultural access easement is a novel private law tool that grants Indigenous peoples access to private land for Indigenous cultural activities such as gathering culturally significant plants and ceremonies.[132] Research for this Article identified at least seven examples of cultural access easements in practice

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[126]*See* DAVID J. DIETRICH & CHRISTIAN DIETRICH, CONSERVATION EASEMENTS: TAX AND REAL ESTATE PLANNING FOR LANDOWNERS AND ADVISORS 1 (2011); *see also* Kueter & Jensen, *supra* note 120.

[127]MAINE COAST HERITAGE TRUST, MCHT CONSERVATION EASEMENT DRAFTING TEMPLATE (2021) https://www.mltn.org/wp-content/uploads/2021/11/MCHT-CE-DraftingTemplate.11152021-for-mltn-site.doc [https://perma.cc/3M8B-EUWT].

[128]*Id.* [127]

[129]MASS. EXEC. OFF. OF ENERGY AND ENV'T AFFS., DEP'T OF CONSERV. AND RECREATION, EEA-DCS MODEL CONSERVATION RESTRICTION APR. 2023 8 (2023), https://www.mass.gov/doc/eea-dcs-model-conservation-restriction-may-2022/download [https://perma.cc/YNP8-T8AW].

[130]*See* Wood & O'Brien, *supra* note 25, at 497–98 (describing the influence of an early model conservation easement over future easement transactions).

[131]*See* LAND TRUST ALLIANCE, https://landtrustalliance.org/ [https://perma.cc/Y34U-KBL3]; *see also* COALITION OF OREGON LAND TRUSTS, https://oregonlandtrusts.org/ [https://perma.cc/893S-KAAC].

[132]*See* Marina Schauffler, *Taking the Long View*, LAND TRUST ALLIANCE (Feb. 6, 2023), https://landtrustalliance.org/blog/taking-the-long-view [https://perma.cc/3692-2UGP]; This Article focuses on cultural access easements on private land, but scholars have also discussed the viability of "sacred easements" for access to sacred sites on public land. *See* Patrick E. Reidy, *Sacred Easements*, 110 VA. L. REV. 833 (2024).

or in development in the past decade.[133] This Article uses the term "cultural access easement"—also called a "cultural respect easement," "cultural use easement," or other names in practice.[134] A land trust or private landowner grants a cultural access easement, giving the Tribe or Native land trust holder cultural access and use rights to the land, either in perpetuity or for a specified duration.[135] This could include land access for harvesting culturally important plants, visiting sacred sites, conducting ceremonies, and other cultural activities. Cultural access easements are a type of affirmative easement in gross—they provide affirmative land use and access rights for cultural activities, a benefit to the Tribe or Native land trust easement holder that is "not tied to [their] ownership or occupancy of a particular unit or parcel of land."[136] As seen in practice, a cultural access easement could also be an interim step toward a fee title land return of that parcel of land.[137]

This Article defines cultural access easements as a distinct legal tool from cultural conservation easements.[138] Cultural access easements focus on

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[133] *Dennis Conservation Land Trust*, NATIVE LAND CONSERVANCY, https://www.nativelandconservancy.org/dennis-conservation-land-trust [https://perma.cc/5LMQ-S2PC]; *Nemasket River Village*, NATIVE LAND CONSERVANCY, https://www.nativelandconservancy.org/nemasket-river-village [https://perma.cc/ZBF4-N5GB]; Leslie Jonas et al., *Northeast Wilderness Trust & Native Land Conservancy Announce Collaboration*, NORTHEAST WILDERNESS TRUST, https://newildernesstrust.org/native-land-conservancy-partnership/ [https://perma.cc/AT9M-HWE9]; *February Love Notes: Program Applications Open!*, SOUL FIRE FARM, https://www.soulfirefarm.org/february-love-notes-program-applications-open/ [https://perma.cc/W4NT-UERY]; Press Release, *Historic Stewarts Point Property Permanently Protected by Save the Redwoods League and Sonoma County Agricultural Preservation and Open Space District*, SAVE THE REDWOODS LEAGUE (Feb. 22, 2017), https://www.savetheredwoods.org/league-announcement/historic-stewarts-point-property-permanently-protected-by-save-the-redwoods-league-and-sonoma-county-agricultural-preservation-and-open-space-district/ [https://perma.cc/R94T-XMJ3]; *Land Trusts Announce Formal Conveyance of Nyland Property*, BENITOLINK (June 20, 2023), https://benitolink.com/land-trusts-announce-formal-conveyance-of-nyland-property/ [https://perma.cc/R576-5F7G]; K. Nicole Wires & Johnella LaRose, *Sogorea Te' Land Trust and Indigenous Food Sovereignty in the San Francisco Bay Area*, 9 J. AGRIC., FOOD SYS. & CMTY. DEV. 31, 34 (2019); *see also* Abel R. Gomez, *(Re)riteing the Land: Sogorea Te' Land Trust, Amah Mutsun Land Trust, and Indigenous Resurgence in California*, 47 AM. INDIAN CULTURE & RSCH. J. 1, 11 (2024) (indicating that as of 2024 the Sogorea Te' Land Trust "has access to ten sites, including those with houses and gardens, through legal agreements, long-term leases, and/or deeds"). There is also at least one example where a state government granted a cultural easement to a Tribe over public property. *See Yocha Dehe and Cortina Take Lead to Protect Sensitive Sites at Glen Cove*, YOCHA DEHE WINTUN NATION (Aug. 31, 2011), https://yochadehe.gov/2011/08/31/yocha-dehe-and-cortina-take-lead-to-protect-sensitive-sites-at-glen-cove/ [https://perma.cc/7B4K-Q44N].

[134] *See* Fred, *supra* note 118 (describing "cultural use easement"); SAVE THE REDWOODS LEAGUE, *supra* note 133 (describing "cultural access easement" granted by Save the Redwoods League to Kashia Band of Pomo Indians of the Stewarts Point Rancheria); NATIVE LAND CONSERVANCY, *supra* note 133 (describing "cultural respect easement" granted by Dennis Conservation Land Trust to Native Land Conservancy).

[135] *See Cultural Respect Easement*, NATIVE LAND CONSERVANCY, https://www.nativelandconservancy.org/cultural-respect-easements [https://perma.cc/9L64-N2TZ]; FIRST LIGHT, DRAFT: WAYS TO FORMALIZE INDIGENOUS ACCESS TO AND USE OF LANDS IN MAINE (Sept. 24, 2021), https://dawnlandreturn.org/sites/default/files/documents/wabanaki-land-use-tools-5_23_21.pdf [https://perma.cc/Y4AD-KYNV].

[136] RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 1.5 (AM. L. INST. 2000); BRUCE & ELY, *supra* note 110, §§ 2:2, 2:10 (describing how an affirmative easement "authorizes the holder to make active use of the servient estate in a manner that, if no easement existed, would constitute a trespass").

[137] *See* Wires & Johnella LaRose, *supra* note 133, at 34 (describing how a nonprofit and a Native land trust "entered into an agreement to grant a cultural easement, and eventually to transfer full title[] of the land").

[138] MIDDLETON MANNING, *supra* note 19, at 228 (discussing that "[a] property can also have both a conservation easement and a cultural easement"). *Contra* Levin, *supra* note 62, at 10 (conflating "cultural easement" and "cultural conservation easement," as both terms for "conservation easement[s] that include[] the protection of cultural features").

affirmative cultural land use and access for Indigenous peoples, rather than centering around restrictions on land use and development.[139] Unlike cultural conservation easements, cultural access easements are not typically drafted to conform to state conservation easement-enabling statutes and federal tax deductibility requirements for conservation easements, including required "conservation purposes" under federal tax law.[140] In practice, land trusts have already begun to use cultural access easements as a distinct tool from cultural conservation easements—such as granting a separate cultural access easement on a property that already has a conservation easement.[141]

Cultural access easements can be tailored to meet a Tribe or Native land trust's cultural access and stewardship goals. The easement's central provisions are typically the affirmative access and use rights of the easement holder. Some cultural access easements provide only a short statement of rights,[142] deferring to the easement holder to determine appropriate cultural and ceremonial access to and uses of the site. Other cultural access easements may have more detailed provisions listing the types of Indigenous ceremonial uses and cultural practices permitted on the land, especially if the property already has a conservation easement or trail easement with restrictions on land use or land closure to public access.[143] For example, a cultural access easement held by the Kashia Band of Pomo Indians of the Stewarts Point Rancheria permits "traditional cultural, ceremonial, and spiritual practices[,] ceremonies[,] and traditions as defined by the Tribal Council by resolution" with uninterrupted use for a "maximum of four (4) days per calendar year."[144] It also provides five days of daylight-hour use per year for "traditional subsistence fishing and gathering of natural marine resources, such as sea plants, shellfish, and fish, in accordance with the Tribe's traditions."[145]

The cultural access easement may also specify restrictions on cultural use and access or requirements for the easement holder.[146] For example, the easement may specify if any notice to the grantor or landowner is required to access the property or close the easement area to public access.[147] Other common restrictions on the easement holder listed in a cultural access easement include prohibitions on mining, logging, commercial use, development, road

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[139]Restrictions on development may be a corollary to the affirmative rights of the easement holder to conduct cultural activities—if development would interfere with the cultural activities. *See supra* notes 108–111 and accompanying text (describing rights of an easement holder).

[140]*See* Wood & O'Brien, *supra* note 25, at 496 (describing how drafters of cultural conservation easements must "ensure that an easement's wording fits into the boilerplate conservation language of the tax laws in order to qualify the grantor for tax benefits"); 26 U.S.C. § 170(h)(4); *see also* DIETRICH & DIETRICH, *supra* note 126, at 1.

[141]*See, e.g.*, CNTY. OF SONOMA, STEWARTS POINT RANCH CULTURAL AND SUBSISTENCE ACCESS EASEMENT CONVEYANCE (2018), Sonoma County APN 122-250-006 [hereinafter Stewarts Point Cultural Access Easement] (on file with author) (cultural access easement granted to Tribe on a property with an existing conservation easement); BENITOLINK, *supra* note 133.

[142]For example, one cultural access easement provides a short statement of rights—"[t]o enter upon the Properties during daylight hours" with use and access that "conform[s] with cultural practices including occasional ceremonial use of the site consistent with the purpose of the Easement." DENNIS CONSERV. LAND TRUST, CULTURAL RESPECT EASEMENT 1 (Dec. 9, 2021) (on file with author).

[143]For example, the Stewarts Point Cultural Access Easement is on a property with an existing conservation easement and public trail easement and requires written notice at least thirty days in advance to the easement grantor and the County if the ceremonial use has more than fifty participants or requires a trail closure. Stewarts Point Cultural Access Easement, *supra* note 141, at 1, 3, 24.

[144]*Id.* [141].

[145]*Id.* [141].

[146]*See* Stewarts Point Cultural Access Easement, *supra* note 141; Dennis Conservation Land Trust, *supra* note 142, at 1 (describing that cultural access rights are subject to "any relevant deed restrictions (including charitable trust provisions) and/or Conservation Restrictions (CRs)" and that "parking for said supervised groups must only occur in designated areas as mutually determined by the Owner" and the easement holder).

[147]*See supra* note 143.

building, and anything beyond *de minimis* surface disturbance of the property.[148] Easements may vary on permissions for archaeological protocols, hunting, camping, trapping, parking on the property, recreational use, and use of fire, including for cultural burning.[149]

Beyond rights and restrictions, a cultural access easement may contain other sections that shape the relationship between the grantor (a land trust or private landowner) and the grantee (a Tribe or Native land trust). Other possible sections include: background on the Indigenous and cultural significance of and activities on the land, indemnity for the grantor, insurance requirements for the grantee, consultation requirements, dispute resolution processes, and a sovereign immunity waiver (when grantee is a federally recognized Tribe).[150] A perpetual cultural access easement should consider including a statement to the effect of the easement "shall run with the land and shall be binding on and shall inure to the benefit of the heirs, administrators, successors, and assigns" of the grantor and grantee.[151]

Consultation and dispute resolution provisions are important aspects of the cultural access easement. Consultation provisions may require that the grantor or underlying landowner consult with the easement holder before engaging in any activity in the easement area that could potentially impair Indigenous cultural activities.[152] Dispute resolution provisions can vary widely—one existing cultural access easement is silent on dispute resolution, while another requires parties to meet and confer in person and, if the dispute cannot be resolved, then the aggrieved party may seek arbitration.[153] The cultural access easement held by the Kashia Band of Pomo Indians of the Stewarts Point Rancheria, a federally recognized Tribe, states that the "applicable laws of the State of California and [T]ribal law, shall be the bases for [dispute] determination and resolution."[154] Overall, the consultation and dispute resolution mechanisms for the easement will shape the interaction and power dynamics between the grantor and the Tribe or Native land trust holder.

c. Cultural Access Agreements

Cultural access agreements are another novel private law tool to grant cultural access to private land for Indigenous peoples.[155] In practice, cultural

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[148]*See, e.g.*, Stewarts Point Cultural Access Easement, *supra* note 141, at 6 (expressly prohibiting "commercial activity"); Dennis Conservation Land Trust, *supra* note 142, at 1 (describing "activities and uses [that] are expressly prohibited" including "[a]ny and all logging, mining, commercial use, development or resource extraction, road building or more than de minimis surface disturbance of the Property").

[149]Stewarts Point Cultural Access Easement, *supra* note 141, at 6 (prohibiting lighting of fires in the easement area); Dennis Conservation Land Trust, *supra* note 142, at 1 (prohibiting "[a]ny and all hunting, camping and trapping; recreational use of the Property that is inconsistent with the intent of this Easement, including the use of fire without the mutual consent of the parties").

[150]*See* Stewarts Point Cultural Access Easement, *supra* note 141, at 2 (including in the background section that the land is called *Danága* and is the "creation place of the Kashia people" that is the "the center of spiritual life" where the Tribe will conduct "gathering, fishing, prayer, and other spiritual and cultural activities according to their traditions"); *Id.* [141] at 7–8 (including Tribe's waiver of sovereign immunity).

[151]*Id.* [141] at 12.

[152]*Id.* [141] at 6.

[153]*Id.* [141] at 10; Dennis Conservation Land Trust, *supra* note 142, at 1.

[154]Stewarts Point Cultural Access Easement, *supra* note 141, at 10.

[155]This Article will use the term "cultural access agreements," but the agreements may also be called "cultural use agreements," "cultural respect agreements," or some combination. *See, e.g.*, Jenn Albertine, *A Welcome Start to Dialog: New Partnership with the Nipmuc*, MOUNT GRACE CONSERVATION LAND TRUST (Feb. 1, 2022), https://www.mountgrace.org/about/news/post/a-welcome-start-to-dialog-new-partnership-with-the-nipmuc [https://perma.cc/7PWX-GBEM] (describing a "cultural use and respect agreement" between land trust and the Nipmuc people); THE NATURE CONSERVANCY MAINE, THE NATURE CONSERVANCY IN MAINE'S COMMITMENT TO COLLABORATING

access agreements have very similar terms to cultural access easements.[156] This Article includes a separate analysis of cultural access agreements because practitioners use them as a distinct tool from cultural access easements, and cultural access agreements may blur the line between an easement and a license.[157] Easements and licenses can already be difficult to distinguish, and the distinction has confounded many courts.[158] This is a "murky area of the law" and "minor matters often tip the scale in close cases."[159]

Although both easements and licenses can both provide cultural access to land, licenses are distinct from easements in several ways.[160] A license is defined as "a permission to do some act on the licensor's land" that "merely excuses acts done by one on land in possession of another that without the license would be trespasses."[161] Importantly, a license "conveys no interest in land."[162] In general, a license is revocable at the will of the licensor, terminates when the underlying land is conveyed (meaning it does not run with the land), is not transferable unless specified, and, in most jurisdictions, does not permit the licensee to enforce the license against interference from the licensor or a third party.[163] While "[t]he revocation of a license may constitute a breach of contract . . . it is nonetheless effective to deprive the licensee of all justification for entering or remaining upon the land."[164] These legal distinctions are important to the durability of the cultural access right for Indigenous peoples and power dynamics between land trusts and Indigenous peoples. A license gives the land trust a great deal of power over the Indigenous cultural access right—including the power to revoke the right at any time for any reason.

Overall, a court may be more likely to classify cultural access agreements as easements rather than licenses—although it is a close case and it would be a question of first impression for U.S. courts.[165] The "critical factor" in

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WITH INDIGENOUS PEOPLES 10 (2022), https://www.nature.org/content/dam/tnc/nature/en/documents/Indigenous-Engagement-Commitments_Final_rs.pdf [https://perma.cc/RQ3V-WDJX] (indicating commitment to increasing Wabanaki access to Nature Conservancy's private lands in Maine, including through cultural use agreements).

[156]*See supra* Part I.B.2 (describing characteristics of cultural access easements); FIRST LIGHT LEARNING JOURNEY, CULTURAL RESPECT AND USE AGREEMENT ANNOTATED TEMPLATE FOR MAINE: DRAFT 4-17-2019 (2019) [hereinafter CRUA Template] (on file with author); DENNIS CONSERVATION LAND TRUST, CULTURAL RESPECT AGREEMENT 5 (Nov. 17, 2016) (on file with author); MOUNT GRACE CONSERVATION LAND TRUST, CULTURAL RESPECT AND USE AGREEMENT(Mar. 16, 2022) (on file with author).

[157]Practitioners have disagreed on whether cultural access agreements are the same as cultural access easements or better viewed as a license. *Compare* Briana Olson et al., *Faithlands Toolkit: A Guide to Transformative Land Use*, AGRARIAN TRUST 54 (2021) (describing "cultural respect easements, cultural respect agreements, and cultural use permits" as "contractual agreements that allow members of a [T]ribe or group access to a piece of land for traditional land-based practices") *with* Levin, *supra* note 62, at 10–11 (categorizing "cultural access agreement" as likely governed by the law of licenses and a separate tool from a "cultural easement").

[158]BRUCE & ELY, *supra* note 110, § 1:3.

[159]*Id.* [110] § 1:8.

[160]*Id.* [110] §§ 1:3–1:4.

[161]Baseball Pub. Co. v. Bruton, 302 Mass. 54, 55 (1938); *see also* BRUCE & ELY, *supra* note 110, § 1:4.

[162]*Bruton*, 302 Mass. at 55.

[163]*See id.* [161] at 56 (describing revocability of license by licensor); BRUCE & ELY, *supra* note 110, § 11:10 (describing how conveying the servient land typically terminates the license); *Id.* [110] §§ 1:4, 11:5 (describing that there is generally no cause of action against the licensor or third parties that interfere with enjoyment of a license, although a few states have allowed licensees to obtain an injunction against third parties); RESTATEMENT (FIRST) OF PROPERTY (SERVITUDES) §§ 512, 517, 521 (AM. L. INST. 1944).

[164]*Bruton*, 302 Mass. at 56.

[165]This analysis is based on general property law principles. To assess cultural access agreements in practice, this analysis should be repeated on a state-by-state and case-by-case basis. To the author's knowledge, no cultural access agreement or easement has come before a U.S. court, and this is an issue of first impression.

distinguishing a license from an easement is the parties' intent.[166] However, courts are not bound by the title of the legal instrument or the parties' characterization to determine intent.[167] Courts look to a number of factors to assess this intent, including the "manner of creation of the right, nature of the right, duration of the right, amount of consideration, and reservation of power to revoke."[168] There are three key features of existing cultural access agreements that, if included in the text of the agreements, may make them more likely to be characterized as easements: the right to revoke is limited to particular reasons or circumstances, the agreement has a set duration, and the agreement uses phrases typical of conveyance of property such as "grant" or "convey."[169] Under existing law, a conditional right to revoke indicates an easement, not a license.[170] All of the cultural access agreements that the author reviewed for this Article were for a set period of time and contained terms that conditioned the right to revoke—typically on whether the landowner or grantor believes an activity by the Tribe or Native land trust is causing substantial harm or damage to the property or the property's conservation values.[171] Some of the existing agreements also used terms like "grant" or "convey" that may weigh in favor of an easement.[172]

However, cultural access agreements also have features indicating that they may be considered licenses by a court: the lack of alienability or divisibility of the right and if they contain consent requirements for improving the burdened property. Cultural access agreements typically indicate in the agreement that the rights are not alienable, divisible, or transferrable, and do not extend to successors or assigns, which could sway some courts in favor of a license.[173] At least one court has found a license where any improvements or alterations to the land area in the legal instrument required "the approval, in writing, of all owners of the property."[174] Since a court applies a factor test to assess the intent of the parties, these two indicators of a license are not conclusive.

Overall, the factors in favor of an easement seem to outweigh those in favor of license, but it may be a close case depending on the particular cultural access agreement, circumstances, and jurisdiction. This uncertainty may counsel land trusts and Indigenous partners to consider other legal tools to support

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[166] BRUCE & ELY, *supra* note 110, § 1:5.
[167] *Id.* [110] § 1:5; 25 AM. JUR. 2D *Easements and Licenses* § 3, 105 (2023).
[168] BRUCE & ELY, *supra* note 110, § 1:7.
[169] *Id.* [110] § 1:5.
[170] *See* BRUCE & ELY, *supra* note 110, § 1:5; SOP, Inc. v. Dept. of Nat, Res., 310 P.3d 962, 968 (Alaska 2013) (holding that "special park use permits that are revocable only for cause convey easements, not licenses"), *as amended on reh'g,* (Oct. 11, 2013); Riverwood Commercial Park, LLC v. Standard Oil Co., 797 N.W.2d 770, 777 (N.D. 2011) (holding that the "permit" was an easement not a license because the "permit is not revocable at the will of the landowner, but is subject to termination only under limited circumstances"); *see also* U.S. v. 126.24 Acres of Land, More or Less, Situate in St. Clair County, 572 F. Supp. 832, 834 (W.D. Mo. 1983) ("The fact that the grantor did not reserve the right to close off the lake at will at any time demonstrates that the rights conveyed to the lot owners were greater than those of a bare license."). *But see* Babcock v. State, 27 A.D.2d 880, 881 (N.Y. App. Div. 1967) (finding that an agreement allowing revocation "at any time between November and April on notice" was a license); Rowan v. Riley, 139 Idaho 49, 57 (2003) (finding a license where "the railroad can revoke the licensee's privileges without consequence").
[171] *See* CRUA Template, *supra* note 156, at 7; Dennis Conservation Land Trust, *supra* note 156 at 1.
[172] BRUCE & ELY, *supra* note 110, § 1:5 (citing Evans v. Holloway Sand & Gravel, Inc., 106 Mich. App. 70, 80 (1981)). *But see* Boyce v. Cassese, 941 So. 2d 932, 937 (Ala. 2006) (finding an easement even where the text of the written license agreement states that "[g]rantors do hereby grant, bargain, sell and convey to Grantee a . . . license").
[173] *See* BRUCE & ELY, *supra* note 110, § 1:5 (citing Bunn v. Offutt, 216 Va. 681, 684 (1976); Pelletier v. Laureanno, 46 A.3d 28, 37–38 (R.I. 2012)) (finding license where words of succession are not included in agreement); CRUA Template, *supra* note 156, at 8. *But see* Entine v. Reilly, 2015 WL 5091271, *8 (Mass. Land Ct. 2015) (concluding that "the absence of such words [of succession] is inconclusive—it neither signifies nor renounces the creation of one interest over the other").
[174] Blackburn v. Lefebvre, 976 So. 2d 482, 486 (Ala. Civ. App. 2007).

cultural land access for Indigenous peoples. Notably, land trusts and Indigenous partners should consider choosing cultural access easements over cultural access agreements for the assurance that a court would construe the former as an easement. If the parties cannot agree to a perpetual cultural access easement, they should consider instead a cultural access easement of a set, shorter duration.[175] This may be preferable to a cultural access agreement as parties would have clarity on the body of law a court would apply in a dispute—easement law.

d. Harvest Permits

Land trusts have also worked with Indigenous peoples on harvest permits allowing harvest of culturally important plants on private land.[176] Harvest permits are typically limited to the right to harvest one or more plants for a specified duration of time, rather than a tool for a broader range of cultural activities on the land. Harvest permits typically include key provisions such as the number of trees or quantity of the plant that can be harvested (or otherwise a "sustainable" amount), any restrictions on access, and an indemnity clause.[177] Harvest permits may be appropriate for private lands where there are culturally significant plants to harvest but either (1) the Tribe or Native land trust does not have interest in owning the land nor conducting ceremonies, gatherings, or other cultural activities on that land or (2) the land is already bound by a more restrictive conservation easement that would not allow for other cultural activities beyond plant harvesting. For one example, the Appalachian Mountain Club (AMC) granted a harvest permit for brown ash trees to the Wabanaki people.[178] AMC described that it was "best way forward within the [conservation] easement constraints [we] had to be able to start to share in a meaningful way this resource we knew existed on the property."[179]

Land trusts issuing harvest permits should be aware that these permits may be found to be a *profit à prendre*, not a license, under general property law principles. Profits are typically governed by easement law in U.S. courts, meaning they are held as a property right and enforceable against the grantor and third parties.[180] For purposes of the analysis in this Part, the Article examines harvest permits for Indigenous cultural purposes that primarily focus on the harvest of noncommercial trees and plants. However, the harvest permit could also include fishing or hunting rights for cultural purposes.

The intent of the parties governs whether or not a harvest permit is a profit or a license.[181] At common law, rights to harvest *fructus naturales*—typically perennial plants grown without human assistance—are considered

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[175]Moreover, a short-term easement would not preclude a perpetual easement in the future. In practice, there are at least two examples where the parties began with a short-term cultural access agreement and later established a perpetual cultural access easement. Dennis Conservation Land Trust, *supra* note 156, at 5 (signing five-year cultural access agreement); Dennis Conservation Land Trust, *supra* note 142 (later granting perpetual cultural access easement on the same property); Bonney Hartley, *Cultural Land Use Agreement with Soul Fire Farm in New York*, MOHICAN NEWS (Nov. 15, 2020), https://www.mohican.com/mt-content/uploads/2020/11/11-15-20.pdf [https://perma.cc/3UKU-CMBM] (describing initial cultural access agreement in 2020); SOUL FIRE FARM, *supra* note 133 (describing grant of perpetual cultural access easement in 2019).

[176]FIRST LIGHT, *supra* note 135.

[177]AMC MAINE WOODS INITIATIVE, BROWN ASH PERMIT (Sept. 1, 2021) (on file with author).

[178]*Id.* [177]

[179]*Facilitating Wabanaki Access—2022 Maine Land Conservation Conference,* MAINE LAND TRUST NETWORK, at 27:12 (June 23, 2022), https://www.mltn.org/video/facilitating-wabanaki-access/ [https://perma.cc/P8CD-EUW7].

[180]*See supra* notes 108–111 and accompanying text. Like an easement, even if a harvest permit states that it is not alienable or devisable, that factor alone does not render it a license. *See* Fairbrother v. Adams, 135 Vt. 428, 430–31 (1977) (finding that profits are devisable and assignable "unless expressly reserved"); *supra* notes 166-173 and accompanying text (distinguishing easement from license).

[181]BRUCE & ELY, *supra* note 110, §§ 1:9–1:11.

profits.[182] The brown ash tree harvest permit described above is likely a profit because brown ash trees are not grown for commercial purposes on the parcel of land. However, this would be analyzed on a case-by-case basis, and a harvest permit could be found to be a license under some circumstances.

3. Licenses and Contracts

Existing literature acknowledges the potential use of licenses and contracts to promote Indigenous cultural land access but provides few examples in practice.[183] This Part describes two examples: land invitations and private land co-management agreements. Land invitations—a type of license—may be appropriate as land trusts and Indigenous peoples are beginning to form a relationship around the land. However, they are unlikely to provide durable, long-term cultural access rights to Indigenous peoples. As described above, licenses in land provide the licensee a privilege to enter the land of the licensor, but that privilege is freely revocable at the will of the licensor.[184] On the other hand, private land co-management agreements may be most appropriate when land trusts and Indigenous peoples are both taking on land management and stewardship responsibilities and seek to share decision making over the parcel of land. A co-management agreement may include access to the land for land stewardship and cultural activities.

a. Land Invitations

Land invitations have emerged as a novel tool for Indigenous cultural access to private lands. While the literature has described informal, handshake agreements between landowners and Indigenous peoples for access to private land, a land invitation is a more formal statement issued to grant land access, rather than informal access for a few individual Indigenous people or neighbors.[185] A land invitation is a short statement issued by a land trust or landowner, typically posted in a public forum or on the internet, that invites a specific group of Indigenous peoples or a Tribe to access the land for cultural activities. There are at least two examples of land invitations in practice—one issued by Vermont Land Trust (VLT) to Abenaki people, and one issued by the landowners of a farm in Maine to the Passamaquoddy Nation.[186] In addition,

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[182] *Id.* [110] § 1:13. At common law, plants are grouped in two categories: those that grow without human assistance and are relatively permanent features of the land (*fructus naturales*) and those that are grown for annual harvests with human intervention (*fructus industriales*). *Id.* [110] This distinction at common law may not align with Indigenous peoples' conceptions of the relationship between humans and the natural world. *See* Robin Kimmerer, *supra* note 47.

[183] Wood & O'Brien, *supra* note 25, at 537 (mentioning the idea of licenses for Indigenous use, including temporary access for Native ceremonies and trail easements for access); MIDDLETON MANNING, *supra* note 19, at 4, 131–34 (2011) (describing one case study of a lease and agreements between the Tsi-Akim Maidu Tribe and the Nevada County Land Trust, including that they "are also working to create an agreement so that [T]ribal members can have access to other . . . properties with cultural resources"); SEEDS OF LAND RETURN, SUSTAINABLE ECON. L. CTR., https://www.theselc.org/seeds_of_land_return [https://perma.cc/PUY6-6T5L] (outlining different contract and property law tools for land return).

[184] *See supra* Part 0 (describing license-easement distinction).

[185] *See* Wood & Welcker, *supra* note 25, at 401–02; Wood & O'Brien, *supra* note 25, at 512; MIDDLETON MANNING, *supra* note 19, at xix, 107.

[186] Letter from Peter Forbes, First Light, to Donald G. Soctomah, Historic Preservation Officer of the Passamaquoddy Tribe (Apr. 15, 2020), https://dawnlandreturn.org/sites/default/files/documents/invitation-to-passamaquoddy-nation.fin-2.pdf [https://perma.cc/7NRR-BHAZ]; *Vermont Land Trust - Abenaki Land Access Agreement,* ATOWI, https://www.atowi.org/blog/vermont-land-trust-abenaki-land-access-agreement [https://perma.cc/BV7V-72CA].

Vermont Family Forests has developed a database of private landowners in Vermont that invite Abenaki people to access their land.[187]

At their most basic, land invitations include a list or map of the properties covered by the invitation and language expressing an invitation to use the property. For example, the VLT invitation states that "Abenaki people are trusted and respected caretakers who do not need any specific permission from VLT to use these lands for community and cultural purposes, and for gathering food, medicine, and materials."[188] Akin to cultural access easements and agreements, land invitations may include restrictions on access, such as hours limitations on entering the property (e.g., daytime use only), parking locations, permitted species of plants to harvest or use, types of plants and animals found on the property, important geographic features (e.g., lakes or streams), and specified locations for camping or holding gatherings.[189] Land invitations can also include notice requirements for access to the land or for larger gatherings or overnight use—especially if the Indigenous peoples are seeking undisturbed access to the land and privacy.[190] To further respect the privacy of Indigenous cultural land use, land invitations in practice have not asked for Indigenous peoples to provide any information about their activities on the land. The land invitation to the Passamaquoddy Nation states that "[y]ou do not need to explain why you are using this land. You can access this place anytime you like at any time of the year."[191]

Land invitations may be appealing to both land trusts and Indigenous peoples because they are less legalistic and may take less time to draft than cultural access easements or agreements, conservation easements, or harvest permits. However, land invitations are licenses and, as such, are less durable because landowners are free to revoke them at any time. Another drawback is the lack of transparency in the invitation: thus far, land invitations in practice have not clearly stated that—legally speaking—the invitation could be revoked at any time. This is not to say the land trust or landowner will revoke the license—especially for land trusts and landowners that are committed to supporting Indigenous peoples' land access and stewardship. However, it is within their legal rights to do so.[192]

b. Private Land Co-Management

Land trusts and Indigenous peoples have a history of informal collaboration on private land management and land access, but have more recently sought to formally co-manage private lands, drawing inspiration from Tribal co-management of federal land.[193] Private co-management agreements may be appropriate where Indigenous peoples are interested in shaping the long-term stewardship of the land without holding title to the land or where a parcel of private land is on the homelands of two or more Indigenous peoples or Tribes

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[187]VERMONT FAMILY FORESTS, *Abenaki Land Access Project*, https://familyforests.org/abenaki-land-access-project/ [https://perma.cc/P3C8-7YUC].
[188]ATOWI, *supra* note 186.
[189]*See* Letter from Peter Forbes, *supra* note 186; VERMONT FAMILY FORESTS, *supra* note 187.
[190]*See* Letter from Peter Forbes, *supra* note 186 ("We would like to know of day use 24 hours ahead in order to notify the caretaker and others of us who may be there then, and schedule overnight use with one week's notice. We want to know when you would like to be there so we can adjust our use to provide your Tribal activities with undisturbed use.").
[191]*Id.* [186]
[192]*See supra* notes 158–165 and accompanying text (describing licenses).
[193]*See* Press Release, *BLM, Forest Service and Five Tribes of the Bears Ears Commission Commit to Historic Co-management of Bears Ears National Monument,* U.S. DEP'T OF THE INTERIOR (June 21, 2022), https://www.doi.gov/pressreleases/blm-forest-service-and-five-tribes-bears-ears-commission-commit-historic-co-management [https://perma.cc/Z5DM-XUEY]; *see also* THE NATURE CONSERVANCY MAINE, *supra* note 155, at 10 (expressing interest in co-managing private lands with Wabanaki people).

with relationships with and cultural stewardship responsibilities to the land.[194] For one recent example, the Big Sur Land Trust and the Esselen Tribe of Monterey County are in pre-planning stages for their first co-management agreement for the 5,000-acre Baker Ranch in Carmel Valley, California.[195] This is an early example of private co-management that "mirror[s] the types of partnerships emerging on the sovereign level between the federal government and Tribes."[196] This co-management agreement is not solely in the context of a specific conservation easement, but on the parcel of land as a whole.[197]

II. DECOLONIZATION IN PRIVATE LAW TOOLS

This Part argues that returning private land and land access to Indigenous peoples may be a means of furthering decolonization. Drawing on existing literature on decolonization, this Part begins by highlighting the role of land return and land access in decolonization, and describing how private law tools for land return have the potential to advance a stewardship model of property law. Next, the Part outlines five guidelines for land trusts seeking to return land and land access to Indigenous peoples in line with principles of decolonization. The decolonization framework reveals how some of the private law tools identified in Part I are more consistent with decolonization than others—and that land trusts should seek out opportunities to return land in fee simple without restrictions to Tribes and Native land trusts. However, private law tools other than unrestricted land return still have potential to promote decolonization and include terms that reflect decolonization principles.

A. Decolonization and a Stewardship Model of Property

Decolonization is broadly defined as the process of dismantling colonialism and its forms of domination, including through political, social, and cultural processes.[198] Settler colonialism—one form of colonialism—is characterized by settlers invading an area of land, attempting to subjugate the Indigenous peoples of that land, and exploiting that land and its peoples, all while establishing territorial sovereignty and seeking to make that land their home.[199]

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[194]Private co-management agreements could also include land co-ownership between a land trust and Tribe(s) or Native land trust(s). *See, e.g.*, Jack Herrera, *Native Tribes are Getting a Slice of their Land Back — Under the Condition that they Preserve it*, L.A. TIMES (Jan. 3, 2023, 3:00 AM), https://www.latimes.com/world-nation/story/2024-01-03/these-tribes-are-getting-a-slice-of-their-land-back-under-the-condition-that-they-preserve-it [https://perma.cc/96N7-P3MQ].

[195]James Herrera, *BSLT, Esselen Tribe of Monterey County to Pursue Co-Management of Basin Ranch*, MONTEREY HERALD (Nov. 17, 2023, 2:14 PM), https://www.montereyherald.com/2023/11/17/bslt-esselen-tribe-of-monterey-county-to-pursue-co-management-of-basin-ranch/ [https://perma.cc/6J6F-J7ZX].

[196]Wood & O'Brien, *supra* note 25, at 527, 531.

[197]Tribes and land trusts can also be co-grantees of cultural conservation easements and agree to collaborate on maintaining and enforcing conservation easements. *See* Fred, *supra* note 118.

[198]Eve Tuck & K. Wayne Yang, *Decolonization is Not a Metaphor*, 1 DECOLONIZATION: INDIGENEITY, EDUC. & SOC'Y 1, 1, 7 (2012); *see* Erich W. Steinman, *Decolonization Not Inclusion: Indigenous Resistance to American Settler Colonialism,* 2 SOC'Y RACE & ETHNICITY 219, 221 (2016); Poka Laenui, *Processes of Decolonization*, *in* RECLAIMING INDIGENOUS VOICE AND VISION 150 (Marie A. Battiste ed., 2000); Aimee Carrillo Rowe & Eve Tuck, *Settler Colonialism and Cultural Studies: Ongoing Settlement, Cultural Production, and Resistance*, 17 CULTURAL STUD. CRITICAL METHODOLOGIES 3 (2017); Raymond F. Betts, *Decolonization: A Brief History of the Word*, *in* BEYOND EMPIRE AND NATION 23 (Els Bogaerts & Remco Raben eds., 2012).

[199]*See* Tuck & Yang, *supra* note 198, at 4–5; Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RSCH. 387, 388–91 (2006) (describing that "[s]ettler colonialism destroys to replace"); Lindsey Schneider, *"Land Back" Beyond Repatriation: Restoring Indigenous Land Relationships*, *in* THE ROUTLEDGE COMPANION TO GENDER AND THE AMERICAN WEST 452, 455, 460–61 (Susan Bernardin ed., 2022).

Settler colonialism not only "strives for the dissolution of [N]ative societies" but also "erects a new colonial society on the expropriated land base," rendering settler colonialism "a structure[,] not an event."[200] Land is required for the project of settler colonialism.[201] Settlers remake the land that they seize "into property" and "human relationships to land are restricted to the relationship of the owner to his property."[202] Including through privatization of property, settler colonialism violently disrupts Indigenous relationships with the land.[203] In the United States, the settler colonial project has taken place on multiple scales, from the national—including land purchases, federal policies of removal of Indigenous peoples, and Supreme Court decisions—to the local—white settlers seizing and privatizing Indigenous lands even before the United States could claim territorial sovereignty over them.[204]

Decolonization in the context of settler colonialism identifies land, and returning land, as the "specific, irreducible element" of the decolonization process.[205] In their seminal piece, *Decolonization is Not a Metaphor*, Eve Tuck and K. Wayne Yang argue that "decolonization in the settler colonial context must involve the repatriation of land simultaneous to the recognition of how land and relations to land have always already been differently understood and enacted."[206] Decolonization includes "the repatriation of Indigenous land *and*

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[200]Wolfe, *supra* note 199, at 388.

[201]Tuck & Yang, *supra* note 198, at 5; Wolfe, *supra* note 199, at 388. Some scholars of abolition have critiqued Tuck & Yang's framework, arguing that centering land as what is "most valuable, contested, required," reduces slavery to "forced labor of stolen peoples on stolen land." Tapji Garba & Sara-Maria Sorentino, *Slavery is a Metaphor: A Critical Commentary on Eve Tuck and K. Wayne Yang's "Decolonization is not a Metaphor,"* 52 ANTIPODE 764, 767 (2020). Other scholars have sought "understandings and practices that bridge decolonisation and abolition" and argued that only "[w]hen we frame Black futures in opposition to Native claims to sovereignty, we arrive at a literal and metaphorical impasse." Andrew Curley et al., *Decolonisation is a Political Project: Overcoming Impasses between Indigenous Sovereignty and Abolition*, 54 ANTIPODE 1043, 1044 (2022); NDN COLLECTIVE, *supra* note 3 (seeking a "future where Black reparations and Indigenous LANDBACK co-exist" and "[w]here BIPOC collective liberation is at the core"); Pieratos, Manning & Tilsen, *supra* note 4, at 56–57. For more on the "relationships between the concept of race and property in Indian country," see Carla D. Pratt, *Indianness as Property*, 105 B.U. L. REV. 311, 314 (2025).

[202]Tuck & Yang, *supra* note 198, at 5; *see also* Beth Rose Middleton, *Jahát Jatítotòdom*: Toward an Indigenous Political Ecology*, *in* THE INTERNATIONAL HANDBOOK OF POLITICAL ECOLOGY 561, 561–562, 564 (Raymond L. Bryant ed., 2015); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1709 (1993).

[203]*See* Kyle Whyte, *Settler Colonialism, Ecology, and Environmental Injustice*, 9 ENV'T & SOC'Y 127, 127 (2018) (summarizing how scholars and activists describe settler colonialism as "violence that disrupts human relationships with the environment").

[204]*See* Park, *supra* note 27, at 1523–27 (citing COLIN G. CALLOWAY, THE INDIAN WORLD OF GEORGE WASHINGTON: THE FIRST PRESIDENT, THE FIRST AMERICANS, AND THE BIRTH OF THE NATION 286 (2018) (describing that "the U.S. government absorbed frontier settlers' takeovers of Indian land; sanctioned, turned a blind eye to, or lamented their killing of Indian people; and invoked on-the-ground-'settler sovereignty' to exert jurisdiction and control over Indian [C]ountry")); Johnson v. M'Intosh, 21 U.S. at 557–58; Indian Removal Act of 1830, ch. 148, 4 Stat. 411 (1839); Maggie Blackhawk, *Federal Indian Law as Paradigm within Public Law*, 132 HARV. L. REV. 1787, 1819 (2019) (describing doctrine of discovery).

[205]Wolfe, *supra* note 199, at 388; Tuck & Yang, *supra* note 198, at 7, 21 (arguing that, although the "details are not fixed or agreed upon," decolonization "specifically requires the repatriation of Indigenous land and life").

[206]Tuck & Yang, *supra* note 198, at 7. Some Indigenous persons and scholars use the term "rematriation" to capture land return that is "grounded in Indigenous law." Robin R. R. Gray, *Rematriation: Ts'msyen Law, Rights of Relationality, and Protocols of Return,* 9 NATIVE AM. & INDIGENOUS STUD. 1, 3 (2022). Gray describes how "colonial configurations of ownership haunt repatriation processes, foregrounding a rematriation paradigm yields more decolonial potential than a typical repatriation paradigm." *Id.* [206]. Gray further indicates that "repatriation" is a "legal concept rife with colonial baggage that develops from Euro-Western ideas about nationhood, personhood, property, and ownership" and "[i]t is just one cog in the wheel of settler law that operationalizes the 'possessive logics' that underpin 'patriarchal white sovereignty." *Id.* [206] at 16 (citing AILEEN

life," including the "full restoration of Indigenous land relationships," Indigenous sovereignty, Indigenous self-determination, and Indigenous dispute resolution.[207] The Land Back movement is closely related to decolonization processes. Movement organizers have described how "Land Back is really a synonym for decolonization and dismantling white supremacy" and that "Land Back needs to happen so that all other aspects of Indigenous livelihood can return with it."[208]

While scholars tend to agree that returning land is an essential element of decolonization in the settler colonial context, they have not settled on the role of private law in this process. As Indigenous scholar Lindsey Schneider questions, "how can Indigenous peoples reclaim land without reinforcing the legitimacy of western systems of title and property, thereby validating legal principles of 'Discovery' and the existence of the settler state?"[209] Can decolonization employ private law tools while simultaneously "reject[ing] Western frameworks by reaffirming the existence of much longer-standing [I]ndigenous relationships with the land?"[210] Western property law has played a central role in Indigenous land dispossession and slavery and, conversely, dispossession and slavery are foundational to Western property law.[211] Furthermore, while there is a great deal of variation among Indigenous peoples and cultures, many Indigenous peoples have relationships with the land where the land is seen as a living relative, not something that can be owned or possessed in the Western property law sense.[212] Several authors have pointed out that the use of property law tools, including easements, may risk commodifying Indigenous peoples' sacred and cultural

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MORETON-ROBINSON, THE WHITE POSSESSIVE: PROPERTY, POWER AND INDIGENOUS SOVEREIGNTY 192 (2015); *see also* Schneider, *supra* note 199, at 455 (describing how there is "justifiable doubt as to whether 'repatriation' (as Tuck and Yang put it) is the best way to talk about the return of the land" and that "[s]ome have called for 'rematriation' of land instead, as a means of recognizing the traditional role of women in Indigenous leadership and land relations").

[207]Tuck & Yang, *supra* note 198, at 21 (emphasis added); Schneider, *supra* note 199, at 453; Middleton Manning, *supra* note 202, at 573; *see also* C.F. BLACK, THE LAND IS THE SOURCE OF THE LAW 115 (2011); Leonardo Figueroa Helland, *Indigenous Pathways Beyond the "Anthropocene": Biocultural Climate Justice through Decolonization and Land Rematriation*, 30 N.Y.U. ENV'T L.J. 347, 347–49 (2022).

[208]Pieratos, Manning & Tilsen, *supra* note 3, at 51.

[209]Schneider, *supra* note 199, at 453; *see also* Orsi, *supra* note 19 ("[When the] framework of private property ownership is so deeply embedded in our culture [then h]ow do we prevent the logic of control, domination, and extraction from recapturing this land and those in relationship to it?"); Figueroa Helland, *supra* note 207, at 400–03, 406–07; *see also* Mohit Mookim et al., *Decolonization and the Law*, SUSTAINABLE ECON. L. CTR. (Oct. 4, 2024), https://www.theselc.org/decolonization_and_the_law ("How do you decolonize law? Isn't 'law' as we know it inextricably linked with colonization?").

[210]Middleton Manning, *supra* note 202, at 571.

[211]*See* Johnson v. M'Intosh, 21 U.S. 543 (1823); K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 YALE L .J. 1062, 1091–92 (2022); Harris, *supra* note 202, at 1721; Munshi, *supra* note 13; Laura Waldman, *No Settled Law on Settled Land: Legal Struggles for Native American Land and Sovereignty Rights,* 26 CUNY L. REV. 220, 223–29 (2023); Tuck & Yang, *supra* note 198, at 12; Joseph Blocher & Mitu Gulati, *Navassa: Property, Sovereignty, and the Law of the Territories*, 131 YALE L.J. 2390, 2397–98 (2022) (describing how "[f]or generations, Western powers used private-law tools to exploit and profit from their colonies").

[212]*See generally* BLACK, *supra* note 207; Winona LaDuke, ALL OUR RELATIONS: NATIVE STRUGGLES FOR LAND AND LIFE 2 (1999); Angela R. Riley, *Before Mine!: Indigenous Property Rights for Jagenagenon*, 136 HARV. L. REV. 2074, 2080–85 (2023) (reviewing MICHAEL HELLER & JAMES SALZMAN, MINE!: HOW THE HIDDEN RULES OF OWNERSHIP CONTROL OUR LIVES (2021)); Carpenter, *supra* note 111, at 1142 (describing how a "property term like 'easement' is never going to express the complex and spiritual nature of Indians' relationships with sacred places"); Carpenter, Katyal & Riley, *supra* note 27, at 1027, 1112–15 (describing how it is "it is difficult to use traditional, exclusionary property concepts to describe the relationship between [I]ndigenous peoples and the earth, due to their reluctance to characterize it in terms of ownership and dominion" and quoting a Cherokee litigant in a lawsuit about a sacred site, describing how "when we speak of land, we are not speaking of property, territory, or even a piece of ground upon which our houses sit and our crops are grown. We are speaking of something truly sacred").

sites.[213] The negotiation of easements and licenses for Indigenous land access may also risk "reinscribing the power of settler-colonial legal paradigms of negotiation" through contract and property law.[214]

Critiques of using private law for decolonization are especially prescient in light of the General Allotment Act of 1887. This Act privatized large tracts of Indigenous land and led to Indigenous peoples losing 90 million acres of land, two-thirds of their landholdings at the start of allotment.[215] Kenneth Bobroff has described that "[b]y statutorily imposing a static version of Anglo-American property and inheritance law on Indian lands," the Act "destroyed [T]ribes' power to adapt their property laws to meet new social, economic, political, and ecological conditions" and "froze Indian property law in place."[216]

Acknowledging the critiques and history of private law, this Article cautiously maintains that private law tools can play a role in decolonization and be shaped by decolonization principles. Decolonization has two component and interwoven parts: (1) repatriation or rematriation of land and (2) "simultaneous . . . recognition of how land and relations to land have always already been differently understood and enacted."[217] The private law tools described in this Article can be used in the near term to meet the first component of decolonization—returning land and land access to Indigenous peoples in practice.[218] As described in Subpart C within this Part, decolonization principles can further shape the use and forms of private law tools for Indigenous land return and land access. However, using private law for land return can also begin to reach the second piece of decolonization—"recognition of how land and relations to land have always already been differently understood and enacted."[219] This Article argues that private law tools for land return—when implemented in line with decolonization principles—are one way to "reaffirm[] the existence of much longer-standing [I]ndigenous relationships with the land" while resisting traditional, Western property logics of possession and exclusion, thereby avoiding merely "reinforcing the legitimacy of western systems of title and property."[220] In the process, use of these private law tools can begin to chip away at the colonial system of property law from within and move toward a stewardship model of property.

In practice—as this research highlights—land trusts and Indigenous peoples are already using private law tools to return land to Indigenous peoples and promote Indigenous cultural access to and stewardship of formerly inaccessible areas of private land.[221] This aligns with existing research

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[213]*See* Carpenter, *supra* note 111, at 1098–99, 1141 (describing how if Indigenous "interests in sacred sites become 'property,' they can be quantified and reduced to monetary damages" but acknowledging that a court will grant injunctive relief to prevent "irreparable harm" to an easement right, not just monetary damages); Jessica Owley, *Cultural heritage conservation easements: Heritage protection with property law tools*, 49 LAND USE POL'Y 177, 178, 180 (2015).

[214]*See, e.g.*, Jane Anderson, *Negotiating Who "Owns" Penobscot Culture*, 91 ANTHRO. Q. 267, 287 (1991).

[215]*See* Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1557, 1561 (2001); Whyte, *supra* note 203, at 135; Jessica A. Shoemaker, *Complexity's Shadow: American Indian Property, Sovereignty, and the Future,* 115 MICH. L. REV. 487, 492-93 (2017); Kristen A. Carpenter, *Contextualizing the Losses of Allotment Through Literature*, 82 N.D. L. REV. 605, 622–23 (2006) (describing loss of cultural practices due to allotment).

[216]Bobroff, *supra* note 215, at 1563. Ironically, at the time, the leadership for the passage of the Act sympathized with Indigenous peoples and some believed that privatizing the land would support Indigenous prosperity and the assimilation of Indigenous peoples into American culture. *See id.* [215] at 1560–62; Canby, *supra* note 51, at 24.

[217]Tuck & Yang, *supra* note 198, at 7. *See supra* notes 205–208 and accompanying text.

[218]Of course, it is for Tribes and Indigenous peoples to decide if they wish to engage with private law tools for land return and land access and which, if any, of these tools align with their conception of decolonization.

[219]Tuck & Yang, *supra* note 198, at 7. *See supra* notes 205–208 and accompanying text.

[220]Schneider, *supra* note 199, at 453; *see* Middleton Manning, *supra* note 202, at 571.

[221]*See supra* Part I.

emphasizing how Indigenous peoples "increasingly utilize property law to vindicate their cultural and human rights, as well as to protect their property interests."[222] This Article agrees that, in the near term, return of land in fee title can be used to "safeguard . . . vital cultural resources" and "without property law, Indians remain unacceptably vulnerable to continuing expropriation and cultural devastation."[223] Returning fee title to Indigenous peoples provides full access to the land, allows Indigenous peoples to protect the land from alteration, interference, or oversight by non-Indigenous people, and may support ceremonies and forming land relationships. Even cultural access easements permit the Native land trust or Tribal holder of the easement to prevent interference from the landowner or third parties with the cultural access and use rights in the easement.[224]

In addition to safeguarding cultural and sacred sites, the private law tools described in this Article can also open up near-term opportunities for Indigenous peoples to cultivate land relationships on land that is currently privately held and inaccessible, in line with decolonization aims to restore Indigenous land relationships.[225] Return of unrestricted fee title to a Tribe or Native land trust may support Indigenous peoples developing relationships with the land without interference or oversight from non-Indigenous people. Even though fee title is a Western property law tool that fails to capture Indigenous land relationships, a Tribe or Native land trust holding fee title may still open opportunities for Indigenous peoples to access land and reinscribe non-Western forms of care, relationship, and law with that land.[226] The Western tools of property ownership and transfer do not capture Indigenous relationships with the land, but at least they can return the land to Indigenous hands.[227] Similarly, perpetual cultural access easements are a Western property law tool that cannot—and should not try to—fully encompass Indigenous land relationships.[228] However, these easements are a durable, perpetual right to not only access private land for cultural activities, but also prevent others from interfering with Indigenous cultural activities, including those that reflect Indigenous duties and responsibilities to the land.[229] To eschew private law tools completely would foreclose these existing avenues to establish durable land access and stewardship—which, as this Article highlights, numerous Tribes and Indigenous peoples are already using in practice.[230] Mashpee Wampanoag community leader and Native Land Conservancy founder Ramona Peters described the benefits of a cultural access easement for her and her people, indicating the possibility for cultural access easements to support Indigenous land relationships:

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[222]Carpenter, Katyal & Riley, *supra* note 27, at 1125.
[223]*Id.* [27]
[224]*See supra* note 111 and accompanying text.
[225]*See supra* notes 206–207 and accompanying text (describing decolonization as restoration of Indigenous land and land relationships).
[226]*See, e.g.*, BLACK, *supra* note 207, at 109–18 (describing Indigenous peoples "reactivating and reweaving the law slumbering under colonialism" including "multi-layered relationships with the land, kinship and law"); Carpenter, Katyal & Riley, *supra* note 27, at 1067 (describing how a core principle at the heart of cultural stewardship of land is "the exercise of rights and obligations independent of title").
[227]*See, supra* note 212 and accompanying text.
[228]*See* Carpenter, Katyal & Riley, *supra* note 27, at 1115 (citing PETER MATHIESSEN, INDIAN COUNTRY 119 (1984) (quoting Jimmie Durham, a Western Cherokee man stating "when we speak of land, we are not speaking of property, territory . . . [w]e are speaking of something truly sacred"); Rebecca Tsosie, *Land, Culture, and Community: Reflections on Native Sovereignty and Property in America*, 34 IND. L. REV. 1291, 1300–02 (2001); Angela R. Riley, *The Ascension of Indigenous Cultural Property Law*, 121 MICH. L. REV. 75, 87 (2022).
[229]*See supra* Part 0 (discussing rights of easement holder).
[230]*See supra* Part I.B. (describing existing land returns, cultural access easements, and other private law tools for land return).

> [It] is the closest expression of land reparation to [I]ndigenous people achieved without an actual transfer of deed. It offers assurance for us to safely access areas of our ancestral homelands to exercise spiritual and cultural practices. Respect for our culture includes respect for our relationship with the earth, especially in areas where our ancestors prayed, danced, toiled, lived and were buried.[231]

Private law tools can be one means to support returning Indigenous lands to Indigenous hands and Indigenous stewardship and care.

In addition to returning land and land access, private law tools for land return can support the second part of decolonization—"recognition of how land and relations to land have always already been differently understood and enacted."[232] In the process of transferring land or land access, the parties can establish that the transfer is a recognition of Indigenous land stewardship and land relationships that exist before, during, and after property tools like title and easements. Broadly, using private law for land return has the potential to challenge traditional, Western notions of property ownership—and its focus on control and extraction—and move toward a stewardship model of property.[233]

Traditional conceptions of Western property law focus on ownership of land and the individual property owner: their right to exclude and their ability to alienate and exploit the land—even to the point of destruction—to generate economic value.[234] Richard Pipes described how "[p]roperty refers to the right of the owner or owners, formally acknowledged by public authority, both to exploit assets to the exclusion of everyone else and to dispose of them by sale or otherwise."[235] The concept of ownership is central to the colonial project—where land becomes property in the hands of the settler and "human relationships to land are restricted to the relationship of *the owner* to his property."[236] This restriction of land relationships facilitates exchange and alienation. As Brenna Bhandar describes, "commoditization of land required a system of ownership that would facilitate exchange without the bothersome encumbrances of the past and of preexisting relationships to the land, and with the maximum possible amount of security for owners."[237] Indigenous land dispossession and colonization is central to traditional, Western conceptions of property—and traditional, Western conceptions of property do not respect enduring Indigenous land relationships and responsibilities.

Even the bundle of rights or sticks model of property falls short of a model that reflects and respects Indigenous land relationships and stewardship. The bundle of sticks model "characterizes property as a bundle of entitlements" where "the legal power to alienate [a] legal interest to another" and "legal privileges of entering on the land, using the land, [and] harming the land" are possible sticks in the bundle.[238] As Craig Arnold points out, "the bundle of rights

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[231]NATIVE LAND CONSERVANCY, *supra* note 135; *see also infra* note 263.

[232]Tuck & Yang, *supra* note 198, at 7. *See supra* notes 205–208 and accompanying text.

[233]*See* Schneider, *supra* note 199, at 460 (describing how decolonization goes beyond returning land and "also means settler infrastructure, and heteropatriarchal systems of relating to the land through control and extraction, are also dismantled").

[234]*See, e.g.*, Carpenter, Katyal & Riley, *supra* note 27, at 1026, 1065–66; *see generally* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (4th ed. 1992).

[235]RICHARD PIPES, PROPERTY AND FREEDOM xv (1999).

[236]Tuck & Yang, *supra* note 198, at 5 (emphasis added); *see also* Middleton, *supra* note 202, at 561, 561–62, 564; Harris, *supra* note 202, at 1709.

[237]BRENNA BHANDAR, COLONIAL LIVES OF PROPERTY: LAW, LAND, AND RACIAL REGIMES OF OWNERSHIP 101 (2018).

[238]*See* Anna di Robilant, *Property: A Bundle of Sticks or a Tree?*, 66 VAND. L. REV. 869, 871, 879 (2013) (summarizing and citing Hohfeld's essays on "bundle of sticks"); Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning,* 26 YALE L.J. 710, 746 (1917); Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE

concept of property typically does not encourage stewardship relationships between people and nature as being inherent in property interests."[239] He further describes the "alienation from self, others, work, and nature that can be found in the bundle of rights way of thinking about property."[240] Kristen Carpenter, Sonia Katyal, and Angela Riley contend that the bundle of sticks model is closer to a stewardship model than the traditional, Western model of property, but could be better conceived as a "web of interests" which they define as the "set of interconnections between people and properties."[241] While the "web of interests" metaphor is more focused on relationships than the traditional, Western model of property, this Article homes in on the stewardship model of property as an analytical framework because it centers the duties of care and responsibility in relationship.[242]

In contrast to property ownership, the stewardship model of property may better align with Indigenous peoples' relationships and responsibilities to and with land as a living entity.[243] Carpenter, Katyal, and Riley describe stewardship as a "duty of care or the duty of loyalty to something that one does not own" and how stewardship "concepts are often expressed in culturally specific terms that convey the interdependence between the [T]ribe and its environment and that underscore the fiduciary obligation felt by many [T]ribes toward their natural resources."[244] They cite to the Navajo Nation Code, which provides one conception of the duty of care to the land as "the sacred obligation and duty to respect, preserve and protect all that was provided[,] for we were designated as the steward for these relatives . . . ."[245] Sherally Munshi describes what "settler colonialism has taken from Indigenous peoples" is "not an already-objectified property interest in land, but a relationship to the land that is not reducible to commodification or ownership."[246] Munshi highlights how "Mohawk legal scholar Patricia Monture-Angus has explained that, although Indigenous peoples 'maintain a close relationship with the land,' their assertion of sovereignty over stolen lands 'is not about control of land'; instead, the 'request to have our sovereignty respected is really a request to be responsible.'"[247] Kyle Whyte

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L.J. 16, 24–53 (1913)); CAROL M. ROSE, PROPERTY & PERSUASION: ESSAYS ON THE HISTORY, THEORY AND RHETORIC OF OWNERSHIP 278–85 (1994).

[239]Craig Anthony Arnold, The *Reconstitution of Property: Property as a Web of Interests*, 26 HARV. ENV'T L. REV. 281, 300 (2002).

[240]*Id.* [239].

[241]Carpenter, Katyal & Riley, *supra* note 27, at 1079–81 (citing *id.* [239]).

[242]While Arnold identifies how a duty of care and responsibility to the land could be integral to the relationships in the web of interests, such duties are not definitional to the web of interests metaphor. *See* Arnold, *supra* note 239, at 333 (defining the web of interests as a "set of interconnections among persons, groups, and entities each with some stake in an identifiable (but either tangible or intangible) object, which is at the center of the web"); *see also id.* [239] at 352 (describing how the web of interests metaphor can illuminate how the "owner has duties of care to the object itself and the natural and human environment").

[243]Carpenter, Katyal & Riley, *supra* note 27, at 1116 (summarizing how "[t]here are of course exceptions to this general principle, but an understanding of land—and sacred sites in particular—as a living thing that must be cared for and integrated into the larger balance of life is a distinctly [I]ndigenous viewpoint"); ROBERT NICHOLS, THEFT IS PROPERTY! 85 (2020) (quoting Susan Hill, a Mohawk woman, stating "I do not believe that it is only by chance that we identify ourselves in relationship to the land we come from, the land we belong to. The land—the territory—defines who we are and how we relate to the rest of the world").

[244]Carpenter, Katyal & Riley, *supra* note 27, at 1068–69. *See* Arnold, *supra* note 239, at 305.

[245]NAVAJO NATION CODE tit. I, § 205(D) (2005). *See also* Carpenter, Katyal & Riley, *supra* note 27, at 1068 (describing how the "belief that humans maintain duties to—rather than dominion over—the earth and its Creator is common among [I]ndigenous peoples").

[246]Munshi, *supra* note 13, at 1039.

[247]*Id.* [246] (citing NICHOLS, *supra* note 243, at 29). *See also id.* [246] (describing how "Michi Saagiig Nishnaabeg scholar Leanne Betasamosake Simpson has described the natural world as a 'compassionate web of interdependent relationships'") (citing Leanne Betasamosake Simpson, *Land as Pedagogy:*

similarly describes the "ancient Anishinaabe reciprocal responsibility with water and wild rice" including "nutritional and ceremonial uses humans gain from rice to the human stewardship and protection of rice habitats that rice gains from humans."[248] Whyte characterizes how "Anishinaabe peoples today . . . seek to maintain relationships of responsibility with wild rice and water for the sake of their identities, nutrition and environmental health, among other purposes," and "[t]his is a persisting responsibility, or one that societies seek to continue into the future."[249]

Congruent with these reciprocal relationships and responsibilities, stewardship "requires contemplation of natural resources as deserving of respect independent of their utility to human interests, and posits that their survival should be facilitated and that their worth exceeds their market-based monetary value," and "[i]nstead of casting humans as rightfully dominant over nature, the stewardship view considers first what is best for the planet."[250]

Private law cannot fully encompass Indigenous relationships and stewardship duties to land as a living entity. However, when private law tools for land return and access are implemented in line with decolonization principles,[251] they have the potential to acknowledge the enduring stewardship and relationship of Indigenous peoples to and with the land and move toward a stewardship model of property. Indigenous land relationships and stewardship duties have existed since time immemorial.[252] But that does not mean these relationships and stewardship duties are unchanging or a fixed set of practices.[253] They are dynamic, responsive to local conditions, and vary between Indigenous peoples.[254] A stewardship model of property does not freeze Indigenous stewardship in place, but supports and acknowledges the evolving and responsive nature of land stewardship duties and relationships.

At their best, private law tools can support and recognize Indigenous land relationships and stewardship while relinquishing property logics of control, possessiveness, and ownership. As Munshi describes, for "beneficiaries of colonial capitalism, to rehearse commonality and to enter collectivity will require us to reimagine who we are, and to give something up . . . ."[255] Private law tools for land return are one forum for giving up not only land itself but the control and possession that is central to the traditional, Western ownership model of

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Nishnaabeg Intelligence and Rebellious Transformation, 3 DECOLONIZATION: INDIGENEITY, EDUC. & SOC'Y 1, 11 (2014)).

[248]Whyte, *supra* note 203, at 131.

[249]*Id.* [203].

[250]Carpenter, Katyal & Riley, *supra* note 27, at 1075–76, 1078 (citing Rhys H. Williams, *Constructing the Public Good: Social Movements and Cultural Resources*, 42 SOC. PROBS. 124, 138 (1995)). *See also* RAYMOND W.Y. KAO, STEWARDSHIP-BASED ECONOMICS 77–78 (2007) ("As inhabitants of Earth, we cannot claim ownership of the Earth or any part of it; we are its stewards. The Earth in its entirety has been bestowed on us for our care.").

[251]*See infra* Part II.C (describing five guidelines for land trusts seeking to use private law tools in line with decolonization principles).

[252]*See* Angelique EagleWoman, *Permanent Homelands through Treaties with the United States: Restoring Faith in the Tribal Nation-U.S. Relationship in Light of the McGirt Decision*, 47 MITCHELL HAMLINE L. REV. 640, 641 (2021) (describing how Indigenous peoples "have lived, governed, stewarded, and spiritually connected to places, territories, and homelands since time immemorial").

[253]*See* Riley, *supra* note 228, at 117–19 (describing how "[m]any [T]ribes go beyond the basic protections, conveying broader ethics of stewardship, sustainability, spiritual sustenance, and the importance of preserving sacred places for the well-being of future generations of the [T]ribe and the planet" but that "[t]hese priorities are written into the respective codes in nuanced and [T]ribe-specific ways"); Middleton, *supra* note 202, at 564, 571 (describing "site-specific [I]ndigenous frames" and "local stories connecting humans to particular places, and local human responsibilities to those places"); Whyte, *supra* note 203, at 131; BLACK, *supra* note 207, at 110–19.

[254]*See* Carpenter, Katyal & Riley, *supra* note 27, at 1083.

[255]Munshi, *supra* note 13, at 1096.

property.[256] This is the possibility in using private law for land return. However, the forms and terms of private law tools matter. They can make the difference between advancing a stewardship model of property that is supportive of Indigenous stewardship and relationships versus a more traditional ownership model of property with control and possessiveness maintained by non-Indigenous people, grounded in ownership over the land.[257]

In practice, there are examples of private law tools for land return and land access that acknowledge longstanding Indigenous stewardship and relationships as the basis for the use of the private law tool. In doing so, these tools move away from traditional models of property grounded in possession and ownership and toward a stewardship model of property. For example, in a recent land return to the Stockbridge-Munsee Mohican Community, a land trust indicated that the "return of Papscanee Island Preserve is an acknowledgment of the Stockbridge-Munsee Community's historical and sacred connection to this property" and "also a recognition of the terrible and bitter history of land dispossession that removed the Stockbridge-Munsee Community's ancestors from their homeland."[258] Bonney Hartley, Stockbridge-Munsee Mohican Community historic preservation manager described how "[t]his place is a cultural touchstone that we can continue to come back to, and directly communicate with and draw strength from our ancestors" and that "[o]ur land is intrinsic to who we are—it's our identity."[259] This land return was expressly motivated by recognizing and supporting enduring Indigenous land relationships and cultural stewardship.

For another example, in a recent cultural access easement, a land trust "recognize[d] that the land in our town holds significant cultural, historic, and natural value to the Indigenous people of Cape Cod."[260] The land trust granted the cultural access easement to ensure "access in perpetuity" with the hope that Indigenous peoples "will re-connect with these lands, lands that provided sustenance to them for thousands of years."[261] The land trust stated in the easement that "[f]or several hundred years we have walked different paths. It is our intent, through this agreement, that we walk together to renew the spirit of the land."[262] The Native land trust holding the cultural access easement indicated that they saw this cultural access easement as a restoration of access to support land relationships:

> Landowners adopting such an easement allow us to embrace and exercise our cultural heritage on lands that have significance and relevant locale. The easement empowers our allies to use their privilege to protect the sanctity of ceremony while [I]ndigenous people assemble. It is historically meaningful that people benefiting from the actions perpetrated by colonists welcome and protect the ceremonial presence of the original people of this continent . . . .[263]

These statements by both the Native and non-Native land trust discuss how supporting enduring Indigenous stewardship and relationship with the land is the core purpose of using the private law tool. They also underscore the relationships between Indigenous and non-Indigenous peoples on and with this

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[256]Sogorea Te' Land Trust has described how the term "rematriation" recognizes "the ways that [N]ative land stewardship . . . can undermine the patriarchal paradigm of capitalistic landownership and possession." Wires & LaRose, *supra* note 133, at 33.

[257]*But see infra* Part II.B and II.C.

[258]*The Greatest Gift: The Return of Papscanee Island*, OPEN SPACE INSTITUTE (June 7, 2022), https://www.openspaceinstitute.org/stories/the-greatest-gift-the-return-of-papscanee-island.

[259]*Id.* [258].

[260]Dennis Conservation Land Trust, *supra* note 142 at 5.

[261]*Id.* [142].

[262]*Id.* [142].

[263]*Id.* [142] at 6.

land as a living entity—an "authentic fellowship" where both parties "walk together to renew the spirit of the land."[264] This is an example of a type of private law instrument that is not "ignorant of and indifferent to Indigenous practices of land stewardship" but supportive of these practices.[265] Place by place, private law tools for land return have the potential to recognize ongoing Indigenous relationships with and stewardship of land as a living entity, ultimately "challeng[ing] ownership as the fundamental nexus of property interests."[266]

Overall, this analysis of the potential role of private law in decolonization is not to overstate it effectiveness. Public law and public lands are essential to decolonization. There are Indigenous sacred and cultural sites on public lands that have not been returned to Indigenous peoples and are not protected from degradation.[267] There are treaties between the United States and Tribes that remain unenforced, and there are Tribes that are refused federal recognition.[268] Private law is not a panacea, but it can serve as one tool to advance decolonization. Private law tools can be used to return land and land access to Indigenous peoples while pushing property law toward a stewardship model that recognizes Indigenous peoples' responsibilities to and relationships with the land. As such, this Article agrees that it "would be a mistake to completely reject the language and tools of property and private law" when they can "play a role in dismantling the colonial structure," by promoting decolonization both in practice and in the contours of property law itself.[269]

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[264]Dennis Conservation Land Trust, *supra* note 142, at 6. *See also* Stewarts Point Cultural Access Easement, *supra* note 141, at 1 (recognizing that "[t]he Tribe has used and occupied portions of the Property since time immemorial for cultural, traditional, spiritual, subsistence, and ceremonial activities").

[265]Munshi, *supra* note 13, at 1094.

[266]*See* Middleton, *supra* note 202, at 571 (reminding us that "[d]ecolonizing thus rejects Western frameworks by reaffirming the existence of much longer-standing [I]ndigenous relationships with the land, including re-asserting local names for places, local stories connecting humans to particular places, and local human responsibilities to those places"); *see also* Carpenter, Katyal & Riley, *supra* note 27, at 1065.

[267]*See* Carpenter, *supra* note 111, at 1061 (describing how "American Indians have been unsuccessful in challenging government actions that harm [T]ribal sacred sites located on federal public lands"); Apache Stronghold v. United States, 95 F.4th 608, 635 (9th Cir. 2024) (denying preliminary injunction to pause the transfer of the Oak Flat—a sacred site for the Apache people on federally owned land—to Resolution Copper for mining of copper ore).

[268]Pieratos, Manning & Tilsen, *supra* note 4, at 52 (describing how the Land Back movement was catalyzed after a protest at "President Trump's rally at Mount Rushmore in order to bring attention to the undelivered treaty obligation of the Fort Laramie Treaty of 1868 to return the Black Hills or the Paha Sapa to its original inhabitants"); *see generally* DUNBAR-ORTIZ, *supra* note 3; VINE DELORIA JR., BEHIND THE TRAIL OF BROKEN TREATIES: AN INDIAN DECLARATION OF INDEPENDENCE (1974) (describing instances of the United States breaking or failing to enforce treaties with Tribes). Although some Indigenous scholars critique or reject the federal recognition process, some Tribes have had their federal recognition denied or reversed. *See, e.g.*, GLEN SEAN COULTHARD, RED SKIN, WHITE MASKS: REJECTING THE COLONIAL POLITICS OF RECOGNITION (2014); Matthew L. M. Fletcher, *Politics, History, and Semantics: The Federal Recognition of Indian Tribes*, 82 N.D. L. REV. 487, 490 (2006) ("Federal recognition is the conquering culture's modest, even weak, attempt at apology."); *see* Rae Gould, *The Nipmuc Nation, Federal Acknowledgement, and a Case of Mistaken Identity*, *in* RECOGNITION, SOVEREIGNTY STRUGGLES, AND INDIGENOUS RIGHTS IN THE UNITED STATES 213 (Amy E. Den Ouden & Jean M. O'Brien eds. 2013) (describing how the Nipmuc did not receive federal recognition); Ruth Garby Torres, *How You See Us, Why You Don't: Connecticut's Public Policy to Terminate the Schaghticoke Indians*, *in* RECOGNITION, SOVEREIGNTY STRUGGLES, AND INDIGENOUS RIGHTS IN THE UNITED STATES 195 (Amy E. Den Ouden & Jean M. O'Brien eds. 2013) (describing the reversal of the Schaghticoke's federal recognition); Fletcher, *supra* note 268, at 491 ("[D]ozens, perhaps hundreds, of Indian [T]ribes—many of them state recognized—remain off the list of federally recognized [T]ribes. Are they fake Indian [T]ribes undeserving of federal recognition? . . . Are they simply and sadly extinct? No.").

[269]Blocher & Gulati, *supra* note 211, at 2390, 2419–20, 2447; *see* Carpenter, Katyal & Riley, *supra* note 27; *see also* Jessica A. Shoemaker, *Re-Placing Property*, 91 U. CHI. L. REV. 811, 890 (2024) (describing

B. Avoiding "Moves to Innocence"

Despite land return's importance for decolonization, non-Indigenous people and institutions find ways to avoid returning Indigenous lands to Indigenous peoples and relinquishing possession, ownership, and control of lands. Tuck and Yang describe how non-Indigenous people seek "easier paths to reconciliation," rather than actually returning land to address their role or complicity in colonization.[270] Non-Indigenous people make "moves to innocence" which are "excuses, distractions, and diversions from decolonization" that "relieve the settler of feelings of guilt or responsibility without giving up land or power or privilege, without having to change much at all."[271] These "moves to innocence" not only avoid returning land and power to Indigenous peoples but also "get in the way of more meaningful potential alliances."[272]

Of all the "moves to innocence" that Tuck and Yang describe, the "settler adoption fantasies" is most pertinent for land trusts seeking to collaborate with Indigenous peoples. Tuck and Yang describe how settler adoption fantasies "can mean the adoption of Indigenous practices and knowledge, but more, refer to those narratives in the settler colonial imagination in which the Native . . . hands over his land, his claim to the land, his very Indian-ness to the settler for safe-keeping."[273] This means that non-Indigenous people and institutions remain in control of land, resources, and the narrative about the land. Tuck and Yang describe how these fantasies "alleviate the anxiety of settler un-belonging" as the settler "adopts the love of land and therefore thinks he belongs to the land" and "is a first environmentalist and sentimentalist."[274] The settler "perform[s] sympathy" and "becomes the reluctant but nonetheless rightful inheritor of the land and warden of its vanishing people."[275]

When land trusts collaborate with Indigenous peoples, they risk reinscribing colonial relationships and making this move to innocence. Land trusts have built their missions and culture around the safe keeping and conservation of the land through land acquisition and placing perpetual conservation easements on the land. Many land trusts' missions describe their goal and their role to forever conserve and steward land, typically for scenic, natural, or conservation purposes, almost always without mention or consideration of Indigenous peoples.[276] Land trusts position themselves as defenders of the land from irreversible development and degradation.[277] When collaborating with Indigenous peoples, land trusts risk positioning themselves as knowing better how to ensure the land is stewarded in perpetuity. Furthermore, land trusts risk "settler adoption fantasies" by selecting and drafting legal tools for land return and land access where land trusts retain as much control and

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stories of "reimagin[ing] *access* in a way that can help us reorient, collectively, to caring about these spaces as *living places* with meaning").

[270] Tuck & Yang, *supra* note 198, at 4.

[271] *Id.* [198] at 3–4, 10.

[272] *Id.* [198] at 3.

[273] *Id.* [198] at 14.

[274] *Id.* [198] at 15.

[275] *Id.* [198] at 16.

[276] *See, e.g.*, *Mission and Values*, ADIRONDACK LAND TRUST, https://adirondacklandtrust.org/about/mission-values [https://perma.cc/N8XV-SHPK] (last visited Feb. 25, 2025) (describing a mission to "forever conserve the forests, org farmlands, waters and wild places . . ."); *Our Mission*, PALOUSE LAND TRUST, https://www.palouselandtrust.org/mission [https://perma.cc/EHD5-T3BE] (last visited Feb. 25, 2025) (describing a mission to "work[] with landowners and communities to conserve the lands we love, now and forever . . .").

[277] *See* Erica Buswell, *Shifting to a Culture of Decolonization in Conservation Communities*, WABANAKI REACH (Jan. 7, 2021), https://www.wabanakireach.org/shifting_to_a_culture_of_decolonization_in_conservation_communities [https://perma.cc/J8TV-VQVD].

decision-making power over the land as possible—for "safe-keeping" of the conservation values of the land.

Ironically, stewardship is a core part of land trusts' missions, but without decolonization, this version of "stewardship" risks employing traditional property logics of control and possession over the land. However, drawing on decolonization principles and engaging with private law for land return and land access, land trusts have an opportunity to recognize and support longstanding Indigenous duties to and relationships with land and move toward a stewardship model of property that reflects decolonization.[278] It is not that land trusts should cease to play a role in land stewardship. They should support Indigenous land stewardship and decision making, but refuse control or oversight over Indigenous land stewardship practices and relationships. By avoiding moves to innocence, land trusts can reach "more meaningful . . . alliances" with Indigenous peoples.[279]

C. Decolonization Applied to Private Law Tools

This Part describes five guidelines for land trusts when selecting and drafting private law tools for land return and land access that align with decolonization. Ultimately, land trusts should defer to Tribes and Indigenous peoples on which legal tools they seek to use. However, where land trusts have a role in selecting or drafting the private law tool, this Part can help land trusts analyze both the type of legal tool to use and its terms.

First, land trusts should avoid placing conservation easements on land returns and preference land returns over granting non-possessory property rights or licenses. Second, land trusts should choose cultural access easements over cultural access agreements. But, in certain circumstances, land trusts should also consider the value of land invitations as a less legalistic form of cultural access. Third, land trusts should seek to limit any restrictions on and oversight over Indigenous peoples in land return and land access. Fourth, land trusts should defer to Indigenous peoples about public access to Indigenous cultural sites. Fifth, land trusts should support Tribal and Indigenous dispute resolution.

Scholars and practitioners have already outlined important guidelines for land trusts and other non-Indigenous organizations seeking to collaborate with Indigenous peoples. While not the focus of this Article, these guidelines bear repeating as they are foundational to collaboration with Indigenous peoples. These guidelines include, but are not limited to:

- taking time to learn about Indigenous peoples and their history (not expecting Indigenous peoples to educate non-Indigenous people);
- committing substantial time and resources to building long-term relationships and trust with Indigenous peoples;
- supporting Indigenous leadership and self-determination in collaboration goals and outcomes;
- listening to Indigenous peoples and not speaking for them;
- including Indigenous peoples in every stage of a project or activity (not as an afterthought);
- respecting the cultural beliefs and privacy of Indigenous peoples' ceremonies and traditional knowledge;
- avoiding collaborating in a way that burdens Indigenous peoples' time and resources; and

[278] *See supra* notes 234–237 and accompanying text.
[279] Tuck & Yang, *supra* note 198, at 3.

- committing to redistribution of land and resources to Indigenous peoples.[280]

1. Prioritize Land Returns without Conservation Easements

This Part argues that land trusts should look for opportunities to return land to Tribes and Native land trusts without retaining a conservation easement on the land.[281] Return of land clearly aligns with the "irreducible element" of decolonization—to put Indigenous lands back in the hands of Indigenous peoples.[282] Some land returns transfer land in unrestricted fee simple; there are no encumbrances on the land held by non-Indigenous entities that could interfere with Indigenous land stewardship.[283] However, not all land returns return full stewardship of and decision making about the land to Indigenous peoples, even though land title is returned. In some cases, land trusts have placed a conservation easement on the land before returning fee title or have returned fee title where there is already a conservation easement on that land held by a non-Indigenous entity.[284] This Part argues that the practice of placing a conservation easement on a land return is a "move to innocence" that avoids decolonization in practice.[285] The idea of land return without a conservation easement may be unsettling to land trusts and private entities. This is part of the process. Going beyond land acknowledgment to actually return land "is precisely why decolonization is necessarily unsettling" because it "implicates . . . everyone" in the project of settler colonialism and its undoing.[286]

In interviews, some non-Native land trusts recognized how retaining a conservation easement on a land return could reinforce colonial relationships and logics of control and possession:

> If there's a conservation restriction on the land and someone has to come every year to make sure that the conservation restriction is being followed and not violated, that just feels like oversight . . . on the land and that someone is still saying that [Tribes] are not capable of taking care of their land themselves . . . They want to protect the land, but they want to protect

[280]*See* Hester Dillon (Cherokee Nation), *Unfencing the Future: Voices On How Indigenous and Non-Indigenous People and Organizations Can Work Together Toward Environmental and Conservation Goals*, 4 RIVERS CONSULTING (2021), https://landtrustalliance.org/resources/learn/explore/unfencing-the-future-voices-on-how-indigenous-and-non-indigenous-people-and-organizations-can-work-together-toward-environmental-and-conservation-goals; Kurt W. Russo, *The Art and Science of Creating a 501(c)(3) Native American Land Conservancy, in* MIDDLETON MANNING, *supra* note 18, at 95; MIDDLETON MANNING, *supra* note 19, at 222–46 (describing takeaways for collaboration between land trusts and Indigenous peoples); Carlson & Coulter, *supra* note 25, at 203–04, 209 (describing takeaways from collaboration between land conservation organizations and the Traditional Seminole); Orsi, *supra* note 19; Sharon Stein et al., *Towards Settler Responsibility in Conservation*, 22 ACME 894, 908 (2023); THE NATURE CONSERVANCY MAINE, *supra* note 155, at 9 (describing the Nature Conservancy Maine's guiding principles for working with Indigenous peoples); WABANAKI COMMISSION, *supra* note 42 (describing principles to "relearn, recenter, and return"); LARRY INNES ET AL., RESPECT AND RESPONSIBILITY: INTEGRATING INDIGENOUS RIGHTS AND PRIVATE CONSERVATION IN CANADA 47–49 (2021).

[281]*See* Orsi, *supra* note 19 (especially "urg[ing] white landowners to explore transferring title, even if you want to remain on the land. Rather than lease, license, or give an easement to a group, flip the arrangement: Grant them the deed, and retain the relationship you need with the land by holding the lease, license, or easement yourself.")

[282]*See supra* note 205 and accompanying text.

[283]For one example of this type of unrestricted land return, *see* DRUMMONDWOODSUM, *supra* note 97.

[284]*See, e.g.*, STOCKBRIDGE-MUNSEE COMMUNITY & OPEN SPACE INSTITUTE, *supra* note 1.

[285]While Indigenous peoples may decide they want to use a conservation easement, this Article argues that land trusts should not seek to impose conservation easements as a condition of collaboration. *See* Wood & Welcker, *supra* note 25, at 403–05 (describing benefits of conservation easements).

[286]Tuck & Yang, *supra* note 198, at 7.

> it within their own [T]ribal laws, write their own [T]ribal guidance . . . And so how can we recognize [that] Indigenous sovereignty over protecting land?[287]
>
> My perception is there's a growing understanding of how colonial systems damage [T]ribal communities . . . it's almost like a "you're not smart enough to understand the conservation here . . . so we need to put a bunch of restrictions on it because we don't want you screwing it up," which is [a] culturally and socially damaging statement.[288]

One Native land trust interviewed described how they do not support conservation easements on land returns to Tribes: "[H]aving restrictions of any kind placed on the land before the [T]ribe gets it back is not acceptable to us."[289]

There are several reasons that placing a conservation easement on a land return may interfere with decolonization in practice. First, placing a conservation easement implies that the land needs perpetual protection with and control through Western property law tools. It is important for land trusts to recognize that Tribes and Indigenous peoples already have their own laws and practices for protecting the land and their ceremonial, sacred, and cultural sites. Land is essential to Indigenous cultures and "Indigenous peoples' reverence for the earth is clearly—and specifically—reflected in their [T]ribal codes, as [T]ribes enact laws to protect ceremonial grounds, sacred sites, culturally significant landscapes, historic properties, and other places of deep religious and cultural significance."[290] Even on private lands held by non-Indigenous people, "[t]he mere fact that the land is not held in Native title does not mean that [Native] people do not hold . . . obligations" and relationships with that land.[291] Due to their traditions and beliefs, some Indigenous peoples may not write down or make known to outsiders their sacred sites, relationships with the land, or cultural practices.[292] Land trusts should respect this enduring Indigenous land stewardship duty and responsibility—that Indigenous peoples have ways of caring for land in perpetuity outside of Western property law tools.

Second, a conservation easement on a land return reinforces colonial relationships between non-Indigenous land trusts and Indigenous peoples. When a land trust holds a conservation easement, they have control and enforcement power over the land under the easement—they can intervene if they deem that Indigenous activities on the land interfere with conservation easement terms. This plays into Western property logics of possessiveness and control and the "settler adoption fantasies" move to innocence, where the Indigenous person "hands over his land, his claim to the land . . . to the settler for safe-keeping."[293] A non-Indigenous entity holding a conservation easement has a legal right of "safe keeping" the land for conservation purposes. In practice, land trusts typically monitor lands with conservation easements to ensure compliance.[294] This monitoring may interfere with Indigenous relationships with the land—and could lead the land trust to enforce the easement against Indigenous peoples if the land trust determines there is a violation of conservation purposes or easement terms. While conservation easements can permit Indigenous cultural activities and include co-monitoring of the easement between the land trust and

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[287]Interview of Land Trust Staff (Aug. 17, 2022).
[288]Interview of Land Trust Staff (Sept. 23, 2022).
[289]Interview of Land Trust Staff (Aug. 23, 2022).
[290]Riley, *supra* note 228, at 118; *see also* Carpenter, *supra* note 111, at 1113.
[291]Tsosie, *supra* note 228, at 1306.
[292]Angela R. Riley, *"Straight Stealing": Towards an Indigenous System of Cultural Property Protection,* 80 WASH. L. REV. 69, 100 (2005).
[293]Tuck & Yang, *supra* note 198, at 14.
[294]*See* Cheever & McLaughlin, *supra* note 14, at 141; Adina M. Merenlender et al., *Land Trusts and Conservation Easements*: *Who is Conserving What for Whom?*, 18 CONSERVATION BIOLOGY 65, 67 (2004).

Indigenous peoples, in practice, many conservation easements restrict uses of the land that are considered incompatible with Western conceptions of conservation.[295] Indigenous land justice practitioners have voiced frustration with conservation easements, that "[land trusts] need to get away from conservation easements and that feeling that there is always going to be a need to control how Indigenous people[s] are on the land."[296] To promote decolonization in practice, land trusts should recognize that Indigenous cultural stewardship commitments should not be overseen by non-Indigenous people via conservation easements.

Third, conservation easements on land returned to Indigenous peoples may undermine Tribal sovereignty and self-determination, in contravention of decolonization principles.[297] One Native land trust interviewed indicated that, in past interactions, some land trusts have placed conservation easements on the land, undermining Tribal sovereignty:

> [Land trusts] have even put or sold . . . conservation easements [on the land], and right away . . . our way of thinking is [that this] negates [T]ribal sovereignty in the decision making of what they are going to use the land for . . . If [the land has] got conditions on it and you aren't up front about that with the [T]ribe, that'll be the end of that relationship.[298]

This is particularly an issue when returning land with a conservation easement to a federally recognized Tribe. In order for a land trust to hold an enforceable conservation easement on land held by a federally recognized Tribe, the Tribe must typically issue a narrow waiver of Tribal sovereign immunity, which permits the land trust to sue the Tribe in state or federal court to enforce the easement.[299] While prior scholarship on land trust-Tribal collaborations has largely accepted sovereign immunity waivers, this Article challenges the practice of asking Tribes to waive sovereign immunity.[300] This may undermine Tribal sovereignty by asking the Tribe to relinquish their immunity from suit as a sovereign, even if only narrowly.

A conservation easement may also interfere with Tribal sovereignty and self-determination by delaying or impeding a federally recognized Tribe's application to take the returned fee land into trust ("fee-to-trust" process). While the fee-to-trust process can be controversial and time-consuming, some scholars have argued that it has "better positioned [T]ribes to engage in self-determination" and a "strong land base enhances collective, [T]ribal life."[301] Tribal trust lands are held in trust by the United States for the Tribe.[302] Trust

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[295] *See, e.g.*, Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENV'T L. REV. 421, 436 n.40 (2005) (describing how some conservation easements contain a "no burn" restriction—which may interfere with Indigenous cultural burning practices).

[296] Nika Bartoo-Smith, *How land trusts overlap with the land back movement in Oregon*, OPB (Sept. 16, 2023), https://www.opb.org/article/2023/09/16/land-trusts-oregon-indigenous-tribes/ [https://perma.cc/XPK3-D7CH]; *see also* Kalen Goodluck, *The Land Back Movement Unravels Manifest Destiny*, SIERRA (Sept. 11, 2023), https://www.sierraclub.org/sierra/2023-3-fall/feature/how-land-back-movement-unraveling-manifest-destiny [https://perma.cc/24AE-PSJC].

[297] TRUST FOR PUBLIC LAND, *supra* note 15 (describing how land trust is seeking to return land "in a manner that supports Indigenous self- determination of land, including transferring the land without a conservation easement."); *see also* Cris Stainbrook, *The better way to right an old wrong*, NATIVE NEWS ONLINE (Aug. 26, 2022), https://nativenewsonline.net/opinion/the-better-way-to-right-an-old-wrong [https://perma.cc/U7B4-U656].

[298] Interview of Land Trust Staff (Aug. 23, 2022).

[299] *See supra* notes 79–81 and accompanying text.

[300] *See* MIDDLETON MANNING, *supra* note 19, at 229.

[301] *See* Kristen A. Carpenter & Angela R. Riley, *Privatizing the Reservation?*, 71 STAN L. REV. 791, 839 (2019); Alex Tallchief Skibine, *Towards a Trust We Can Trust: The Role of the Trust Doctrine in the Management of Tribal Natural Resources*, *in* TRIBES, LAND, AND THE ENVIRONMENT 9–12, *supra* note 25.

[302] 25 C.F.R. § 151.2(d) (2023).

lands also provide Tribes access to housing opportunities, tax credits, protection of cultural resources, and federal programs.[303] Moreover, trust lands are not subject to state law, state taxation, or local property taxation or land use laws.[304] Trust lands cannot be "sold, alienated, or transferred to non-Indians or non-Natives"—they are part of the Tribe's land base and the Tribe has jurisdiction over these lands.[305]

A conservation easement on the land may delay the timeline for the fee-to-trust process and increase BIA scrutiny over the process.[306] After the trust decision has been made by BIA, they review any encumbrances on the land, including easements, and "*may* require the elimination" of the encumbrances "prior to taking final approval action on the acquisition."[307] BIA has not issued clear guidance on whether conservation easements held by non-federal entities will remain in force once the land is taken into trust.[308] The issue of whether to retain a conservation easement is decided on a case-by-case basis, at BIA's discretion, and the conservation easement is invalid unless BIA accepts it.[309] As such, decisions may vary between regional BIA officers.[310]

A conservation easement may also prevent BIA from taking the land into trust in the first place. While there is limited case law on the subject, the administrative appeals decision most on point indicates that: (1) BIA is required to consider if the conservation easement would cause any "[j]urisdictional problems" or "potential conflicts of land use" when assessing the fee-to-trust application; and (2) a land trust holding a conservation easement would likely have standing to challenge approval of the trust acquisition because they have a property interest in the land.[311] In a recent appeal of a fee-to-trust acquisition, the Interior Board of Indian Appeals (IBIA) held that BIA was required to consider "'[j]urisdictional problems and potential conflicts of land use which may arise' as a result of the trust acquisition" but they failed to consider the landowners' "allegations that when the Tribe's ownership interest in a shared or coextensive easement is taken into trust, the easement will become less enforceable against other individuals and unenforceable against the Tribe."[312] Overall, the specter of land trust interference in the fee-to-trust process—an

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[303]MURRAY, *supra* note 87, at 11; Skibine, *supra* note 301, at 7, 10; *Benefits of Trust Land Acquisition (Fee to Trust)*, U.S. DEP'T OF THE INTERIOR INDIAN AFF., https://www.bia.gov/service/trust-land-acquisition/benefits-trust-land-acquisition [https://perma.cc/L94X-N6GC] (last visited Feb. 27, 2025).

[304]CANBY, *supra* note 51, at 320–321; U.S. DEP'T OF THE INTERIOR INDIAN AFF., *supra* note 303; Frank Pommersheim, *Land into Trust: An Inquiry into Law, Policy, History*, 49 IDAHO L. REV. 519, 531 (2013).

[305]Press Release, *Administration makes good on promise to place at least one half million acres of land into trust for tribal nations, working to make tribal communities whole again*, U.S. DEP'T OF THE INTERIOR, INDIAN AFF. (Oct. 12, 2016), https://www.bia.gov/office/trust-lands [https://perma.cc/TBL8-RD9N]; *see* CANBY, *supra* note 51, at 81–102, 337–40.

[306]MIDDLETON MANNING, *supra* note 19, at 24.

[307]25 C.F.R. §151.13(b) (2023) (emphasis added); *see also* BUREAU OF INDIAN AFFAIRS, ACQUISITION OF TITLE TO LAND HELD IN FEE OR RESTRICTED FEE STATUS (FEE-TO-TRUST HANDBOOK) 17–19 (2016).

[308]MIDDLETON MANNING, *supra* note 19, at 25.

[309]*Id.* [19] at 106.

[310]*Id.* [19] at 24, 106. *But see id.* [19] at 170 (land trust director describing how they are "confident that the conservation easement will remain viable if the land is converted into trust status" and Tribal policy advisor explaining how "the BIA has recently taken into trust [T]ribal fee properties with a conservation easement on them").

[311]25 C.F.R. § 151.11(f) (2023) (requirement for BIA to consider jurisdictional problems and potential conflicts of land use in an off-reservation discretionary trust acquisition for a Tribe); Crest-Dehesa Granite Hills-Harbison Canyon Subreg'l Planning Grp. v. Acting Pac. Reg'l Dir., 2015 WL 10939222, at *4–7 (IBIA Aug. 21, 2015).

[312]Crest-Dehesa, 2015 WL 10939222, at *5 (citing 25 C.F.R. § 151.10(f)) (finding BIA's statement that the easements and rights of way on the title would be maintained did not address landowners' concerns as required by law).

important process for Tribal self-determination—is another manifestation of colonialism in conservation easements on land returns.

Moreover, there are alternatives to conservation easements that acknowledge the purpose of the land return—promoting Indigenous cultural stewardship of the land—and respect Indigenous sovereignty and self-determination. Unlike conservation easements, neither of these options give a land trust any rights over land stewardship nor require a Tribe to waive sovereign immunity in state or federal court. First, the land trust returning the land could issue a statement of intention for the land return—to support Indigenous cultural stewardship and enduring relationship with the land—and how that intention falls within the land trust's organizational mission. This statement would not give the land trust any enforceable right on the land but could assuage land trust concerns about acting within their organizational mission.[313] A Tribe could also consider issuing a statement indicating their intent for stewardship of the land in line with their cultural practices and any applicable Tribal laws for cultural sites and landscapes.[314]

Second, a Tribe could place a conservation covenant under Tribal law on the land returned.[315] This has already been done in practice by the Confederated Tribes of the Colville Reservation, who accepted a land return with a conservation covenant that can be enforced by the Tribe on behalf of their members in Tribal court.[316] This does not require a waiver of sovereign immunity in state or federal court and may be appropriate if a Tribe decides that they wish to impose such a restriction under their own law. However, a land trust should not pressure or require that a Tribe place a restrictive covenant on their land as a condition to a land return.[317]

Sometimes, land trusts and Indigenous partners choose to place conservation easements on land returns in order to access federal or state funding for land acquisition or to reduce property taxes on the land.[318] At times, this funding could be essential to the timely acquisition of a parcel of culturally significant private land when it enters the speculative market.[319] As described in Part III, Subpart B, reforms of federal and state funding programs could remove conservation easement/restriction requirements when a Tribe or Native land trust holds the land acquired. In the meantime, land trusts and Tribes could inquire with federal and state funding programs about using Tribally held conservation covenants under Tribal law as a substitute for conservation easements on land acquired.[320] Moreover, if property taxes are a barrier, the conservation covenant under Tribal law may reduce the value of the property for purposes of state property taxes on fee lands. To lower the tax burden, a Tribe could alternatively form an affiliated nonprofit Native land trust to hold the land as a tax-exempt organization that manages the land for cultural stewardship purposes.

Land trusts should not only avoid using conservation easements on land returns, but also draft conservation easements on all the lands they conserve to

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[313]*See infra* Part 0 (describing land trusts' legal concerns about tax-exempt status).

[314]Riley, *supra* note 228, at 116–22 (describing Tribal laws and codes protecting sacred, ceremonial, and culturally significant sites and landscapes).

[315]Colville Business Council, *supra* note 89.

[316]*Id.* [89]

[317]*See* Orsi, *supra* note 19 ("[M]any BIPOC-led land projects are under threat of becoming burdened and immobilized by commitments other parties demand of them, like recording covenants guaranteeing land will forever be used in a certain way.").

[318]*See* MIDDLETON MANNING, *supra* note 19, at 123–26.

[319]*See* Wood & O'Brien, *supra* note 25, at 494.

[320]For an example of another possible arrangement, the Little Traverse Conservancy, a land trust, and the Little Traverse Bay Bands of Odawa Indians, a federally recognized Tribe, signed a "Conservation Easement Supplemental Agreement," which provided that land returned to the Tribe would be bound by a conservation easement should it go out of trust status. This Agreement was formed in part to access funding for conservation land acquisition that required a conservation easement. MIDDLETON MANNING, *supra* note 19, at 123–27.

avoid precluding future land returns or cultural access easements.[321] This would avoid situations like a recent example where a restrictive conservation easement on a parcel prevented the parcel from being divided. The conservation easement thus eliminated the option of the landowner returning a piece of that land to Indigenous peoples. As the land conservation practitioner described:

> [W]e didn't contemplate the possibility that a landowner might want to give a portion of their land back to the Native community, so we didn't write anything into the easement that would allow for this to happen.[] This rationalization is perhaps the most revealing symptom of colonial thinking: we didn't consider the fact that we were doing our 'good' work in Indigenous territory, so it didn't ever cross our minds to account for that fact or the possibility of an Indigenous land return in our program design and implementation.[322]

There are certainly other examples of restrictive conservation easements drafted by land trusts that have impeded land returns to Indigenous peoples or cultural land access.[323] Land trusts should seek to amend conservation easement templates to avoid future restrictions on land return or granting cultural access easements.

2. Choose Cultural Access Easements and Land Invitations for Land Access

If a land return is not legally possible nor preferred by the Tribe or Indigenous peoples in a given situation, other private law tools could be used to support Indigenous cultural access to and stewardship of private land.[324] This Article argues that land trusts should focus on using two of the possible legal tools for land access: the cultural access easement or the land invitation.[325] If a Tribe or Native land trust seeks a land access right, the land trust should preference granting a perpetual cultural access easement over a cultural access easement of lesser duration (or a cultural access agreement). If Indigenous peoples are seeking more informal access to the land, a land invitation is a less legalistic tool to support such access. Although a land invitation is a license that is freely revocable by the licensor, this tool may be preferable for more informal access, or while in the process of formalizing a cultural access easement or land return.[326]

From a decolonization perspective, land trusts should open up opportunities to grant Indigenous peoples perpetual cultural access easements that recognize longstanding Indigenous relationships with and stewardship of the land. Decolonization includes "full restoration of Indigenous land relationships" and "reaffirming the existence of much longer-standing [I]ndigenous relationships with the land."[327] Because a perpetual cultural access easement provides for access to and stewardship of the land forever into the future, it may

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[321] *See supra* Part I.B.2 (describing updating conservation easement templates to avoid precluding future Indigenous cultural access on lands under conservation easement).

[322] Buswell, *supra* note 277.

[323] *See, e.g.*, Jay Watson, *'Rematriations' return Native Americans to their land*, N.J. CONSERVATION FOUND. (Nov. 9, 2023), https://www.njconservation.org/rematriations-return-native-americans-to-their-land/ [https://perma.cc/UHE5-Q7WA] (describing how the Turtle Clan of the Ramapough Lenape Nation hoped to buy a parcel of land that used to be a Munsee Lenape village but "were told that the preservation regulations in place on the property did not allow the transfer of title to the Turtle Clan").

[324] There may be circumstances where a Tribe or Native land trust indicates their preference to not receive land in fee simple or where a parcel of land cannot be transferred due to a conservation easement or other restrictions. *See, e.g.*, *id.* [3233]

[325] *See supra* Parts 0, 0.

[326] *See supra* Part 0 (describing land invitations as a license).

[327] Schneider, *supra* note 199, at 453; Middleton, *supra* note 202, at 571; Tuck & Yang, *supra* note 198, at 13, 21.

align with Indigenous peoples' stewardship of the land time since immemorial.[328] Furthermore, rebuilding Indigenous land relationships on private lands that were previously inaccessible to Indigenous peoples may take many years. A short-term cultural access easement may not be well suited to this long-term relationship building. However, once an easement is granted, the land trust cannot interfere with the grantee's cultural access right and neither can a third party. This may open a space for Indigenous peoples rebuilding their relationships with the land without interference.[329]

This Article cautions against the use of cultural access agreements, unless Indigenous partners specify their preference for this type of tool. In practice, cultural access agreements have very similar terms to cultural access easements but contain more restrictions and legalese than a land invitation. As analyzed in Part I, Subpart B.2, courts may find that cultural access agreements are actually easements or that they are licenses that are freely revocable at any time. This means that the parties signing the agreement may not have certainty on the duration and durability of Indigenous cultural access to the land under a cultural access agreement. If the parties are going through the time and effort of drafting an agreement, they should consider clearly granting a cultural access easement. If the parties are seeking more informal land access, the land trust can issue a short land invitation—a freely revocable license.

3. Limit Restrictions and Oversight

Grantors should align the terms of these private law tools for land access with decolonization. This includes minimizing restrictions on Indigenous cultural activities and access to the land, reducing land trust oversight over Indigenous peoples, and limiting or eliminating any notice or permission requirements for Indigenous peoples.[330] Decolonization includes supporting and respecting Indigenous self-determination and Indigenous relationships to the land. Moreover, reducing restrictions and oversight resists the sense of control and ownership in traditional, Western models of property, moving toward a stewardship model grounded in duties to and care for the land.[331]

As written, some existing cultural access easements and agreements risk reifying colonial relationships by giving land trusts control or oversight over Indigenous cultural activities and positioning land trusts as the ultimate safeguard of the land for conservation purposes.[332] One Native land trust interviewed described how, in the process of drafting a cultural access instrument, they received a version of the document that was heavily focused on restrictions: "[I]t was all about what we cannot do . . . it was nothing about a relationship between our organizations."[333] A non-Native land trust described how they are prioritizing forms of cultural access that minimize restrictions and oversight on Indigenous peoples:

> How can we formalize a right for Indigenous communities to get on to land for ceremonial or often ceremonial purposes [such as] gathering and some other traditional uses? . . . [O]ur take was, and we want to make it clear that, all Indigenous folks are welcome on these lands for those purposes, and we

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[328]Tsosie, *supra* note 47, at 227–28 (describing Tribes' political traditions focused on commitment to preserving land for future generations); EagleWoman, *supra* note 252, at 641; *see generally* LADUKE, *supra* note 47 (describing Indigenous peoples' relationship to the land in the long term).

[329]*See supra* note 231 and accompanying quote.

[330]If the land already has a conservation easement, then land trusts will have to navigate the legal requirements of that easement. This is further argument for land trusts to use conservation easement templates that do not restrict future Indigenous cultural access and activities. *See supra* Part 0.

[331]*See supra* Part II.A.

[332]*See* Tuck & Yang, *supra* note 198, at 15–16.

[333]Interview of Land Trust Staff (Aug. 22, 2022).

> don't want to create restrictions around this . . . Some land use agreements [are] actually just the set of restrictions on what Indigenous folks can do and a lot of them, at the core, it's like, before you do that, you need to check in with a European [settler] expert.[334]

In practice and in templates, cultural access easements and agreements have included a number of restrictions and forms of oversight on Indigenous peoples: limitations on the number of days per year that Indigenous peoples can access the land,[335] prohibitions on camping, hunting, or the use of fire without consent from the grantor,[336] notice being required if the Indigenous ceremonial activity has more than fifty people participating,[337] permission being required to use motorized vehicles to transport any equipment for a ceremony,[338] among other restrictions and permission requirements. A draft cultural access agreement template in Maine includes an entire menu of possible restrictions and requirements—seasonal limitations on harvesting and ceremony, limitations on harvesting when the landowner has an event on the property, annual harvest limits (with potential requirements to report any harvesting monthly), limitations on the number of people allowed at a ceremony, notice requirements for ceremonies, limitations on parking, and a prohibition of cutting any vegetation other than that listed in the agreement.[339] Land trusts should heed the note in this template to include restrictions, limitations, and notice/reporting requirements "only as needed or appropriate."[340]

This Article argues for land trusts to approach cultural access easements and agreements with as few limitations or restrictions as possible on Indigenous cultural access. A land trust could draft a bare grant of cultural access in the easement and then only add back in restrictions that are legally necessary or preferred by the Tribe or Native land trust involved. If there is a pre-existing conservation easement on the property, the Tribe or Native land trust could be on notice of the easement—rather than having to ask the land trust for permission to do cultural activities to make sure those activities align with the conservation easement.[341] In some cases, Indigenous peoples may prefer a notice provision for holding a ceremony to confirm that non-Indigenous people will not be present on the property. However, this could be drafted as a requirement for the *landowner* or land trust to provide uninterrupted access to the property for the ceremony with sufficient notice—rather than a requirement for Indigenous peoples to seek permission for a ceremony. One cultural access easement in practice—granted from Dennis Conservation Land Trust to Native Land Conservancy—is exemplary of limiting restrictions and permission requirements. However, even this easement could have fewer restrictions. For example, it may not have been required by law to restrict "[a]ny and all hunting, camping and trapping" and "use of fire" on the property "without the mutual consent of the parties."[342]

Cultural access easements may not always be appropriate on lands with restrictive conservation easements. While their terms may only rarely conflict,

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[334]Interview of Land Trust Staff (Oct. 20, 2022).
[335]Stewarts Point Cultural Access Easement, *supra* note 141, 3–4.
[336]Dennis Conservation Land Trust, *supra* note 142, at 1.
[337]Stewarts Point Cultural Access Easement, *supra* note 141, at 3–4.
[338]Mount Grace Conservation Land Trust, *supra* note 156.
[339]CRUA Template, *supra* note 156, at 2–6.
[340]*Id.* [156] at 2.
[341]Stewarts Point Cultural Access Easement, *supra* note 141, at 13 ("The Tribe expressly acknowledges and agrees that the Ceremonial Activities are subject to and must be conducted in a manner that is consistent with the Conservation Easement.").
[342]Dennis Conservation Land Trust, *supra* note 142, at 1.

the terms of the earlier conservation easement take precedence.[343] One land trust practitioner described how conservation easements may have unintended consequences on Indigenous land stewardship and access:

> By placing a perpetual conservation easement on a property, the landowner granting an easement and the land trust holding that easement are afforded the ability to not only decide, but also control (through legal enforcement) how the land can and cannot be used, forever . . . [T]he unintended harm in Native communities stemming from [conservation easements] may not only be long lasting, but may also be compounded into the future, since forever is a long time.[344]

4. Defer to Indigenous Peoples on Public Access

In addition to reducing restrictions and oversight, private law tools for land access should defer to Indigenous peoples on public access to cultural sites whenever legally possible—reflecting the stewardship needs of that land. Land trusts often emphasize public access as an important part of their conservation mission and some state, federal, and private funding sources require or preference public access on conservation lands acquired with the funding.[345] However, public access may conflict at times with Indigenous cultural activities and duties, especially on sensitive ceremonial and sacred sites. For example, some ceremonies are not meant to be heard or witnessed by non-Indigenous people.[346] In interviews, some land trusts identified that they felt a tension if Indigenous cultural access to the land would lead to a closure of or limit on public access to the land:

> How can we justify expenditure of charitable dollars in a situation where there is no public access?[347]

> [One] perspective in general [is that] public access is good. So, if a project has a public access, it is better than if it doesn't. And by public access, I mean legally required and mandated public access. So, a lot of funding sources require that or strongly preference that in the ranking criteria and other things.[348]

Yet, other land trusts identified why it is not appropriate to require public access where there are or may be Indigenous cultural and sacred sites on the land:

> The whole concept of public land is problematic . . . because if [there are] sacred sites or culturally important sites, the quickest way to ruin them is to make them public. We had lots of discussion [with Indigenous peoples] of

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[343] *See* James Y. Stern, *The Essential Structure of Property Law*, 115 MICH. L. REV. 1167, 1187 (2017) (describing how "the principle of mutual exclusivity is at work because property law will not recognize property rights held by others that contradict it").

[344] Buswell, *supra* note 277.

[345] *See* Wood & O'Brien, *supra* note 25, at 483, 489.

[346] *See, e.g.*, David L. Moore, *Rough Knowledge and Radical Understanding: Sacred Silence in American Indian Literatures*, 21 AM. INDIAN Q. 633, 645, 651–53 (1997) (describing "cultural proscriptions against divulging ceremonial and spiritual details either within or across cultures"); Carlson & Coulter, *supra* note 25, at 198, 207 (describing how Traditional Seminole could no longer use a site for their ceremonial Green Corn dance because of non-Seminole people interfering in the ceremony); NATIVE LAND CONSERVANCY, *supra* note 135 (Native land trust describing how the cultural access easement "offers assurance for us to safely access areas of our ancestral homelands to exercise spiritual and cultural practices").

[347] Interview of Land Trust Staff (Aug. 18, 2022).

[348] Interview of Land Trust Staff (Oct. 20, 2022).

> case studies and examples of where really culturally important sites had been, "protected"—turned into parks—and ruined.[349]

Another land trust identified that some funding sources still prefer public access, which can be a barrier to raising funds for a land return:

> One of the hardest steps . . . was talking to the funders to say you can't require a conservation easement here, you can't require public access on this land. Here's why. And those conversations, making them bend their rules or undo their rules for their funding were hard and were vital to the [land return] project being successful.[350]

Private law tools for land access can maintain some public access while deferring to Indigenous peoples. The cultural access instrument could include a provision that the Tribe or Native land trust may close the property to public access—and access by the landowner—as appropriate for ceremony and stewardship. For a temporary closure, instead of requiring the Tribe or Native land trust to ask permission to close the land to public access, the agreement could have a notice provision to the landowner. With notice, the landowner and any other easement or rights-holders on the site would then take steps to provide uninterrupted cultural access to the site. The cultural access tool could also include a clause that authorizes the Tribe or Native land trust to set an appropriate level of public access more broadly, including by providing for a "reasonable" level of public access given the cultural sensitivity of the site.[351] This "reasonable" level of access, as specified by Indigenous peoples, could balance any existing requirements for public access on the parcel—such as a conservation or public access easement—with the sensitive nature of ceremonies, sacred sites, and Indigenous cultural access and land relationships. One land trust interviewed expressed that this was their general policy for working with Tribes:

> Leaving public access to the discretion of the [Tribal] community is what our preference would be.[352]

Another land trust interviewed described how the social license for land trust work does not need to be public access—that supporting Indigenous cultural stewardship is justification for their work:

> At the time [we conserved this parcel of land] our priority was public access, because otherwise you have this [land] that's not doing much off the tax rolls . . . so we were trying to give a public benefit. The social license for doing this work was public access. But then, of course, in working with the [T]ribe, we wanted to limit the public access. I think if we had to do it all over again, the first conversation would be [with] the [T]ribe.[353]

> Cultural preservation, cultural integrity and the importance of land to the [T]ribe's culture . . . is in itself a form of . . . social license.[354]

Another land trust interviewed indicated that limited or no public access is already accepted in the context of agricultural conservation easements, because public access can conflict with agricultural use:

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[349]Interview of Land Trust Staff (Sept. 23, 2022).
[350]Interview of Land Trust Staff (Aug. 16, 2022).
[351]*See* Benewah County, Idaho, v. Nw. Reg'l Dir., Bureau of Indian Affs., 2012 WL 8434345, at *1–2 (IBIA Sept. 21, 2012) (describing Memorandum of Agreement between the Coeur d'Alene Tribe of Idaho and the Bonneville Power Administration).
[352]Interview of Land Trust Staff (Oct. 20, 2022).
[353]Interview of Land Trust Staff (Oct. 13, 2022).
[354]*Id.* [353]

> [For] agricultural conservation and agricultural access, everybody's kind of internalized that public access can be highly conflictive with ongoing agricultural use. It's just funny how it's not really an issue there . . . .[355]

5. Support Tribal and Indigenous Dispute Resolution

Private law tools can further align with decolonization by supporting Tribal and Indigenous dispute resolution processes.[356] Thus far, some cultural access easements and agreements incorporate alternative dispute resolution outside of state and federal courts. Two of the cultural access agreements identified in research for this Article outline the following initial dispute resolution steps: (1) candid and open conversation between the parties and informal dialogue, and (2) mediation with an impartial mediator.[357] However, if steps one and two fail, these agreements resort to termination of the agreement and legal action to resolve the dispute in "any court of competent jurisdiction," which is a more adversarial dispute resolution process.[358] The first two steps in this process reflect a more relational dispute resolution process—informal discussion and then mediation. For another example, in one cultural access easement the Kashia Band of Pomo Indians of the Stewarts Point Rancheria, Save the Redwoods League, and Sonoma County, California agreed to arbitration where "applicable laws of the State of California and [T]ribal law, shall be the bases for determination and resolution."[359] This could serve as a model for future cultural access easements to include that dispute resolution should apply relevant Tribal law. While there is not yet an example in practice, an easement or agreement could include a clause to engage in Tribal dispute resolution procedures or Indigenous peacemaking—if the Tribe or Indigenous peoples involved prefer this method of dispute resolution.[360]

When a cultural access easement or agreement is between a land trust and a federally recognized Tribe, it could potentially include a Tribal forum selection clause that requires that any claim against the Tribe under the agreement to be brought in Tribal court.[361] The Tribal court may be able to hear claims brought against the Tribe—even in a dispute with a land trust outside Indian Country—because Tribes retain "attributes of sovereignty over both their members and their territory."[362] In addition, if the agreement is on non-Indian fee land in Indian Country, then this Tribal court forum selection clause may also be able to apply to suits brought by the Tribe against the land trust.[363] Following *Montana*

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[355]Interview of Land Trust Staff (Oct. 20, 2022).

[356]*See* Middleton Manning, *supra* note 202, at 573 (advocating for "restoring [I]ndigenous principles of governance and dispute resolution").

[357]CRUA Template, *supra* note 156, at 6–7; Mount Grace Conservation Land Trust, *supra* note 156, at 4.

[358]CRUA Template, *supra* note 156, at 6–7; Mount Grace Conservation Land Trust, *supra* note 156, at 5.

[359]Stewarts Point Cultural Access Easement, *supra* note 141, at 10.

[360]*See* Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235, 240, 274–77 (1997).

[361]*See* Nicholas R. Sanchez, *Out With the New, In With the Old: Re-Implementing Traditional Forms of Justice in Indian Country*, 8 AM. INDIAN L.J. 68, 102–04 (2020) (describing Tribal forum selection clauses); *see also* Adam Crepelle, *How Federal Indian Law Prevents Business Development in Indian Country*, 23 U. PA. J. BUS. L. 683, 712–14 (2021) (describing uncertainty surrounding enforcement of Tribal court forum selection clauses).

[362]United States v. Mazurie, 419 U.S. 544, 557 (1975). *But see* CANBY, *supra* note 51, at 277 (indicating that Tribal court may only possibly have concurrent jurisdiction over a claim brought by a non-member against Tribal member—or a Tribe if they waived sovereign immunity to suit in Tribal court—when the source of the claim is outside Indian Country).

[363]*See* CANBY, *supra* note 51, at 278 (indicating that Tribal court may have jurisdiction over a claim brought by a Tribe against a non-Tribal member on non-Indian fee lands in Indian Country).

v. United States, Tribes generally do not have civil jurisdiction over nonmembers, with some exceptions.[364] In order to permit a suit against the land trust in Tribal court, a *Montana* exception would need to apply—for one, that the easement or agreement involves the Tribe "regulat[ing], through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the [T]ribe or its members, through commercial dealing, contracts, leases, or other arrangements."[365] The agreement may need to be on non-Indian fee lands within Indian Country for the *Montana* exception to apply—not on non-Indian lands outside Indian Country.[366] Overall, there is significant uncertainty over whether a Tribal forum selection clause would be enforceable for claims against the Tribe or against the land trust.[367] Alternatively, the Tribe could issue a waiver of their sovereign immunity in the agreement only for suits brought against them in Tribal court—which may be permissible under current law.[368] Overall, these are examples of how private law tools for Indigenous land access could potentially support Tribal and Indigenous dispute resolution and Tribal courts.

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[364]Montana v. United States, 450 U.S. 544, 563–565 (1981); *see* Owley, *supra* note 25, at 181.

[365]*Montana*, 450 U.S. at 565 (describing one exception where "Indian [T]ribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians *on their reservations*, even on non-Indian fee lands") (emphasis added); *see* Dollar Gen. Corp. v. Miss. Band of Choctaw Indians, 579 U.S. 545 (2016); Dolgencorp, Inc. v. Miss. Band of Choctaw Indians, 746 F.3d 167, 173 (5th Cir. 2014) (describing how the argument that "noncommercial relationships do not give rise to [T]ribal jurisdiction under the first *Montana* exception" is not "supported by any compelling rationale").

[366]Nevada v. Hicks, 533, U.S. 353, 360 (2001) (describing that "absence of [T]ribal ownership has been virtually conclusive of the absence of [T]ribal civil jurisdiction; with one minor exception, we have never upheld under *Montana* the extension of [T]ribal civil authority over nonmembers on non-Indian land"); Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316, 332 (2008) ("*Montana* and its progeny permit [T]ribal regulation of nonmember conduct *inside the reservation* that implicates the [T]ribe's sovereign interests.") (emphasis added); Hornell Brewing Co. v. Rosebud Sioux Tribal Ct., 133 F.3d 1087, 1091 (8th Cir. 1998) ("Neither *Montana* nor its progeny purports to allow Indian [T]ribes to exercise civil jurisdiction over the activities or conduct of non-Indians occurring *outside their reservations*."). *But see* F.T.C. v. Payday Fin., LLC, 935 F. Supp. 2d 926, 937 (D.S.D. 2013) ("*Montana*'s first exception does not textually include a requirement that the consensual relationship be formed inside the reservation."); Luckerman v. Narragansett Indian Tribe, 965 F. Supp. 2d 224, 230 (D.R.I. 2013) ("[The] First Circuit has suggested, albeit before the Supreme Court's decision in *Plains Commerce Bank*, that a [T]ribal court may, in some circumstances, have jurisdiction over activities occurring off the reservation.") (citing Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth., 207 F.3d 21, 32 (1st Cir. 2000)).

[367]*See* CANBY, *supra* note 51, at 252 (describing how *Montana* exceptions are construed narrowly); Plains Com. Bank, 544 U.S. at 332 (describing that cases applying first *Montana* exception tend to involve activities with "discernible effect on the [T]ribe or its members"); *see also* Owley, *supra* note 25, at 181 (describing how the *Montana* exception does not encompass sales of land); *see generally* Matthew L.M. Fletcher, *A Unifying Theory of Tribal Civil Jurisdiction*, 46 ARIZ. ST. L.J. 779 (2014) (describing complexity of Tribal civil jurisdiction).

[368]This waiver could balance supporting Tribal courts and Tribal sovereignty with the land trust's interest in an enforceable cultural access easement or agreement. It is well-established that Tribes may narrowly waive their sovereign immunity from suit by contract, so long as the waiver is clear. C & L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla., 532 U.S. 411, 418 (2001). However, there is limited case law on a waiver only to permit suits against the Tribe in Tribal court. Two district court cases have held that Tribes may issue a waiver sovereign immunity that only permits suits brought against the Tribe in Tribal court. Sanderford v. Creek Casino Montgomery, No. 2:12-CV-455-WK, 2013 U.S. Dist. LEXIS 3750, at *8 (M.D. Ala. Jan. 10, 2013) (holding that a Tribe, by Tribal statute, can grant a "limited waiver of sovereign immunity, but only for suits brought in the Tribe's Tribal Court" meaning that "the [T]ribe has not waived its immunity in federal court); Hickey v. Crow Creek Hous. Auth., 379 F. Supp. 1002, 1003 (1974) (holding that '[b]y granting its consent to sue and be sued, the Tribal Council would only have power to establish [T]ribal, not federal, jurisdiction" in an action concerning a Tribal entity).

III. LEGAL CONCERNS AND PUBLIC LAW REFORMS

In the process of considering and implementing novel private law tools for Indigenous land return and land access, land trusts and landowners have raised some legal concerns about the private law tools.[369] This Part addresses some of these legal concerns and concludes that there are no major legal barriers for land trusts to return land and land access to Indigenous peoples. Then, this Part identifies potential public law reforms that would support and provide funding for private land return and land access for Indigenous peoples.

A. *Legal Concerns for Private Land Return and Land Access*

This Part addresses some of the legal concerns surrounding novel private law tools: perpetuity and termination of cultural access easements, landowner liability for cultural activities on private land, and whether unrestricted land returns could jeopardize land trusts' tax-exempt status. This Part concludes that these legal concerns are not major barriers to land trusts returning land and land access to Indigenous peoples.

1. Perpetuity and Termination of Cultural Access Easements

Some land trusts may be concerned with the durability of perpetual cultural access easements on private land. However, this Part describes how cultural access easements run with the land on which the easement is granted—ensuring that Tribes and Native land trusts, as easement holders, have perpetual cultural access. A cultural access easement is best characterized as an affirmative easement in gross.[370] Any restrictions on land use included in the cultural access easement could be interpreted as limitations on the scope of the affirmative access and use rights.[371] For example, a cultural access easement may specify that the land may be accessed for cultural activities not including mining, commercial use, development, or road building.

Even where an affirmative easement is held in gross, if the burden of the easement in gross is appurtenant—attached—to a parcel of land it will likely run with the burdened land even if the land title is transferred.[372] As described in the Restatement of Property, the "burden of an affirmative easement or profit is always appurtenant since it rests directly on a specific piece of property."[373] As such, the burden of a cultural access easement—that the land is subject to an affirmative easement for cultural use and access rights—should run with the underlying parcel of land even if it changes owners.

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[369] *See* Levin, *supra* note 62, at 3; *First Light Community*, WABANAKI COMMISSION, *supra* note 61.

[370] *See supra* Part 0.

[371] This affirmative easement held by a Tribe or Native land trust on a parcel of land implies a corresponding obligation on the landowner to not interfere with the cultural access and use rights granted. BRUCE & ELY, *supra* note 110, § 8:32 (describing how easement holder is "entitled to equitable relief against a servient owner's unlawful interference with the easement holder's enjoyment of the servitude").

[372] *See* RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) §§ 1.5, 5.2 (AM. L. INST. 2000) (describing how appurtenant burden runs with the land to all subsequent owners and possessors of burdened property); *see* 4 MICHAEL ALLAN WOLF, POWELL ON REAL PROPERTY § 34.02 (2025) (describing appurtenant easements as attached to the land); Thomas E. Roberts, *Promises Respecting Land Use—Can Benefits Be Held in Gross,* 51 MO. L. REV. 933, 935 (1986) (noting "[i]n this country, the burden of easements in gross will run" with the land); Charles E. Clark, *The Assignability of Easements, Profits and Equitable Restrictions*, 38 YALE L.J. 139, 141–42 (1928) (same); Lawrence Berger, *Integration Of The Law Of Easements, Real Covenants and Equitable Servitudes*, 43 WASH. & LEE L. REV. 337, 362 (1986) ("Since [affirmative easements] involve rights to use servient land, it is absolutely clear, by any analysis, that their burden would always touch and concern that land and would bind a new possessor of it.").

[373] RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 4.5 cmt. e. (AM. L. INST. 2000).

There are two legal shortcomings with easements as a tool for perpetual cultural land access. First, as noncommercial easements in gross, they may not be alienable or devisable by the holder unless the jurisdiction looks to the intent of the parties to determine transferability.[374] In most instances, this is unlikely to be an issue for Tribes holding cultural access easements, as they hold the easement for cultural access on behalf of their people, in perpetuity—there is no reason to transfer it. However, non-transferability could pose an issue for a Native land trust holding a cultural access easement if the organization were ever to dissolve and wanted to transfer the easement to a Tribe or another Native land trust.[375] Second, perpetual cultural access easements can be terminated in a variety of ways, like any easement at common law.[376] For example, a landowner could terminate a cultural access easement if they permanently block physical access to the land and the easement holder fails to challenge this within the statutorily prescribed amount of time for adverse possession in that jurisdiction.[377] Land trusts and Indigenous peoples should be aware of these shortcomings of cultural access easements when using them as a tool for perpetual cultural access.

2. Landowner Liability for Cultural Activities

Land trusts and landowners have also raised legal concerns about liability for any injury to people during cultural activities on the land. First, land trusts can readily address this issue by including an indemnity section in any cultural access easement or agreement.[378] However, even without an indemnity section, all fifty states have recreational use statutes that confer liability protection to landowners allowing individuals to use and access their land for recreational purposes.[379] These statutes limit the liability of the landowner for recreational or harvesting activities that others undertake on the property without compensating the landowner, typically unless the damage or injury to the individual was caused by willful, wanton, or grossly negligent failure of the landowner to guard or warn against a dangerous condition, use, structure, or activity.[380] Some states explicitly include cultural or religious uses of land in their limited liability recreational use statutes.[381] States could amend their statutes to explicitly cover Indigenous cultural activities, but this is likely unnecessary due to the breadth of activities covered by current statutes. Some cultural access easements and

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[374]Dana & Ramsey, *supra* note 115, at 14; *see* Alan David Hegi, Note, *The Easement in Gross Revisited: Transferability and Divisibility Since 1945*, 39 VAND. L. REV. 109, 114 (1986). *But see* BRUCE & ELY, *supra* note 110, § 9:6 (describing that some courts will look to parties intent); Farmer's Marine Copper Works, Inc. v. City of Galveston, 757 S.W.2d 148, 151 (Tex. App. 1988) (describing that "the parties may create an assignable easement in gross through an express assignment provision"); Miller v. Lutheran Conf. & Camp Ass'n, 331 Pa. 241, 250 (1938).

[375]One way to address this issue would be for a non-Native land trust to return a small parcel of land to the Native land trust along with granting the cultural access easement over the non-Native land trusts' land. This small parcel transferred to the Native land trust would serve as the "anchor" parcel—so the cultural access easement is "appurtenant" to that parcel. *See* Cheever & McLaughlin, *supra* note 14, at 136 (describing use of anchor parcels to create appurtenant conservation easements before state conservation easement enabling statutes).

[376]*See* BRUCE & ELY, *supra* note 110, § 10 (describing termination of easements).

[377]*See id.* [110] § 10:25.

[378]*See, e.g.*, Stewarts Point Cultural Access Easement, *supra* note 141, at 7; Mount Grace Conservation Land Trust, *supra* note 156.

[379]*See States' Recreational Use Statutes*, NAT'L AGRIC. L. CTR. (Sept. 7, 2022), https://nationalaglawcenter.org/state-compilations/recreational-use/ [https://perma.cc/9D7H-T7PN]; *see generally* Michael S. Carroll et al., *Recreational User Statutes and Landowners Immunity: A Comparison Study of State Legislation*, 17 J. LEGAL ASPECTS SPORT 163 (2007); TOMMY L. BROWN, CORNELL UNIVERSITY, HDRU SERIES NO. 06-12, ANALYSIS OF LIMITED LIABILITY RECREATION USE STATUTES IN THE NORTHERN FOREST STATES (2006).

[380]*See, e.g.*, ME. REV. STAT. ANN. tit. 14, § 159-A (2022).

[381]*See, e.g.*, MASS. GEN. LAWS ch. 21, § 17C(a) (2022).

agreements explicitly reference these statutes and the intent of the agreements' drafters for the statutes to apply to cultural activities under the agreement.[382]

3. Concerns about Maintaining Tax-Exempt Status

As land trusts have begun to return land and land access, some land trusts have raised concerns about losing their 501(c)(3) tax-exempt status by acting *ultra vires* or for the benefit of a private individual or business. Overall, it is unlikely that even unrestricted land returns would be considered *ultra vires* or violate the private benefit doctrine.

Many land trusts do not have cultural conservation or Indigenous land stewardship listed in their corporate Articles and Bylaws.[383] As a result, some of these land trusts have expressed concern about unrestricted land returns being an *ultra vires* action in violation of their charitable purposes.[384] As described in Part I, Subpart A, land trusts could amend their Articles and Bylaws to include supporting Indigenous cultural purposes as part of their mission before initiating a land return. This would dispel any concern of *ultra vires* action.[385] Similarly, some land trusts have documented the intent of the land return—that the land would be maintained and conserved by Indigenous peoples for Indigenous cultural stewardship purposes—and how that aligns with their organizational mission.[386]

Even without amending their Articles and Bylaws or issuing such a statement, land trusts are unlikely to be acting *ultra vires* with an unrestricted land return. Land trusts' Articles and Bylaws typically also include a general charitable purpose statement that would support a land return.[387] Under IRS regulations, "charitable" purposes can include "eliminat[ing] prejudice and discrimination," including against Indigenous peoples and "relief of the poor and distressed or of the underprivileged," which may also apply depending on the situation of the Tribe or Indigenous peoples.[388] A land return is likely to fall under this general charitable purpose.[389] Moreover, courts "do not favor *ultra vires* as a means of challenging corporate actions" and "state statutes increasingly prevent the assertion of *ultra vires* in a manner that would disrupt the legitimate expectations of third parties."[390] An *ultra vires* claim against a land return would disrupt the legitimate expectations of the third party (a Tribe or Native land trust) receiving the land. Some states expressly prohibit an *ultra vires* claim in such an instance.[391] Overall, an *ultra vires* claim is of limited legal concern for land trusts engaging in land return.

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[382]CRUA Template, *supra* note 156.
[383]Levin, *supra* note 62, at 2–3.
[384]*Id.* [62] at 2.
[385]*Id.* [62]
[386]Interview of Land Trust Staff (Sept. 26, 2022). *See* also Benewah County, 2012 WL 8434345, at *2 (describing how the Coeur d'Alene Tribe of Idaho passed a resolution stating that the "Tribe will continue to use the properties for the ongoing preservation of wildlife habitat").
[387]*See Suggested Language for Corporations and Associations (per Publication 557)*, INTERNAL REVENUE SERV., https://www.irs.gov/charities-non-profits/suggested-language-for-corporations-and-associations-per-publication-557 [https://perma.cc/G4L2-4ZF7] (last visited Feb 28, 2025) (including general charitable purpose statement).
[388]Levin, *supra* note 62, at 2 (citing Treas. Reg. § 1.501(d)(2)).
[389]*Id.* [62]
[390]*See* C. Timothy Lindstrom, *Hicks v. Dowd: The End of Perpetuity,* 8 Wyo. L. Rev. 25, 55–56 (2008) (citing WYO. STAT. ANN. § 17-19-304 (2023)); 19 C.J.S. Corporations § 676 (2008)). *See* C. TIMOTHY LINDSTROM, A TAX GUIDE TO CONSERVATION EASEMENTS 35 (2008) (describing an example of how the court could rule that a land trust land transaction was *ultra vires* but still uphold the transaction to avoid disrupting the legitimate expectations of the party that purchased the land).
[391]*See* WYO. STAT. ANN. § 17-19-304 (2007) (specifying that "a corporation's power to act may be challenged in a proceeding against the corporation to enjoin an act *where a third party has not acquired rights*") (emphasis added).

The private benefit doctrine is also unlikely to apply. The private benefit doctrine, at its most basic, states that tax-exempt organizations cannot "serve[] a private interest more than incidentally."[392] Organizations that run afoul of this doctrine risk losing their tax-exempt status.[393] However, the private benefit doctrine does not apply to land trust transactions with governmental entities like federally recognized Tribes or other charitable entities like Native land trusts that have 501(c)(3) status.[394] Land trusts have not violated this doctrine when they return land to Tribes and Native land trusts, as opposed to individual Indigenous people or private entities without charitable purpose.

B. Public Law Reforms for Land Return and Land Access

This Part proposes two public law reforms to support return of land and land access to Indigenous peoples: (1) tax incentives for land returns and cultural access easements and (2) exceptions to public access and conservation easement requirements in state and federal funding programs for land acquisition when the land is held by a Tribe or Native land trust. This Part also outlines the possibility of public funding for Tribes and Native land trusts' acquisition of cultural access easements on private land.

1. Federal Tax Code

As a first recommended reform, the federal tax code could be amended to permit tax deductibility for donations of cultural access easements (separate from conservation easements) and land returns to Tribes and Native land trusts.[395] Federal income, gift, and estate tax deductions have been crucial incentives for the expansion of conservation easements in the United States.[396] Under existing law, federal tax deductions for conservation easements are unlikely to include donations of cultural access easements and land returns to Tribes and Native land trusts. Only "[q]ualified conservation contributions" are tax deductible—defined as donations of "(A) of a qualified real property interest, (B) to a qualified organization, (C) exclusively for conservation purposes."[397] For cultural access easements and land returns, part (C) is likely the largest

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[392]John D. Colombo, *In Search of Private Benefit*, 58 FLA. L. REV. 1063, 1064 (2006) (citing I.R.S. G.C.M. 39,598 (Jan. 23, 1987)).

[393]Paige Madeline Gentry, Note, *Applying the Private Benefit Doctrine to Farmland Conservation Easements*, 62 DUKE L.J. 1387, 1388 (2013) (citing I.R.S. G.C.M. 39,862, at 1 (Nov. 22, 1991)).

[394]*See* Colombo, *supra* note 392, at 1067; *supra* note 62, at 6–7. *See generally* Harvey Philip Dale, *Standards for Exemption: Inurement, Private Benefit, and Excess Benefit Transactions*, 59 REAL PROP. TR. & EST. L.J. (2024).

[395]*Cf.* Jessica E. Jay, *Opportunities for Reform and Reimagining in Conservation Easement and Land Use Law: A To-Do List for Sustainable, Perpetual Land Conservation*, 46 VT. L. REV. 387, 403 (2022) (suggesting amending conservation easement section of tax code to enable "grants of land or cultural conservation easements back to Indigenous people and to heirs of previously enslaved people").

[396]Isla S. Fishburn et al., *The Growth of Easements as a Conservation Tool*, 4 PLOS ONE 1, 5 (2009); Andrew Flynn, *Restoring the Conservation Purpose in Conservation Easements: Ensuring Effective and Equitable Land Protection through Internal Revenue Code Section 170(h)*, 40 STAN. ENV'T L.J. 3, 12–15 (2021). Tax incentives for conservation easement have been abused in some instances and subsequent reforms and enforcement have targeted these abuses. *See* Nancy A. McLaughlin, *Perpetual Conservation Easements in the 21st Century: What Have We Learned and Where Should We Go from Here?*, 2013 UTAH L. REV. 687, 703-09 (2013) (summarizing some of the abuses of the tax incentives for conservation easements, including those described in two articles by the *Washington Post* in 2003 and 2004); *see also* Nancy A. McLaughlin, *Conservation Easements and the Valuation Conundrum*, 19 FL. TAX. REV. 225, 227 (2023) (describing how "deduction has encouraged thousands of property owners to donate easements that protect land and historic structures with important conservation and historic values" but that the "deduction has also, however, been subject to abuse, including valuation abuse").

[397]26 U.S.C. § 170(h)(1)(A)-(C); 26 C.F.R. § 1.170A-14 (2022) (defining conservation purposes); LINDSTROM, A TAX GUIDE, *supra* note 390, at 21; Flynn, *supra* note 396, at 16.

barrier to tax deductibility. While some state conservation easement-enabling statues include cultural values of land, the federal tax code does not list cultural values of land as a conservation purpose. Although the "preservation of an historically important land area" is a permissible conservation purpose, this is unlikely to include an Indigenous cultural site unless it meets the National Register Criteria for Evaluation or is adjacent to a property on the National Register of Historic Places.[398] Overall, this conservation purpose may be difficult and time consuming to achieve for an Indigenous cultural site.[399]

However, these tax code provisions for conservation easements could serve as a model for tax incentives for cultural access easements and land returns. New legislation could create an income, gift, and estate tax deduction for a "qualified Indigenous cultural contribution" of a qualified real property interest (fee title or a perpetual cultural access easement), to a qualified organization, exclusively for Indigenous cultural purposes. The legislation could specify that a qualified organization includes a federally recognized Tribe, state-recognized Tribe, or a nonprofit Native land trust. Indigenous peoples could draft or provide guidance for drafting regulations on what is "exclusively for Indigenous cultural purposes" to have these regulations match Tribes' and Indigenous peoples' cultural stewardship values. The language of the statute and regulations could be analogous to the conservation easement portions of the tax code and tax regulations.[400]

Overall, these changes to the tax code would benefit not only Indigenous peoples but also the general public. As Vanessa Racehorse and Anna Hohag describe, "rematriation and rebuilding the peoples' relationship to the land is a relationship that not only benefits Indigenous peoples [but] . . . everyone because it has proven to be an effective method of environmental stewardship for millennia."[401] Cultural access easements would benefit the public by supporting the protection and stewardship of land.[402] These tax deductions would incentivize and support private landowners returning land and land access to Indigenous peoples.

2. State and Federal Funding Programs

Federal and state governments provide integral funding for conservation of private land, including funds for land acquisition.[403] This Part proposes exceptions to public access and conservation easement requirements in these funding programs where a Tribe or Native land trust will hold title to the land acquired. This Part also outlines the possibility of new federal and state funding programs for Tribes and Native land trusts to acquire cultural access easements on private land.[404]

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[398]26 U.S.C. § 170 (h)(4)(A)(iv); 26 C.F.R. § 1.170A-14(d)(5)(ii) (2022). *See also* MIDDLETON MANNING, *supra* note 19, at 22 (describing process of listing a culturally significant parcel of land on the National Register as a Traditional Cultural Property in order to meet this conservation purposes requirement); *see generally* PATRICIA L. PARKER AND THOMAS F. KING, GUIDELINES FOR EVALUATING AND DOCUMENTING TRADITIONAL CULTURAL PROPERTIES, *in* U.S. DEP'T OF THE INTERIOR, NAT'L PARK SERV., NATIONAL REGISTER BULLETIN 38 (1990).

[399]Owley, *supra* note 213, at 178–79 (describing limited and confusing case law on "preservation of a[n] historically important land area" as a conservation purpose); Kueter & Jensen, *supra* note 120, at 1059–62.

[400]*See* 26 U.S.C. § 170(h); 26 C.F.R. § 1.170A-14(c)(2).

[401]Racehorse & Hohag, *supra* note 3, at 183–84.

[402]*See* Jay, *supra* note 395, at 401.

[403]*See Federal Funding Opportunities*, LAND TRUST ALLIANCE (Sept. 29, 2023), https://landtrustalliance.org/resources/learn/explore/federal-funding-opportunities [https://perma.cc/W7UA-58TB] (listing federal funding opportunities for land trusts).

[404]With its focus on the role of private entities in supporting return of land and land access, this Article does not detail possible reforms to federal and state funding programs that would increase the amount of direct funding to Tribes for acquisition of ancestral homelands for cultural stewardship. For one

Currently, many federal and state funding programs for conservation land acquisition require public access to the land or a conservation easement on the land.[405] Public access requirements in particular have been a barrier to using this funding for land return to Indigenous peoples, because public access may be inappropriate for lands with sensitive cultural or ceremonial sites.[406] Where a Tribe or Native land trust will be the holder of the land acquired and the land has sensitive cultural sites, the funding program should provide an exception to the public access requirement. There are existing examples of programs that have public access requirement exceptions under various circumstances.[407] Funding programs requiring a conservation easement on the land should permit a similar exception to avoid oversight and outside control over Indigenous peoples' cultural stewardship of and relationships with the land.[408]

In addition, state and federal governments could consider funding programs for Tribes and Native land trusts to acquire cultural access easements on private lands. Some state and federal programs already fund the purchase of conservation easements on private lands, including easements held by federal and state government entities.[409] The expenditure of public funds on conservation easements on private property is often justified by the public benefits of maintaining agricultural lands, open space, wildlife habitat, and other land conservation values.[410] Supporting Indigenous cultural access to land also benefits the general public—by promoting the long-term stewardship of and care for the land.[411] The use of federal funding to support cultural access easement acquisition by Tribes could be further justified under the federal government's trust relationship with and trust responsibility to Tribes.[412]

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example, some federal funding programs for land acquisition for conservation could provide funding directly to Tribes instead of through the state government. *See Land and Water Conservation Fund*, U.S. DEP'T OF INTERIOR, https://www.doi.gov/lwcf [https://perma.cc/NT67-9N5H] (last visited Feb. 28, 2025) (describing how Tribes must access funds from the Land and Water Conservation Fund through the state and cannot receive them directly).

[405]*See supra* note 85 (providing examples of funding sources requiring a conservation easement or public access).

[406]*See supra* Part 0.

[407]36 C.F.R § 230.2 (2023) (describing requirements for Community Forest Program funding, including "description of public access and the rationale for any limitations on public access, such as protection of cultural (including tangible and intangible resources"); *cf.* N.J. ADMIN. CODE § 7:36-15.3 (2023) (permitting exceptions to public access requirement for state funding program where "public accessibility would pose an unacceptable risk to the land or to any natural resources associated with the land").

[408]*See supra* Part 0 (discussing how conservation easements on land returns are incompatible with decolonization principles).

[409]*See, e.g.*, Envtl. Press Release, *DEC Announces New Forest Conservation Easements for Land Trusts Grant Program*, N.Y. STATE DEP'T OF ENV'T CONSERVATION (Mar. 17, 2022), https://dec.ny.gov/news/press-releases/2022/3/dec-announces-new-forest-conservation-easements-for-land-trusts-grant-program [https://perma.cc/5S62-S2PZ]; U.S. DEP'T OF AGRIC., FOREST SERV., U.S. FOREST SERVICE STEWARDSHIP FINANCING OF FOREST LEGACY CONSERVATION EASEMENTS 10 (2013), https://www.fs.usda.gov/sites/default/files/USFS-ForestLegacyReportFinal-StewardshipFinancing.pdf [https://perma.cc/CE4F-MDR6] (describing how the Forest Legacy Program funds the purchase of a conservation easement held by federal, state, or local government entities).

[410]*See* N.Y. STATE DEP'T OF ENV'T CONSERVATION, *supra* note 408; Cheever & McLaughlin, *supra* note 14, at 135 (describing how "[s]tate legislatures have come to recognize . . . that restricting the development and other uses of property for conservation or historic preservation purposes can provide significant benefits to the public").

[411]*See* Racehorse & Hohag, *supra* note 3, at 183.

[412]*See* CANBY, *supra* note 51, at 39–43; Scott W. Stern, *Rebuilding Trust: Climate Change, Indian Communities, and a Right to Resettlement*, 47 ECOLOGY L.Q. 179, 219–20 (2020) (summarizing how the present scope of the trust responsibility includes an obligation for the federal government to provide Tribes a variety of services and protect Tribal land); Jeri Beth K. Ezra, Comment, *The Trust Doctrine: A Source of Protection for Native American Sacred Sites*, 38 CATH. U. L. REV. 705, 705–07 (1989) (suggesting the trust responsibility includes a duty to protect Native American sacred sites); *see generally* Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust*

CONCLUSION

The sincerest hope of this Article is to inspire private entities and landowners to return land and land access to Indigenous peoples. This Article has surveyed the range of private law tools currently being used for land return and land access—including novel tools such as cultural access easements and agreements, harvest permits, and land invitations. This Article has described how private law tools for land return can advance decolonization and a stewardship model of property law. The Article has also addressed legal concerns with land return and land access—concluding that none pose major legal barriers to land return—and recommended public funding and tax incentives to support land return and land access. Overall, this Article calls on private entities to go beyond land acknowledgment to actually return land and land access to Indigenous peoples. This work should be done carefully, under the leadership and direction of Indigenous peoples, with respect and deference.

Furthermore, this Article illuminates the decolonial possibilities of private law and the potential to move from a traditional, Western ownership model of property law toward a stewardship model. In the near term, private entities and landowners can return land in fee simple to Indigenous peoples without a conservation easement. They can also grant perpetual cultural access easements to Indigenous peoples for harvesting, ceremonies, and other cultural activities. The terms of cultural access easements can further support Indigenous dispute resolution and minimize any restrictions or oversight on Indigenous cultural activities on private land. Private land return is voluntary and possible now—it does not require legislation or litigation. It does not require the government at all. Of course, this should not abate pressure on federal, state, and local governments to return land and land stewardship to Indigenous peoples and provide funding and incentives for private land return. But returning land to Indigenous peoples does not belong to the province of government alone. It pertains to all of us.

Doctrine Revisited, 1994 UTAH L. REV. 1471 (1994) (weighing the strengths and weaknesses of trust doctrine as a legal tool for exercising Indigenous sovereignty). This funding could also be justified by state and federal governments seeking to redress longstanding government interference with Indigenous cultural activities and ceremonial practices. *See generally* John Rhodes, *An American Tradition: The Religious Persecution of Native Americans*, 52 MONT. L. REV. 13 (1991).

Appendix A
Table of Examples of Native Land Trusts

Name of Native Land Trust (or Similar Organization)	**Website**
Cultural Conservancy	https://www.nativeland.org/ [https://perma.cc/SJB4-GJGE]
InterTribal Sinkyone Wilderness Council	https://sinkyone.org/ [https://perma.cc/29CV-RCRG]
White Earth Land Recovery Project	https://www.welrp.org/ [https://perma.cc/CP64-QGA8]
Haudenosaunee Environmental Task Force	http://hetf.org/
Native American Land Conservancy	https://www.nativeamericanland.org/ [https://perma.cc/M27J-T3H3]
Indian Land Tenure Foundation	https://iltf.org/ [https://perma.cc/CWA6-CRMZ]
Native Conservancy	https://www.nativeconservancy.org/ [https://perma.cc/6WYR-AY7L]
Blackfeet Indian Land Conservation Trust Corporation	https://projects.propublica.org/nonprofits/organizations/311703318 [https://perma.cc/5NPX-JSJM]
Kumeyaay Diegueño Land Conservancy	http://www.kdlc.org/ [https://perma.cc/TT9P-Q2D8]
Moloka'i Land Trust	https://molokailandtrust.org/ [https://perma.cc/EAP9-TUJA]
Maidu Summit Consortium	https://www.maidusummit.org/ [https://perma.cc/XB6P-J73M]
Native American Advancement Corporation	https://www.nativeadvancement.org/ [https://perma.cc/584K-3TAL]
Native Land Conservancy	http://www.nativelandconservancy.org/ [https://perma.cc/N6KV-5TL2]
Sustainable Southeast Partnership	https://sustainablesoutheast.net/ [https://perma.cc/ELV2-84RC]
Amah Mutsun Land Trust	https://www.amahmutsunlandtrust.org/ [https://perma.cc/BF4H-H7GV]
Nibezun	https://nibezun.org/nibezunthankyou/ [https://perma.cc/TB8B-W4FP]
Nipmuc Cultural Preservation	https://www.tides.org/our-community/tides-grantees/honor-of-life-land-returned-to-nipmuc-nation-after-14-generations/ [https://perma.cc/8LL6-85NA]
Pocasset Pokanoket Land Trust	https://www.pocassetlandtrust.org/ [https://perma.cc/84T7-WKLX]
Ute Land Trust	https://web.archive.org/web/20230214014541/https://www.utelandtrust.org/

Name of Native Land Trust (or Similar Organization)	**Website**
Sogorea Te' Land Trust	https://sogoreate-landtrust.org/rematriate-the-land-fund/ [https://perma.cc/V8XM-GVAU]
Bomazeen Land Trust	https://www.bomazeenlandtrust.org/ [https://perma.cc/Z5LP-RET3]
Koy'o Land Conservancy	https://colfaxrancheria.com/koyo-land-conservancy [https://perma.cc/A4HP-8T5E]
Niamuck Land Foundation	https://www.niamucklandtrust.com/ [https://perma.cc/42FZ-THDB]
Native Land Trust Council	https://web.archive.org/web/20230531171936/https://nativelandtrustcouncil.org/
Northeast Farmers of Color Land Trust	https://nefoclandtrust.org/ [https://perma.cc/BHE9-9U9B]
Tongva Taraxat Paxaavxa Conservancy	https://www.tongva.land/ [https://perma.cc/NTN4-6ZYH]
Eastern Woodlands Rematriation Collective	https://rematriate.org/ [https://perma.cc/TED2-BYET]
Lenape Union Land Trust	https://lenapeunionlandtrust.org/ [https://perma.cc/M7YF-6W2T]
Ramapo Munsee Land Alliance	https://ramapomunseelandalliance.org/
Indigenous East	https://www.indigenouseast.org/ [https://perma.cc/U58C-9N5A]

Table of Additional Examples of Land Returns

Land Trust, Non-Profit, or Landowner Returning Land	**State**	**Recipient of Land**	**Type of Land Recipient**	**Acres Returned (Approx.)**	**Year Returned (Approx.)**	**Conservation Easement on land? (Where information is available)**	**Source**
Elliotsville Foundation	ME	Penobscot Nation	Tribe	735	2020		https://www.mainepublic.org/environment-and-outdoors/2020-10-30/elliotsville-foundation-returns-735-acres-to-penobscots [https://perma.cc/HPT9-7HBS]
Save the Redwoods League	CA	InterTribal Sinkyone Wilderness Council	Native Land Trust or Non-profit affiliated with a Tribe	523	2022	Yes	https://www.savetheredwoods.org/press-releases/523-acres-of-forestland-donated-to-intertribal-sinkyone-wilderness-council/ [https://perma.cc/A9R6-GXFM]
Chesapeake Conservancy	VA	Rappahannock Tribe	Tribe	465	2022	Yes	https://archive.chesapeakeconservancy.org/what-we-

Land Trust, Non-Profit, or Landowner Returning Land	State	Recipient of Land	Type of Land Recipient	Acres Returned (Approx.)	Year Returned (Approx.)	Conservation Easement on land? (Where information is available)	Source
							do/conserve/advancing-goals/fones-cliffs-conservation-2/the-rappahannock-tribes-return-to-the-river/ [https://perma.cc/YKR3-D2NH]
Northeast Wilderness Trust	MA	Native Land Conservancy	Native Land Trust or Non-profit affiliated with a Tribe	33	2024	Yes	https://www.capecodtimes.com/story/news/2024/11/18/native-land-conservancy-trust-mashpee-wampanoag-indigenous/76266612007/ [https://perma.cc/5J5M-WGZV]
New Jersey Conservation Foundation	NJ	Native American Advancement Corporation	Native Land Trust or Non-profit affiliated with a Tribe	63	2023		https://www.njconservation.org/press_release/63-acres-in-salem-county-returned-to-indigenous-conservationists/ [https://perma.cc/S6GA-QD7E]
The Conservation Fund	DE	Nanticoke Indian Association (Nanticoke Indian Tribe)	Tribe	31	2021	Yes	https://www.nanticokeindians.org/nanticoke-indian-tribe-acquires-land-of-their-ancestors/ [https://perma.cc/M4VD-5CLK]
American River Conservancy	CA	Miwok people	Native Land Trust or Non-profit affiliated with a Tribe	320	2022 (announced)		https://fox40.com/studio-40/ladies-valley-land-back-project/ [https://perma.cc/CD9Q-AK2Q]
Western Rivers Conservancy	WA	Confederated Tribes of the Colville Reservation	Tribe	4	2020		https://www.westernrivers.org/about/tribal-nation-partners/confederated-tribes-of-the-colville-reservation [https://perma.cc/2T4Z-VFVZ]
Western Rivers Conservancy	CA	Tübatulabal Tribe	Tribe	1,240	2023	Yes	https://ictnews.org/news/tubatulabal-tribe-acquires-1240-acres-of-ancestral-land/ [https://perma.cc/9NQU-7Q87]
Capitol Land Trust	WA	Cowlitz Indian Tribe	Tribe	unknown	2023		https://www.cowlitz.org/landback2023 [https://perma.cc/J3LM-U5NH]
Placer Land Trust	CA	Koy'o Land Conservancy	Native Land Trust or Non-profit affiliated with a Tribe	40	2022		https://placerlandtrust.org/ancestral-homelands-return-to-local-tribe/ [https://perma.cc/5DMV-AED3]
Ducks Unlimited	VA	Nansemond Indian Nation	Tribe	504	2022		https://www.wvtf.org/news/2022-10-25/in-a-win-for-

Land Trust, Non-Profit, or Landowner Returning Land	**State**	**Recipient of Land**	**Type of Land Recipient**	**Acres Returned (Approx.)**	**Year Returned (Approx.)**	**Conservation Easement on land? (Where information is available)**	**Source**
							conservation-nansemond-indian-nation-is-given-back-ancestral-land [https://perma.cc/F5KC-6H7M]
Save the Redwoods League	CA	InterTribal Sinkyone Wilderness Council	Native Land Trust or Non-profit affiliated with a Tribe	164	2012	Yes	https://www.sfgate.com/science/article/indians-given-164-acres-by-save-the-redwood-league-3517183.php [https://perma.cc/QM4D-9LM5]
Western Rivers Conservancy	OR	Confederated Tribes of the Umatilla Indian Reservation	Tribe	545	2014		https://www.westernrivers.org/about/tribal-nation-partners/confederated-tribes-of-the-umatilla-indian-reservation [https://perma.cc/8DYQ-KGDT]
Western Rivers Conservancy	OR	Confederated Tribes of Grand Ronde	Tribe	411	2016		https://www.westernrivers.org/about/tribal-nation-partners/confederated-tribes-of-grand-ronde [https://perma.cc/Q2FV-9NLH]
Taos Land Trust	NM	Taos Pueblo	Tribe	44	2012	Yes	https://sacredland.org/taos-pueblo-tribe-regains-ownership-of-sacred-hot-springs-blog/ [https://perma.cc/V8Z8-PP7K]