

A THIRD WAY

In *A Third Way*, Hillary Hoffmann and Monte Mills detail the history, present context, and future of the ongoing legal fight to protect indigenous cultures in the United States. At the federal level, this fight is shaped by the assumptions that led to current federal cultural protection laws, which many tribes and their allies are now reframing to better meet their cultural and sovereign priorities. At the state level, centuries of antipathy toward tribes are beginning to give way to collaborative and cooperative efforts that better reflect indigenous interests. Most critically, tribes themselves are creating laws and legal structures that reflect and invigorate their own cultural values. Taken together, and evidenced by the recent worldwide support for indigenous cultural movements, events of the last decade signal a new era for indigenous cultural protection. This important work should be read by anyone interested in the legal reforms that will guide progress toward that future.

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DECOLONIZING THE LAWS OF INDIGENOUS
CULTURAL PROTECTION

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*To Chad, Anna, Nuala, Isabelle, and Jack, with love.
To Ellery, with hope for a better and more just future.
And to a “third way.”*

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Preface

The story of indigenous cultures and the law in the United States has been one of theft, loss, and decimation, at least when that story has been created and told by nonindigenous voices. As this book makes clear, we believe the era of those stories has passed and indigenous people will define the future of indigenous cultures and their protection on their own terms. Therefore, we did not write this book in an attempt to establish normative guidelines of indigenous cultural preservation. Instead, we have set out to provide a framework within which tribes – and those interested in the area of indigenous cultural protection – can glean a basic understanding of the various laws that impede that effort as well as those that advance claims to protect indigenous cultures. To frame this discussion in the chapters that follow, we want to begin with a clear description of our purpose and goals.

We are not Native Americans, and particularly in light of the history of appropriation and exploitation of indigenous people and their cultures, we want to be crystal clear that we write as cultural “outsiders,” not from within the indigenous cultures this book describes or relates to. It is neither our place nor our intent to claim any such cultural connections or identities. Rather, in writing this book, we have drawn from our experience – experience advocating for indigenous peoples, serving as in-house legal counsel for an Indian tribe, as counsel for individual tribal members in state and federal court, teaching federal Indian law and related subjects to law and graduate students, testifying in Congress about the impact of public lands and energy bills on tribes, giving talks to lawyers about the field of federal Indian law and how it relates to tribal cultural rights, commenting to media on tribal cultural resource threats, and writing numerous articles addressing various aspects of the cultural assaults that indigenous Americans face in the twenty-first century.

During that time, we have encountered knowledge gaps that surprised us, even among audiences and individuals who were highly educated, and especially among fellow communities of outsiders. One of our many goals is to educate those who lack a basic understanding of the cultural threats that tribes face, and the laws that

created, or in some way relate to those threats, with the many examples, cases, and stories in the pages that follow. Another goal is to present a comprehensive set of laws and legal arguments that might be useful to tribes and tribal members seeking to defend against cultural appropriation or other types of cultural threats.

The title of this book draws from a passage in a book, *Tonto's Revenge*, written by renowned Osage and Cherokee scholar Rennard Strickland, in which he spoke with a Lummi tribal elder about life during the termination era, immediately after World War II. The elder recalled the day that a Bureau of Indian Affairs (BIA) agent had called the tribe together to inform them that the tribe would be “terminated” by the federal government. The BIA agent told them that it could happen in one of two ways: either the “easy way,” with the tribe cooperating, or the “hard way,” if the tribe refused, either one of which would lead to termination. At that point, the elder recalled, her husband, a Marine sergeant who had just returned from the war, stood up and said “No, there is a third way and that is with the tribe saying ‘NO’ and if necessary, going to the congress to stop you” (quoted in Strickland, *Tonto's Revenge*, p. 49). The third way is what the Lummi chose, and they succeeded.

For tribes, bands, nations, or communities of indigenous people and their allies seeking a “third way” to protect their cultures and cultural connections to this continent in the twenty-first century, their path forward might be in Congress, state legislatures, tribal council chambers, the courts, on social media, in the streets, or, most likely, some combination the above.

We wrote this book to support that movement.

Acknowledgments

Although this work was motivated generally by the authors' shared experience of tribal advocacy, the idea for a dedicated manuscript on the topic of indigenous cultural protection was born out of a class that each of the authors have taught at the Alexander Blewett III School of Law at the University of Montana. That class, offered as part of the school's Summer Indian Law Program, focuses on the laws of cultural protection and how Indian tribes and indigenous people can and do utilize those laws to their advantage. The authors appreciate the opportunity to teach in this area and thank the University of Montana for establishing and supporting that course and for continuing to offer such a depth of curricular offerings for students interested in the study of federal Indian Law and tribal advocacy.

Without excellent professors and mentors, it is impossible to learn a subject as complex as federal Indian law. The authors therefore wish to thank Charles Wilkinson, David Getches, Richard Collins, Sarah Krakoff, and Alexander Skibine, who planted the seeds that eventually grew into this book. Without their generosity of spirit and dedication, this field would not be the extensive and inspirational body of law that it is today. The scholars whose work has continually nourished those seedlings as they matured, whose dedication has proven immeasurably inspirational in times when we questioned whether a third way was possible, and whose work appears throughout this manuscript, with reverence and deep gratitude, are Rennard Strickland, Vine Deloria, Walter Echohawk, Joy Harjo, Winona LaDuke, Matthew L. M. Fletcher, and Rebecca Tsosie. Lastly, we appreciate and are grateful for the important legacy of scholarship, teaching, and service that those named in this paragraph and many others, like Margery Hunter Brown, Ray Cross, Kevin Washburn, and Ralph Johnson to name just a few, have built. The power of their example for Indian Country, and the rest of the country, cannot be emphasized enough, and we humbly strive to carry that legacy forward.

While we are fortunate enough to give credit to a few of those folks here, we would also like to acknowledge the many tribal leaders, officials, citizens, and

attorneys who are engaged in the daily work of protecting and advancing tribal sovereignty and indigenous cultures and inspire our work, thinking, and writing. Hopefully, this book supports their efforts.

In addition, the authors wish to thank their respective institutions, Vermont Law School and the Alexander Blewett III School of Law at the University of Montana, for their support of this and other scholarly research. Without the institutional support for scholarship, works like this would not be possible.

Finally, we benefited from helpful and insightful commenters like April Youpee-Roll and excellent research support from dedicated students. For the latter, the authors wish to acknowledge and thank their research assistants: Thomas Flynn, Samantha Doyle, Sarah Mooradian, Margaret Kelly, and Hallee Kansman.