INDIAN COUNTRY LAND, NATURAL RESOURCES, AND WATER

KEY POINTS AND TAKEAWAYS:

- Through land secessions, takings, and federal policies dividing landownership, Indian Country has a complex legal landscape regarding the regulation and protection of its land, natural resources, and water.
- Tribes are empowered to exercise their inherent right to self-government and regulate their own land bases and natural resources.
- Tribal water rights are essential for cultural, traditional, and agricultural purposes, and many Tribes have prior water rights under law.
- Recent changes in federal laws through the 2018 Farm Bill support the USDA program access and agency cross-collaboration to support food and agriculture systems in Indian Country.

The cultural identity of American Indian and Alaska Native peoples is closely associated to one's location and all its natural resource attributes. With the importance of this identity tied to "place," there are a significant number of economic and environmental priorities for Tribal Nations on their retained land base and water rights that are essential to building and support strong Tribal governments and communities. Currently, the vast number of resource holdings throughout the 56.2 million acres of trust land existing in Indian Country.[1] While that number has increased by approximately 500,000 acres over the last decade, all Tribal Nations have different and varied histories dealing with land takings and secessions which are rooting in federal policy, creating complex legal landscape of jurisdiction in Indian Country.

The General Allotment Act of 1887[2] required lands held by in common a Tribal Nation to be divided into individual tracts among Tribal members, with each receiving a parcel of a certain size established by federal law. The remaining lands were then opened for non-Indian settlement, resulting in the loss of 90 million acres of Indian land nationwide. The result left a checkerboard of land ownership patterns within Tribal reservation boundaries, with some titles being held in individual fee by both Indians and non-Indians and others being held in trust by the federal government for the benefit of Tribes and individual Indians. Depending on the Tribal membership status of the landowner and title of the land, this has resulted in a jurisdictional labyrinth in Indian country when one considers overlays of local, state, and tribal law applying to different individuals in the same area.

As the trustee for lands held in trust for the benefit of Tribes and individual Indians, the U.S. Department of the Interior – Bureau of Indian Affairs acts as the approval authority for many different activities, including leasing the surface and subsurface holdings of Tribes,[3] environmental protection, irrigation, energy, among other issues. Different regulations apply to each type of lease, depending on the usage sought and the resource impacted.[4] The Helping Expedite Affordable and Responsible Tribal Homeownership Act of 2012 (HEARTH Act), allows Tribes to develop their own regulations leasing. Once the regulations are approved by the Secretary of the Interior, the Tribe may enter into business and agricultural leases for a 25-year-term without federal approval of each individual lease. Several Tribes have adopted agricultural leasing regulations under the HEARTH Act authority, allowing for a greater exercise of Tribal sovereignty concerning on-reservation land leases. These provisions are incorporated in the larger part of each Tribes' code and have allowed for landowner ease of entering into leases without unnecessary delay often caused by the federal approval process.

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In addition to land use issues, water remains a culturally significant and important attribute to the lifestyles in Tribal communities. This is especially true in the arid west, where water may often be a scarce resource and competing uses may spur conflicts with surrounding stakeholders. In most instances, water rights disputes and regulation are handled by the relevant state jurisdiction. However, the federal government maintains certain water rights in Indian country that exist separate from state law.

Under the doctrine established in 1908[5] by Winters v. United States, the U.S. Supreme Court recognized the concept of Indian reserved water rights. Specifically, the assumption is that when Congress reserved land for an Indian reservation, it also reserved water to fulfill the purposes of that reservation. A "priority date" then attaches to these rights at the date the reservation was established by Congress, allowing these rights to be claimed by those subsequently established by competing stakeholders.[6] Because Indian reservations often date many years prior to non-Indian stakeholders settling the surrounding areas, Indian water rights established under Winters often have a more senior priority date than competing users.

In Winters, the Court noted that Tribal reservations were mainly established to sustain an agrarian settlement.[7] Therefore, Indian water rights are often interpreted as enough water necessary to irrigate reservation agriculture.[8] This holds enormous potential for agricultural production in Tribal communities as these rights are often more senior to surrounding uses and are secured by federal law. However, federal programs supporting agricultural production under the U.S. Department of Agriculture (USDA) are often inaccessible to Tribes because their authorizing legislation provides no pathway for Tribal access – often leaving conservation and irrigation infrastructure funding programs inaccessible by those throughout Indian country. Additionally, the lack of cross-coordination between USDA and the Bureau of Indian Affairs at the U.S. Department of the Interior has made it difficult to implement federal agriculture programs on Tribal trust lands.

There has been a strong shift in this paradigm with the 2018 Farm Bill, which was passed with a record 63 Tribal-specific provisions, many of which focus on Tribal parity in program access and cross-collaboration between USDA and the BIA. This work, accomplished by the Native Farm Bill Coalition and its 170 member Tribes, does a great deal in addressing the funding and access disparities for Tribal producers. Still, this monumental achievement did not instantaneously solve all the funding disparities and program access barriers that have plagued Indian Country for years. Philanthropic support for agricultural-focused work is, and will remain, a vital resource for Tribal communities because many USDA program participation criteria are not yet aligned to recognize traditional practices, often creating a void in federal funding for community-based work.

1. https://www.bia.gov/frequently-asked-questions.
2. 25 U.S.C. 331 et seq.
3. 25 U.S.C. 415.
4. 25 CFR Part 162.00.
5. 207 U.S. 564 (1908)
6. https://nationalaglawcenter.org/wp-content/uploads/assets/crs/RL32198.pdf
7. Id.
8. Id.