

## TRIBAL CONSERVATION EASEMENTS WEBINAR Q&A

**Presenter:** Thomas Linzey, Center for Democratic and Environmental Rights

*DISCLAIMER: Thomas Linzey is admitted to the Bar of the Commonwealth of Pennsylvania, but any answers below should not be construed as the offering of legal advice in any jurisdiction.*

- **If easements are placed in federal agency hands (tribal), can they be used against the Tribe?**

**Thomas Linzey:** Yes, which is the underlying purpose of donating or selling conservation easements to a federal agency. Once the federal agency has the easement, they can enforce the provisions of the easement against the Tribe if the Tribe runs afoul of those easement provisions. And, because the easements are generally negotiated between the current landowner and the federal agency, Tribes are often left out. Foundations are generally more comfortable buying the land, restricting the use of the land, and then doing “land back.” It’s why we counsel Tribes to become more involved in the negotiation between the foundation and the federal government, so that the easements can be changed to reflect the needs of the Tribe.

- **Is the BIA ever involved in conservation easements?**

**Thomas Linzey:** Yes, but not as often as other parts of the Department of the Interior. For a look at BIA Easements overall, here’s a guide – it just touches on conservation easements on page 6, but gives a good overview of BIA easements and the process for granting them - [https://www.bia.gov/sites/default/files/dup/assets/public/raca/handbook/pdf/52%20IAM%209-H%20ROW%20HB%20\\_FINAL\\_signed\\_w.footer\\_Jan%202022\\_minor%20corrections\\_508.pdf](https://www.bia.gov/sites/default/files/dup/assets/public/raca/handbook/pdf/52%20IAM%209-H%20ROW%20HB%20_FINAL_signed_w.footer_Jan%202022_minor%20corrections_508.pdf)

- **As more conservation easements and legal frameworks begin to incorporate rights of nature, how are these rights reconciled with climate-driven changes that are outside of a landowner’s control? For example, in the western U.S., watercourses can dry up due to prolonged drought, reduced snowpack, or other natural causes. In such cases, would the loss of flow be interpreted as a violation of the easement or of the rights of nature provisions? And if so, how are these situations handled?**

**Thomas Linzey:** Too early to tell; but generally, things or events outside of the landowner’s control can’t be considered a violation of the provisions within the easement. However, if ecosystems have certain rights, and those rights are violated by any actor, then the easement holder could (on paper, at least) sue the actors that are causing a violation of the rights. That could include opening up a new front in climate activism for example, by using the easement rights to sue utilities and other actors responsible for climate change. In other words, the focus of the action wouldn’t be the landowner but other parties violating the

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rights contained within the easement. It's also the next front in "rights of nature" lawmaking, in which a tribe or municipality could conceivably use the rights of nature to sue utilities and other contributors to climate change – especially now, when science and tech has gotten us to a point where we can identify the dozen or so actors who are the major contributors of CO2 emissions. I think it's all part of a new kind of environmental activism that has to emerge, in which we launch from oases of nature protection to leverage the rights of nature against the actual actors who are violating those rights. As the first part of that, the White Earth Ojibwe in Minnesota, for example, legally recognized that wild rice ("manoomin") had a right to a sustainable climate; and then used that right against the permit issued by Minnesota to the Enbridge corporation to construct Line 3.

- **To encourage a Tribal nonprofit landowner to consider a conservation easement to protect their property that includes endangered species habitat, how do you address the "we don't sell land" perspective? For example, if the nonprofit members are tribal members, but the land is not recognized as tribal, some members might be conserved about selling their land rights and do not trust FWS oversight.**

**Thomas Linzey:** I might misunderstand the question here, but donating or selling a conservation easement isn't the same as selling land; it is a conferral of a slice of the property interest in the land. I wouldn't trust FWS oversight either; but one thing that we've counseled tribes to do is to establish their own tribal land trust which could then be the easement holder. That tribal land trust could then hold the easement for the tribal nonprofit landowner. It would be a separate, and technically independent tribal land trust, but could have overlapping individuals serving in the capacity as the board of the tribal land trust. That way, the easement holder wouldn't be the federal government, but could be the tribe itself.

- **What if there are differing understandings of what constitutes improved protections of land? For example, an easement that restricts harvesting but there are medicines or plants dying out because Native people are no longer able to harvest them. Could harvesting access be restored?**

**Thomas Linzey:** Great question. Part of the problem is that the conservation easements out there have been written by western lawyers, and they exist within the western system of land ownership and transfer. We have yet to see the development of indigenous conservation easements; although FNDI is working on that project now. In the problem framed above, I would suggest re-writing the easement to include provisions that deal specifically with medicines and plants, to avoid any interpretation issues down the road. This would mean becoming involved with the easement writing process at the beginning of the transaction; in the long-term, it probably means writing a template indigenous conservation easement that can be used for all of these transactions, which take into account these kinds of issues. That way, as a template indigenous easement, it could be used any time these issues crop up.

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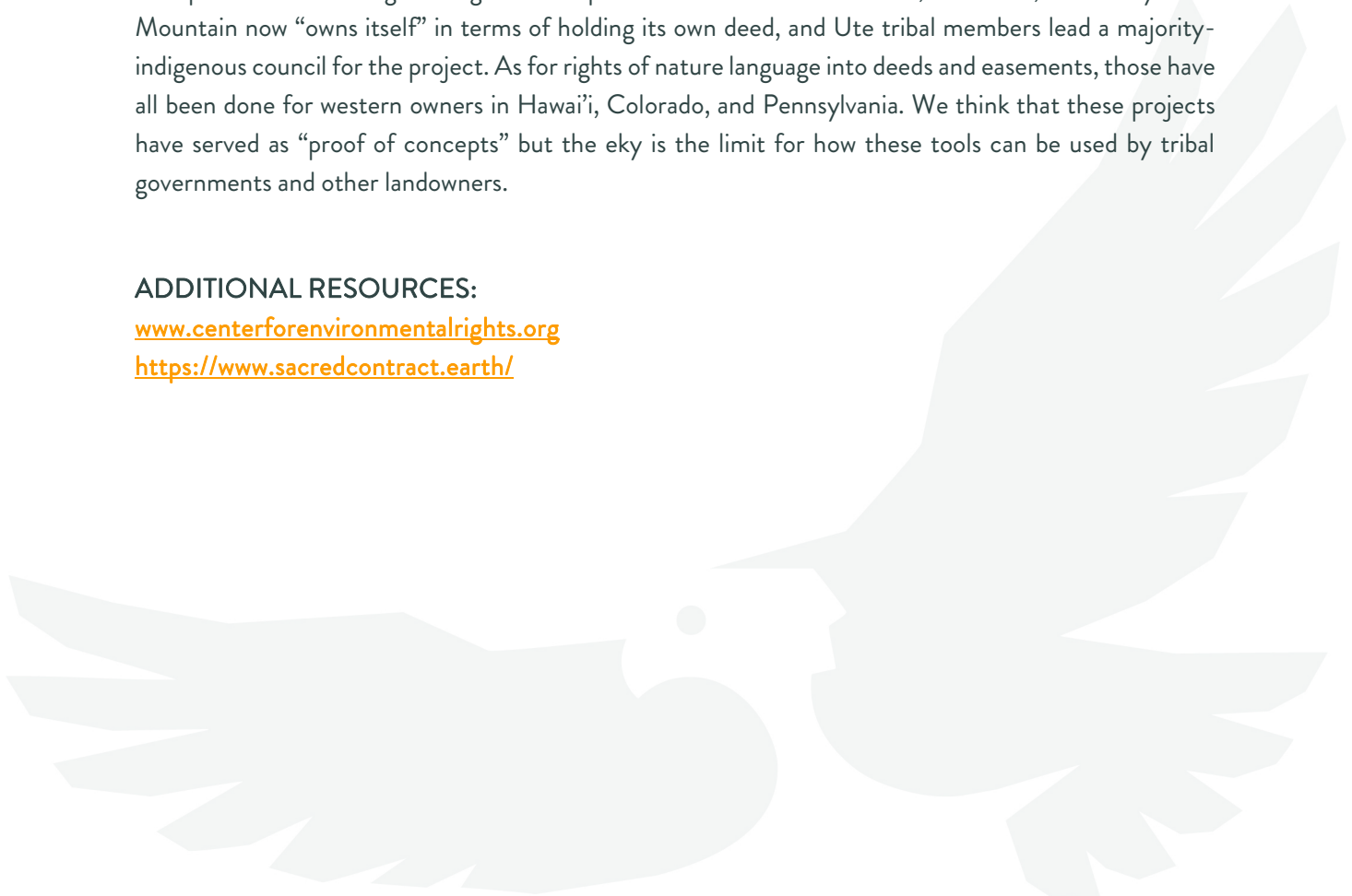
- Are there any existing resources – like a map, directory, or database – that show which Tribes are participating in Indigenous Guardianship Councils or have expressed interest in incorporating rights of nature or guardianship language into deeds or easements?

**Thomas Linzey:** It's a landscape that changes daily – right now, there's only one project in the U.S. that incorporates these indigenous guardianship councils – it is in Crestone, Colorado, where Pyramid Mountain now “owns itself” in terms of holding its own deed, and Ute tribal members lead a majority-indigenous council for the project. As for rights of nature language into deeds and easements, those have all been done for western owners in Hawai'i, Colorado, and Pennsylvania. We think that these projects have served as “proof of concepts” but the sky is the limit for how these tools can be used by tribal governments and other landowners.

## ADDITIONAL RESOURCES:

[www.centerforenvironmentalrights.org](http://www.centerforenvironmentalrights.org)

<https://www.sacredcontract.earth/>



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