4 Ariz. J. Envtl. L. & Pol'y 187

Arizona Journal of Environmental Law & Policy
Spring, 2014

Article
Kevin R. Kemper, Ph.D., J.D., LL.M.
candidate[a1]

*187 ENVIRONMENTAL INFORMATION POLICY AND SECRETS ABOUT JAGUARS: WHY TRUSTING ARIZONA TRIBES IS THE BEST STRATEGY FOR JAGUAR PROTECTION

*The jaguar (*Panthera onca*) roams the Southwest boundary region of the United States, Mexico, and tribal nations, particularly in southeastern Arizona and northeastern Sonora. This transboundary species - walking across numerous political borders - has remained elusive and controversial. Those who care about the preservation of the species want to learn all they can so that political action can be taken. This requires information about the jaguar, but the federal and state governments do not give all of the information they have, and the tribal governments say little. Knowing the exact locations of jaguars is not necessary for the preservation of jaguars. Tribes can be trusted to take care of jaguars on reservation lands. To support that thesis, this Article details how information about the jaguar flows - or not - among federal, state, local, and* ***188** *tribal governments, as well as the public that may want the information. Despite many government and media reports generally omitting tribal reservations from the discussion, this Article also explains how many of the historical and recent sightings and confirmations of jaguars in Arizona have occurred on or near tribal reservations, and that jaguars still could be on reservation land. This supports the notion that tribes not only know these jaguars exist, but also know how to care for them. Finally, environmental information policy may require some secrecy at times to make certain endangered species are protected, but policy-making outside of the public gaze must not be a permanent situation, even when it involves tribes.*

***190 INTRODUCTION**

The jaguar (*Panthera onca*) roams the Southwest boundary region of the United States, Mexico, and tribal nations, particularly in the southeastern quadrant of Arizona and the northeastern section of Sonora.[1] That means it is transboundary, crossing international and state borders as it seeks food, mates, and general habitat.[2] Since the jaguar is an endangered species protected under the U.S. Endangered Species Act [ESA],[3] one might assume that the management of the jaguar is clear-cut. On the contrary, management of the habitat of the jaguar has been regulated by various and conflicting laws and jurisdictions and even subsumed by a political firestorm over issues like the ongoing U.S./Mexico border fence project.[4] The entire process has been hidden in a fog of unanswered questions until the U.S. Fish & Wildlife Service recently announced designation of critical habitat in southeastern and far southwestern New Mexico.[5] The 764,207 acres intentionally do not include lands in the Tohono O'odham Nation, which straddles the U.S./Mexico border in south central Arizona,[6] even though a jaguar had been confirmed during the past decade in the Baboquivari Mountains.[7]

***191** Jaguars have been known to exist in the southwestern and southern United States all the way from California to Texas and perhaps to Tennessee, and even northward to Colorado.[8] Scientists assume the jaguars wander from Mexico, but no one knows for certain where the jaguars confirmed in Arizona had been born.[9] Tribes have not been apparent in the larger public conversation until the U.S. Fish & Wildlife Service released in March 2014 its final announcement about critical habitat. The last female jaguar publicly known in the United States was killed in the White Mountains of Arizona, not far from the White Mountain Apache Reservation and the San Carlos Apache Reservation.[10] A year later, a male was killed on the White Mountain Apache Reservation.[11] Macho B--the famous jaguar who had been trapped, collared, and later recaptured and euthanized--was first taken near Baboquivari Peak, which is sacred to the Tohono O'odham people, whose nation straddles the U.S./Mexico border.

This Article argues that tribes should be consulted, considered, and trusted as essential stakeholders in the management of this species. Because of a few passing comments in the public debate,[12] this Article originally assumed tribes were not an integral part of cooperative jaguar management. Ironically, the extensive discussions in the Federal Register about the exclusion of Tohono O'odham Nation from critical habitat came as a delightful surprise.[13] Because the federal and state governments say little about their ongoing work with tribes, the public was left to guess. As we consider the history of jaguar management in the southeastern United States and even northeastern Mexico, we see that the tribes would have much to say about jaguars, but their actions and positions usually are not known publicly. This Article, therefore, suggests ways in which the tribes have a more meaningful role in the process of jaguar management along the U.S./Mexico/tribal borders. However, the historical record shows that other tribes like the White Mountain Apache Tribe have set strict boundaries about information flow with the federal government because of past abuses, which may have contributed to the general lack of information about tribes in cooperative jaguar management, *infra*. The laws of wildlife and of Native Americans and natural resources--particularly usufructuary rights, reserved rights, and regulatory ***192** jurisdiction[14]--provide a framework upon which to involve tribes in cooperative jaguar management. It appears that tribes would be partners if they would want to be partners, and tribes do not have to be explicit partners to be able to protect the jaguars. Cooperative management might be as simple as allowing tribes to regulate matters on tribal land, the federal and state governments to regulate matters on federal and state land. As we will see, the expectation of cooperative management even between the federal and Arizona governments has not worked too well.

Despite government and media reports omitting tribal reservations from the discussion, this Article explains how many of the historical and recent sightings and confirmations of jaguars in Arizona have occurred on or near tribal reservations, and that jaguars still could be on reservation lands. In the meantime, trusting indigenous tribes in Arizona by tolerating secrecy about jaguars on reservations may be the optimal strategy right now for saving the jaguars in the United States, at least for now. Jaguars may be on tribal lands, cooperative management among local, state, federal, and tribal officials has not worked well yet. The tribes have inherent authority to use their traditional ecological knowledge and experience for dealing with wildlife on their lands. We do not have to know everything tribes do to protect endangered species.[15]

Again, tribes can be trusted to take care of jaguars. To support that thesis, Part I of this Article gives anecdotal and historical evidence to suggest that jaguars likely *could* be found on reservation lands in Arizona--as governments know but do not usually admit publicly. A table is provided, *infra*, to share that evidence. Part II explores how attempts at cooperative management among state, federal, and tribal officials have been occurring, despite what little the public knows about them. Then, Part III gives more details about how tribes in their sovereignty have usufructuary rights, reserved rights, and regulatory jurisdiction over wildlife on their reservation lands. Part IV explains the current environmental information policy about endangered species in Arizona, given state and federal statutes and case law, as well as tribal law and agreements among some tribes and the U.S. and Arizona governments. Finally, the Conclusion summarizes the findings, makes suggestions for improving the environmental information flow about tribes and endangered species, and encourages future research.

I. JAGUARS MAY BE ON TRIBAL LANDS IN ARIZONA

Almost with the patience of someone tracking an actual jaguar, we have to track scientific research, history, and news accounts to see if jaguars even would have some presence among Arizona tribes. Let us be clear in the beginning. There is little documentary evidence establishing as a scientific certainty that jaguars live on Arizona reservations. Rather, I share with you signs and tracks of what little is publicly available. Indeed, that is a ***193** significant point of this research--very little *is* publicly available. That *status quo* actually creates a buffer of protection for what could be happening on reservations. Again, the last female jaguar was killed near the White Mountain Apache Indian Reservation, and a male was killed there the following year.[16] If you look at a map of the White Mountain Apache Indian Reservation,[17] you will notice large swathes of closed land. You might wonder what might be in those closed areas--monster elk, especially given the tribe's prosperous hunting conservation program for elk;[18] bears, and maybe even a most rare grizzly bear, since the last recorded grizzly bear in Arizona may have been killed on Mount Baldy, on the reservation;[19] Mexican grey wolves;[20] and maybe even jaguars. If they were in proximity on or near the White Mountain Apache Indian Reservation, a female jaguar and a male jaguar might have been a breeding pair on that reservation. But then where are the offspring? Or other relatives? Perhaps they live still on the White Mountain Apache Reservation, or the neighboring San Carlos Apache Indian Reservation to the south.

We do have some evidence in the public record that perhaps a few tribes are involved in jaguar management with support

from other tribes. For instance, during the Fall 2012 period for public comment about whether U.S. Fish & Wildlife Service should designate critical habitat for jaguars, the Tohono O'odham Nation's council and chairperson Ned Norris, Jr., filed public comments that gave an outline about the tribe's particular interests in saving the jaguars and suggested the tribe actively has a program to protect them.[21] Details of that tribal program were included in the Final Rule about critical habitat.[22] One telling paragraph--published after this Article was being readied for press--outlines the arguments of this Article:

> As a sovereign entity, the Tohono O'odham Nation seeks to continue to protect and manage their resources according to their traditional and cultural practices. The Tohono O'odham Nation requests that their land be excluded from the designation of critical habitat for the jaguar due to their sovereign status and their right to manage their own resources. They are concerned that critical habitat designation on their land would limit the Nation's right to self- ***194** determination and self-governance. The Tohono O'odham Nation recognizes that their land contains jaguar habitat, and they consider the jaguar to be culturally significant.[23]

This position by U.S. Fish & Wildlife reflects ongoing commitments to work with tribes about endangered species.[24] The agency used a cost-benefit analysis, detailed in § 4(b)(2) of the ESA,[25] to weigh factors like economic impact, national security, and tribal needs.[26] Also, the tribe has maintained ongoing relationships with the agency in preserving the jaguar.[27] In fact, the agency awarded almost $170,000 for the tribe to survey and monitor any jaguars on the reservation.[28]

This project began as a journalistic project, spurred by reports during the winter of 2009 about the capture and subsequent euthanization of Macho B in the Baboquivari Mountains, on the eastern border of the Tohono O'odham. After driving hundreds of miles across southern and eastern Arizona and talking with numerous people who claimed to have seen jaguars, some former students at the University of Arizona's School of Journalism and I filed freedom of information requests during March of 2012 with Arizona Game & Fish, U.S. Fish & Wildlife Service, pertinent agencies with the federal government of Mexico and the state government of Sonora, the White Mountain Apache Tribe, the San Carlos Apache Tribe, and the Tohono O'odham Nation.[29] These letters also were supposed to be part of the methodology for a research project about FOI laws along the U.S./Mexico border. Each letter, which cited any pertinent FOI laws for that jurisdiction, requested information about sightings of jaguars, ocelots, and other endangered cats since the Macho B incident. Given my experience with journalism in Indian Country, it was expected that the tribes would not answer. However, it was expected that the state and federal governments in the U.S. would release information, as would the state and federal governments in Mexico. Each of these entities provided some information, but only the Arizona Game & Fish officials provided actual reports of jaguar sightings. Journalistic interviews were conducted after the release of those state records. Then, because of difficulties in obtaining information, it became apparent that a more interesting legal research project would be an examination of information flow about jaguars. Also, it was noteworthy that most of the responses from the ***195** Arizona Game & Fish Department redacted information about exact locations of the more probable or confirmed sightings of jaguars.

As of today, jaguars have been confirmed by the media in the Whetstone Mountains and Santa Rita Mountains, to the south and east of the Tucson metropolitan area, to the south and west of the White Mountains.[30] Through personal conversations, I have heard of stories about unconfirmed jaguar sightings as far west as the Baboquivaris, as far south in Arizona as the Patagonia Mountains, and north and west as far as the Galiuro Mountains and even the White Mountains. Perhaps those stories are tall tales, and perhaps they are cases of mistaken identities. Also, we must not forget that scientists seek scientific evidence, like scat or photographs, and cannot establish the presence of jaguars easily without it. Therefore, we must be careful not to assume too much. Then again, we must be careful not to assume too little. The evidence listed here ought to act as an invitation or incentive for consideration to be given to possible locations of jaguars, regardless of where they exist. Also, I have had hesitation even writing some of what I know, lest it bring unnecessary attention to what might be happening on tribal reservations for jaguars. Then again, the tribes know what they know, and officials from outside agencies and organizations know more about what the tribes are doing than the public knows. That is a point of this Article--to consider whether that information flow is helpful to the public, governments, and most importantly, the jaguars.

Therefore, to set up a discussion about the laws involving cooperative jaguar management among tribes and the federal and state governments, Table 1 provides a reinterpretation of historical data about confirmed jaguar sightings and killings because they are listed on or in proximity to tribal reservations in Arizona. As we can see from Table 1, out of 60 or so sightings and killings in Arizona since 1900, at least 23 (or about one-third) were on or near Indian reservations. This is not surprising, since Indian reservations cover a large part of Arizona's lands.[31] Also, jaguars have had an impact on local tribal cultures.[32] Logically, there would be more jaguars than sightings of jaguars. On reservations, only the tribes and their people may know about other jaguars. Most importantly, please note that Table 1 does not function as unequivocal scientific evidence of

jaguars now on reservations, but rather to suggest the possibility. There is active resistance to release of official public documentation, which is the point of this Article. There is enough circumstantial evidence to ***196** suggest the probability of jaguars in and around reservations north of Interstate 10, along with actual evidence of jaguars near or on reservations south of Interstate 10. Officially, U.S. Fish & Wildlife acknowledges Class 1 confirmations of jaguars in the following areas of Arizona since 1963: Santa Rita Mountains, Whetstone Mountains, Atascosa Mountains, Tumacacori Mountains, Coyote Mountains, Baboquivari Mountains, Dos Cabezas Mountains, Santa Cruz River, and Patagonia Mountains.[33] In New Mexico, there have been Class 1 confirmations since 1963 in the San Luis Mountains and Peloncillo Mountains.

TABLE 1

DATE[34]	**REPORTED LOCATION**[35]	**RESERVATIONS AT OR CLOSE TO SIGHTINGS**[36]
2001-2007	Cameras to southeast of Baboquivari Mountains, as well as Coyote Mountains[37]	Tohono O'odham
1997	Reports of jaguars in Graham and Gila counties[38]	San Carlos Apache, White Mountain Apache
Aug. 31, 1996	Baboquivari Mountains	Tohono O'odham
1990	Northern Gila National Forest[39]	White Mountain Apache; Navajo
Jan. 16, 1964	White Mountain Apache Reservation[40]	White Mountain Apache; perhaps San Carlos Apache
Sept. 28, 1963	Near White Mountain Apache Reservation	White Mountain Apache
Oct. or Nov. 1957	Red Mountain, near Clifton	San Carlos Apache
1956 or 1957	White Mountain Apache Reservation	White Mountain Apache
1940	White Mountain Apache Reservation	White Mountain Apache
1933	Sierra Estrella	Gila Bend Indian Reservation; Salt River Pima-Maricopa Indian Community
1932	Grand Canyon Village	Hualapai; Havasupai
1928 or 29	Sand Tank Mountains	Gila Bend Indian Reservation
Apr. 12, 1924	Near Cibeque	White Mountain Apache
1909 to 1918	Grand Canyon	Hualapai; Havasupai
1913	Red Mountain, near Clifton	San Carlos Apache
Feb. 1912	Southwest of Winslow	White Mountain Apache

1900 to 1912	Baboquivari Mountains	Tohono O'odham
Oct. 1910	Chevlon Canyon[41]	White Mountain Apache
1907-1908	Killed by Hopi Indians, four miles from Grand Canyon	Hualapai; Havasupai
1907	White Mountain Apache Reservation	White Mountain Apache
1904	Camp Verde	Yavapai-Apache

***198 II. COOPERATIVE MANAGEMENT OF JAGUARS HAS BEEN DIFFICULT FOR POLITICAL REASONS**

After recent confirmed sightings of jaguars in the early 21st century,[42] as well as related litigation over jaguar habitat, the U.S. Fish & Wildlife Service issued a proposed rule for, and called for public comments about, critical habitat for the jaguar in the southeastern quadrant of Arizona and the far southwestern corner of New Mexico.[43] While the most western end of the 764,207 acres includes the Baboquivari Mountains on the eastern end of the Tohono O'odham Reservation, none of the other critical habitat comes near other tribes.[44] Earlier in the process, U.S. Fish & Wildlife acknowledged that tribal lands were within the proposed critical habitat area, as well as its obligation for tribal consultation,[45] but instead opened the possibility for the reservations to be excluded.[46] It said:

> Using the criteria found in the Criteria Used To Identify Critical Habitat section, we have determined that there are tribal lands that were occupied by jaguar at the time of listing that contain the features essential for the conservation of the species, as well as tribal lands unoccupied by the species at the time of listing that are essential for the conservation of the jaguar in the United States.[47]

U.S. Fish & Wildlife reached out to Ak Chin Indian Community, Gila River Indian Community, Hopi Tribe, Pascua Yaqui Tribe, Salt River-Maricopa Indian Community, San Carlos Apache Nation, Tohono O'odham Nation, and Yavapai-Apache Nation in Arizona and Mescalero Apache Tribe in New Mexico.[48] Special attention was given to the Tohono O'odham, as it "is the main tribe affected by this proposed rule."[49] Tribes in Arizona do have traditional ecological knowledge about jaguars.[50] In fact, we know from that letter to ***199** U.S. Fish & Wildlife Service from Tohono O'odham Chairman Ned Norris, accompanied by a resolution by the Tohono O'odham Council, that "the jaguar holds an important place in the Nation's culture and the Nation has taken steps to study and protect and preserve the habitat on the Nation lands that is significant to the jaguar ..."[51] It seems odd, however, that U.S. Fish & Wildlife gave special attention to the Tohono O'odham and not other tribes, given the historical occurrences listed, *supra*. In fact, none of the proposed critical habitat is north of Interstate 10 in Arizona,[52] despite historical occurrences on or around reservations to the north of Interstate 10.

The federal and state governments had wrestled over habitat selection. Arizona Game & Fish Department, in its own contribution to public comments, asked "that [U.S Fish & Wildlife Service] withdraw the proposed rule because habitat essential to the conservation of the jaguar as a species does not exist in either Arizona or New Mexico under any scientifically credible definition of the term."[53] Overall, the memorandum complained about differences of interpretations of data, but one line was particularly pertinent to understand some of the dysfunction: "AGFD believes that, in the spirit of the 2008 [Memorandum of Understanding] between our agencies regarding Roles and Responsibilities for Implementing the Endangered Species Act in AZ, the USFWS should have worked more closely with our staff in an effort to evaluate the arguments whether or not critical habitat is prudent prior to making any determination to propose critical habitat."[54] That 2008 memorandum acknowledged tribes, though they apparently were not part of the agreement at that time: "Given that the State of Arizona does not have wildlife management jurisdiction on Tribal lands, Department participation in implementing the ESA on such Tribal lands is subject to prior approval by the appropriate Tribal authority."[55] Also, consultation may occur at times among federal, state, and tribal officials.[56] Under a heading ***200** "Conflict Resolution," the agreement says the state and federal game officials are supposed "[t]o work cooperatively of threatened, endangered, and other special status species."[57]

In a specific memorandum of understanding about jaguar management between Arizona Game & Fish and New Mexico Department of Game & Fish, the area for consideration is broader than the federally proposed critical habitat, in that it also includes areas on or near tribal reservations like the White Mountain Apache or San Carlos Apache.[58] In fact, tribal agencies that manage wildlife were invited, along with other state, federal, and local entities, to be a part of that agreement.[59] It should be noted that the states of Arizona and New Mexico, along with pertinent counties, have had a consultation agreement that did not include pertinent tribes.[60]

In Arizona's response to the federal government about jaguar habitat, an interesting case was cited, *Arizona Cattle Growers' Assoc. v. Salazar*, where the Ninth Circuit in 2010 considered an issue over whether a species like the Mexican spotted owl has "occupied" an area.[61] "Factors to consider are (1) how often the species uses an area; (2) the necessity of area for the species' conservation; (3) species biological characteristics that affect its mobility or migration, and (4) any other relevant factors."[62] If that is the controlling test in Arizona, then one must ask how tribal information about jaguars would factor into a critical habitat designation under the ESA. In fact, the ESA mandates that critical habitat designations must consider ""best scientific data available."[63] As we can infer, disconnects among tribes and other governments would not yield the "best scientific data available" for either party. How can limited data be the "best" data? The word ""available" is the key. Not all is available because tribes do not release it.

To set up more discussion about tribal management, we need to understand some basic principles about wildlife management, especially about endangered species, from a federal, state, and local perspective. This also gives understanding to some of the difficulties the state and federal officials have had with creating a cooperative management strategy.

***201 A. Distinguishing animals, wild animals, domesticated animals, game, non-game, and threatened and endangered species, for purposes of management**

In animal law, it is essential to distinguish definitions of animals, wild animals, wildlife, and game, as well as whether those animals are endangered or threatened.[64] Generally in the United States, the state has jurisdiction over wild animals.[65] In Arizona, for instance, "a landowner does not acquire property rights to the wild animals naturally existing on his or her land unless they are reduced to actual possession and control."[66] This is part of the concept of *ferae naturae*,[67] As the age-old case of *Pierson v. Post* illustrates, landowners are allowed to take wildlife to convert it to property,[68] but we know that there are many state, federal, and tribal regulations about which wildlife to take, and when, and how.

B. Federal management of endangered species, including jaguars

Usually, the federal government leaves wildlife management to the state, but there are major federal statutes that regulate matters about endangered or threatened species, regardless of states. In fact, federal regulation of wild animals has survived constitutional challenge, as "a constitutional exercise of congressional power under the Property Clause."[69] Also, Congress has power under the Commerce Clause to regulate wildlife in certain circumstances.[70]

In 1973, Congress passed a sweeping bill called the Endangered Species Act, which gave authority for ensuring that the Nation's flora and fauna would not become extinct.[71] The statute requires the federal government to cooperate with states,[72] as well as with international nations,[73] to protect endangered and threatened species. There are few if any explicit references to tribes in the ESA. Even recently, the 11th Circuit Court of Appeals ***202** held that Congress had barred federal subject matter jurisdiction when tribes bring claims that involve statutes like ESA.[74]

It could be argued that a tribe, if it adjusts habitats for jaguars in a way that harms the jaguars, could commit an illegal taking.[75] Under the ESA, a taking "means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[76] One case in the Ninth Circuit, interpreting that statute, uses language from the Department of Interior (which also deals with tribes through the Bureau of Indian Affairs) that harm also means "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."[77] As the Ninth Circuit noted, the U.S. Supreme Court has upheld that definition of harm.[78] One wonders if the U.S./Mexico border fence would amount to an illegal taking, or if tribal action or inaction also would be, if it would affect jaguar breeding and other behaviors.[79]

There are exceptions to prohibited takings, including incidental takings.[80] You apparently have to have explicit permission from the federal government for an incidental taking,[81] with due consideration being given to the application for a permit.[82] Deliberate actions to take an animal are not an incidental taking.[83] The takeaway point is that it is a process, managed by the federal government, to take incidentally an endangered species. So, one could argue that habitat management and modification needs to be an intentional process that goes through the federal government. While that may not satisfy those who promote tribal sovereignty or even state sovereignty, it appears to be the law, especially when we consider other issues like regulatory jurisdiction, *infra*.

There has been specific litigation in the Ninth Circuit about jaguar management, especially of its habitat. In *Center for Biological Diversity v. Kempthorne*, Federal District Judge Roll found in 2009 that the U.S. Fish & Wildlife Service's earlier decision not to create critical habitat for jaguars was a mistake, because it was not consistent with information ***203** available.[84] Also, U.S. Fish & Wildlife Service must analyze economic impacts along with other issues when determining critical habitat.[85] With that *Center for Biological Diversity* decision, plus recent sightings, it would make sense that U.S. Fish & Wildlife Service in 2012 recommended 838,232 acres in southern Arizona and New Mexico to be set aside as critical habitat for jaguars, but it would not be consistent with Arizona Game & Fish Department's decision to oppose that, *supra.* However, one still asks about why tribal lands were basically excluded from the recent proposal, with only one mentioned in the Final Rule.

This strategy is not unknown in endangered species law, especially in Arizona. In *Center for Biological Diversity v. Norton*, the federal district court in Arizona considered whether it was appropriate under the ESA for U.S. Fish & Wildlife to keep tribal lands - like those of the San Carlos Apache Tribe - out of a proposed critical habitat for Mexican spotted owl.[86] The court quoted the agency:

> In light of this and the fact that the Tribe will soon have their management plan completed, we find that the designation of critical habitat will provide little or no additional benefit to the species. The designation of critical habitat would be expected to adversely impact our working relationship with the Tribe and we believe that Federal regulation through critical habitat designation would be viewed as an unwarranted and unwanted intrusion into tribal natural resource programs. Our working relationships with the Tribe has (sic) been extremely beneficial in implementing natural resource programs of mutual interest.[87]

However, the Court was not impressed with the agency's failure to produce a completed copy of the tribal management plan, holding that violated the Administrative Procedure Act, along with holding the plan violated the ESA.[88] Therefore, for tribes to have a part in management of the jaguars in Arizona, any management plans apparently must be available to the agency and the public. As we will see, *infra*, that is inconsistent with certain tribal policies.

More importantly, the Secretary of the Interior has ordered that tribes must be consulted when there are considerations about critical habitat around and on reservation lands.[89]

***204 C. State of Arizona and local management of endangered species, including jaguars**

In Arizona, there are specific statutes protecting jaguars.[90] For instance, it is a Class 1 misdemeanor, with potential for civil damages, "to knowingly kill, wound or possess a jaguar or any part thereof," even though there are exceptions for protecting a life of a human.[91] Two years after the 1998 law, in an unpublished opinion, the Ninth Circuit Court of Appeals upheld the earlier convictions of two men in Arizona for violating the federal Lacey Act.[92] In the opening brief for one appellant who was convicted in 1996, the attorney argued that A.R.S. § 17-320 was necessary to clarify some vagueness in A.R.S. § 17-309, which addresses wildlife violations.[93] In a reply brief for both defendants, another attorney attempted to persuade the Court that the lack of clarity at the time of the killing of the jaguars in question meant that it was legal at the time to take a jaguar in Arizona.[94] It appears, though, that the history of sightings had informed the timing of the 1998 law. Emil B. McCain and Jack L. Childs, in an important article about their tracking and camera monitoring program, said the sightings in 1996 of a jaguar in far southeastern Arizona and another in the Baboquivaris pushed officials to take action.[95] At that point, as McCain and Childs explain, federal and state agencies created a conservation team for jaguars--but they do not mention tribes as stakeholders.[96] Thus, Arizona law protects jaguars, but as we have seen, *supra*, the state and federal governments do not always cooperate politically, when it comes to jaguar management.

In an interesting twist, the government of Pima County--home of the metropolitan Tucson area and scene of some jaguar sightings--issued a conservation plan in November 2012 that did not mention the jaguar as an endangered species to be protected, but did mention tribal consultation and members of tribes on a steering committee, as part of the process of protecting endangered species.[97] In fact, the administrator of Pima County ***205** went as far as to recommend tribal consultation for the Pima County Multi-species Conservation Plan and the county's application for an incidental take permit, because of various projects across the county.[98] The administrator confirmed that officials from the Tohono O'odham Nation and other members of the Four Southern Tribes Cultural Resource Working Group had been involved.[99]

So, one easily might have thought the tribes are on the outside looking in, instead of being equal parties. Instead, at least one tribe is a part of jaguar management, while others may be conducting their own jaguar management without releasing information about it.

III. TRIBES HAVE EXPERIENCE MANAGING WILDLIFE

To argue that the tribes know what they are doing, we might be making a presumption--faulty or not--that someone might not think of trusting the tribes. Or even worse, there could be a presumption that tribes are untrustworthy. And, we do not want to fall into the stereotypical thinking that tribal peoples inherently are more knowledgeable about nature, and thus are ""noble savages."[100] None of that is appropriate. Given the centuries of struggles among tribes and the federal and state governments, perpetual racism, and the commonly understood scheme of federal and state management, it is not surprising that we do not think first of the tribes when it comes to management of endangered species. We should. Tribes have the inherent authority to regulate wildlife within their lands, because of concepts like usufructuary rights, reserved rights, and regulatory jurisdiction.

A. Tribes Have Inherent Authority to Regulate Wildlife On Their Lands

1. Usufructuary rights

First, the basic concept of usufructuary rights helps us to understand tribal management of wildlife as a continued property right by tribes, under certain conditions. Black's Law Dictionary defines "usufruct" as "[a] right for a certain period to use and enjoy the fruits of another's property without damaging or diminishing it, but allowing for any natural deterioration in the property over time."[101] In critiquing Chief Justice Rehnquist's use of Black's definition of usufruct in his dissent in *Minnesota v. Mille Lacks Bank of Chippewa* ***206** *Indians* (1999),[102] Judith V. Royster and Michael C. Blumm note "usufructuary rights may be of limited duration, or they may be perpetual, depending on the intent of the parties to the agreement."[103] Now, one might wonder why the concept of usufruct--a right for using the land of another--applies to tribes, when tribes have their own reservations. A basic understanding of *Mille Lacs Band* frames the situation as a tribe that had original rights, and then was conquered, and then retained through treaty certain rights it originally had. A somewhat analogous situation would be someone who lost land through foreclosure or even sale, but retained certain rights to that land through agreement.

In *Mille Lacs Band*, the U.S. Supreme Court held that tribal usufructuary rights were not extinguished by an executive order, or Minnesota's admission into the Union, because they were not extinguished in two separate treaties.[104] Even though it had ruled in *Oregon Dept. of Fish and Wildlife v. Klamath Tribe* (1985) that the treaty had abrogated tribal usufructuary rights,[105] the Court thought that the Chippewa's claims were different: first, "usufructuary rights under the 1837 Treaty existed independently of land ownership," and second, "there is no background understanding of the rights to suggest that they are extinguished when title to the land is extinguished."[106] The dissent by Chief Justice Rehnquist claimed that the majority opinion written by Justice O'Connor had overturned *Ward v. Race Horse* (1896), "sub silentio,"[107] meaning that it would have elevated Minnesota's admission into the Union, under the "equal footing" doctrine, as a way of overturning the tribe's usufructuary rights. That is, the state rights would trump tribal rights, because of federal power. However, the *Mille Lacs* majority felt "that a tribe's treaty rights to hunt, fish, and gather on state land can coexist with state natural resources management."[108]

A couple of courts since *Mille Lacs* have distinguished the case. For instance, a federal district court, while acknowledging *Mille Lacs*, said that state rights over natural resources must be balanced with treaty rights for tribes.[109] That court in *Ottawa Tribe of* ***207** *Oklahoma v. Ohio Dept. of Natural Resources* also used *Mille Lacs* to cite the canon of construction that the courts must "give effect to the terms [of the treaty] as the Indians themselves would have understood them."[110] However, this

gets back to the same issue--treaty construction. To hold that the Ottawa Tribe no longer had fishing rights in Lake Erie, plain language of the treaty was most dispositive for the case and negative for the tribe.

A more recent major case involving usufructuary rights of tribes, especially for endangered species, is *Anderson v. Evans*, where the Ninth Circuit Court of Appeals in 2004 decided that the Marine Mammal Protection Act regulated the Makah Indian Tribe's hunting of protected whales.[111] The Court reached that conclusion by applying a test for "when reasonable conservation statutes affect Indian treaty rights: (1) the sovereign has jurisdiction in the area where the activity occurs; (2) the statute is non-discriminatory; and (3) the application of the statute to treaty rights is necessary to achieve its conservation purpose."[112] Another interesting part of the overall holding of *Anderson v. Evans* is that the Ninth Circuit also held the federal government accountable for not completing an environmental impact statement under National Environmental Policy Act to consider a whaling quota.[113] This implies that the federal government does need to concern itself with tribal concerns about endangered species. One might think that the case keeps the tribe from taking grey whales. In fact, the Court suggests that the tribe, by using the MMPA, could have permission to take whales.[114]

In *U.S. v. Dion* (1986), the U.S. Supreme Court refused to let treaty rights usurp the Endangered Species Act, when an Indian was caught with parts of a bald eagle.[115] The way it approached that was the meaning of the federal Bald Eagle Protection Act and the 1858 Treaty between the Yankton Sioux Tribe and the federal government.[116] The standard is straightforward: "What is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty."[117] The Court seemed perplexed enough with language in the Eagle Protection Act about an exception for Indians to mention the exception, but not perplexed enough to hold otherwise:

> Congressional intent to abrogate Indian treaty rights to hunt bald and golden eagles is certainly strongly suggested on the face of the Eagle Protection Act. The provision allowing taking of eagles under permit for the religious purposes ***208** of Indian tribes is difficult to explain except as a reflection of an understanding that the statute otherwise bans the taking of eagles by Indians, a recognition that such a prohibition would cause hardship for the Indians, and a decision that that problem should be solved not by exempting Indians from the coverage of the statute, but by authorizing the Secretary to issue permits to Indians where appropriate.[118]

That is, it appears that the exception did not meet the terms of the treaty, in the eyes of the Court. That analysis seems consistent with how other courts use *Dion.* For instance, there are some cases out of Hawaii where the Ninth Circuit Court of Appeals had considered *Dion* to stand for the proposition that a treaty right for taking of wildlife is essential in an analysis for whether Congress had overturned that treaty right.[119] Also, in *U.S. v. Kanholani*, a Native Hawaiian claimed that *Dion* protected him because "he, like the Sioux, has an 'aboriginal' right to hunt an endangered species, a right that can only be abrogated by the 'clear and plain intent' of Congress."[120] The Court said, "Absent an explicit treaty or statutory right to take monk seals, Kaneholani can point to no legally recognized "aboriginal right" to take monk seals."[121] In *U.S. v. Billie*, a federal district court in Florida did not buy the argument by an American Indian that hunting the endangered Florida panther was essential to his First Amendment rights of religion, or that hunting as an American Indian is more important than the purposes of the Endangered Species Act.[122]

Overall, it seems that the courts want to look for any practical reason to find abrogation of usufructuary rights in all of Indian Country, especially if there is plain Congressional language justifying that decision. Remember how the Court in the Makah Whaling Case relied upon federal statutes to see whether tribes have rights to wildlife.[123] However, a clear treaty right and clear Congressional language might result in tribes in Arizona being able to claim they have usufructuary rights over jaguars. This means that the answer to a question about abrogation of usufructuary rights turns on how courts read terms of treaties and federal legislation. In the end, Congress still retains plenary power, meaning it has sweeping power over tribes.[124] For Arizona tribes, we would have to conduct detailed analyses for each tribe of treaties and other agreements with the federal government, as well as federal statutes, to see the extent of usufructuary rights, before even continuing to analyze how those apply to the jaguar as a specific species of animal.

209** ***2. Reserved Rights

Within the idea of usufructuary rights is the idea of reserved rights, or what has remained through the treaty and legislative process of conquest. Given what we have learned about usufructuary rights, though, one would be pessimistic whether

reserved rights would give a better strategy to tribes.

Though it can be found in numerous cases in federal Indian law, the concept of reserved rights found strong voice in *U.S. v. Winans* (1905), where the U.S. Supreme Court settled a case about Yakima Indians and fishing rights.[125] Relying upon *Shively v. Bowlby* (1894), the Court again affirmed the "equal footing doctrine," or that states which enter the Union are on ""equal footing" with other states in how they have property and rights.[126] However, the *Winans* Court articulated a rule called "reserved rights," saying "the treaty was not a grant of rights to the Indians, but a grant of right from them, a reservation of those not granted."[127] Another case about reserved rights--*Winters v. U.S.* (1908)--dealt more specifically with water rights,[128] but it stands for the proposition that tribes keep what has not been stolen.

Still, this brief discussion of reserved rights suffers essentially the same fate as usufructuary rights, in that usufructuary rights are a type of reserved rights, and those rights can be taken away through treaty or statute--both of which through Congress. Therefore, we have to keep searching for legal authority to argue that tribes have the right to manage endangered species like jaguars. It is important to note, however, that tribes like the White Mountain Apache Tribe have asserted reserved rights which claiming that federal regulations put involuntary servitudes on tribal lands, in violation of federal Indian law.[129]

3. Regulatory Jurisdiction

Perhaps the concept of regulatory jurisdiction provides that legal authority, but as we will see, the plenary power of Congress still rules. *Black's Law Dictionary* defines jurisdiction, as "[a] government's general power to exercise authority over all persons and things within its territory ..."[130] Yet, the dictionary does not use the exact phrase "regulatory jurisdiction." The primary case law and statutes about tribal jurisdiction reveal a structure where tribes do not have power "over all persons and things within its territory." Then, there is an open legal question whether the tribe has jurisdiction over a jaguar that wanders onto the reservation, seeing as how the federal government has asserted its jurisdiction over endangered species-- including the jaguar.

***210** To explore that question, we need to understand modern regulatory jurisdiction in Indian Country, which is illustrated by *Montana v. U.S.* (1981), where the U.S. Supreme Court held the Crow Indian Tribe could not "regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe."[131] However, the Court did provide two exceptions for regulating non-Indians: first, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements,"[132] and second, "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[133] None of those exceptions appear to be used by the U.S. Supreme Court to justify tribal authority over endangered species, thought that argument could be made.

In fact, in another major case speaking to the issue of regulatory jurisdiction, but more specifically to jurisdiction over wildlife management on reservations, the U.S. Supreme Court in *New Mexico v. Mescalero Apache Tribe* (1983) declined to use *Montana v. U.S.* to justify tribal management of wildlife in general because the *Montana* case involved questions about non-Indian behavior on fee simple land in the reservation and not the reservation in general.[134] Instead, by tracing case law all the way back to *Worcester v. Georgia* (1832), the Court maintained the principle that the state generally does not have authority on tribal reservations, though with exceptions.[135] It still looked to federal statutes like the Lacey Act to justify the idea that Congressional approval of tribal sovereignty is necessary, in regards to jurisdiction over wildlife.[136] The conclusion to *Mescalero Apache Tribe* is illuminative:

> In this case the governing body of an Indian Tribe, working closely with the Federal Government and under the authority of federal law, has exercised its lawful authority to develop and manage the reservation's resources for the benefit of its members. The exercise of concurrent jurisdiction by the State would effectively nullify the Tribe's unquestioned authority to regulate the use of its resources by members and nonmembers, interfere with the comprehensive tribal regulatory scheme, and threaten Congress' firm commitment to the encouragement of tribal self-sufficiency and economic development. Given the strong interests favoring exclusive tribal jurisdiction and the absence of State interests which justify the assertion of concurrent ***211** authority, we conclude that the application of the State's hunting and fishing laws to the reservation is preempted.[137]

This may well disincentivize states from cooperating with tribes. Therefore, as we have considered usufructuary rights, reserved rights, and regulatory jurisdiction as a framework for tribal management of endangered species, we are left with an obvious conclusion - they can, especially if the treaties and pertinent statutes approved by Congress say they can. More research into each and every tribe would be required, as explained *supra*, to know whether that would work. Also, tribes often will do what they want to do, with or without approval by Congress. Generally, Congress could pass a law that explicitly grants jurisdiction to tribes to manage jaguars, or tribes could pass their own laws and wait for the expected challenge in the courts. However, there are some current options, in the ESA and otherwise. For instance, courts can look to statutory language in treaties and other legislation about specific tribes to see whether the tribe has regulatory jurisdiction over natural resources on their reservations.[138]

B. Tribes Have Traditional Ecological Knowledge To Guide Any Management of Jaguars

American Indian tribes--like all indigenous peoples--have certain knowledge about their cultures and environments. Tribes often view this knowledge as sacred. Traditional ecological knowledge is a growing theoretical and practical field in disciplines like American Indian Studies and various sciences. Experts define traditional forest-related knowledge as "(1) its attention to sustainability; (2) relationships to the land; (3) identity; (4) reciprocity; and (5) limitations on market."[139] A pertinent concept for this Article is reciprocity, which means "people maintain their system of benefit sharing among themselves ..."[140] However, reciprocity does not mean that *everything* is shared. Tribal peoples share with others when they maintain other values like identity. Indigenous scholars argue that "the source of knowledge is the land, not humans," which means that knowledge is created through intimate relationships with the land.[141] This localizes knowledge, meaning that those who do not have relationships with the land cannot fully understand or appreciate any knowledge disseminated by those who do. The concept of "respect" is an essential part of traditional knowledge,[142] which is operationalized as community, connectedness, seventh generation, ***212** and humility.[143] These ideas have ethical and policy implications.[144] For instance, the potlatch systems among tribes in the Pacific Northwest support sustainability.[145] Part of implementing that in a modern world is transparency, which suggests that those with "caretaking responsibilities" need to be accountable.[146] Taking that further, "enforcement of reciprocity rules were totally public."[147] This all suggests that it can be consistent with tribal norms to have public transparency.

Other scholars present the idea of traditional ecological knowledge as an indigenous alternative to Western science, though it has many similarities like adaptive management.[148] A primary difference? Traditional ecological knowledge has "local social mechanisms."[149] Traditional ecological knowledge involves some level of information diffusion, either within or without the tribe.[150] Across the world, this involves the exchange of information among stakeholders.[151] We must not forget that indigenous peoples have unique worldviews that affect how they interpret the knowledge they hold,[152] as well as how they decide to share it. And, we must not fall into the trap of thinking that somehow their worldviews are antithetical to science. The growing body of scholarship illustrates that traditional ecological knowledge has much to offer the sciences, from intimate knowledge of flora and fauna, to a historical overview, to a more sustainable approach to the management of resources.

There is another general truth about traditional ecological knowledge-- "in contrast to Western science, there is little or no separation between such knowledge and other spheres of culture."[153] As we will see in the discussion, *infra*, this fosters even more opportunities for indigenous peoples to keep secret their knowledge. This challenges us to consider Berkes' admonition that "cross-cultural sensitivity is at the heart of all research and understanding of traditional knowledge."[154] Those wanting to manage resources like ***213** endangered species, though, need that traditional knowledge, as it has a vital connection to the success of that management.[155]

Indigenous peoples have a vested interest in the survival of endangered species that can be demonstrated by the idea of traditional ecological knowledge, which can be defined as *"a cumulative body of knowledge, practice, and belief, evolving by adaptive processes and handed down through generations by cultural transmission, about the relation of living beings (including humans) with one another and with their environment.*"[156] In fact, some species are so important that they are keystone, or so intertwined with indigenous culture that the culture would not survive without that species, and *vice versa*, as illustrated by Nimiipuu (Nez Perce) and salmon.[157] The federal Endangered Species Act (ESA) raises specific issues about the roles of tribes in the management of those endangered species.[158]

We need to understand generally how such traditional ecological knowledge is created and transferred. In a diagram with its

study of tribes in the northwestern section of North America, Nancy J. Turner, Marianne Boelscher Ignace, and Ronald Ignace show how “Communication and Exchange of Knowledge” are kept through:

• Oral histories, traditions, and stories;

• Ceremonies and customs;

***214** • Everyday discourse and oratory;

• Trade;

• Dreams and visions;

• Experiential teaching and learning;

• Ecological principles and learning;

• Environmental modification;

• Harvesting strategies;

• Inventory monitoring;

• Adaptability;

• Knowledge of climate, seasons;

• Knowledge of the landscape;

• Classification, nomenclature.[159]

Their point is that the traditional ecological knowledge is created through culture, which cannot be summarized easily or kept

by government documents. That is, access to government records is not necessarily an efficient or complete approach to gathering such traditional ecological knowledge. However, *some* of the traditional ecological knowledge may be held in *some* government records, and thus we can consider whether that knowledge is available to the public. We need to respect, however, the right of indigenous peoples to manage the control of that information. As Robin Wall Kimmerer warns, "misappropriation of traditional ecological knowledge can lead to adverse consequences, such as resource exploitation and misuse of knowledge." Thus, the consequences can be to the tribes, too.[160]

Traditional ecological knowledge has been noted among indigenous tribes, but more importantly, there has been a growing acceptance by scientists and scholars. This would apply to traditional ecological knowledge about jaguars, too. American Indians tribes in Arizona know about jaguars and the surrounding environment. One scholar reported how the O'odham interact with endangered species, but said nothing about jaguars.[161] Still, given admissions by O'odham leaders about jaguar management, we can assume that the tribe's traditional ecological knowledge would apply to jaguars.

*215 IV. TRIBAL SOVEREIGNTY EXTENDS TO WILDLIFE MANAGEMENT DECISIONS

Tribes are sovereign to decide how to handle information. I hope they share as much as reasonable and proper. In my earlier field of journalism and mass communications scholarship, which advocates vociferously for freedom of information, what is argued here might be considered heresy: There are times when secrecy may be the lesser of two evils. I do not argue against freedom of information, but rather for tribal sovereignty to decide whether to uphold freedom of information. Practically, the context of tribal information about endangered species is an intersection of two instances where secrecy arguably might be a necessary evil. First, as explained *infra*, there are serious problems when a tribe needs and wants to keep information secret, but then state and federal governments with open records laws have that information, which could be shared recklessly with the public. Thus, this section provides a brief discussion of some examples--*Salt River Pima-Maricopa Indian Community v. Rogers* (1991) in the context of Arizona Open Records Act, and *Dep't of the Interior v. Klamath Water Users Protective Ass'n* (2001) in the context of the federal Freedom of Information Act.[162] Those cases show how tribes often assert their wishes to keep information confidential. This puts the decision making upon the tribe, though sometimes serious questions are raised about whether the information should be released, as in the *Rogers* case. Second, a growing number of states--including Arizona--have codified the idea that the exact locations of endangered species should be exempt from release. As we will see, some federal courts and current local practices do that, anyway. Again, this does not argue against freedom of information, but rather for a pragmatic and respectful strategy to encourage tribes to practice it in ways that protect tribes and endangered species, as well as the public. Simply put, it was somewhat ironic that this Article had been written with the presumption of the tribes could be a part of jaguar management, only to learn in the Final Rule that they have been all along. That means communication about jaguars among federal, state, and tribal officials has been under the proverbial radar.

A. Federal, State, and Tribal FOI Laws

At first glance, freedom of information seems antithetical or oxymoronic to the idea of preserving traditional ecological knowledge, especially as tribes tend to be secretive about that knowledge. However, some of that knowledge is essential to the survival of endangered species. The goal of this study is to establish some common-sense boundaries that foster free information *and* endangered species *and* indigenous tribes. This project builds upon the growing literature about freedom of information, but in unique and powerful ways.[163] Not ***216** enough has been written, though, about the intersection of freedom of information and the environment,[164] even though the federal Freedom of Information Act has been a helpful ally for environmentalists and their attorneys who want to access information about the environment.[165] In arguing for reforms to the Endangered Species Act, Robert L. Fischman and Vicky J. Meretsky said, "Rapid release of data would permit better monitoring of endangered species recovery; better dissemination and evaluation of conservation techniques; better communication between cooperating entities; and better-informed participation by outside researchers, oversight groups, and other stakeholders."[166]

This scholarship builds a field called "environmental information policy." The building of information policy is necessary for environmental planners.[167] Scholar Benjamin W. Cramer, in an article discussing the benefits of the Aarhus Convention, which asserts freedom of information about environmental issues as an international human right, says:

> Environmental problems do not observe national borders, and the activities of many governments can

> contribute to the pressures faced by the natural world. Those same governments can also contribute to the amelioration of transnational environmental challenges through unilateral or cooperative action. For the citizens of the world to gain oversight of these activities and to contribute to the protection of their environment, access to information about leaders' environmental activities is imperative.[168]

Cramer also recognizes what he calls "freedom of environmental information," as he analyzes laws like the National Environmental Policy Act of 1969 (NEPA). This means ***217** the federal government must "make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment."[169] Again, this aspiration does not explicitly mention tribes. The same is true of a compilation of environmental information policy for North America - it talks about the United States, Canada, and Mexico, but only mentions tribes once.[170]

B. Federal FOI, tribes, and endangered species

There are some conceptual problems in federal law with FOI, tribes, and information about endangered species. Environmental information does not fit nearly into the commonly understood framework for freedom of information in federal law, which is codified in the Freedom of Information Act (FOIA) and has nine exemptions.[171] U.S. Fish & Wildlife Service summarizes them as:

- Classified documents;
- Internal agency personnel rules;
- Information exempt under other laws;
- Trade secrets or confidential commercial information;
- Internal agency memoranda and policy discussions;
- Personal privacy;
- Law enforcement investigations;
- Federally regulated banks;
- Oil and gas wells.[172]

Exemption (3) is pertinent to our discussion, because it exempts release of information that is exempted by another federal

statute.

There are statutory exemptions *and* right of access involving environmental information, including endangered species. For instance, in *Friends of Animals v. Salazar*, the D.C. Circuit Court of Appeals granted summary judgment in the claim by the Friends of Animals et al. that it had "organizational standing to challenge alleged violations of subsections 10(c) ... of the ESA based on an informational injury."[173] That means that they had a statutory right of access to information about permits under the Endangered Species Act. There is a growing body of cases about the use of FOIA for accessing information ***218** about endangered species.[174] Some of the cases include *National Ass'n of Home Builders v. Norton*, where the D.C. Circuit Court of Appeals held that public interest outweighed personal privacy in releasing "site-specific information about the location of an endangered species."[175] A federal district court in the District of Columbia had held that the names of those in Idaho and Montana who had posted comments about grizzly bears should be released by U.S. Fish & Wildlife Service, though a later settlement narrowed that release.[176] The trend is to narrow release of information where survival of that species is at stake.

Federal agencies have specific policies for how they implement The National Environmental Policy Act of 1969 (NEPA), which incentivizes release of information.[177] For instance, a state conservation officer must "[k]eep NRCS area and field offices informed of species listed as being threatened or endangered, geographic area in which they are found, and information such as their numbers, preferred habitat, and critical factors."[178] Of interest is how none of those policies mention involvement with tribes.[179] Also, the National Environmental Policy Act requires exchange of information among governments, but not explicitly with tribes: "all agencies of the Federal Government shall" ... "make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment ..."[180] At the least, the "federal government provides an increasing amount of state local environment information via the Internet."[181] Yet again, tribes are absent from those discussions. However, in ***219** testimony to the U.S. Senate, Robin M. Nazzaro was careful to include tribal governments in the list of stakeholders about endangered species.[182] As part of that report, the General Accounting Office "found that the Fish and Wildlife Service generally used the best available information in key endangered species decisions, although the agency was not always integrating new research into ongoing species management decisions."[183] Courts have held that information gathering is an essential part of NEPA and other statutes.[184] Implementation of the Endangered Species Act requires "best scientific and commercial data available."[185]

It is important to understand federal obligations when it comes to information it holds about tribes. In a major U.S. Supreme Court case, *Dep't of the Interior v. Klamath Water Users Protective Ass'n.,* environmental information from tribes about water was available to the public, because FOIA does not have an "Indian trust exemption."[186] If tribes do not want to release information, they do not want to give it to the federal government.[187] However, the U.S. District Court in Missoula, Montana, held in *Flathead Joint Board of Control v. U.S. Dep't. of Interior* that the government did not have to disclose documents relating to water because of how the Court viewed the tribe as being under the commercial exemption (4) of FOIA.[188] The takeaway point is that the tribes need to situate any disclosed records within federal exemptions, if they want to keep those confidential, even though the policy of FOIA is openness. However, there is not an exemption in FOIA for environmental information generally.

The *Citizens Progressive Alliance* Court denied a FOIA request, applying a rule from the U.S. Supreme Court that, "[u]pon request, FOIA mandates disclosure of records held by a federal agency, unless the documents fall within certain enumerated exemptions."[189] Again, ***220** in *Klamath Water Users.*, the U.S. Supreme Court had refused to find an "Indian trust" exemption from FOIA.[190] The *Citizens Progressive Alliance* Court sought to distinguish *Klamath*, though, noting that the information that had to be released in *Klamath* had to do with "communications from the Tribe to the BIA and DOIA, and a communication from the BIA to the tribe."[191] However, a federal district court in Colorado has said that "... Exemption 5 to FOIA is neither ambiguous, nor specially crafted for the benefit of Native American tribes," meaning that interagency communications should not be presumed closed just because they are about tribes.[192]

An important question remains whether Congress has acknowledged or delegated the authority of the tribe to ignore the mandates of FOIA specifically and freedoms of information and the press generally. The Ninth Circuit looks to agreements with tribes and statutory language to look for Congressional intent for applying federal mandates to tribes.[193] The Ninth Circuit also defers to exhaustion of tribal remedies in tribal court, even in the ***221** remote chance the tribe has jurisdiction, before taking jurisdiction.[194] Laurie Reynolds says this exhaustion doctrine has been applied to the Indian Civil Rights Act, which guarantees free press and other rights for tribes, but even that is not necessary after *Santa Clara Pueblo v. Martinez*, which sent an ICRA question back to the tribe.[195] The U.S. Department of Justice, however, has opined in the context of

biological information that an ICRA claim of violation of free speech might occur if a tribe passed an ordinance that would limit the transmission of that information.[196]

C. Arizona FOI and Endangered Species

Freedom of the information about endangered species under Arizona law is a general concept with some statutory exemptions. As we will see, an interesting confluence of cases about tribes, FOI, and environmental information creates more questions than provides answers. It is important to understand the basics about FOI and tribes in Arizona to get some of why it is difficult to get information from and about tribes in Arizona.

The Arizona Open Records remains clear: "Public records and other matters in the custody of any officer shall be open to inspection by any person at all times during office hours."[197] This clearly appears to provide freedom of information in Arizona, but reality is more vague than the primary statute. For instance, there are numerous statutes exempting information from public disclosure.[198] There are pertinent statutes, as one prohibits ***222** disclosure of "the location of archaeological discoveries,"[199] while another recently forbad release of "wildlife species location":

> Wildlife species location information is not subject to disclosure or inspection under title 39, chapter 1, article 2 for wildlife species location information on private property or when the department determines that disclosure or inspection of the information may cause harm to any wildlife species.[200]

To build an understanding of environmental information in Arizona, we need to start with a case that does not address environmental information, *Griffis v. Pinal County*,[201] where the Arizona Supreme Court used *Salt River-Pima Maricopa Indian Community* to cast some sunshine about a problem with lack of sunshine into records about American Indians. *Griffis* addresses questions about the purchase of hunting and fishing equipment,[202] but come nowhere near dealing with environmental information, especially about endangered species. However, the case helps us to begin to see some of the problems with getting information about tribes.

The *Griffis* case began when Phoenix Newspapers, Inc., which includes the newspaper *The Arizona Republic*, made a public records request for "all e-mails sent to or received by [former Pinal County Manager Stanley] Griffis on the County's email system from October 1 to December 2, 2005."[203] The investigation by *The Arizona Republic* and ultimately the Pinal County Attorney's office involved allegations of "public corruption" through misappropriation of county funds for personal use, to which Griffis pleaded guilty in January 2007.[204] County prosecutors recommended 10 years prison for Griffis's corrupt behavior,[205] but only served almost three years.[206] This illustrates *why* newsgatherers need access to public records. Were it not for the press keeping Griffis accountable, the corruption might never have been exposed.

Griffis originally obtained an injunction to stop the release of what he thought to be personal e-mail on the government e-mail system, but the Superior Court of Pinal County said that, while he could redact personal information, the county had to release email.[207] That lower Court had said "everything that is on a computer of the Pinal County ... governmental entity is presumed to be a public record" and that "any records generated on a ***223** public computer are presumptively open to public inspection."'[208] That is the preferred position for newsgatherers wanting as much information as possible about the conduct of government. The Arizona Court of Appeals, Division 2, acknowledged that the Pinal County e-mail policies require that "all e-mail messages are county property and 'not the private property of any employee;' e-mail messages 'are considered Public Records, unless they fall into one of three exemption categories: (1) Confidentiality, (2) Personal Privacy, or (3) Best Interest of the State ...."[209] Interestingly, the phrase "best interest of the state" mirrors some language in one of the more recent interpretations of the Open Meetings Act by the Arizona Supreme Court. In *Cox Arizona Publ'ns, Inc. v. Collins,* the Court said that the public official with the record has to "demonstrate how production of the documents would violate rights of privacy or confidentiality, or would be 'detrimental to the best interests of the state."'[210] A problem with that language is the lack of specificity. When Pinal County released about 700 e-mails of Griffis, some emails were withheld for the following reasons:

- Personal e-mail addresses;

- Personal telephone numbers;

• Private citizen names and e-mail addresses;

• Personal benefits or health account information;

• Bank account numbers;

• Personnel issues;

• Personal e-mails;

• Ongoing litigation;

• Homeland Security information;

• Attorney/client privileged communications."[211]

It makes sense that attorney/client privilege and health information is not public, given current law.[212] But Phoenix Newspapers would not stand for such a broad interpretation of privacy:

> ***224** Of the 10 categories enumerated by the County, only three-personal/health benefits, bank account numbers and attorney-client communications-provide a *potential* basis to redact any information. The remaining redactions are either completely unfounded, or based on entirely speculative categories of information.[213]

The Arizona Supreme Court acknowledged the long-standing presumption, even acknowledging Phoenix Newspapers' assertion "that the court of appeals misapplied *Salt River* and ignored Arizona's longstanding presumption in favor of providing public access to government records."[214] Note the difference between the presumption of providing public access to government records and a presumption that all records in possession of government are public. The Arizona Supreme Court, citing *Carlson v. Pima County* and Arizona's Open Records Act, acknowledged the presumption that public records must be disclosed.[215] However, the Court narrowed the definition of public records, saying that "only those documents having a 'substantial nexus' with a government's agency activities quality as public records."[216] The Court further said:

> Because the nature and purpose of the document determine its status, mere possession of a document by a public officer or agency does not by itself make that document a public record ... nor does expenditure of public funds in creating the document. To hold otherwise would create an absurd result: Every note made on government-owned paper, located in a government office, written with a government-owned pen, or composed on a government-owned computer would presumably be a public record .... The public records law was never intended to encompass such documents; the purpose of the law is to open *government* activity to public scrutiny, not to disclose information about private citizens [citations omitted].[217]

The Court then asserts a circular argument: "Although the public records law creates a strong presumption in favor of disclosure, that presumption applies only when a document first qualifies as a public record."[218] The Court then asserts a two-step test from *Salt River*:

> When the facts of a particular case "raise a substantial question as to the threshold determination of whether the document is subject to the states," the ***225** court must first determine whether that document is a public record. If a document falls within the scope of the public records statute, then the presumption favoring disclosure applies and, when necessary, the court can perform a balancing test to determine whether privacy, confidentiality, or the best interests of the state outweigh the policy in favor of disclosure.[219]

This shifts away from other Arizona appellate court opinions that first recognized the presumption, and then required that a balancing test with rights like privacy be applied to see whether or not disclosure was necessary.[220] The Court recognized in a footnote that some records "are clearly public records," not requiring the threshold determination, but failed to give clear guidance on what are clearly public records or not.[221]

The *Salt River* case, to which the *Griffis* Court looked for precedent about the definition of a public record, gives guidance to how Arizona courts view FOI about tribes.[222] Despite a footnote where the *Griffis* Court dismissed concerns that the case might be inapposite because it had "a unique intersection of state, federal, and tribal law," the *Salt River* case does provide a roadmap for discussing the unique differences among state, federal, and tribal law, and thus a description of the status of tribal records.[223]

The Salt River Pima-Maricopa Indian Community attempted to keep Phoenix Newspapers, Inc. and its reporter from obtaining a list of tribal members with personal information that was held at the state Treasurer's office.[224] The Court noted that the content "pertains to tribal land interests that are recorded only in the Bureau of Indian Affairs (BIA) Land Titles and Records Office and thus constitutes federal-tribal information."[225] The Court also noted that the BIA contract "required the Community to comply with the [federal] Privacy Act ... and its accompanying regulations ... [citations omitted]."[226] However, the reporter used state law to ask for records from the state Department of Transportation.[227] The state Department of Transportation then gave back the documents to ***226** the Community, just days before an attempt to get a court to restrain that action.[228] The state Treasurer had a list of where checks had been distributed to members of the Community.[229] Phoenix Newspapers, Inc., argued state law for access to the records, while the state argued federal law and a contractual agreement for confidentiality with the Community.[230]

The *Salt River* Court focused its attention on "the check distribution list containing the names and addresses of Community allottees and the amount of the check issued to each," instead of federal and state documents that the Court thought to be open.[231] The Court then examined whether the list was a "public record" or "other matter," as per the statute that does not define those terms and the case law that does.[232] The Court adopted the rule from Iowa that "[n]ot every document which comes into the possession or custody of a public official is a public record. It is the nature and purpose of the document, not the place where it is kept, which determines its status."[233] Then, the Court looked to FOIA and related federal case law to affirm that rule.[234] Thus, because the relationship about the information was between the federal government and the tribal community, and not the state of Arizona, the document was not a public record under state law, even though in the possession of a state public official.[235] So, the Arizona Supreme Court punted to the federal and tribal courts, despite the assertion earlier that FOIA rules through the Bureau of Indian Affairs are implicated by the information and the fact that Arizona looks to FOIA rules to guide its decisions, including the *Salt River* decision.[236]

This leaves open the possibilities that such information would be found through tribal or federal law, though more research is necessary to show whether the reporter in question or the attorneys ever attempted to do just that. A record request like that today could be exempt from disclosure under FOIA as an ""inter-agency or intra-agency communication[]."[237] Interestingly, that court seems to imply that a clearer request might ***227** have met with different results.[238] Relating to the *Salt River* case, note the Salt River Pima-Maricopa Indian Community's constitution says nothing about freedom of the press or information, and no case law can be found on point for that tribe.[239] That is not surprising, given that not all tribes have those guarantees in their constitutions, as well as the low number of on-point case law in tribal courts.[240] However, at least one tribal leader across the country has been removed from office in part for not following tribal laws about public records.[241]

D. Other States FOI and Endangered Species

Even under state statutes, like in Washington, scientists and policymakers really need the best data to make decisions, but do not always consult tribes.[242] At least 11 states - including Arizona, *supra* - have exemptions to their open records acts that specifically address the issue of endangered species, with some situating the issue with related issues about tribal resources. Arizona's law speaks to all wildlife species and not just endangered species.[243]

Vermont has an explicit statute about location, which reflects reciprocity with stakeholders: "All information regarding the location of endangered species sites shall be kept confidential in perpetuity except that the secretary shall disclose this information to the owner of land upon which the species has been located, or to a potential buyer who has a bona fide contract to buy the land and applies to the secretary for disclosure of endangered species information, and to qualified individuals or organizations, public agencies and nonprofit organizations for scientific research or for preservation and planning purposes ***228** when the secretary determines that the preservation of the species is not further endangered by the disclosure."[244]

In Pennsylvania, exempt records include those "identifying the location of an archeological site or an endangered or threatened plant or animal species if not already known to the general public."[245] In Connecticut, there are explicit statutes that require the Commission of Environmental Protection to provide records.[246] North Dakota passed a law keeping secret "population distributions of threatened and endangered species," but that law apparently is not in effect.[247]

Oregon may draw a connection between endangered species and tribes. The public records exemptions include "information developed under state statute regarding the habitat, location or population of any threatened or endangered species."[248] Then, Reporters Committee for Freedom of the Press says, "This exemption is similar to the archeological site exemption, subsection (11) above," which exempts "[i]nformation relating to location of archeological sites or objects except in cases where a governing body of an Indian tribe requests such information for purposes of the tribe's cultural or religious activities."[249]

Tennessee specifically made confidential certain records from the Department of Environment and Conservation and prohibited "[d]isclosing the specific location of threatened, endangered, or rare species that would not be available to the public under the federal law or regulation."[250] Louisiana exempts "any records, notes, or maps within the Louisiana Department of Wildlife and Fisheries' Natural Heritage Program database on rare, threatened, or endangered species or unique natural communities."[251] Georgia exempts the following information from public disclosure:

> Records that contain site specific information regarding the occurrence of rare species of plants or animals or the location or sensitive natural habitats on public or private property if the Department of Natural Resources determines ***229** that disclosure will create a substantial risk of harm, theft, or destruction to the species or habitats or the area of place where the species or habitats are located; provided, however, that the owner or owners of private property upon which rare species of plants or animals occur or upon which sensitive natural habitats are located shall be entitled to such information pursuant to this article.[252]

Maryland law provides, "A custodian may deny inspection of a public record that contains information concerning the site-specific location of an endangered or threatened species of plant or animal, a species of plant or animal in need of conservation, a cave, or a historic property as defined in § 5A of the State Finance Procurement Article."[253] Virginia has a similar law: "Records containing information on the site specific location of rare, threatened, endangered or otherwise imperiled plant and animal species, natural communities, caves, and significant historic and archaeological sites if, in the opinion of the public body which has the responsibility for such information, disclosure of the information would jeopardize the continued existence or the integrity of the resource. The exemption, however, does not apply to requests from the owner of the land."[254]

Of note is Idaho, which exempts disclosure of "the location of archaeological or geophysical sites or endangered species, if not already known to the general public."[255] Idaho also exempts release of records otherwise exempted in federal or state law.[256] Archaeological sites at times implicate tribal cultural knowledge, and endangered species implicate traditional ecological knowledge. So, this arguably could provide protection of information held by tribes.

As we can see, there are trends across the United States to protect certain information about endangered species, but this has not yet directly affected federal law in the Freedom of Information Act.[257] Location of endangered species seems to be the point of contention. We know these species exist, but we do not know whether they are on our land, or our neighbor's land,

etc. The situation complicates when tribes are involved. The tribes may know about locations of endangered species like jaguars, but they likely will not be talking about them.

***230 E. Tribal FOI and Endangered Species**

Freedom of information remains an issue for the 22 indigenous tribes with at least some reservation land in Arizona.[258] Freedom of information is an issue as the public--including tribal members and non-members--attempt to access information about the governmental functions and other issues about tribes.[259] As we will see, *infra*, there are examples of tribes asserting control over environmental information. Before that, it helps to have an overview about the idea of tribes and FOI.

The Navajo Nation in Arizona, New Mexico, and Utah generally protects FOI. In an act of sovereignty, the Navajo Nation looks to its own common law to decide questions about freedoms of speech and information under its jurisdiction:

> [The Navajo common law] provides that an individual has a fundamental right to express his or her mind by way of spoken word and/or actions. As a matter of Navajo tradition and custom, people speak with caution and respect, choosing their words carefully to avoid harm to others. This is nothing more than freedom with responsibility, a fundamental Navajo traditional principle.[260]

That case applied these tribal principles to a question on whether tribal employees had been "fired for copying and removing" certain documents, among other issues.[261] While the Supreme Court of the Navajo Nation spoke more specifically about speech rights and not informational rights, the concept of FOI is informed with the decision. The Court held, in part:

> The documents distributed at the meeting were never made public or put in the "wrong hands,' nor was there evidence of disruption or disharmony in the office as a result. NAPI [Navajo Agricultural Products Industry]'s interest to ***231** not disclose demoralizing or disruptive information is not an adequate interest to outweigh an individual's right to free speech.[262]

Basically, the Navajo interest in working out problems by talking with the people in question drove the analysis. What is interesting is the implication that, had the documents been given to the "wrong hands," the holding might have been different. Of note for this Article, the Navajo Nation will not release records containing "[i]nformation related to the location of an individual member of any threatened or endangered species, such that that individual could be placed further at risk ..."[263] Therefore, it has a regime of protecting the right of access, but makes exceptions in certain circumstances. This may not be as robust as with the state and federal governments, but it shows tribes can and do address these important issues.

The issue about freedom of information in Indian Country has implications for international human rights. Freedom of information about the functions of government is a human right recognized in international agreements, but disagreements continue in Arizona about how far to allow that freedom in state, federal, or tribal law. The Universal Declaration of Human Rights says: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."[264] These rights have been incorporated into the U.N. Declaration of Rights for Indigenous Peoples.[265] The International Covenant on Civil and Political Rights says:

> 1. Everyone shall have the right to hold opinions without interferences.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(*a*) For respect of the rights or reputations of others;

***232** (*b*) For the protection of national security or of public order (*ordre public*), or of public health or morals.[266]

A part of freedom of information is access to public records of governments.[267] Thomas Emerson - noted for his explication of the concept of freedom of expression - views freedom of information to be integral to freedom of expression as a requisite to democracy.[268] Emerson quotes President James Madison, who once said:

> A popular government, without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy; or perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own governors, must arm themselves with the power knowledge gives.[269]

Tribes have the sovereignty to make these decisions about FOI. However, if international human rights are supposed to be available for all people, *supra*, and indigenous peoples in particular need those rights guaranteed, then one wonders why state, federal, and tribal laws do not guarantee freedom of information for tribal members and non-members in regards to records about the functioning of tribal governments. Again, the U.S. Supreme Court said, in reference to options a tribe has to regulate activities on non-Indian land:

> [A] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians ... within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.[270]

Thus, and rightly so, the final say over whether the tribes provide freedom of information is with each tribe. An example of a tribe protecting freedom of information to a degree is the Cherokee Nation in Oklahoma, which passed the "Freedom of Information and Rights of Privacy Act of 2001."[271] This law said, "Any person has a right to inspect or copy any public record of a public body, except as otherwise provided by § 75-1-6, in ***233** accordance with reasonable rules concerning time and place of access."[272] Admittedly, § 75-1-6 contains a long list of excluded information, including salaries of people employed by the Cherokee Nation.[273] However, at least it attempts to separate public from private information and to guarantee access to more public information than in the past.

From what we can see, without explicit laws and regulations about dissemination of information, it could be argued tribes generally are not practicing freedom of information. However, given the struggles that tribes in Arizona have had with intrusiveness and theft of cultural and natural resources, one could understand the reticence to pass such laws. In the end, the tribes have to do it. The state and federal laws and regulations seem to go out of their way to protect information about tribes. That would include information about jaguars and other endangered species. Freedom of information is an international obligation of tribes, as it is a fundamental human right, but the tribes have inherent sovereignty to apply this to their own records. Forcing the tribes under state or federal law to release records might be a sound strategy for some plaintiffs, but raises more questions than answers for how to promulgate freedom of information in Indian Country.

F. Agreements With Tribes About Release of Information and Wildlife

Through documents that have filtered into the public space, we can get an idea about how tribes and outside agencies work together to protect information the tribes want to be protected. Ironically, we cannot be for certain right now how many agreements - public or private - exist among tribes in Arizona and local, state, and federal agencies. Anecdotally, I know of more than one instance where a tribal government, after *Klamath*, *supra*, decided not to release information to local, state, or federal agencies, lest open records laws put that information into the public space. As we can see from the example of the White Mountain Apache Tribe, there have been serious reasons why tribal officials wanted to protect information about wildlife.

The White Mountain Apache Tribe's reservation occupies the middle of eastern Arizona, as well as the heart of the famous White Mountains. 1994 and 1998 appear to be pivotal years for how the tribe asserted its sovereignty and authority over wildlife on its reservation. The Tribal Council passed a resolution to set strict boundaries about how the ESA and other laws are applied on the reservation.[274] At the beginning of the long resolution, the council articulated many concerns about how encroachment of non-Apache into the White Mountains has caused considerable damage to the environment, including wildlife.[275] The Tribal Council also claimed "many species of animals and plants which are proposed as threatened or endangered off Reservation have thrived on the Fort Apache ***234** Indian Reservation due to the management programs, culture and philosophy of the White Mountain Tribe ...."[276] Also, "Indian reservations, because they have not have been extensively populated or developed by non-Indians, frequently remain the last refuge of plant and animal species which have been exterminated or virtually eliminated by non-Indians outside reservations for the sake of non-Indian economic or recreational development ...."[277] Under the White Mountain Apache Tribal Constitution, the Council has the responsibility "[t]o protect and preserve the wildlife, plant life, forests, natural resources and water rights of the Tribe, and to regulate hunting and fishing on the reservation."[278]

As a part of that resolution, the White Mountain Apache council called for the creation of a Natural Resources Department, and thus asserted even more authority over wildlife management on its lands. Despite the aggressive posture of the resolution, the council indeed has been cooperative when it thinks that would be in the tribe's best interests. For instance, one U.S. Fish & Wildlife official praised Chairman Ron Lupe for his leadership to create a protocol for tribal cooperation with the federal government.[279] That protocol mandated that scientific information by and about the tribe must be held in confidence.[280] In fact, "[t]o the maximum extent possible, any potentially sensitive Tribal information shall remain in the custody of the Tribe."[281] The White Mountain Apache Tribe was involved with a memorandum of understanding about the reintroduction of Mexican grey wolves in eastern Arizona and western New Mexico.[282] This shows the tribes *could* be involved with agreements about jaguars.

The current White Mountain Apache Code details regulations about Game and Fish, as well as the Environment and Natural Resources in general.[283] It could be argued the Code would allow for taking a jaguar for scientific purposes: "With Tribal Council approval, the Department may issue special permits for collecting or holding wildlife, for conducting Field Trials, or for any other recreational, educational or scientific purpose."[284] However, ***235** jaguars are not listed in the definitions of wildlife.[285] Simply, because of the laws and regulations about wildlife and information gathering on that reservation, we simply do not know what happens or not about jaguars there. A clue would be a sign at the White Mountain Apache Culture Center and Museum at Fort Apache Historic Park: The tribe admits it helps the federal government to protect jaguars. As Table 1 indicates, *supra*, jaguars have been and perhaps still are on that reservation. Therefore, it is not too much of a stretch to wonder if jaguars wander that reservation, far north of the proposed critical habitat in southern Arizona and New Mexico.

Practically speaking, it makes sense not to reveal exact locations of jaguars, given possible dangers to them from those who do not want them where they are. Also, it makes sense to give respect to a tribe's sovereignty to decide whether to release information to the public about jaguar management on reservations. They *should* release information, under international law, but they get to decide in the end. The implications for environmental information policy are enormous, as policy-makers struggle with protecting endangered species and freedom of information.

CONCLUSION

There are some simple solutions for addressing this tension between freedom of information on one hand, and the needs of tribes and endangered species on the other. First, the U.S. Congress arguably could follow the lead of many states and amend FOI laws to include exemptions for locations of endangered species. The Arizona Open Meetings Act, for instance, allows for executive session of governmental bodies when discussing tribal-related issues.[286] And, if an exemption for tribal information had been in FOIA, the U.S. Supreme Court in *Klamath* very likely would have held that the information about tribal water was private. However, given the longstanding policies of freedom of information, it might not seem preferable to amend the federal Freedom of Information Act[287] to protect exact locations of endangered species. As an advocate for freedom of information, I recognize that common sense exceptions exist for disclosure of information. However, I also advocate for the greatest amount of tribal sovereignty possible. Therefore, honoring tribal competency and sovereignty is key for efficient environmental information policy about endangered species like the jaguar.

As tribes develop their programs, leaders will have to consider whether to let the public know what they are doing. You cannot use state or federal law efficiently, given the current FOI regimes, to force tribes to give up information. They have to see for themselves how FOI would work for their tribal cultures and constituencies. It was both humorous and disconcerting to write this Article thinking that tribes would be omitted from cooperative management, only to discover that they had been involved all along. The public deserves to have more knowledge about how state, federal, *and* tribal governments work together to ***236** protect endangered species like the jaguar. That brings us squarely to the thesis - tribes should be trusted with the task of caring for endangered species, despite the public being out of much of the policy-making with tribes. It is presumptuous at best and offensive at worst to think that indigenous tribes must accept all Western notions of the law. They do what they do because they are who they are. This must be respected as various governmental entities work with tribes. It would be a welcomed development if tribes talk more about what they do about preserving endangered species. They have traditional ecological knowledge that would help with species management. It is in the best interests of endangered species to do what U.S. Fish & Wildlife Service has done - trust tribes to take care of what is on their lands.

More biological, legal, and cultural research needs to occur before policymakers can have a complete sense of the extent of the range of the jaguars, and then whether the jaguars have a breeding population in the United States. After four years of travelling all over the Southwest to search for jaguars, I believe that such breeding populations may well exist - and they more than likely exist on tribal reservations. Only the tribes can say for certain, and for now, it is best we do not know for certain, lest others with less honorable motives kill or drive out the jaguars that still exist. I have been told more than once by credible sources that jaguars would be killed by parties not wanting them around, if they knew exactly where those jaguars would be. Given traditional ecological knowledge, tribal sovereignty, and common sense, the tensions between the state and federal governments would be lessened with the idea of honoring tribal protections of jaguars. And, jaguars would keep their home in the United States, thanks in part to the tribes.

Footnotes

[a1] B.A., 1989, East Central University; M.A., 1999, University of Oklahoma; Dual Ph.D. Journalism, 2006, J.D., 2007, University of Missouri-Columbia; LL.M. candidate, University of Arizona, Indigenous Peoples Law & Policy Program; Assistant Professor, College of Social and Behavioral Sciences, The University of Arizona, Tucson. The Author (Choctaw/Cherokee) is a licensed lay advocate in Pascua Yaqui Tribal Courts, but is not licensed to practice law in a state jurisdiction. The Author, a former journalist, also serves the Native American Journalists Association as Research Fellow and Intake Liaison for the Legal Hotline for Journalists. Contact: 1303 E. University Blvd., No. 20720, Tucson, Ariz. 85719, 520-621-9680, 520-903-4461, krkemper @email.arizona.edu or kevinrkemper@hotmail.com. Much of this Article comes from class projects as a visiting J.D. student and an LL.M. student at the James E. Rogers College of Law, as well as class projects in graduate American Indian Studies courses at The University of Arizona. I thank Professors Benedict Colombi, Ronald Trosper, James Hopkins, Robert Hershey, Robert Williams, and Melissa Tatum for their input and wisdom at various stages. For other parts of this project, I also would like to thank the assistance of journalism students Cecelia Marshall, Guadalupe "Litzy" Galarza Pacheco, and Brett Haupt, who assisted with freedom of information requests about jaguars, as well as with background information. Finally, this Article is dedicated to the Author's oldest son, Nathan Kemper, who understands more than most why his father loves the mountains and the jaguars that roam in them.

[1] The nexus of this project began as a journalistic project about jaguars as part of my previous work at the University of Arizona's School of Journalism, but evolved into a law review article discussing tribal involvement and environmental information policy. This Article relies upon and interprets documents and information already in public circulation, and does not reveal any confidential information. This project does not involve human subjects research because it is not generalizable. *See, e.g., Human Research Determination*, Form F309, University of Arizona Office for Responsible Conduct of Research (Jan. 2013), http://orcr.arizona.edu/hspp/forms. I make certain assertions and conjectures based upon personal knowledge gained and confirmed through the past four years of "chasing jaguars" around southern and eastern Arizona.

[2] For a sample of literature about transboundary species management, see Graham J. Forbes & John B. Theberge, *Cross-Boundary Management of Algonguin Park Wolves*, 10 CONSERVATION BIOLOGY 1091 (1996), *available at* http:// www.jstor.org/stable/2387145 (arguing that protected areas have to be increased to make them more effective); *See also* Robert B. Keiter & Harvey Locke, *Law and Large Carnivore Conservation in the Rocky Mountains of the U.S. and Canada*, 10 CONSERVATION BIOLOGY 1003 (1996), *available at* http:// www.jstor.org/stable/2387136 (explaining how inconsistencies with laws along the U.S./Canadian border do a disservice to wildlife management).

[3] 16 U.S.C. § 1531-1544 (1973).

[4] *See, e.g.*, Dennis Wagner, articles with *Macho B: Last Roar of the Jaguar*, THE ARIZ. REPUBLIC (Dec. 10, 2012), *available at* http:// www.azcentral.com/news/articles/20121209macho-b-cover-up-celebrations.html.

[5] Endangered and Threatended Wildlife and Plants; Designation of Critical Habitat for Jaguar, 79 Fed. Reg. 12572, 12575 (Mar. 5, 2014) (to be codified at 50 C.F.R. pt. 17) (the Service also excluded Fort Huachucha in Cochise County, Arizona, because it also had a management plan).

[6] *Id.*

[7] *Id.* at 12579

[8] DAVID E. BROWN & CARLOS A. LOPEZ GONZALEZ, BORDERLAND JAGUARS: TIGRES DE LA FRONTERA 96 (2001); Mark Jenkins, *Deep South: Hard-Core Cavers in Three Southern States Stop at Nothing to Probe an Underworld Wilderness*, NAT'L GEOGRAPHIC MAG., June 2009, *available at* http:// ngm.nationalgeographic.com/print/2009/06/tag-caves/jenkins-text.

[9] Numerous scientists have told me privately that no unequivocal evidence exists that the jaguars found in Arizona have been born in Mexico, though that would be a logical conclusion, given the sightings.

[10] BROWN & LOPEZ GONZALEZ, *supra* note 8, at 30-43.

[11] *Id.*

[12] *See, e.g.*, Letter from Dr. Ned Norris, Jr., Chairman of the Tohono O'odham Nation to U.S. Fish & Wildlife Service Public Comments Processing (Oct. 19, 2012) (asserting tribal concerns about critical habitat assessment for jaguars in Arizona), http://www.regulations.gov/#!home. http:// www.regulations.gov/#!home.

[13] 79 Fed. Reg. at 12602-12604

[14] These terms, discussed *infra*, speak to the idea that tribes have the rights and jurisdiction to manage natural resources on their lands.

[15] Todd Wilkinson, *Can There Be Peace in the Wolf Wars?*, THE CHRISTIAN SCI. MONITOR, June 6, 2011, at 26, 28 (discussing the political tug-of-war over wolf and grizzly bear management).

[16] BROWN & LOPEZ GONZALEZ, *supra* note 8, at 96.

[17] *See Maps*, WHITE MOUNTAIN APACHE TRIBE GAME AND FISH, http:// www.wmatoutdoors.org/maps (last visited on April 7, 2014).

[18] *See Home*, WHITE APACHE MOUNTAIN TRIBE, http://www.wmat.nsn.us/ (last visited April 26, 2014).

[19] Clay Thompson, *AZ 101: Grizzly Bears in Arizona*, THE ARIZ. REPUBLIC (Feb. 11, 2010), *available at* http:// www.azcentral.com/travel/articles/2010/02/11/20100211azhist0213.html.

[20] Memorandum of Understanding Among the Ariz. Game & Fish Dep't, N.M. Game & Fish Dep't, U.S.D.A. Animal & Plant Health Inspection Serv./Wildlife Servs., U.S.D.A. Forest Serv., U.S. Fish & Wildlife Serv., White Mountain Apache Tribe, Ariz. Cos. of Graham, Greenlee, and Navajo, N.M. Counties of Catron & Sierra, and the N.M. Dep't. of Agriculture (Oct. 31, 2003), http://www.azgfd.gov/pdfs/w_c/MexicanWolf_MOU_200310311.pdf.

[21] Letter from Norris to U.S. FWS (Oct. 12, 2012).

[22] 79 Fed. Reg. at 12602-604.

[23] *Id.* at 12602.

[24] *Id.* (citations omitted).

[25] *Id.* at 12598, *quoting* 16 U.S.C. § 1533(4)(B)(2).

[26] *Id.* at 12598-604

[27] *Id.* at 12603 (citing Statement of Relationship (April 2013)). According to documentsat http://www.tolc-nsn.org, a Statement of Relationship was approved in March 2003.

[28] Resolution of the Tohono O'odham Legislative Council, Resolution No. 13-498, *available at* http://www.tolc-nsn.org/docs/actions13/13498.pdf.

[29] Various letters from Kevin R. Kemper to Arizona Game & Fish, U.S. Fish & Wildlife Service, agencies with the federal government of Mexico and the government of Sonora, the White Mountain Apache Tribe, the San Carlos Apache Tribe, and the Tohono O'odham Nation (March 2012) (on file with author). Those journalistic interviews are not quoted in this law review article.

[30] *See, e.g.*, Tony Davis, "UA, Government Agencies Release 4 Photos of Jaguar in Santa Ritas," ARIZ. DAILY STAR, Dec. 21, 2012, *available at* http://azstarnet.com/news/science/environment/ua-governmentagencies-release-photos-of-jaguar-in-santa-ritas/article_7c6661ae-db1e-5c39-b704--06fe99cff42b.html. I confirmed through journalistic interviews that the jaguar treed in November 2011 was in the Whetstone Mountains, to the east of the northern Santa Rita Mountains, southeast of Tucson.

[31] *Tribal Homelands of Arizona, Maps*, INTER TRIBAL COUNCIL OF ARIZONA, INC. (2013), http://itcaonline.com/?page_id=16.

[32] *See, e.g.*, BROWN & GONZALEZ, BORDERLAND JAGUARS (2001) *passim;* RICHARD MAHLER, THE JAGUAR'S SHADOW: SEARCHING FOR THE MYTHIC CAT (2009); Letter from Ned Norris to U.S. FWS (Oct. 12, 2012) (on file with author).

[33] 79 Fed. Reg. at 12579-80. Class I reports, according to U.S. Fish & Wildlife, require "some sort of physical evidence ..." *Id.* at 12579.

[34] Sightings without a specific listing are listed in Table 1 of BROWN & LOPEZ GONZALEZ, BORDERLAND JAGUARS, 6-9. Table 1 only includes jaguars in or very near Arizona that would be in close proximity to Indian reservations, but does not list every proven instance of a jaguar in Arizona. Also, some but not all are listings in the tables provided in the Final Rule about

critical habitat. 79 Fed. Reg. at 12579-80.

[35] Locations and nearby reservations were searched at http:// www.google.com. Results are not purported to be accurate, but instead illustrate how the reports are related to large swaths of potential jaguar habitat in Arizona. For more information about suitable habitat, *see, e.g.,* James R. Hatten, Annalaura Averill-Murray, and W.E. Van Pelt, *Characterizing and Mapping Potential Jaguar Habitat in Arizona*, Nongame and Endangered Wildlife Program Technical Report 203, Ariz. Game & Fish Dep't. (2003), http:// www.azgfd.gov/pdfs/w_c/jaguar/characterizing_mapping.pdf.

[36] The presumption is that the jaguar in question may have been on or near these reservations, but there are no guarantees to accuracy.

[37] Three unique jaguars were photographed in a monitoring program. Emil B. McCain & Jack L. Childs, *Evidence of Resident Jaguars (*Panthera Onca*) in the Southwestern United States and the Implications for Conservation*, 89 J. OF MAMMOLOGY 1, 2 (2008)

[38] These reports were mentioned in a footnote of Center for Biological Diversity v. Kempthorne, 607 F.Supp.2d 1078, 1095 at n. 3 (D.Ariz. 2009). This was not listed in the Final Rule for Critical Habitat. 79 Fed. Reg. at 12580-81.

[39] *Center for Biological Diversity*, 607 F. Supp. 2d at 1095 n. 3. While the sighting was in New Mexico, the sighting was near the White Mountain Apache Reservation and the Navajo Nation reservations.

[40] The Final Rule disputes the records in 1963 and 1964 because of allegations the jaguars were there for "canned hunts." 79 Fed. Reg. at 12580-81.

[41] This may be a misspelling of Chevelon Canyon, where there is a Chevelon Canyon Lake. *See Chevelon Canyon Lake*, THE ARIZ. REPUBLIC, http:// www.azcentral.com/travel/arizona/arizonalakes/articles/chevelon-lake.html. (last visited April 7, 2014).

[42] For a log of many issues and publications about the jaguar controversy, see *Jaguar Conservation*, Ariz. Game & Fish Dep't. (2013), http://www.azgfd.gov/w_c/es/jaguarmanagement.shtml. (2013).

[43] 50 C.F.R. Part 17, 77 Fed. Reg. 50214, 50216 (2012), http:// www.fws.gov/southwest/es/arizona/Documents/SpeciesDocs/Jaguar/Jaguar_pCH_FR_8-20-2012.pdf (last accessed April 7, 2014).

[44] *Id.* at 50214.

[45] *Id.* at 50237 (noting, *e.g.,* Government-to-Government Relations with Native American Tribal Governments, and the Forest Service's obligations under 59 Fed. Reg. 22951 and Exec. Order No. 13175, Consultation and Coordination with Indian Tribal Governments.

[46] *Id.*.

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] Letter from Norris to U.S. Fish & Wildlife, at 4, *including* Res. No. 12-415, Resolution of the Tohono O'odham Legislative Council, Authorizing the Submission of Comments to the United States Fish and Wildlife Service on Proposed Rule to Designate Critical Habitat for Jaguar (Oct. 17, 2012), and citing Steve Pavlik, *Rohonas and Spotted Lions: The Historical and Cultural Occurrence of the Jaguar, Panthera onca, Among the Native Tribes of the American Southwest*, 18 WICAZO SA REV. 157-175 (Spring 2003), http:// www.jstor.org/stable/1409436 http://www.jstor.org/stable/1409436.

[51] Resolution of the Tohono O'odham Legislative Council, Authorizing the Submission of Comments to the United States Fish and Wildlife Service on Proposed Rule to Designate Critical Habitat for Jaguar, Resolution 12-415 at 1 (Oct. 12, 2012), *available at* http://www.tolc-nsn.org/docs/actions12/12415.pdf.

[52] 50 C.F.R. Part 17, 77 Fed. Reg. 50214, 50240-41(Aug. 2, 2012).

[53] ARIZONA GAME & FISH DEPARTMENT, ARIZONA GAME AND FISH DEPARTMENT RESPONSE TO 50 C.F.R. PART 17 2 (Oct. 19, 2012), *available at* http:// www.azgfd.gov/w_c/es/documents/121019_Jaguar_Dept_response_critical_ habitat.pdf.

[54] *Id.*

[55] Master Memorandum of Understanding Between United States Department of the Interior Fish and Wildlife Service Region 2 and State of Arizona, Arizona Game and Fish Commission 2 (Aug. 11, 2008), http:// www.fws.gov/southwest/es/arizona/Documents/ESAGuidance/AGFD_MOA.pdf.

[56] *See, e.g., id.* at 9.

[57] *Id.* at 15.

[58] Memorandum of Understanding Between the Arizona Game & Fish Department and the New Mexico Department of Game and Fish for Jaguar Conservation (March 21, 2007), http://www.azgfd.gov/w_ c/es/documents/JAGCT.MOU.2007-2011.20070321.Final.Signed.pdf.

[59] *Id.* at 1.

[60] *Id.*

[61] ARIZONA RESPONSE TO 50 C.F.R. PART 17, *supra* note 53, at 8 (citing Arizona Cattle Growers' Assoc. v. Salazar, 606 F.3d 1160, 1164 (9th Cir. 2010)).

[62] *Id.*

[63] Arizona Cattle Growers, 606 F.3d at 1164 (quoting 16 U.S.C. § 1533(b)(2) and citing (6)(C)(ii)).

[64] *See* 38 C.J.S. GAME § 1(2012).

[65] *Id.* (citing Nicholson v. Smith, 986 S.W.2d 54 (Tex. App. 1999)).

[66] Booth v. State, 207 Ariz. 61, 83 P.3d 61, 65 (Ariz. Ct. App. 2004).

[67] *Id.* at 64 (quoting BLACK'S LAW DICTIONARY 635 (7th ed. 1999)).

[68] Pierson v. Post, 3 Cai. 175 (N.Y. 1805) (quoted in JAMES L. WINOKUR, R. WILSON FREYERMUTH, & JEROME M. ORGAN, PROPERTY AND LAWYERING 67-71 (West Group 2002)). Also, for a discussion about how that case was more about struggles over community instead of individual property, even in ways that involved local tribes, see Bethany R. Berger, *It's Not About the Fox: The Untold History of* Pierson v. Post, 55 DUKE L.J. 1089 (Apr. 2006).

[69] 38 C.J.S. GAME § 6 (citing Kleppe v. New Mexico, 426 U.S. 529, 546, 96 S.Ct. 2285 (1976) and U.S. CONST. ART IV § 3 cl. 2).

[70] *Id.*, (citing Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000) and U.S. CONST. ART I § 8 cl. 3.

[71] 16 U.S.C.A. Ch. 35.

[72] 16 U.S.C.A. § 1535.

[73] 16 U.S.C.A. § 1537.

[74] Miccosukee Tribe of Indians of Florida v. U.S. Army Corps of Engineers, 619 F.3d 1289 (11th Cir. 2010) (citing Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, 123 Stat. 524).

[75] *See, e.g.*, Steven G. Davison, *Alteration of Wildlife Habitat as a Prohibited Taking Under the Endangered Species Act*, 10 J. LAND USE & ENVTL. L. 155 (Spring 1995).

[76] 16 U.S.C.A. § 1532(19).

[77] Environmental Protection Information Center v. Simpson Timber Co., 255 F.3d 1073 (9th Cir. 2001) (quoting 50 C.F.R. § 17.3 (2000)).

[78] *Id. at* 1075 (citing Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995)).

[79] *See, e.g., supra*, note 52.

[80] 16 U.S.C. § 1539.

[81] Loggerhead Turtle v. County Council of Volusia County, Fla., 148 F.3d. 1231, 1242 (11th Cir. 1998) (where implied permission was not enough to take sea turtles).

[82] Friends of Endangered Species, Inc., v. Jantzen, 760 F.2d 967, 982 (9th Cir. 1985).

[83] U.S. v. McKittrick, 142 F.3d 1170, 1177 (9th Cir. 1988) (citing *Sweet Home*, 515 U.S. at 700-01).

[84] Center for Biological Diversity v. Kempthorne, 607 F. Supp. 2d 1078 (D. Ariz. 2009).

[85] New Mexico Cattle Growers Ass'n v. U.S. Fish & Wildlife Service, 248 F.3d 1277 (10th Cir. 2001).

[86] Center for Biological Diversity v. Norton, 240 F. Supp. 2d 1090 (D.Ariz. 2003), *amended in part*, Center for Biological Diversity v. Norton, 2003 WL 22849594 (Feb. 19, 2003).

[87] *Id. at* 1091 (citing 66 Fed.Reg. 8530, 8545).

[88] *Id. at* 1107.

[89] U.S. DEPT. OF INTERIOR SECRETARIAL ORDER NO. 3206 (June 5, 1997), http://www.fws.gov/nativeamerican/L_T_History.html. For an explanation of the provisions, see Lawrence R. Liebesman & Rafe Petersen, *Secretarial Order No. 3206's Attempt to Harmonize the Conflicting Rights and Duties of Indian Tribes and the Federal Government in Applying the ESA, in* 3 LAW. OF ENVIRONMENTAL PROTECTION § 24:75 (2013).

[90] ARIZ. REV. STAT. ANN. § 17-320 (2013) (West).

[91] *Id.* at §§ 17-320(A)(1), B(2).

[92] United States v. Haas, 141 F.3d 1181 (9th Cir. 2000) (unpublished). *See also*, Lacey Act 18 U.S.C. §§ 42-43, 16 U.S.C. §§ 3371-3378 (2012).

[93] Opening Brief of Appellant John Lloyd Klump at 26, United States v. Haas, 141 F.3d 1181 (9th Cir. 2000) (Nos. 99-10188; 99-10216), 1999 WL 34710279.

[94] Opening Brief for Defendant Timm Jon Hass at 6, U.S. v. Haas, 141 F.3d 1181 (9th Cir. Aug. 23, 2000), 2000 WL 33998989.

[95] Emil B. McCain & Jack L. Childs, *Evidence of Resident Jaguars* (Panthera Onca) *in the Southwestern United States and the Implications for Conservation*, 89 J. MAMMOLOGY 1, 2 (2008).

[96] *Id.*

[97] PIMA COUNTY OFFICE OF SUSTAINABILITY & CONSERVATION, PIMA COUNTY'S MULTI-SPECIES CONSERVATION PLAN: BALANCING DEVELOPMENT AND HABITAT CONSERVATION, 3, 6, 14 (Nov. 2012), http:// www.pima.gov/cmo/sdcp/MSCP/MSCPdocs/Pima_County_MSCP_Summary.pdf.

[98] Memorandum from C.H. Huckelberry, County Administrator, to Pima County Board of Supervisors, (Aug. 28, 2012), *available at* http:// www.pima.gov/cmo/sdcp.../bd-mscp%20tribal%20notifications.pdf.

[99] *Id.* The other tribes include the Ak-Chin Indian Community, the Gila River Indian Community, and the Salt River Pima-Maricopa Indian Community. ADVISORY COUNCIL ON HISTORIC PRESERVATION, CASE DIGEST: SECTION 106 IN ACTION (Summer 2012), http://www.achp.gov/docs/CaseDigestWinter2012.pdf.

[100] For a discussion about this and other stereotypes, see, for example, Leo Killsback, *The Legacy of Little Wolf: Rewriting and Rerighting Our Leaders Back into History*, 26 WICAZO SA REV. 85, 87 (2011).

[101] BLACK'S LAW DICTIONARY (9th ed. 2009),

[102] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999).

[103] JUDITH V. ROYSTER & MICHAEL C. BLUMM, NATIVE AMERICAN NATURAL RESOURCES LAW: CASES AND MATERIALS 511 (Carolina Academic Press 2002, 2008) (citing TIFFANY ON REAL PROPERTY § 839, at 429 (3rd ed. 1939) and RESTATEMENT OF PROPERTY: SERVITUDES §§ 4.1, 4.3 (2000)).

[104] *Mille Lacs Band*, 526 U.S. at 175.

[105] *Id.* at 200 (citing Oregon Dept. of Fish and Wildlife v. Klamath Tribe, 473 U.S. 753, (1985)).

[106] *Id.* at 201.

[107] *Id.* at 219 (Rehnquist, C.J.) (citing Ward v. Race Horse, 163 U.S. 504 (1896)).

[108] *Id.* at 203 (citing Washington v. Washington State Commercial Passenger Fishing Vessel Assn., 443 U.S. 658 (1979)).

[109] *See, e.g.*, State v. Matthews, 635 N.W.2d 601 (Wis. Ct. App. 2001) ("Although *Mille Lacs* recognized the rights of states to regulate in the interest of conservation, the Court did not address whether a state could also regulate to protect public health and safety. We do not read the Court's language as excluding the possibility that regulation may be appropriate for other compelling reasons.").

[110] Ottawa Tribe of Okla. v. Ohio Dep't of Natural Res., 541 F. Supp. 2d. 971, 984 (N.D. Ohio 2008).

[111] Anderson v. Evans, 371 F.3d 475, 498 (9th Cir. 2004).

[112] *Id.* at 497 (citing U.S. v. Fryberg, 622 F.2d 1010 (9th Cir. 1980)).

[113] *Id.* at 501. *See also* National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370(h) (2006).

[114] *Id.*

[115] United States v. Dion, 476 U.S. 734, 745 (1986).

[116] *Id. at* 736-37 (citing 16 U.S.C.A. § 668 (West 2014) and Treaty with the Yankton Sioux, Apr. 19, 1858, 11 Stat. 743).

[117] *Id.* at 739-40.

[118] *Id.* at 740.

[119] United States v. Nuesca, 945 F.2d 254, 256-7 (9th Cir. 1991).

[120] United States v. Kaneholani, 773 F. Supp. 1393, 1395 (D. Haw. 1990).

[121] *Id.*

[122] United States v. Billie, 667 F. Supp. 1485, 1497 (S.D. Fla. 1987).

[123] Anderson v. Evans, 371 F.3d at 475, 475 (9th Cir. 2004).

[124] For a discussion about the plenary power doctrine, *see, e.g.*, ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA 71-83 (Univ. of Minn. Press 2005).

[125] United States v. Winans, 198 U.S. 371, 383 (1905).

[126] *Id.* at 383 (citing Shively v. Bowlby, 152 U.S. 1 (1894)).

[127] *Id.* at 381.

[128] Winters v. United States, 207 U.S. 564 (1908).

[129] WHITE MOUNTAIN APACHE TRIBE RES. NO. 02-94-060, at 5 (Feb. 24, 1994), available at http://www.wmat.us/Legal_Scans/Resolutions/1994/02-94-60.Fish_and_WildlifeService.pdf.

[130] BLACK'S LAW DICTIONARY (9th ed. 2009).

[131] Montana v. U.S., 450 U.S. 544, 557 (1981).

[132] *Id.* at 565 (citations omitted).

[133] *Id.*

[134] New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 331 (1983) (citing *Montana*, 450 U.S., at 557-67).

[135] *Id.* at 331 (quoting Worcester v. Georgia, 6 Pet. 515, 561(1832)).

[136] *Id.* at 337-38.

[137] *Id.* at 343-44.

[138] *See, e.g.*, Bugenig v. Hoopa Valley Tribe, 266 F3.d. 1201 (9th Cir. 2001).

[139] Ronald L. Trosper, et al., *The Unique Character of Traditional Forest-Related Knowledge: Threats and Challenges Ahead*, TRADITIONAL FOREST-RELATED KNOWLEDGE: SUSTAINING COMMUNITIES, ECOSYSTEMS AND BIOCULTURAL DIVERSITYY 563 (John A. Parrotta & Ronald L. Trosper eds., Spring 2012).

[140] *Id.* at 566.

[141] *Id.* at 568.

[142] Ronald L. Trosper, *Traditional American Indian Economic Policy*, 19 AM. INDIAN CULTURE & RES. J. 65-95 (1995).

[143] *Id.* at 66-67.

[144] *Id.* at 67.

[145] Ronald L. Trosper, *Incentive Systems That Support Sustainability: A First Nations Example*, 2 CONSERVATION ENERGY 11 (1998), *available at* http:// www.ecologyandsociety.org/vol2/iss2/art11/.

[146] *Id.*

[147] Ronald L. Trosper, *Northwest Coast Indigenous Institutions That Supported Resilience and Sustainability*, 41 ECOLOGICAL ECON. 329, 333 (2002), *available at* http://www.elsevier.com/locate/ecolecon.

[148] Fikret Berkes, Johan Colding, Carl Folke, *Rediscovery of Traditional Ecological Knowledge as Adaptive Management*, 10 ECOL. APPL. 1251 (2000).

[149] *Id.* at 1256.

[150] *Id.* at 1253.

[151] *Id.* at 1257.

[152] FIKRET BERKES, SACRED ECOLOGY: TRADITIONAL ECOLOGICAL KNOWLEDGE AND RESOURCE MANAGEMENT 51-54 (1999).

[153] *Id.* at 23.

[154] *Id.* at 28.

[155] *Id.* at 30-32. *See, also,* a special issue in October 2000 of *Ecological Applications*: Jesse Ford & Dennis Martinez, *Traditional Ecological Knowledge, Ecosystem Science, And Environmental Management*, 10 ECOL. APPL. 1249; Francesco Mauro & Preston D. Hardison, *Traditional Knowledge of Indigenous and Local Communities: International Debate and Policy Initiative*s, 10 ECOL. APPL. 1263; Henry P. Huntington, *Using Traditional Ecological Knowledge in Science: Methods and Applications*, 10 ECOL. APPL. 1270; Nancy J. Turner, Marianne Boelscher Ignace, Ronald Ignace, *Traditional Ecological Knowledge and Wisdom of Aboriginal Peoples in British Columbia*, 10 ECOL. APPL. 1275; Gary Paul Nabhan, *Interspecific Relationships Affecting Endangered Species Recognized by O'Odham and Comcáac Cultures*, 10 ECOL. APPL. 1288; Madhav Gadgil, P. R. Seshagiri Rao, G. Utkarsh, P. Pramod, Ashwini Chhatre, Members of the People's Biodiversity Initiative, *New Meanings for Old Knowledge: The People's Biodiversity Registers Program*, 10 ECOL. APPL. 1307; Maria E. Fernandez-Gimenez, *The Role of Mongolian Nomadic Pastoralists' Ecological Knowledge in Rangeland Management*, 10 ECOL. APPL. 1318; Raymond Pierotti & Daniel Wildcat, *Traditional Ecological Knowledge: The Third Alternative (Commentary)*, 10 ECOL. APPL. 1333; Kheryn Klubnikin, Cynthia Annett, Maria Cherkasova, Michail Shishin, Irina Fotieva, *The Sacred and the Scientific: Traditional Ecological Knowledge in Siberian River Conservation*, 10 ECOL. APPL. 1296 (October 2000).

[156] Berkes, *supra* note 148, at 8.

[157] *See, e.g.*, Benedict J. Colombi, *Salmon And The Adaptive Capacity of Nimiipuu (Nez Perce) Culture To Cope With Change*, 36 AM. INDIAN Q. 75-97 (2012); BENEDICT J. COLOMBI JAMES F. BROOKS, EDS., KEYSTONE NATIONS: INDIGENOUS PEOPLES AND SALMON ACROSS THE NORTHERN PACIFICC (School of Advanced Research 2012), http://sarweb.org/index.php?sar_press_keystone_nations.

[158] *See, e.g.*, Colleen M. Diener, *Comments: Natural Resources Management and Species Protection in Indian Country: Alternatives to Imposing Federal and State Enforcement upon Tribal Governments and Native Americans*, 41 IDAHO L. REV. 211 (2004).

[159] Turner, et al, *supra* note 155, at 1277.

[160] Robin Wall Kimmerer, *Weaving Traditional Ecological Knowledge into Biological Education: A Call to Action*, 52 BIOSCIENCE 432, 437 (2002).

[161] Gary P. Nabhan, *Interspecific Relationships Affecting Endangered Species Recognized by O'Odham and Comcáac Cultures*, 10 ECOL. APPL. 1288 (2000).

[162] U.S. Dep't. of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1 (2001).

[163] *See, e.g.*, Seth F. Kreimer, *The Freedom of Information Act and the Ecology of Transparency*, 10 U. PA. J. CONST. L. 1011 (2008); david cuillier, *public support for press access declines as personal privacy concerns increase*, 25 NEWSPAPER RES. J. 95 (Fall 2004) (noting how personal privacy influences attitudes about access); David Cuillier, *Access Attitudes: A Social Learning Approach to Examining Community Engagement and Support for Press Access to Government Records*, 85 JOURNALISM & MASS. COMM. Q. 549 (Autumn 2008) (finding that support for community engagement and press rights were key to attitudes about access); David Cuillier, *Honey v. Vinegar: Testing Compliance-Gaining Theories in the Context of Freedom of Information Laws*, 15 COMM. L. & POL'Y 203 (2010) (using compliance-gaining theories to test the effectiveness of various types of demand letters); David Cuillier & Bruce E. Pinkleton, *Suspicion and Secrecy: Political Attitudes and Their Relationship to Support for Freedom of Information*, 16 COMM. L. & POL'Y 227 (2011) (measuring public views about transparency of government, which relates to access laws and policies).

[164] *See, e.g.*, David C. Vladeck, *Information Access--Surveying the Current Legal Landscape of Federal Right-to-Know Laws*, 86 TEX. L. REV. 1787 (2008) (where he lists several federal statutes that do not fulfill their potential of providing an adequate amount of environmental information to the public).

[165] *See, e.g*, Hong Huynh & Jeanne Sinnott, *Recent FOIA Amendments Bring Relief to Superfund PRPs*, 23 NAT. RES. ENVIRO. 48 (2008).

[166] Robert L. Fischman & Vicky J. Meretsky, *Endangered Species Information: Access and Control* 93, 41 WASHBURN L.J. 90, 93 (2001).

[167] *See generally*, Athulang Mutshewa, *The Information Behaviors of Environmental Planners: An Exploratory Study*, 24 GOV'T. INFO. Q. 429 (2007).

[168] Benjamin W. Cramer, *The Human Right to Information, the Environment and Information about the Environment: From the Universal Declaration to the Aarhus Convention*, 14 COMM. L. & POL'Y 73, 74 (2009). *See also* Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, United Nations Economic Commission for Europe, June 25, 1998, 38 I.L.M. 517 (entered into force Oct. 30, 2001).

[169] Cramer, *supra* note 155, at 91.

[170] *North American Environmental Law and Policy*, Commission for Environmental Coopera.tion of North America 1 (2003).

[171] 5 U.S.C. § 552 (2012).

[172] Office of Chief Information Officer, *Freedom of Information Act (FOIA)*, U.S. FISH & WILDLIFE SERVICE, http://www.fws.gov/irm/bpim/foia.html (last updated May 20, 2011). This expression was used for brevity, but note that the details are narrower than presented.

[173] Friends of Animals v. Salazar, 626 F. Supp. 2d 102, 111 (D.D.C. 2009).

[174] *See, e.g., Forest Service Must Disclose Spotted Owl Nest Maps*, Reporters Committee for Freedom of the Press (Jan. 27, 1997), http:// www.rcfp.org/browse-media-law-resources/news/forest-service-must-disclosespotted-owl-nest-maps; *Court Says Pygmy Owl Habitat Disclosures Do Not Invade Privacy*, Reporters Committee for Freedom of the Press (Nov. 2, 2002), http://www.rcfp.org/browse-media-law-resources/news/court-says-pygmy-owl-habitatdisclosures-do-not-invade-privacy; *FOIA Request Shows Interior Department Manipulated Data on Eagles*, Reporters Committee for Freedom of the Press (May 30, 2007), http://www.rcfp.org/browse-media-law-resources/news/foia-request-showsinterior-department-manipulated-data-eagles; Loren Cochran, *Enviro. Group Sues for Records on Endangered Species Rulings*, Reporters Committee for Freedom of the Press (Jan. 2, 2008), http://www.rcfp.org/browse-media-law-resources/news/envirogroup-sues-records-endangered-species-rulings.

[175] National Ass'n of Home Builders v. Norton, 309 F.3d 26, 30 (D.C. Cir., 2002).

[176] *Fish & Wildlife Reaches Secret Settlement to Release Names*, Reporters Committee for Freedom of the Press (Apr. 11, 2000), http:// www.rcfp.org/browse-medialaw-resources/news/fish-wildlife-reaches-secret-settlement-release-names.

[177] *See, e.g.*, Rare, Threatened, and Endangered Species of Plants and Animals, 7 C.F.R. § 650.22.

[178] *Id.* at 7 C.F.R. § 650.22(d)(4).

[179] *Related Environmental Concerns*, 7 C.F.R. 650, Subpart B, http:// www.law.cornell.edu/cfr/text/7/650/subpart-B.

[180] 42 U.S.C. § 4332 (2014).

[181] Margaret M. Jobe, *Going Local: Environmental Information on the Internet*, in SUHASINI L. KUMAR, ED., THE CHANGING FACE OF GOVERNMENT INFORMATION: PROVIDING ACCESS IN THE TWENTY-FIRST CENTURY 257 (The Haworth Information Press 2006).

[182] U.S. GOV'T ACCOUNTABILITY OFFICE GAO-05-732T, Endangered Species Act: Successes and Challenges in Agency Collaboration and the Use of Scientific Information in the Decision Making Process, http://www.gao.gov/cgi-bin/getrpt? GAO-05-732T.

[183] *Id.* at 1.

[184] *See, e.g.*, Sierra Club v. Marsh, 872 F.2d 497 (1stCir. 1989), http://docs.google.com; Alabama-Tombigbee Rivers Coalition v. Kempthorne, 477 F.3d 1250 (11th Cir. 2007), http://caselaw.findlaw.com/us-11th-circuit/1035357.html.

185 Michelle Bryan Mudd, DarAnne Dunning, and Melissa Hayes, *The Role of Fish and Wildlife Evidence in Local Land Use Regulation*, 30 PUB. LAND & RESOURCES L. REV. 107, 126 (2009) *citing* 16 U.S.C. § 1533(a)(2), (b)(1)(A); *see also, id*. at 107n102, *citing* Holly Doremus, The Purposes, Effects, and Future of the Endangered Species Act's Best Available Science Mandate, 34 ENVTL. L. 397 (2004).

186 *Klamath Waters Users*, 532 U.S. at 15-16.

187 *See, e.g.*, Klamath *Confluence*, Reporters Committee for Freedom of the Press (Summer 2001), http://www.rcfp.org/browse-media-law-resources/news-medialaw/news-media-and-law-summer-2001/klamath-confluence.

188 Flathead Joint Board of Control v. U.S. Dep't. of Interior, 309 F. Supp. 2d 1217 (2004).

189 Citizens Progressive Alliance, 241 F. Supp. at 1353, (citing Dep't of Interior v. Klamath Water Users Protective Assn., 532 U.S. 1, 7 (2001)), (citing generally 5 U.S.C. § 552(b)). For a brief discussion about the application of FOIA to tribal-federal communications and other similar issues relating to federal law with tribes, *see* David H. Getches, CHARLES F. WILKINSON, & ROBERT A. WILLIAMS, JR., CASES AND MATERIALS ON FEDERAL INDIAN LAW 337-340 (West 5th ed., 2005) (citing *Klamath* and other cases as it discusses "when a federal 'statute of general applicability' conflicts with Indian rights.") That presumes that the federal statute conflicts with Indian rights, when in fact FOIA seeks to preserve free information rights for all people in the United States, regardless of ethnicity. The underlying contrary argument seems to be premised on the idea that tribal sovereignty is more important that individual rights, something that needs to be explored in other research. For a discussion of the negative response of certain tribal interests to *Klamath*, *see Supreme Court Delivers Blow to Tribes* (March 6, 2001), http://www.indianz.com/News/show.asp?ID=law/362001-1. For an excellent discussion of the conflicts over access to information with tribes, *see Access to Records, Meetings a Struggle in Indian Country, in* Peter Saharko, *A Reporter's Guide to American Indian Law* 7-8, *in* THE NEWS MEDIA & THE L (The Reporters Committee for Freedom of the Press, Fall 2006), *also* http:// www.rcfp.org/reporters-guide-american-indian-law

190 Klamath Water Users, 532 U.S. at 1069-70. There is, however, a tribal exemption from FOIA in the Indian Child Welfare Act of 1978, regarding certain information about biological and adoptive parents of adopted children. *See* 25 U.S.C. § 1951(a), *available at* http://www.tribal-institute.org/lists/chapter21_icwa.htm.

191 Citizens Progressive Alliance, 241 F. Supp. 2d. at 1356, *citing* Dep't of Interior, 532 U.S. at 6.

192 Merit Energy Co. v. Dep't of the Interior, 180 F. Supp.2d 1184, 1190 (D. Colo. 2001) (relying upon *Klamath Water Users* to allow release of information about royalty payments made regarding oil and gas on tribal lands), *cited by New FOI Decisions, April-June 2001*, FOI POST (U.S. Dep't of Justice's Office of Information and Privacy, 2001), http:// www.justice.gov/archive/oip/foiapost/2001foiapost9.htm. FOIA's Exemption 5 applies to "inter-agency or intra-agency memoranda or letters that are not available by law to a party other than the agencies involved." 5 U.S.C. § 552(b)(v). For other examples of litigation in the context of tribes, *see* 50 AM. JUR. TRIALS 407, *citing* Osage Nation and/or Tribe of Indians of Oklahoma v. U.S., 66 Fed.Cl. 244 (2005) (applying *Klamath Water Users* to distinguish issues of discovery rules with FOIA).

193 *See, e.g.*, Bugenig v. Hoopa Valley Tribe, 266 F.3d 1201 (9th Cir. 2000) (the federal government had looked to the tribe to enact a law regulating logging by non-Indian owner of land within the reservation).

194 Allstate Indem. Co. v. Stump, 191 F.3d 1071 (9th Cir. 1999), *amended by* Allstate Indem. Co. v. Stump, 197 F.3d 1031 (9thCir. 1999) (dealing with a tort claim arising from an automobile accident on tribal land); Ford Motor Co. v. Todecheene, 474 F.3d 1196 (9thCir. 2007), *amended and superseded by* Ford Motor Co. v. Todecheene, 488 F.3d 1215 (9th Cir. 2007) (remanding until after exhaustion of tribal remedies). For a general discussion on the issue of exhaustion, *see, e.g*, Laurie Reynolds, *Exhaustion of Tribal Remedies: Extolling Tribal Sovereignty While Expanding Federal Jurisdiction*, 73 N.C. L. REV. 1089 (March 1995).

195 Reynolds, *Exhaustion of Tribal Remedies*, at 1098, *citing* Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303 (1982) (the press clause is in § 1302(1)); and Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (holding that "[s]uits against the tribe under

the ICRA are barred by the tribe's sovereign immunity from suit, since nothing on the face of the ICRA purports to subject tribes to the jurisdiction of federal courts in civil actions for declaratory or injunctive relief"). For a discussion on the implications of this, along with finding possible remedies in tribal court, *see* STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 278-91 (New York University Press, 3d ed., 2004).

196 *Tribal Resources on Sharing of Indigenous Knowledge on Uses of Biological Resources*, 1999 WL 33229993, at 1 (O.L.C.) (Oct. 12, 1999) ("The legality of such an ordinance would depend on a number of factors including how widely known the information is; whether those who hold the information have a particular relationship of trust with the tribe; the magnitude of the tribal interest underlying the tribe's effort not to disclose the information; and whether the information can be viewed as tribal property under an intellectual property regime that is otherwise consistent with applicable law.").

197 ARIZ. REV. STAT. ANN. § 39-121 (2013) (West).

198 For a list and discussion, *see, e.g.,* ARIZONA REPORTER'S HANDBOOK ON MEDIA LAW (5th ed., Perkins Coie Brown & Bain, 2005).

199 ARIZ. REV. STAT. ANN. § 39-125 (2013) (West).

200 ARIZ. REV. STAT. ANN.§ 17-252 (2013) (West).

201 Griffis v. Pinal County, 215 Ariz. 1 (2007).

202 *Id.* at 3.

203 *Id.* at 2.

204 Dianna M. Náñez, *Prosecutor Suggests 10 Years for Ex-Pinal Manager*, THE ARIZ. REPUBLIC, Apr. 23, 2007, http://www.azcentral.com/news/articles/0423gr-griffis23-ON.html.

205 *Id.*

206 Lindsey Collom, *Former Pinal Manager Griffis' Redress Payments May Rise*, THE ARIZ. REPUBLIC, May 1, 2011, http://www.azcentral.com/news/articles/2011/05/01/20110501pinal-county-stanleygriffis.html..

207 Griffis, 215 Ariz. at 3.

208 *Id.* (quoting Griffis v. Pinal County, 213 Ariz. 300, 141 P.3d 780 (Ariz. Ct. App. 2006), *overruled by* Griffis, 215 Ariz. 1 (quoting the trial court's unreported opinion).

209 Griffis v. Pinal County, 213 Ariz. 300, 141 P.3d 780 (Ariz. Ct. App. 2006).

210 Cox Arizona Publ'ns, Inc. v. Collins, 175 Ariz. 11, 14, 852 P.2d 1184, 1197 (1993).

211 Griffis, 213 Ariz. at 304 n.4.

[212] *See, e.g*, Health Insurance Portability and Accountability Act, P.L. 104-191 (1996). This does not mean, however, that such statutes are immune from scrutiny by those who believe in freedom of information. *See, e.g.*, Hannah Bergman, *A Reporter's Guide to Medical Privacy Law* (The Reporters Committee for Freedom of the Press), http://rcfp.org/hipaa/index.html.

[213] Griffis, 213 Ariz. at 304 n.4.

[214] Griffis, 215 Ariz. at 5.

[215] *Id.* at 6, *citing* Carlson v. Pima County, 141 Ariz. 487, 489-90, 687 P.2d 1242, 1244-45 (1984), and ARIZ. REV. STAT. ANN. § 39-121 (2013) (West),

[216] *Id.* at 4, *citing* Salt River Pima-Maricopa Indian Community v. Rogers, 168 Ariz. 531, 815 P.2d 900 (1991).

[217] *Id.* at 9-10, *citing*, *e.g.*, State v. City of Clearwater, 863 So. 2d 149, 154 (Fla. 2003). Note for discussion, *infra*, that the Court also cites *Bureau of Nat'l Affairs, Inc. v. U.S. Dep't of Justice*, 742 F.2d 1484, 1486 (D.C. Cir. 1984)holding that personal records do not fall under FOIA, 5 U.S.C. § 552 (2006).

[218] *Id.* at 9.

[219] *Id.* at 10, *citing* Salt River, 168 Ariz. At 536, 815 P.2d at 905; and Carlson, 141 Ariz. at 490-91, 687 P.2d at 1245-46.

[220] *See, e.g.* A.H. Belo Corp. v. Mesa Police Dep't, 202 Ariz. 184, 42 P.3d 615 (Ariz Ct. App. 2002) (arguing, "access is not unqualified, however, for 'an unlimited right of inspection might lead to substantial and irreparable private or public harm") *citing* Carlson, 141 Ariz. at 491; Phoenix Newspapers, Inc., v. Keegan, 201 Ariz. 344, 35 P.3d 105 (Ariz. Ct. App. 2001).

[221] Griffis, 215 Ariz. at 5n7, *citing*, *e.g*, Scottsdale Unified Sch. Dist. v. KPNX Broad. Co., 191 Ariz. 297, 955 P.2d 534 (1998); Cox Ariz. Publ'ns, 175 Ariz. 11, 852 P.2d 1194 (Ariz. 1993), and Carlson, 141 Ariz. at 487, 852 P.2d at 1194.

[222] Salt River, 168 Ariz. at 531.

[223] Griffis, 213 Ariz. at 309.

[224] Salt River, 168 Ariz. at 533.

[225] *Id.*

[226] *Id.* at 534 (citing 5 U.S.C. § 552 (2014), 43 C.F.R. § 2.45 (2014), and 25 C.F.R. § 271.56(a) (2010)). The last CFR reference is no longer in effect.

[227] *Id.* at 535.

[228] *Id.* at 536.

[229] *Id.* at 535-36.

[230] Salt River, 168 Ariz. at 535-36.

[231] *Id.* at 537.

[232] *Id. (*citing A.R.S. § 39-121 and Arizona Bd. of Regents v. Phoenix Newspapers, 167 Ariz. 254, 257, 806 P.2d 348, 351 (1991)).

[233] *Id.* at 538, *citing* Linder v. Eckard, 261 Iowa 216, 152 N.W.2d 833, 835 (1967).

[234] *Id., citing* Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 157, 100 S.Ct. 960, 972 (1980); Warth v. Dep't of Justice, 595 F.2d 521, 522 (9th Cir. 1979); Goland v. CIA, 607 F.2d 339, 345-47 (D.C.Cir. 1978).

[235] *Id.* at 539-40.

[236] *Id.* at 541-42 [citations omitted]. For Department of Interior rules about FOIA, see 43 C.F.R., pt. 2, http:// www.ecfr.gov/cgibin/retrieveECFR?gp=& SID=3cf2d9487b3873a721f90f5f7513c333&r=PART&n=43y1.1.1.1.2. Tribes are only mentioned in context of whether they can get a fee waiver for making FOIA requests. 43 C.F.R. § 2.20(6) (2014).

[237] Citizens Progressive Alliance v. U.S. Bureau of Indian Affairs, 241 F.Supp.2d 1342 (D.N.M. 2002) (relying upon FOIA's Exemption 5 to bar the release records from the BIA and Department of Interior relating to tribal water rights).

[238] *Id.* at 1365.

[239] CONST. & BY-LAWS OF THE SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, http://thorpe.ou.edu/IRA/pimacons.html.

[240] *See* Richard La Course, *A Native Press Primer*, COLUM. JOURNALISM. REV. 51 (November/December 1998) (claiming 64 out of 557 federally-recognized tribes between 1852 and 1980 included free press provisions in their constitutions); La Course, *Protecting the First Amendment in Indian Country* (1998) (draft on file with author); Stacey J.T. Hust, *Performing the Watchdog Function: An Investigation of the Status of Freedom of Expression Within Native American Tribal Courts* (paper presented to Minorities and Communication Division of the Association for Education in Journalism and Mass Communication, Kansas City, Mo., August 2003); Leslie E. Newell, Unprotected and Disconnected: Tribal Newspapers, Tribal Law and the Indian Civil Rights Act (1988) (unpublished M.A. thesis, University of Arkansas at Little Rock) (on file with author). *See also* J. Ruth Hegwood, Free Press in Indian Country: Historical Research Guide (Sequoyah Research Center/American Native Press Archives/University of Arkansas at Little Rock, 2005).

[241] *See, e.g.*, Benny Polacca, *UPDATE: Osage Nation Principal Chief Red Eagle Removed from Office*, Osage News, Jan. 21, 2014, http:// osagenews.org/article/update-osage-nation-principal-chief-red-eagle-removedoffice.

[242] *See* Ferry County v. Concerned Friends of Ferry County, 155 Wash. 2d 824, 123 P.3d 102 (2005).

[243] ARIZ. REV. STAT. ANN. § 17-252 (2012) (West).

[244] 10 VT. STAT. ANN. § 5410 (2012).

[245] 65 PA. CONS. STAT. § 67.708; *also quoted and cited at* Commonwealth of Pennsylvania Right to Know Law, Act 3 (2008), *Open Records: Pennsylvania's Right-to-Know Law*, Pennsylvania Freedom of Information Coalition, http://www.pafoic.org/rtk.html#708.

[246] *See, e.g,* CONN. GEN. STAT. § 1-200 (2013) (general provisions of Freedom of Information Act); CONN. GEN. STAT. § 22a-2d(a)(4)(A). (specific guidance for Commissioner). The Department of Energy and Environmental Protection must be about "[c]onserving, improving and protecting the natural resources and environment of the state ..."

[247] *Lawmakers Weigh Access Against Privacy, Security Concerns*, NEWS MEDIA & THE L., Reporters Committee for Freedom of the Press (Summer 2005), http://www.rcfp.org/browse-media-law-resources/news-medialaw/news-media-and-law-summer-2005/lawmakers-weigh-access-agai

[248] *Oregon Open Government Guide,* Reporters Committee for Freedom of the Press (2011), (citing OR. REV. STAT. § 192.501(13) (2014)).

[249] *Id.* (citing OR. REV. STAT.§ 192.501(11) (2014)).

[250] TENN. CODE. ANN. § 11-1-102 (2012), *cited by Tennessee Open Government Guide*, Reporters Committee for Freedom of the Press (2011), http:// www.rcfp.org/tennessee-open-government-guide

[251] LA. REV. STAT. ANN. § 44:4 (2012).

[252] GA. CODE. ANN. § 50-18-72 (2011), *Georgia Open Government Guide*, Reporters Committee for Freedom of the Press (2011), http:// www.rcfp.org/georgia-open-government-guide.

[253] MD. CODE ANN. § 10-618(g)(1) (2012), *Maryland Open Government Guide*, Reporters Committee for Freedom of the Press (2011), http:// www.rcfp.org/maryland-open-government-guide.

[254] VA. CODE ANN. § 2.2-3705.7 (10) (2013).

[255] IDAHO CODE ANN. § 9-340E (1) (2012).

[256] IDAHO CODE ANN. § 9-340A (1) (2012).

[257] Freedom of Information Act, 5 U.S.C.A. § 552 (2009).

[258] These include Ak-Chin Indian Community, Cocopah Tribe, Colorado River Indian Tribes, Fort McDowell Yavapai Nation, Fort Mojave Tribe, Gila River Indian Community, Havasupai Tribe, Hopi Tribe, Hualapai Tribe, Kaibab-Paiute Tribe, Pascua Yaqui Tribe, Quechan Tribe, Salt River Pima-Maricopa Indian Community, San Carlos Apache Tribe, San Juan Southern Paiute, Tohono O'odham Nation, Tonto Apache Tribe, White Mountain Apache Tribe, Yavapai-Apache Nation, Yavapai-Prescott Indian Tribe, and the Pueblo of Zuni. For links and information about each tribe, *see* Member Tribes, Inter-Tribal Council of Arizona, http://itcaonline.com.

[259] However, it is difficult to find tribal cases on point. Searches of "access /s record" and "freedom of information" included The Tribal Court Clearinghouse, http://www.tribal-institute.org/lists/decision.htm.

[260] Navajo Nation v. Crockett, No. SC-CV-14-94, ¶39 (Navajo Nation, Nov. 26, 1996), http://www.tribal-institute.org/opinions/1996.NANN.0000006.htm. This case also was discussed in Saharko, *Reporter's Guide to American Indian Law*, at 4. For a general discussion of applying tribal customs and traditions to tribal law, *see, e.g,* Christine Zuni

Cruz, *Tribal Law as Indigenous Social Reality and Separate Consciousness--[Re]Incorporating Customs and Traditions into Tribal Law*, TRIBAL L.J. (2000/2001) http:// tlj.unm.edu/articles.czc/content.htm (May 3, 2007).

261 Crockett, SC-CV-14-94, at ¶39.

262 *Id.* at ¶ 50.

263 NAVAJO NATION CODE ANN. tit. 2 § 85 (17) (2009).

264 Universal Declaration of Human Rights, art. 19, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), http:// www.un.org/en/documents/udhr/.

265 United Nations Declaration on the Rights of Indigenous Peoples, art. 1, G.A. Res. 61/295 (Sept. 13, 2007), http:// www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

266 United Nations, International Covenant on Civil and Political Rights, Gen. Res. 2200A (XXI) (Dec. 16, 1996), http:// www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.

267 *See, e.g*, ACCESS DENIED: FREEDOM OF INFORMATION IN THE INFORMATION AGE (Charles N. Davis & Sigman L. Splichal, eds., Iowa State Univ. Press 2000).

268 Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U. L. Q. 1 (1976). For seminal works on free expression, *see* Thomas I. Emerson, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (Random House, 1966), and THE SYSTEM OF FREE EXPRESSION (Random House, 1970).

269 *Id.* (quoting Letter from James Madison to W.T. Barry (Aug. 4, 1822), *in* 9 WRITINGS OF JAMES MADISON 103 (G. Hurst ed., 1910)).

270 Atkinson Trading Co. v. Shirley, 532 U.S. 645, 651 (2001) (quoting Montana v. U.S., 450 U.S. 544, 566 (1981).

271 Cherokee Leg. Act. 25-01, Ch. 1, Title 75 (2001), https:// cherokee.legistar.com.

272 *Id.* at § 75-1-5(A).

273 *Id.* at § 75-1-6.

274 Resolution of the White Mountain Apache Tribe of the Fort Apache Indian Reservation, Res. No. 02-94-060 (Feb. 24, 1994), at 7. This and related materials cited herein were part of a set of materials from Robert Hershey, *Animal Law in Indian Country*, State Bar of Ariz. (Feb. 2010).

275 *Id.* at 1.

276 *Id.* at 3.

277 *Id.*

[278] WHITE MOUNTAIN APACHE TRIBE CONST., art. iv, § 1(f), http:// www.wmat.nsn.us/legal/constitution.html.

[279] memo of nancy m. kaufman, s.w. reg. dir., u.s. dep't. of interior, fish & wildlife service, to ron lupe, chairman white mt. apache tribe (april 28, 1998).

[280] white mountain apache tribe and u.s. fish & wildlife service, region 2 protocol for information management (1998)

[281] *id.* at 2.

[282] for discussion about tribal attitudes about wolves, *see, e.g.*, steve pavlik, *san carlos and white mountain attitudes toward the reintroduction of the mexican wolf to its historic range in the american southwest*, 14 WICAZO SA REV. 129 (Spring 1999), http://www.jstor.org/discover/10.2307/1409520? uid=3739552&uid=2&uid=4&uid=3739256&sid=21103628427951.

[283] White Mountain Apache Code, Rev. Ed. (2000), http:// www.wmat.nsn.us/Legal/contents.html.

[284] *Id.* at Game and Fish Code, § 3.5.

[285] *Id.* at § 1.3(B).

[286] Ariz. Rev. Stat. Ann. § 38-431.03 (2013) (West).

[287] 5 U.S.C. § 552 (2009).