COLONIALISM CONTINUES: A COMPARATIVE ANALYSIS OF THE UNITED STATES AND BRAZIL'S EXPLOITATION OF INDIGENOUS PEOPLES' FOREST RESOURCES

INTRODUCTION

> We indigenous people have been the guardians of Mother Earth until now. We don't want the march of progress and economic ambition to inflict further wounds. On the contrary, we want to find new allies, allies for the survival of our planet.[1]

Despite the well-known prophesy that "[t]hose who do not know history are doomed to repeat it,"[2] history is currently repeating itself as the colonialism[3] that almost extinguished the Quinault Nation[4] in the Pacific Northwest is replayed in the Brazilian jungle with the Yanomami Indians.[5] Moreover, the forestry resource exploitation in Brazil is occurring on a much larger global scale than the devastation that occurred in Washington State two hundred years ago.[6] The Yanomami, who depend on the Amazon rainforest's resources for survival, are directly and negatively impacted by this current exploitation.[7] But, the rest of the world also feels the impacts of deforestation through biodiversity loss[8] and through damage to the

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1. Marcos Terena, *Sing the Song of the Voice of the Forest*, *in* STORY EARTH: NATIVE VOICES ON THE ENVIRONMENT 31, 43 (1993). Marcos Terena is an indigenous person from Brazil's Mato Grosso del Sur and "works nonstop to disseminate and defend the realities and demands of native communities." *Id.* at 31.

2. ROBIN L. ANDERSON, COLONIALISM AS EXPLOITATION IN THE AMAZON RAIN FOREST 1758–911, preface (1999) (recounting the history of devastation to indigenous groups and their environment in the settlement of Amazonia).

3. Colonialism is defined as "the aggregate of various economic, political, and social policies by which an imperial power maintains or extends its control over other areas or peoples." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 447 (1986).

4. The Quinault Indian Nation is referred to as the Quinault Nation throughout this paper because it consists of six tribes: Quinault, Queets, Quileute, Hoh, Chehalis, and Cowlitz. E-mail from Larry Workman, Economic Development, Quinault Nation, to Samara Anderson, student, Vermont Law School (Jan. 28, 2002, 11:30 AM EST) (on file with author). "As long as the members are not voting members of another tribe, they may vote and participate in the Quinault General Council." *Id.*

5. The indigenous population is referred to by a multitude of terms: native, Indian, Native American, and tribe. Each term reflects the preference of a specific author or scholar. This Note will predominantly use Quinault Nation and Yanomami Tribe to identify the respective indigenous tribes in the United States and Brazil.

6. *See infra* Part I.A.

7. *See infra* Part I.B.

8. Janelle E. Kellman, *The Brazilian Legal Tradition and Environmental Protection: Friend of Foe*, 25 HASTINGS INT'L & COMP. L. REV. 145, 145–47 (2002).

rainforest's oxygen-producing and carbon-absorbing functions, which are the life blood of the entire planet.[9]

Given contemporary social and political attitudes that reveal greater respect for indigenous rights and a concern for responsible environmental practices,[10] it is important to understand the nature and impulse behind this modern-day colonial practice. Colonialism today is more than the simple "extraction of wealth from the poor by the wealthy,"[11] as demonstrated by the unequal economic positions of Brazil and the United States.[12] Rather, colonialism is better seen as a constant battle between the subjugation of "traditional" social institutions and the competing "modernism," which symbolizes the dominant industrialized society's culture.[13] This battle exists not only on social but economic fronts. For example, when a dominant culture brings colonialism to indigenous tribes, it invariably extinguishes or greatly diminishes the tribes' choices concerning their

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9. *See* Henry W. McGee, Jr. & Kurt Zimmerman, *The Deforestation of the Brazilian Amazon: Law, Politics, and International Cooperation*, 21 U. MIAMI INTER-AM. L. REV. 513, 518–20 (1990) (discussing the devastating effects of deforestation in the Amazon rain forest within the context of global climate change); *see also* RAINFOREST ACTION NETWORK, RAINFORESTS AND GLOBAL WARMING (2002) ("Tropical deforestation also leads to global warming by destroying one of the Earth's only ways to absorb excess atmospheric carbon."), at http://www.ran.org/info_center/factsheets/04a.html (last visited Aug. 10, 2003).

10. *See* Benjamin J. Richardson, *Indigenous Environmental Management Regimes in the Developing World: Self-determination, Survival and Sustainability* 2 (2001) ("Growing awareness of the environmental role of indigenous peoples is part of a wider movement for local approaches to environmental management."), *at* http://www.yorku.ca/fes/strategies/Richardson.PDF (last visited Aug. 10, 2003).

11. RICHARD J. PERRY, FROM TIME IMMEMORIAL: INDIGENOUS PEOPLES AND STATE SYSTEMS 35 (1996). The industrialized countries fuel the exploiting forest markets as "Asian logging companies have joined the Americans and the Europeans in stripping the forest of mahagony and other hardwoods, and researchers from major pharmaceutical companies, eager to find the ingredients for new miracle drugs in Amazon plants, target the knowledge of indigenous communities, where shamans are the repositories of centuries of plant knowledge." Phillip Blazdell, *Quiet Riot*, BRAZZIL, Sept. 2000, at 24, http://www.brazzil.com/p24sep00.htm. Extractive industries, such as rubber and oil, produced a "regime of terror with the character of a holocaust" that was directed "against the debt-bonded indigenous population [which] was the only means to dramatically increase short-term productivity." Soren Hvalkof, *Outrage in Rubber and Oil: Extractivism, Indigenous Peoples, and Justice in the Upper Amazon*, *in* PEOPLE, PLANTS, AND JUSTICE: THE POLITICS OF NATURE CONSERVATION 83 (Charles Zerner ed., 2000).

12. This imbalance is illustrated in the trade of pirated mahogany illegally logged from lands of indigenous tribes; nearly half of all mahogany exported from Latin America comes by demand to the United States. Press Release, Rainforest Action Network, Activists Prevent Ship from Unloading Pirate Mahogany in Savannah Harbor (Mar. 4, 1996), *available at* http://www.ran.org/news/newsitem.php?id=261&area=newsroom. The consumption of mahogany not only perpetuates the "cycle of violence and destruction occurring in conjunction with mahogany harvesting," it also causes extensive environmental damage because mahogany trees are scattered throughout the rain forest. *Id.*

13. PERRY, *supra* note 11, at 33. (noting that "modern" or "western" thought typically views the social organization of indigenous cultures as tending "to retard healthy growth, advancement, and progress.").

natural resource use and management rights in favor of an exploitative development program.[14]

Colonialism reveals many historical and cyclic faces. The term first encompassed global settlement by European powers starting in the 16th century.[15] But, colonialism is also instructive to understand the methods of settlement and land use in North and South America and the subsequent detrimental, sometimes fatal, interactions with indigenous people.[16] Early colonists, for example, did not divorce their settlement techniques from the European meaning and use of property embodied in such principles as the discovery theory.[17] The accumulation of land and natural resources equaled an accumulation of wealth.[18] Wealth translated into power, which translated into an expanding greed to control indigenous resources; a greed that spread across the physical geographies of both North and South America at different rates.[19] In contrast to the rapid pace of colonization in the United States, colonization in Brazil proceeded on a slower pace, in part due to the more imposing landscape of the Brazilian rainforest.[20]

The Quinault and Yanomami tribes are connected by the fact that they are indigenous groups who pre-date European colonial settlement in the Americas and who established an "intimate relationship with the land" and

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14. *See, e.g.*, ANDERSON, *supra* note 2, at 40 (explaining how colonists in the Amazon Basin decimated the indigenous population while simultaneously exploiting the natural resources).

15. *See* 3 THE OXFORD ENGLISH DICTIONARY 494–95 (2d ed. 1989) (citing to examples of the word dating back to 1622).

16. "Colonialism" is now frequently used in "the derogatory sense of an alleged policy of exploitation of backward or weak peoples by a large power." *Id.* at 495 n.2 ("A colonialist, Madam. I exploited these unhappy natives to make a fortune for myself . . . . We colonialists thought only of private gain.") (citing a 1959 source).

17. Johnson v. McIntosh, 21 U.S. (543 Wheat.), 573–74 (1823) ("[Discovery occurred through] the exclusion of all other Europeans, [which] necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it."). Early American settlement techniques embodied the "Eurocentric view of the inferiority of the Indian people," which caused "tragedy, deception, barbarity, and virtually every other vice known to man in the 300-year history of the expansion of the original 13 Colonies . . . ." Christine A. Klein, *Treaties of Conquest: Property Rights, Indian Treaties, and the Treaty of Guadalupe Hidalgo*, 26 N.M. L. REV. 201, 206 (1996); see also United States v. Sioux Nation of Indians, 448 U.S. 371, 437 (1980).

18. JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 14–15 (4th ed. 1998) (outlining occupancy theory and the principle of "first in time").

19. *See* PERRY, *supra* note 11, at 35 (examining the "inherently exploitative" relationship between "First World" countries extracting resources from "Third World" countries of Latin America, which were divested of control over their natural resources).

20. *See id.* (discussing the colonialzation of North and Central America). By 1997, "parts of Brazil's Amazon region, which has some of the world's most extensive wilderness areas, [remain] sparsely inhabited by indigenous peoples still in the process of coming into contact with the modern world." FEDERAL RESEARCH DIVISION OF THE LIBRARY OF CONGRESS, BRAZIL: A COUNTRY STUDY 89 (Rex A. Hudson ed., 5th ed. 1998) [hereinafter BRAZIL: A COUNTRY STUDY].

its respective rainforest resources.[21] However, the present categorization of the United States as a *developed* country and Brazil as a *developing* country, combined with the economic development programs of each, distinguish the two tribes. The issues of development status and speed of development are critical differences because, while colonialism in the United States occurred without much external international pressure to prevent the extinguishment of its indigenous people,[22] the "possible replay of 'Manifest Destiny' in Brazil does not go unnoticed and unaddressed by the world community."[23] As one scholar put it, "[i]ndigenous peoples have found significant and growing support worldwide—in the heartland and the capitals of the once-conquering nations."[24]

The United States developed through the exploitation of its forestry resources and indigenous people before the world could bear witness and speak out against the resulting negative effects. As a developing country, Brazil is in the international limelight, developing economically and entering international markets through the management of its forestry resources.[25] Despite Brazil's use of imperialistic economic development, similar to the United States (massive exploitation of natural resources and indigenous people), the world has put enough pressure on Brazil to force alteration in its management of forestry resources and indigenous people.[26]

This Note discusses whether Brazilian policy changes have had any positive or practical effect for the Yanomami people. This Note also focuses on colonialism's application to modern day exploitation of

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21. José Paulo Kastrup, *The Internalization of Indigenous Rights from the Environmental and Human Rights Perspective*, 32 TEX. INT'L L. J. 97, 98, 102 (1997).

22. *Indigenous Peoples and the Natural Environment of Brazil: Hearing Before the Subcommittee on the Western Hemisphere of the Committee on Foreign Affairs House of Representatives*, 103d Cong. 11 (1994) (statement of Rep. Faleomavaega) [hereinafter *Hearing on Brazil's Indigenous People*]. The United States' "first policy toward the indigenous Indians here in our country was to kill them. Then, after that, we thought, well, let's assimilate them, make them part of America. Then, after that, say let's terminate them. No more recognition of their tribal sovereignties as separate tribes." *Id. See* DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 52–83 (4th ed. 1998) (outlining the colonial era influence as occurring initially through the European doctrine of discovery beginning in 1497, and continuing under the United States colonizing legal theory).

23. Siegfried Wiessner, *Esa India! Latcrit Theory and the Place of Indigenous Peoples Within Latina/o Communities*, 53 U. MIAMI L. REV. 831, 845 (1999).

24. *Id.*

25. *See* I. J. BOURKE & JEANETTE LEITCH, FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, TRADE RESTRICTIONS AND THEIR IMPACT ON INTERNATIONAL TRADE IN FOREST PRODUCTS 1–6 (1998) (discussing the increased trade in wood product between developing countries, which are the "main exporters of raw tropical timber"), *at* http://www.fao.org/forestry/FOP/FOPH/bkleich/B98-1.stm (last visited April 12, 2003).

26. *See infra* Part I.

indigenous people and their subsistence forest resources.[27] Section I contains an in-depth background of the respective national governments' forestry management on the Quinault and Yanomami Reservations. It explores this management as an imposed political apparatus, effectively attaching an ideological choice favoring rainforest property and natural resources over tribal subsistence. Section II compares federal jurisdiction over Quinault and Yanomami forest resources within the three branches of each federal government. Section III compares state jurisdiction over forestry resources in Washington State on the Quinault Reservation to that of the State of Roraima in Brazil on the Yanomami Reserve. Finally, Section IV compares the tribes' relative inability to obtain jurisdiction over forest resources that they occupy. Neither tribe has completely won tribal sovereignty or the power of self-determination, but each has carved out distinct legal protections that may enable them to survive and hopefully develop a voice for their own hopes of economic development through forestry management.

I. BACKGROUND: FEDERAL REGULATION OF QUINAULT AND YANOMAMI FORESTRY RESOURCES

A. Development of Federal Indian Forest Policy in the United States

Indigenous people have lived on the Northwest Coast of the United States for over 9,000 years.[28] Western settlers considered Indian inhabitants of the Olympic Peninsula the wealthiest of tribes north of Mexico because their land and sea resources were so abundant.[29] *Hoquats*[30] (Europeans) visited the Quinault in 1775, before making contact with any other coastal inhabitants of Washington State.[31] Europeans who landed on the coast called the dense forest of giant Douglas fir, hemlock, Sitka spruce, and sprawling red cedars, the Green Desert.[32] Currently, one-third of the entire

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27. This Note utilizes the framework of forestry resource management to represent the exploitation of indigenous natural resources. Forestry management is important to the Quinault and Yanomami tribes because both tribes reside in rain forests, which are areas of fragile biodiversity. Kellman, *supra* note 8, at 145.

28. JACQUELINE M. STORM ET AL., LAND OF THE QUINAULT 46 (Pauline K. Capoeman ed., 2d ed. 1991) (describing the Quinault tribe and its land on the Olympic Peninsula).

29. *Id.* at 15. The current Quinault Reservation is capable of "a total timber volume of 8,000 to 11,000 cubic feet per acre compared to 1,400 cubic feet per acre elsewhere in the Nation. This bounty is owed to the weather, the soils, the topography." *Id.* at 18.

30. "Hoquat" is a Quileute word for "whiteman" that is commonly used along the Northwest Coast. *Id.* at 81.

31. *Id.* at 48.

32. *Id.* at 101.

Quinault Reservation is coastal rainforest, receiving over 200 inches of rain per year.[33]

Despite the abundance of fish and timber, the lack of "technologies needed to take advantage of [these] resources" limited the early exploitation of natural resources.[34] History describes the first interactions between the Europeans and the Quinault as peaceful because the tribe wanted to engage in tradeand barter, especially for iron.[35] In one instance, after a violent interaction between the tribe and the Europeans, trade resumed the following day.[36] This demonstrates that even at the earliest stages in the Quinault interaction with outsiders, the tribe was interested in its own economic development and success in society. Yet the equal bartering system did not extend into the future dealings as inequality in power eventually developed into a unilateral relationship where the dominant culture muted tribal concerns over tribal economic development.[37]

Early settlers exposed the Quinault tribe to non-native diseases throughout their extensive contact.[38] Between approximately 1785 and 1885, these diseases diminished the tribe's population by ninety percent.[39] The sheer lack of tribal members diminished its ability to function as a sovereign nation because "[tribal] knowledge and whole lines of oral history and mythology were lost forever, not to mention biological and geographical knowledge."[40] The Quinault tribe currently has 2,000

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33. Telephone Interview with Max Stocks, Economic Development Department, Quinault Nation (November 20, 2001) [hereinafter Stocks Telephone Interview].

34. STORM, *supra* note 28, at 46–47.

35. *Id.* at 49. The Quinault were used to warfare and were described as the "fiercest tribes west of the Rockies. For several decades, Europeans dreaded being washed up on this coast." *Id.* at 50–51.

36. *Id.* at 51. "[T]he day after Captain Gray bombarded and sank a canoe full of men in Gray's Harbor, the people returned to trade, almost as if nothing had happened." *Id.* at 76.

37. *See* Dave Somers, *Rediscovering Respect for the Land and Its Inhabitants*, *in* NATIVE AMERICANS AND PUBLIC POLICY 311 (Fremont J. Lyden & Lyman H. Legters eds., 1992). Somers notes:

> [Within the Pacific Northwest,] tribes are no longer completely the masters of their own fate. Non-Indian society has covered the land that was once sparsely populated and has established state and federal governmental systems to allocate and exploit the natural resources that once seemed limitless. These management systems are often single purposed, contradictory, and designed to supply the needs of a non-Indian society that no longer recognizes its ties to local natural resources.

Id.; *see also* STORM, *supra* note 28, at 180 (discussing how the Department of the Interior represented by the "BIA began even more intensive harvesting on the Reservation").

38. STORM, *supra* note 28, at 46 (noting that diseases were the most important "catastrophic forces that destroyed the old way of life").

39. *Id.* Smallpox, intermittent fever and tuberculosis caused "much [tribal] knowledge [to perish], and whole lines of oral history and mythology were lost forever, not to mention biological and geographical knowledge." *Id.*

40. *Id.* Disease decimated most of Washington Territory's western district tribes by 1846. *Id.* at 103.

members, not including the five other tribes who also inhabit the Quinault Reservation.[41] The tribe barely survived its forced removal by the federal government onto a permanent reservation.

1. Removal of the Native American Tribes to Permanent Reservations

Once the United States gained independence from Britain, the federal government asserted exclusive control over management of indigenous property, trade, and land cessions under the Indian Trade and Intercourse Act of 1790.[42] The Intercourse Act did not adequately safeguard the tribes from the infringement of white settlers searching for property or natural resources on tribal lands.[43] Eventually, the federal government used treaties to encourage Indian tribes to voluntarily remove westward to avoid interfering with non-native settlements and the interests of colonialism.[44]

In 1830, Congress passed the Removal Act[45] authorizing the President to divide the territory west of the Mississippi River into land districts for tribal settlement.[46] The tribes could remove themselves from their territory east of the Mississippi to reside in the newly created western districts.[47] Many tribes "relinquished millions of acres of land in exchange for assurances of a retained homeland of smaller size in which they would remain free from federal and state interference and the intrusions of non-Indian settlers."[48]

Many tribes did not widely accept voluntary removal. The Cherokee Nation responded by organizing a tribal constitution and asserting sovereignty over its land.[49] The Supreme Court upheld the Cherokee

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41. *Id.*

42. The Trade and Intercourse Act of 1790, ch. 33, 1 Stat. 137 (codified as amended at 25 U.S.C. § 177), *cited in* ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW: CASES AND MATERIALS 142–43 (3d ed. 1991).

43. GETCHES ET AL., *supra* note 22, at 98–99.

44. CLINTON ET AL., *supra* note 42, at 145. Certain tribes agreed to voluntarily relocate to areas that were not yet settled in the West. *Id. See, e.g.*, Treaty with the Choctaws, Sept. 27, 1830, 7 Stat. 333, 340; Treaties with the Delawares, Aug. 3, 1829, and Sept. 24, 1829, 7 Stat. 326, 327; Treaty with the Western Cherokee, May 6, 1828, 7 Stat. 311; Treaty with the Creeks, Jan. 24, 1826, 7 Stat. 286; Treaty with the Creeks, Feb. 12, 1825, 7 Stat. 237; Treaty with the Choctaws, Oct. 18, 1820, 7 Stat. 210.

45. Act of May 28, 1830, ch. 148, 4 Stat. 411 (1830).

46. *Id.*

47. *Id.* ("Indians . . . may choose to exchange the lands where they now reside, and remove there . . . .").

48. Mary Christina Wood, *Fulfilling the Executive's Trust Responsibility Toward the Native Nations on Environmental Issues: A Partial Critique of the Clinton Administration's Promises and Performance*, 25 ENVTL. L. 733, 740 (1995).

49. Cherokee Nation v. Georgia, 30 U.S. 1 (5 Pet.) (1831).

Nation's constitution as a valid assertion of tribal sovereignty.[50] However, the acknowledgement of this reserved right of tribal sovereignty did not come without cost to the tribes because the "largely autonomous tribal governments [were still] subject to an overriding federal authority [even if they remained] essentially free of state control."[51] The European doctrine of discovery still limited ownership of tribal land on reservations. The Supreme Court applied this discovery doctrine to hold that tribes only had the original title to use and occupy aboriginal lands; they could not transfer ultimate title to their lands.[52]

Removal received widespread political support from settlers who wanted increased land for settlement.[53] Many people generally assumed that natives could not be assimilated into the white civilization and would remain a threat to it.[54] Even some supporters of assimilation believed that separating the Indians from the whites would eventually result in their smoother transition into civilization because the white population could mold and manage the Indians' behavior.[55] In the end, this philosophy of

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50. *Id.*

51. CHARLES F. WILKINSON, AMERICAN INDIANS, TIME AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 24 (1987). Wilkinson refers to the Marshall Trilogy in which Chief Justice Marshall outlined the basic doctrines in Indian law: Worcester v. Georgia, 31 U.S. (515 Pet.) (1832); *Cherokee Nation*, 30 U.S. at 1 (5 Pet.); and Johnson v. McIntosh, 21 U.S. (543 Wheat.) (1823).

52. *Johnson*, 21 U.S. at 591.

53. GETCHES ET AL., *supra* note 22, at 94–95 ("Large segments of the white population . . . desired to control the . . . unceded Indian lands. . . . The removal policy eventually gained political support . . . .").

54. *Id.* Getches illustrates the assumption of American Indian inferiority to white Europeans through statements by President Jefferson: "we presume that our strength and their weakness is now so visible that they must see we have only to shut our hand to crush them, and that all our liberalities to them proceed from motives of pure humanity only"; and John Quincy Adams: "[s]hall the lordly savage not only disdain the virtues and enjoyments of civilization himself, but shall he control the civilization of a world?" *Id.* at 94–95 (citations omitted). President Jefferson actually sided with Georgia against the Cherokee nation and tribal sovereignty; he "had early decided that it was farcical to treat with the Indian tribes as though they were sovereign and independent nations, and he could point to considerable evidence to show that treaties had never been a success." *Id.* at 99. The government practiced removal intensively through 1861 when "a central theme in federal Indian policy was the removal of the tribes beyond state boundary lines, often as a prelude to the admission of new states into the Union." CLINTON ET AL., *supra* note 42, at 146.

55. GETCHES ET AL., *supra* note 22, at 99 (citation omitted) ("The promoters of the program argued with great sincerity that only if the Indians were removed beyond contact with whites could the slow process of education, civilization, and Christianization take place."). Removal was perceived as a method to increase the civilization and assimilation of Indian tribes. This was demonstrated by a statement "[i]n 1851 [when] Commissioner Lea said that 'if timely measures were taken for the proper location and management of these tribes, they may, at no distant period, become an intelligent and Christian people,' leading to 'their ultimate incorporation into the great body of our citizen population.'" FELIX S. COHEN, FEDERAL INDIAN LAW 123 (Rennard Strickland et al. eds., 1982).

transition received the most support through both government and missionary involvement on the reservations.[56]

Removal initially focused on forcing eastern tribes to relocate to the sparsely occupied West.[57] Colonialist settlement patterns, however, soon moved across the contiguous United States to the resource-rich Pacific Northwest.[58] The Quinault Nation originally inhabited a region on the Olympic Peninsula in the State of Washington.[59] They viewed the land as existing for communal tribal benefit, inseparable from its culture.[60] The majority of white settlers saw land as a fungible "commodity to be bought, fenced, used, and sold."[61] Therefore, land acquisition and subsequent resource accumulation served as a mark of financial and social success for the settlers. This culminated in a clash of attitudes over land ownership between the white settlers' individual ownership and the Indians' communal stewardship.[62]

In 1855, the Quinault tribe signed the Treaty of Olympia.[63] This treaty allowed non-natives to continue their settlement into the Pacific Northwest[64] and ceded to the United States a vast tract of land on the Olympic Peninsula.[65] In return, the United States set aside the Quinault Indian Reservation for the use and occupancy[66] of four tribes: the Quinault,

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56. STORM, *supra* note 28, at 104 ("The United States government believed that the most effective way of securing Indian adaptation to the white culture was through religious conversion.").

57. COHEN, *supra* note 55, at 78. In response to the Indian tribe's resistance "to relinquish their lands by treaties of cession, the federal government accelerated a policy of removing the Indians to lands in the West in exchange for their territory in the eastern United States." *Id.*

58. DEVON BENT, GROWTH AND EXPANSION OF THE UNITED STATES IN THE ERA OF JAMES MADISON I (2003), *at* http://www.jmu.edu/madison/1775pop.htm. "[In 1775, t]he two and one-half million colonists were strung along a narrow strip of land between the Atlantic and the Appalachians and stretching from Maine to Georgia." *Id.* "[By 1812], seven million Americans growing by a third every ten years and with their gaze on the Pacific were too great a force to be stopped." *Id.* at III.

59. STORM, *supra* note 28, at 15.

60. *Id.* at 173.

61. *Id.*

62. *Id.*

63. Treaty with the Quinaielt, 12 Stat. 971 (1855), *cited in* United States v. Mitchell, 463 U.S. 206, 208 (1983).

64. *See* Appropriate Act of March 3, 1853, 10 Stat. 226, 238 (authorizing the President to enter into negotiating with Indians to secure Indian lands west of Iowa and Missouri for settlement and to extinguish Indian title to the lands); Act of June 5, 1850, ch.16, 9 Stat. 437 (authorizing the President to negotiate with Indian tribes of the Oregon Territory to extinguish title to lands west of the Cascade Mountains, and to remove Indians to east of the Cascades); Quinault Allottee Ass'n v. United States, 202 Ct.Cl. 625, 628–29 (1973) (stating that it was the "avowed policy of the United States in the mid 1800s to remove Indian tribes from wide areas of the Pacific Northwest . . . to make way for white settlers").

65. *Mitchell*, 463 U.S. at 208.

66. *Id.*

Quileutes, Hohs, and Queets.[67] The government initially reserved 10,000 acres, but the tribes objected to the tract chosen because of "its limited size and heavy forestation."[68] This land did not provide for the tribe's fishing subsistence on the coastal waters.[69] In response, President Grant issued an executive order "designating about 200,000 acres along the Washington coast as an Indian reservation."[70] This expanded coastal area consisted largely of rainforest with huge, coniferous trees and highly acidic soil.[71]

The removal era granted tribes a slight reprieve after European contact, but "removal [also] destroyed their economies and uprooted them from the lands and resources that had sustained them for centuries."[72] Tribes at this time attempted to free themselves from the territorial pressures of settlement.[73] In the mid 1800s, the federal government established the Quinault Agency to oversee Indian Affairs.[74] Indian agents sent to each reservation "set a tone of paternalism and disapproval unto harassment of the old culture, its mores, religion, and language that would persist for scores of years."[75] Furthermore, the presence of Indian agents continued to expose

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67. STORM, *supra* note 28, at 103 (citing agency census records).

68. *Mitchell*, 463 U.S. at 208. The Quinault Agency superintendent recommended that due to the tribe's subsistence on fishing, they "should be collected on a reservation suitable for their fishing needs." *Id. See generally* United States v. Washington, 384 F. Supp. 312, 350–53 (W.D. Wash. 1974) (describing pre-Treaty role of fishing among Northwest Indians).

69. The Institute for Natural Progress, *In Usual and Accustomed Places: Contemporary American Indian Fishing Rights Struggles*, *in* THE STATE OF NATIVE AMERICA: GENOCIDE, COLONIZATION, AND RESISTANCE 218 (M. Annette Jaimes ed., 1992). "[Because] fish ha[d] always been 'not much less necessary than the atmosphere they breathed' for the indigenous peoples of the Pacific Northwest . . . they were far more concerned with reserving perpetual access to their customary fishing sites along the coasts and interior waterways. . . ." *Id.* During allotment on the Quinault Reservation, "the Indian People were most concerned about their fishing rights." STORM, *supra* note 28, at 177.

70. *Mitchell*, 463 U.S. at 208 (citing 1 INDIAN AFFAIRS: LAWS AND TREATIES 923 (Charles J. Kappler, ed., 1902)). "The Order declared that the reservation would be held for the use of the. . . Quinault . . . 'and other tribes of fish-eating Indians on the Pacific Coast.'" *Id.* at 208 n.4.

71. STORM, *supra* note 28, at 21, 23 ("Conifers and heavy rainfall help to produce acid soils [which grow rainforests of] thick, high, varied canopy of hemlock, spruce, and cedar.").

72. Robert J. Miller, *Economic Development in Indian Country: Will Capitalism or Socialism Succeed?*, 80 OR. L. REV. 757, 811 n.190 (2001) (citation omitted).

73. *See* Darla J. Mondou, *Our Land Is What Makes Us Who We Are: Timber Harvesting on Tribal Reservations After the NIFRMA*, 21 AM. INDIAN L. REV. 259, 260–61 (1997). Mondou discusses the importance of the Indians relinquishing their "right to freely roam on aboriginal land, land that they had lived on and off of, long before Europeans ever envisioned the utopia of natural resources for the taking on this continent. . . . [T]he Indians lived and hunted well in the woods. They made use of the sap, bark, branches, leaves, needles and roots." *Id.* at 261.

74. STORM, *supra* note 28, at 103. Storm notes that "the War Department . . . establish[ed] its agency in the middle of Taholah. . . . It is doubtful that the Tribe expected to be under such close scrutiny by agent after agent . . . in the 1870's [sic] . . . ." *Id.*

75. *Id.*

the tribes to the ravages of disease and introduced a new scourge of alcoholism.[76]

Despite the preferences of some Indian agents to accept the tribe's presence and survive with them, the federal government believed religious conversion was "the most effective way of securing Indian adaptation to the white culture."[77] To implement this policy, President Grant divided the Pacific Northwest into five religious denominations to assimilate the Indians through Christianity; the Methodists were assigned to the Quinault area.[78] Thus, the agent's position became enmeshed with the dual goals of civilizing and Christianizing the tribes.[79] The federal government, as part of the civilizing process, gave the tribe agricultural tools to assist in clearing land and growing crops.[80] Although these methods may have been productive in the eastern United States, they did not work effectively in the Pacific Northwest's acidic soils.[81] One tribal member stated that the soils in the rainforest "are only good for producing cedars."[82]

In addition, the Quinault tribe's reprieve on the reservation did not last long as guidebooks, newspapers, and magazines lured settlers to the mild climate of the Pacific Northwest.[83] One monthly magazine declared that "[n]o country, considering its rugged aspect, is more easily subjugated. It takes but a short time, and little expense, except labor, for a settler to make a home."[84] Another guide book stated that "[v]ery few portions of the world . . . afford a greater variety, and quantity, or a better quality of timber."[85] Settlers and loggers alike responded to this publicity, putting pressure on the federal government to open up the reservations for development.[86]

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76. *Id.* at 103–04 (recounting the exploits of trading ships that would stop along the Northwest coast exposing the Indians to disease and alcohol).

77. *Id.*

78. *Id.* at 173.

79. *Id.* ("The duty of the church was limited, though, to recommending individuals to the government to fill the role of Indian agent . . . . [which] not only reported to the federal government, but reported annually to their respective churches.").

80. *See id.* at 105 (discussing the Quinault's agricultural record kept by Indian Agents).

81. *See* STORM, *supra* note 28, at 21.

82. Stocks Telephone Interview, *supra* note 33.

83. *See* William G. Robbins, *"The Great Raincoast": The Legacy of European Settlement*, *in* THE RAIN FORESTS OF HOME: PROFILE OF A NORTH AMERICAN BIOREGION 313, 323 (Peter K. Schoonmaker et al. eds., 1997).

84. *Id.*

85. *Id.* at 318. The monthly journal *West Shore* in the 1880s described the forests of Washington as "practically unlimited and inexhaustible" and the *Pacific Monthly* in 1904 called the region a "garden spot, this land pregnant with hidden resources, possibilities that almost stagger the imagination, opportunities!!" *Id.* at 323.

86. *Id.* at 323–24. The region took on the "aura of an invester's frontier as lumber capitalists from eastern North America, The Great Lakes States, and England turned their attention to the region's

2. Allotment Authorized Privatization of Land Ownership on the Quinault Reservation

Economic pressures from private settlers and companies in search of valuable resources continued to infringe on the rights of tribes to reside without interference on their reservations.[87] The federal government responded by using its plenary power in Indian affairs to carve up the reservations and allow non-native settlers to purchase reservation land under the Indian General Allotment Act of 1887,[88] and later under the Quinault Allotment Act of 1911.[89] The Quinault allotment ultimately resulted in a "checkerboard of land" with six types of ownership on the reservation: tribal, fee patent, partial fee patent, partial tribunal, mixed tribunal (trust and fee), and trust lands.[90] This altered the traditional, communal, and stewardship-based property system that previously dominated tribal ownership.[91] It also forced tribes into private land ownership alongside their seemingly more "civilized" white counterparts and further accelerated the assimilation process.[92] The tremendous opportunity for the extraction of timber resources on reservations drew settlers

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forest bounty." *Id.* at 323.

87. *See* STORM, *supra* note 28, at 177. The agent on the Quinault Reservation apparently felt that settlers deserved the resource-rich land more than the Indians, stating:

> There is plenty of fraud going on in regard to the opening of the Quinault Indian Reservation and by the time that it is ready for settlement, government pets will have secured the greater part of it. All that is necessary to prove the assertion is to wait until the time comes and see how many men, who are already wealthy have claims on the reservation. I know of men in the country who have taken up four homesteads already and have never set foot on any of them.

Id. (citation omitted).

88. Dawes Act of 1887, 24 Stat. 388 (codified as amended at 25 U.S.C. § 331). Congress enacted the Dawes Act upon demand from reformers to privatize Indian reservations and break up the communal nature of tribal relations. Dawes Act 24 Stat. at 388–91, *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY 171 (Francis P. Prucha ed., 2d. ed. 1990). "Section 5 of the Act provided that the United States would hold the allotted land for 25 years 'in trust for the sole use and benefit of the Indian to whom such allotment shall have been made.'" United States v. Mitchell, 463 U.S. 206, 209 n.5 (1983). But the United States' 25-year period controlling alloted Indian lands was extended indefinitely with the Indian Reorganization Act of 1934, ch. 576, § 2, 48 Stat. 984 (codified at 25 U.S.C. § 462). *Id.*

89. Quinault Allotment Act of 1911, ch. 246, 36 Stat. 1345, 1345–46 (1911) (authorizing the Secretary of the Interior to make allotments on the Quinault Reservation).

90. STORM, *supra* note 28, at 172 (reprinting a map of the complex ownership patterns as they appeared in 1989).

91. *Id.* at 173 ("The Indian people believed the land belonged to no one but was for the use of everyone . . . .").

92. *Id.* at 174 ("Some thought that land ownership would hasten the 'civilization' of Indian peoples . . . .").

and forestry prospectors to the vast economic potential that allotments made available.[93]

Allotment continued to provide tribes with tools to become agriculturally productive, a policy that had begun in the removal-era.[94] The government attempted to allot only those lands suitable for agriculture or grazing and excluded heavily forested areas, which the government felt settlers and logging companies could use more productively.[95] The Supreme Court did not allow this narrow land characterization, which would have further restricted lands available for allotment to the Indians, and therefore the Court required the allotment of forested lands.[96]

Despite this positive ruling, the federal government alloted eighty acres to each Indian on the Quinault reservation and placed the natives on tribal and individual trust lands contiguous to water sources without heavy forestation.[97] Non-Indian loggers purchased the remaining fee lands resulting in tribal ownership of less than two percent of the originally allotted 200,000-acre reservation.[98] This ownership of Quinault land by the private lumber industry fueled Washington State's emergence as a leader in lumber production.[99] Therefore, the original economic incentive to privatize the Quinault Reservation resulted in direct economic benefit to the State of Washington. To combat this loss of indigenous forestry resources, the tribe formed the Quinault Land and Timber Enterprise (QLTE) in 1988.[100] The QLTE initially focused on the acquisition of tribal trust land and marketing of timber and subsequently looked to "develop and operate business ventures relating to the forestry resources."[101] Through aggressive repurchasing, the Quinault tribe now owns sixty to sixty-five percent of its

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93. Economic competition existed "[f]rom the outset of colonial settlement in the Americas, the question was hardly ever whether there would be an accommodation between Indian claims and the settler economy, but rather what kind of accommodation would take place." CLINTON ET AL., *supra* note 42, at 915. Clinton foreshadows the importance of these early economic relationships, which may "determine cultural, political, and legal realities." *Id.* at 915.

94. *Mitchell*, 463 U.S. at 209 (noting allotment actions prior to 1924).

95. *Id.* at 209.

96. United States v. Payne, 264 U.S. 446, 449 (1924).

97. Stocks Telephone Interview, *supra* note 33. Stocks stated that the government allocated lands to the tribes along the Quinault River. *Id.* President Theodore Roosevelt enlarged the federal forests in 1907, but the epidemic speculation within Washington affected "thousands of acres of valuable coastal forestland [which] already had been transferred to the private sector, much of it concentrated in the hands of a few large ownerships." Robbins, *supra* note 83, at 324.

98. Stocks Telephone Interview, *supra* note 33.

99. Robbins, *supra* note 83, at 324.

100. STORM, *supra* note 28, at 178. After a controversy exposed by the Iran/Contra Hearings, where profits from the Iranian arms deal were to buy Reservation land, the tribe formed the QLTE to purchase the land instead. *Id.*

101. *Id.* at 179.

original land in trust.[102] The Quinault tribe works hard achieving its goal to "restor[e] the land base to ensure proper management and allow the Tribe to become self-sufficient from the U.S. Federal Government."[103] These goals continue presenting challenges to the Quinault, but they nevertheless serve as a guiding light to the Yanomami in Brazil's Amazon rainforest.

B. Development of National Indigenous Forest Policy in Brazil

Brazil, the fifth largest country in the world, is slightly larger than the continental United States.[104] According to Brazil's Constitution, one-tenth of this "territory is to be set-aside for its Indian population."[105] Forty-two percent of the country is covered with the Amazon basin, the largest tropical rainforest in the world.[106] The Brazilian rainforest is heralded as the "world's most remarkable example of biological diversity supporting millions of different species."[107] Not only does the Amazon rainforest provide timber and other valuable natural resources, it also serves as the "global thermostat."[108] This "thermostat" is highly sensitive to massive deforestation, which can severely increase atmospheric carbon dioxide.[109]

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102. Stocks Telephone Interview, *supra* note 33. In 1978, the tribe secured an FHA loan for one million dollars to purchase private land, which increased tribal ownership by 4.7%. STORM, *supra* note 28, at 178. During the Iran/Contra hearings, the federal government attempted to purchase Quinault fee lands owned by the Federal Land Bank of Spokane (FLB) with the profits from the "'Iranian arms deal.'" *Id.* Congressional inquiries exposed the FLB which subsequently negotiated the sale of 9,985 acres of land to the Quinault nation. *Id.*

103. *Id.*

104. *See* David Blomstrom, Geobopological Survey, Size Comparison of Countries (2001), *at* http://www.geobop.org (last visited Aug. 27, 2003). The United States, including Alaska and Hawaii, is the third largest nation. *Id.*

105. BRAZIL: A COUNTRY STUDY, *supra* note 20, at lxv. In reality, "fewer than half of the reservations have been demarcated, and the issue has continued to be controversial." *Id.* Despite the fact that the national government seemingly demonstrates great generosity in establishing large protected areas for indigenous people, this generosity does not extend to actual protection from invaders. Karen E. Bravo, *Balancing Indigenous Rights to Land and the Demands of Economic Development: Lessons from the United States and Australia*, 30 COLUM. J.L. & SOC. PROBS. 529, 565 (1997). Bravo quoted a "spokesman for the Catholic Church [who] condemned the government for its policy of 'negligence on the most important issues for indigenous people, like . . . the non-preservation of their lands.'" *Id.* at 565 n.222 (citing *Church Hits Brazil Over Treatment of Indians*, SEATTLE POST-INTELLIGENCER, Nov. 7, 1996, at A8, *available at* 1996 WL 6459159).

106. Marc Pallemaerts, *Development, Conservation, and Indigenous Rights in Brazil*, 8 HUM. RTS. Q. 374, 374 (1986).

107. McGee & Zimmerman, *supra* note 9, at 514.

108. *Id.*

109. RAINFOREST ACTION NETWORK, *supra*, note 9 ("Clearing and burning rainforests release vast amounts of greenhouse gases such as carbon dioxide, [which] is believed to be responsible for approximately half of global warming.").

Over 20,000 Yanomami tribal members reside within Brazil's tropical rainforest.[110] The Yanomami tribe is the largest indigenous nation in the Amazon,[111] residing in northern Brazil and southern Venezuela,[112] with roughly 9,386 Brazilian Yanomami living in 188 communities.[113] They reside within "*malocas* scattered amid the densely forested hills of the watershed between the upper Orinoco and the Negro and Branco basins."[114] Scholars characterize the Yanomami as "the largest indigenous people in the Americas to retain their traditional way of life."[115] Contact with western societies began early in the twentieth century and at times was "bloody and brutal as Indian lands were forcibly taken over."[116] Recently, Brazil's determination to industrialize through its national policy of economic development has prompted an increase in western contact.[117] This contact has led to increased anthropological studies of Brazilian indigenous people and their lack of control over land and resources.

The Yanomami have been characterized as "forest-dwellers" whose survival is inextricably linked to their forest-land resources.[118] This link is emphasized by the Yanomami classification method of identifying all forest areas by giving them names, thereby fixing them in the "economy and the communal memory of the tribe."[119] This "profound knowledge of [an] area is essential for [the Yanomami's] survival . . ." and illustrates part of the

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110. Gale Goodwin Gomez, *Indigenous Rights and the Case of the Yanomami Indians in Brazil, in* HUMAN RIGHTS OF INDIGENOUS PEOPLES 185, 188 (Cynthia Price-Cohen ed., 1998) (evaluating the Yanomami tribe's historical struggle for survival, their current situation, the Pro-Yanomami Commission, and concerns for the future).

111. Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 76 (1999).

112. Gomez, *supra* note 110, at 188.

113. *Id.* (citing the latest census conducted by the Brazilian national Health Foundation, DSY/FNS-RR, 03/95, *quoted in* CCPY (Commision for the Creation of the Yanomami Park) Update # 92, at 1 (April 1997)).

114. John Hemming, *Indians, Cattle and Settlers: The Growth of Roraima, in* THE FOREST FRONTIER: SETTLEMENT AND CHANGE IN BRAZILIAN RORAIMA 39, 47 (Peter A. Furley ed., 1994) (describing a maloca as a communal hut where the tribal members live).

115. JOHN D. EARLY & JOHN F. PETERS, THE XILIXANA YANOMAMI OF THE AMAZON: HISTORY, SOCIAL STRUCTURE, AND POPULATION DYNAMICS 3 (2000).

116. *Id.* at 57.

117. *See id.* at 241–50. The Brazilian government saw the Amazon as the primary solution to Brazil's problems of inequality, of financing industrialization, of paying off the international debt, and of taming inflation, which increased contacts with indigenous groups. *Id.*

118. *See* Joseph C. Grasmick, *Land and the Forest-Dwelling South American Indian: The Role of National Law*, 27 BUFF. L. REV. 759, 760 (1978) (attributing the decrease in forest-dwelling Indian groups to a "separation of the Indians from their forest land resources").

119. EARLY & PETERS, supra note 115, at 260.

reason why the Yanomami would probably not survive if forced to relocate to another forested area.[120]

The Yanomami's use of the land contrasts with Western forestry management. Western forestry principles typical "divide the land into areas for forests, agriculture, and conservation . . . indigenous groups [on the other hand] typically combine these activities in time and space" relying heavily on fire and the "diversity of species."[121] The land base required for indigenous horticulture must be extensive enough to support the "slash-and-burn system" of agriculture, followed by succession-species management on multiple plots of land in varying stages of regrowth.[122] Indigenous management of these resources exists under a system of "common property" and "collective ownership."[123]

One distinguishing feature of the Yanomami tribe is the international publicity the Yanomami people receive. Anthropologists made the Yanomami famous as "exotic peoples" which "has been an invaluable weapon in their self-preservation against the inroads of threats from modernization . . . ."[124] This international fame has given the Yanomami increased protection through the support of many industrialized countries, including the United States, international and domestic non-governmental organizations (NGOs), the Commission for the Creation of the Yanomami Park (CCPY), and the United Nations.[125] The Quinault Nation, in contrast, never received any notice or international publicity in the international forum because their assimilation and exploitation occurred within United States during a time of historical isolation and in an atmosphere generally accepting indigenous repression as a settlement byproduct. Publicity over the Amazon's deforestation has elevated Brazil's forest management practices into the international forum.[126] Tropical rainforest advocates put extreme pressure on Brazil to protect this fragile area, which many people

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120. Pallemaerts, *supra* note 106, at 386 (citing Price, *What Lands Should be Reserved?*, *in* IN THE PATH OF POLONOROESTE, ENDANGERED PEOPLE OF WESTERN BRAZIL 62 (Cultural Survival Occassional Paper No. 6) (1981)).

121. Julio C. Tresierra, *Rights of Indigenous People Over Tropical Forest Resources*, *in* FOREST RESOURCE POLICY IN LATIN AMERICA 135, 137 (Kari Keipi ed., 1999).

122. *Id.* at 137–38.

123. *Id.* at 138. The most efficient common property management systems are "performed by cohesive groups, characterized by family ties, traditions of mutual assistance, and no sharp disparities in wealth." *Id.*

124. FRANK A. SALAMONE, THE YANOMAMI AND THEIR INTERPRETERS, FIERCE PEOPLE OR FIERCE INTERPRETORS? 33 (1997).

125. Gomez, *supra* note 110, at 190–93.

126. *Id.* (indicating the efforts of environmental and human rights groups to bring the ongoing tragedy of the Yanomami to the attention of the international press and their respective governments).

consider essential for global sustainability.[127] Unfortunately, international pressure has not effectively protected the Yanomami's rights over their forestry resources.

1. Federal Government's Promotion of the Policy of Assimilation

Brazil's legal system differs from the common law regime of the United States in that it has retained ties to European civil law.[128] Through this European connection, Brazil "remain[s] greatly influenced by [its] colonial experience."[129] Brazil's Civil Code, dating from 1916, "establishes that the Indians have relative incapacity to practice the acts of civil life under a regime of tutorship."[130] Under this tutelage system, Indians are treated the same as young people between the ages of sixteen and twenty-one.[131] The federal government intended tutorships to protect Indians from abuse or harm, especially in commercial transactions.[132]

This tutelage system is elaborated in the Indian Statute, which embodies the colonist distinction in its classification of Indian tribal groups into three legal categories: (1) isolated: "tribes [are] totally unknown and with no contacts whatsoever with the civilization;"[133] (2) integrating:"tribes . . . maintain intermittent or frequent contacts with civilization"[134] and are more "accepting [of] certain practices and ways of life common to the other sectors of the national community;"[135] and (3) integrated: "tribes [are]

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127. *Hearing on Brazil's Indigenous People*, *supra* note 22, at 1–2 (statement of Hon. Robert G. Torricelli). Mr. Torricelli advocated:

> We must also convince Brazil to consider protection of its tropical forests as a more appropriate and lucrative policy than destruction of those forests. The biodiversity of the Amazon . . . may well contain information and material critical to new generations of products in the fields of biotechnology and genetic engineering, with inestimable value to the planet.

Id.

128. Grasmick, *supra* note 118, at 765.

129. *Id.*

130. L. Roberto Barroso, *The Saga of Indigenous Peoples in Brazil: Constitution, Law and Policies*, 7 ST. THOMAS L. REV. 645, 65–2 (1995) (citing CÓDIGO CIVIL [C.C.] 6.001 (Braz.)).

131. MANUELA CARNEIRO DA CUNHA, MINISTRY OF FOREIGN AFFAIRS, CIVIL CODE (2003) ("The Civil Code treated the Indians in the same way as young people between the ages of 16 and 21, within the category of having 'relative legal capacity.'"), *at* http://www.mre.gov.br/cdbrasil/itamaraty/web/ingels/polsoc/pindig/legislac/ccivil/index.htm (last visited Feb. 19, 2003).

132. *Id.*

133. Pallemaerts, *supra* note 106, at 379 (citing C.C. 6.001 art. 4); Barroso, *supra* note 130, at 648.

134. Pallemaerts, *supra* note 106, at 379 (citing C.C. 6.001 art. 4); Barroso, *supra* note 130, at 648.

135. Pallemaerts, *supra* note 108, at 379 (citing C.C. 6.001, art. 4).

totally or significantly integrated in the national society."[136] The statute's undertones reflect an assimilationist purpose and "a paternalistic and ethnocentric model of 'development'" for the Amazon region.[137] An Indian may "petition the competent Court of Justice to release him from the tutelage provided in this Law, vesting him with full civil capacity."[138] Also, the statute explicitly "foresees that the incapacity shall cease if and when the Indian becomes integrated into the civilization."[139] The Brazilian government does consider the unique situation of specific Indian tribes, unlike the United States, which uses the generic characterizations of Native Americans or Indians as one general group, distinguishing only whether a tribe is federally recognized.[140]

The Yanomami remained largely isolated until the 1960s, when the government opened the Amazon rainforest for development through the "National Integration Plan."[141] This era also marked the Yanomami's first contact with the Brazilian National Indian Foundation (FUNAI), the governmental agency in charge of regulating Brazilian Indians.[142] Under this development scheme, two devastating events occurred to the indigenous tribes in the Amazon: the Transamazonian Highway construction[143]

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136. *Id.* at 379; Barroso, *supra* note 130, at 648.

137. Pallemaerts, *supra* note 106, at 380.

138. C.C. 6.001 art. 9. The four requirements for tutelage release are: (1) 21 years minimum age; (2) Portuguese language knowledge; (3) "necessary skill to perform a useful activity in the national communion"; and (4) "reasonable comprehension of the usages and customs of the national community." *Id.* at art. 9, I–IV.

139. Barroso, *supra* note 130, at 652 (citing C.C. 6.001, art. 10).

140. *See* Carole Goldberg, *Descent Into Race*, 49 UCLA L. REV. 1373, 1374–75 (2002) ("The idea of indigenous North Americans as a single 'race' was a European invention. . . . Today, state and federal courts continue to characterize Native Americans as a racial group and still use this characterization to justify and support denying them their rights.").

> The notion of 'Indians' was invented to distinguish the indigenous peoples of the New World from Europeans. . . . The 'Indian' is emphatically non-European in the ethnic sense. . . . They created the concept of 'the Indian' to give what they did see some kind of unification, to make it a single entity they could deal with, because they could not cope with the reality of 400 different cultures.

John Mohawk, *Looking For Columbus: Thoughts on the Past, Present and Future of Humanity*, *in* THE STATE OF NATIVE AMERICA: GENOCIDE, COLONIZATION, AND RESISTANCE 440 (M. Annette Jaimes ed., 1992); *see also* Ramapough Mountain Indians v. Norton, No. 00-5464 (D.C. Cir. Dec. 11, 2001), *available at* 2001 WL 1699413 (describing the seven criteria for federal recognition in upholding tribe's denial for recognition).

141. Pallemaerts, *supra* note 106, at 374 (citing Decree-Law No. 1.106 of June 1970). The World Bank, the Inter-American Development Bank, the United States Agency for International Development, and other international lending agencies funded the Brazilian government's development plans. *Id.* at 374.

142. Gomez, *supra* note 110, at 189.

143. Brazil declared one hundred kilometer-wide strips on either side of the entire highway legal property of the federal government available for "commercial agricultural colonialization projects." Pallemaerts, *supra* note 106, at 374–75 (citing Decree No. 1.164 of 1 April 1971, 1971 III Coleção das

and a scheme of fiscal incentives to promote private investment in the Amazon.[144] The Brazilian government's policy supporting economic development ultimately caused massive deforestation of the Amazon rainforest and destruction of its indigenous inhabitants.[145]

Governmental response to deforestation has been fairly uniform across all Amazonian countries: "Given the Amazon nations' need for foreign investment and economic growth, development and exploitation of the Amazon's resources has historically proceeded at any cost."[146] The government built roads to promote Amazonian settlement.[147] Brazil, alone, created more than 6,000 miles of roads throughout the region.[148] Tax incentives attracted many developers, who invested in the area by clearing huge tracts of land to establish cattle ranches.[149] Available land lured settlers, leading to "large settlements by nonindigenous colonizers and the advance of livestock farming."[150]

In 1985, the Brazilian military launched Calha Norte to protect the Brazilian state of Roraima's northern border.[151] "[The] campaign plant[ed] military garrisons all along Brazil's northern frontiers."[152] Ironically, no apparent reason existed for urgent military occupation because the northern border had been peaceful for two centuries.[153] The actual purpose behind the military's occupation was to bring the Yanomami and other Indians "into the mainstream of Brazilian society, a delicate process that was being achieved by missionaries and FUNAI officers."[154]

As a result of centuries of isolation, the Yanomami had not developed any natural immunity to the western diseases that natural resource exploiters and non-native settlers brought to their reservation.[155] These "so-

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Leis 9, art. 1, 2; and Decree No. 68.524 of 16 April 1971, 1971 IV Coleção das Leis 40, art. 1(c)).

144. *Id.* at 375 (citing Law No. 5.174 (27 October 1966)). Corporations from the United States, Japan, and Europe took advantage of these tax breaks for commercial logging and mining. *Id.*

145. *Id.* at 376. The Brazilian government attempted to make amends by creating a number of national parks and reserves to preserve "representative samples" of an unspoiled tropical rainforest. *Id.*

146. Karen M. Schwab, *Added Hope for the Amazon Rainforest*, 15 HOUS. J. INT'L L. 163, 173 (1992).

147. Roger W. Findley, *Legal and Economic Incentives for the Sustainable Use of Rainforests*, 32 TEX. INT'L L. J. 17 (1997).

148. *Id.*

149. *Id.*

150. Tresierra, *supra* note 121, at 139.

151. Hemming, *supra* note 114, at 48.

152. *Id.*

153. *Id.*

154. *Id.*

155. Gomez, *supra* note 110, at 190 ("Like other native peoples, the Yanomami have no natural immunities to the so-called white man's diseases . . . .").

called white man's diseases" caused 2,280 Yanomami deaths.[156] During the Northern Perimeter Highway's first year of construction through Roraima, twenty-two percent of the Yanomami living near construction areas died.[157] Highway construction through Latin American rainforests also caused "deforestation and degradation, which makes [highways] the main threat to biodiversity."[158]

The worst threat to Yanomami survival arrived in the 1980s with the onslaught of illegal gold miners, or *garimpeiros*,[159] who at one point numbered 45,000.[160] These miners arrived responding to a myth that Yanomami lands "were full of gold and cassiterite, mineral wealth in such quantity that it could pay off all of Brazil's foreign debt."[161] Initially, the numerous Indians overwhelmed the miners.[162] The miners attempted to "buy goodwill through the liberal distribution of food and goods."[163] Eventually, the Indians began to rely on the miners' compensation to rectify serious health and subsistence damage caused by the miners' intrusion.[164] The Brazilian government aided these illegal miners when it expelled all medical and religious personnel from the area.[165] This resulted in entire Yanomami communities being killed from malaria.[166] Thus, Yanomami assimilation occurred through their natural resource exploitation, which benefited the Brazilian economy at the expense of Yanomami lives.

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156. *Id.* (citing Press Release, CCPY (Commission for the Creation of the Yanomami Park), UPDATE # 83, 2 (Dec., 1995)). The "white-man's diseases" included "malaria, measles, mumps, tuberculosis, venereal diseases, and common respiratory infections." *Id.*

157. *Id.* at 190. "Brazil's Northern Perimeter Highway . . . cut through the southeastern part of [the Yanomami] territory in the Brazilian State or Roraima along 225 kms. Twenty-two percent of the Yanomami living near the contruction areas died in the first year, principally from respiratory diseases contracted from contruction workers." *Id.* (citation omitted).

158. Tresierra, *supra* note 121, at 139.

159. *Garimpeiros* are characterized as "small-scale, independent miners who are not interested in establishing a long-term presence in any one place." EARLY & PETERS, *supra* note 115, at 59.

160. Gomez, *supra* note 110, at 191.

161. Hemming, *supra* note 114, at 47.

162. EARLY & PETERS, *supra* note 115, at 59–60.

163. *Id.* at 60.

164. *Id.* The destruction of the Yanomami communities by miners occurred because "[t]he rivers were polluted, the game was scared away by the noisy machinery, and many Indians died in constant epidemics of malaria, flu and so on." *Id.*

165. Gomez, *supra* note 110, at 191.

166. *Id.* ("The incidence of malaria among the Yanomami quadrupled . . . .").

2. Demarcation of Indian Reservations under the Brazilian Constitutional Mandate

Brazil's transition from monarchy to democracy after independence did not occur as smoothly as the United States' analogous transition.[167] Brazil began with a constitutional monarchy, utilizing a system of "relative democracy" under an oppressive military government for twenty years, and finally settled on the current social-democratic model of modernization.[168] The eighth Brazilian Constitution, adopted in 1988,[169] explicitly recognizes the "inalienable right of indigenous people to their ancestral lands and natural resources, and guarantees their right to exist as distinct cultures."[170] The land that indigenous people occupy is "inalienable and indisposable," and they therefore possess use and occupancy rights similar to United States tribes.[171]

In contrast with the United States, Brazil implicitly recognizes indigenous ties to the earth and constitutionally guarantees that "lands traditionally occupied by Indians are intended for their permanent possession, and they shall be entitled to exclusive use of the riches of the soil, rivers, and lakes existing thereon."[172] Through the large territorial grants to indigenous tribes in Brazil, the government seemingly recognized that Indians need an extensive area for a subsistence and agricultural lifestyle. Such subsistence-agricultural methods require crop rotation and "forgotten plantings."[173] Also, the Brazilian Constitution recognizes the specific connections of Indians to specific areas by stating that lands "traditionally occupied by Indians are intended for their permanent possession . . . and

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167. BRAZIL: A COUNTRY STUDY, *supra* note 20, at 255 (noting that the "new nation retained a slave-based, plantation economy, and political participation remained very limited.").

168. *Id.* at 255–57 (describing how under "relative democracy," "Congress remained open, but with greatly reduced powers").

169. CONSTITUIÇÃO FEDERAL [C.F.] [Constitution of Brazil] art. 231, 232, *translated in* INSTITUT FÜR ÖFFENTLICHES RECHT, BRAZIL-CONSTITUTION (1998), http://www.oefre.unibe.ch/law/icl/br00000_.html (last visited Feb. 4, 2003). The Constitution also acknowledged aboriginal or original title. *See infra* text accompanying note 135.

170. Press Release, Rainforest Action Network News, Brazil Reverses Indigenous Rights (Jan. 25, 1996), *available at* http://www.ran.org/news/newsitem.php?id=264&area=newsroom.html [hereinafter Brazil Reverses].

171. C.F. art. 231(4), *translated in* INSTITUT FÜR ÖFFENTLICHES RECHT, BRAZIL-CONSTITUTION (1998), http://www.oefre.unibe.ch/law/icl/br00000_.html (last visited Feb. 4, 2003).

172. *Id.* at art. 231(2).

173. Mona Suhrbier, *The Present Situation of Indigenous People in the Amazon Region*, *in* AMAZONIA AND SIBERIA: LEGAL ASPECTS OF THE PRESERVATION OF THE ENVIRONMENT AND DEVELOPMENT IN THE LAST OPEN SPACES 257, 259 (Michael Bothe et al. eds., 1993). This practice of forgotten plantings takes into account "seasonal shortages or surpluses of resources . . . and is adapted to the Amazon soil which is poor in nutrients." *Id.* This method of cultivation and respect for the rain forest enabled the Yanomami to harvest twenty-three tons of bananas per hectare. *Id.*

exclusive use."[174] Therefore, Brazil bypassed the United States' removal era policies and instead constitutionally mandated that Brazilian Indians remain on their original lands. The United States viewed land as fungible, something tribes retained no recognized right to, and therefore the United States did not connect a tribe's survival to a specific piece of property.[175]

The 1988 Constitution mandated all indigenous lands be demarcated by 1993.[176] Under this system, the government gave each Brazilian Indian an average of 400 hectares, compared to the United States, which gave only eighteen hectares per Native American.[177] In 1992, Brazilian President Fernando Collor buckled under intense domestic and international outrage over the devastation of the Yanomami people.[178] On May 25, 1992, he signed a decree demarcating 68,000 square miles of Amazon rainforest (an area the size of Washington State), legally creating the Yanomami Indigenous Reserve.[179] However, strong economic forces embodied by "politicians, mining interests, and elements of the Brazilian military have remained determined to undermine the gains made on behalf of the Yanomami."[180]

Demarcation proved a hollow victory as it left the Yanomami with only twenty-five percent of their original land.[181] The government's assimilation strategy "force[d] the Yanomami into a sedentary life . . . and preclude[d] their traditional spatial mobility over a large territory for hunting-gathering and shifting cultivation."[182] Despite acknowledgement of the Yanomami's distinct survival ties to the earth, the government limited their Reserve to allow for colonialism, settlement, and subsequent exploitation in the area. The Yanomami continue to have a tough row to hoe in the Brazilian

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174. C.F. tit. VIII, ch. VIII, art. 231(2), *translated in* INSTITUT FÜR ÖFFENTLICHES RECHT, BRAZIL-CONSTITUTION (1998), http://www.oefre.unibe.ch/law/icl/br00000_.html (last visited Feb. 4, 2003).

175. *See infra* notes 223–24 and accompanying text (discussing the fungible notion of property). The doctrine of discovery utilized by the European colonists was embodied within "[t]he message of *Johnson v. McIntosh*, [which] was that the natural rights of human beings to dispose of property that they held by virtue of possession did not apply to Indians in America." GETCHES ET AL., *supra* note 22, at 70. Under Locke's labor theory, land "[p]ossessors, in the white man's view, cultivated and improved their land, mixed their labor with it, but the Indians had done none of this." DUKEMINIER & KRIER, *supra* note 18 at 17. "The view that a tribe's right to its homeland constituted less than full fee simple was rooted in a Eurocentric view of the inferiority of the Indian people. . . ." Klein, *supra* note 17 at 18.

176. Bravo, *supra* note 99, at 564.

177. BRAZIL: A COUNTRY STUDY, *supra* note 20, at lxv.

178. *See* Gomez, *supra* note 110, at 192.

179. *Id.* (citing CCPY Update #57, June 1, 1992).

180. *Id.* at 193.

181. EARLY & PETERS, *supra* note 115, at 295.

182. *Id.* at 294.

government's garden of rights as illustrated by the length of time and intense pressure needed to even demarcate a protected reserve.

3. Executive Decree Authorizes Challenges to the Demarcation of Indigenous Reserves

Brazilian Presidents have not adequately protecting indigenous rights in applying the constitutional demarcation mandate. In 1997, ten years and four presidents after the constitutional revision, 291 out of 559 territories still awaited formal demarcation.[183] In 1996, President Cardoso issued Executive Decree No. 1775, which permitted commercial interests to challenge Indian land demarcation.[184] Under pressure from economic investors, the government basically revoked Indian property rights and protections, and allowed states, municipalities, and non-Indians to combat demarcation, which could suspend or eliminate Indian property claims.[185] Under this "Genocide decree,"[186] only fully demarcated indigenous areas are immune to challenge,[187] but many people interpreted "the decree as permitting challenges to all demarcations," including the Yanomami reserve.[188]

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183. Beto Borges & Gilles Combrisson, *Indigenous Rights in Brazil: Stagnation to Political Impasse* (Feb. 1, 1997), *at* http://forests.org/archive/brazil/brnewrig.htm. *See* Bravo, *supra* note 105, at 565 (noting demarcation numbers as of 1996).

184. Brazil Reverses, *supra* note 169 ("This undermines the rights of the indigenous people to their traditional lands as promised in the constitution, and could take the natural resources—which the local communities depend on for survival—out of indigenous control.").

185. BRAZIL: A COUNTRY STUDY, *supra* note 20, at lxv – lxvi. In a quote from a mining executive and congressman from the state of Roraima in the *Folha de São Paulo* newspaper, "With decree 1775, the government has placated our anger." Dean Graber & Roberto Villar, *Decree Endangers Indigenous Reserves* (1996), *at* http://lanic.utexas.edu/ilas/brazctr/publications/rb/archives/RB2/indigenous.html. After the President passed Decree No. 1775, a Brazilian court upheld a challenge to the Macuxi demarcation in Roraima: the court allocated 200,000 hectares of Indian land to 14 ranchers and created enclaves of non-Indian land in the middle of indigenous reserves. Borges & Combrisson, *supra* note 183.

186. Decree No. 1775 is known as the "'Genocide Decree'" because it "allowed private interests as well as state and local governments to challenge the legality of indigenous land titles." Julio Feferman & Beto Borges, *Brazil's Indians on Alert as Government Hears Final Land Rights Appeals*, WORLD RAINFOREST REP. (Rainforest Action Network, San Francisco, CA) Summer-Fall, 1996, at Vol. XIII, No. 2, *reprinted in* FORESTS.ORG, BRAZIL'S INDIANS ON ALERT AS GOVERNMENT HEARS FINAL LAND RIGHTS APPEALS (1996), *at* http://forests.org/archive/brazil/lasthrbr.htm (last visited Feb. 4, 2003).

187. Sheryl Barbic, *Lie of the Land*, BRAZZIL, Mar. 20, 1996, at 20, *available at* http://www.brazzil.com/p20mar96.htm. In attempting to protect the indigenous lands that are not demarcated, indigenous groups asked for a halt to the G-7 disbursements of $9.7 million that were intended to support the demarcation of indigenous lands in Brazil but could be misdirected. *Id.*

188. Gomez, *supra* note 110, at 194. At this time, the decree has not had a direct negative impact on the Yanomami reserve. *Id.* at 194.

Ironically, FUNAI is the agency responsible for processing the demarcation appeals before forwarding the claims to Brazil's Minister of Justice.[189] FUNAI is charged with securing "land title for all of Brazil's indigenous territories," but is faced with appeals on "some of the most resource-rich of the indigenous territories" by "miners, loggers, ranchers, and government officials, targeting 42 different Indian areas." This duty poses a conflict of interest because FUNAI is constitutionally mandated not only to protect the interests of the Indians, but also to weigh the Indians' interests against those of non-Indians who could lose access to these demarcated areas. Brazil has further denied FUNAI funding after previously giving it wide latitude in defining the boundaries for demarcation, adding another wrinkle to the protection of indigenous rights.[190] The decreased funding prevented FUNAI from adequately considering the Yanomami tribes' interests.[191] Therefore, even the governmental agency charged with protecting the Indians must bow to the economic benefits from the destruction of the rainforest and the Indians. *Garimpeiros* continue to illegally invade the Yanomami Reserve, causing destruction of the Yanomami and the Amazon's resources.[192] For the first time in Yanomami history, some Yanomami are killing themselves "[o]ut of despair about being driven out of their life-sustaining environment."[193]

The Brazilian government's covert move to submerse Indian rights specifically outlined in the Constitution is arguably its version of the General Allotment Act.[194] Decree No. 1775 breaks up territories originally intended for exclusive Indian use and allows for commercial exploitation of natural resources by private investors.[195] The Decree also allows for

189. Feferman & Borges, *supra* note 186 ("According to challenge criteria, claimants had to prove that the land had not been ancestral Indian territory."). FUNAI has three options: (1) it can reject the challenges out of hand, (2) recommend a denial of the challenge, or (3) support the challenge. *Id.*; *see also supra* note 142.

190. Bravo, *supra* note 95, at 565.

191. *Id.*

192. Gomez, *supra* note 110, at 195. *See infra* notes 159–165 and accompanying text. "The continued presence of illegal gold miners not only pollutes the streams and rivers with deadly mercury, frightens away game animals, and results in violent conflicts between the miners and the Indians, but it dramatically increases the health risks to the Yanomami." *Id.* As Davi Kopenawa, the Yanomami spokesman stated:

> The whites don't want the land; they only want the gold, pieces of rock; they don't like the land; they only like gold, diamonds, money, that's all. That is why we Yanomami don't want them to keep harassing us, destroying the river, destroying the land, destroying the forest. They need to look at the law and respect it.

Id. at 193 n.33 (noting a Statement to the Commission for the Creation of the Yanomami Park (1995)).

193. Wiessner, *supra* note 111, at 77 (citing Telephone Interview with Professor Gail Goodwin Gomez, visitor to the Amozon Indians for twenty years (Jan. 10, 1996)).

194. *See supra* Part I.A.2 (discussing allotment era policy).

195. Feferman & Borges, *supra* note 186.

increased assimilation into Brazil's western culture, another possible policy rationale regarding indigenous peoples, because it would enable the government to continue further economic development within the rainforest.[196] These were all goals of the United States' General Allotment Act, which left a wide swath of destruction because of the tribes' vulnerability to increased non-native contact.

One tool that the Yanomami cannot rely on is treaty rights because "unlike North American Indians . . . [n]o treaties were ever concluded between Brazilian Indians and the Portuguese colonists."[197] Therefore, the only source of indigenous rights come from Brazilian national law, which is "subject only to the international legal obligations of Brazil."[198] The Brazilian government does not even enforce its own constitutional provisions mandating Indian sovereignty and land protection; any political leaders attempting to protect Indians from infringing economic interests have been removed from office.[199]

II. FEDERAL JURISDICTION OVER QUINAULT AND YANOMAMI FOREST RESOURCES: INTERPLAY OF THE EXECUTIVE, LEGISLATIVE, AND JUDICIAL BRANCHES OF GOVERNMENT

A. Role of Congress

1. Congressional Management of the Quinault Forest Resources

Through the Constitution's Indian Commerce Clause, Congress has broad plenary power to regulate tribal affairs.[200] This broad plenary power is arguably an exercise of Congress' police power over Indian affairs,[201] but, in practice, the term plenary has come to mean "absolute or total power."[202] The application of the plenary doctrine to Indian affairs has

196. Pallemaerts, *supra* note 106, at 379. The goal of assimilation allows for integration into the "dominant society and its market economy." *Id.*

197. Pallemaerts, *supra* note 106, at 377.

198. *Id.*

199. *See, e.g.*, Wiessner, *supra* note 111, at 77. The federal government dismissed FUNAI President Sydney Possuelo when he attempted to protect indigenous people from encroachment by gold miners. *Id.* The people impeached President Collor de Mello after he ordered the demarcation of the Yanomami territory. *Id.*

200. U.S. CONST. art. I, § 8, cl. 3 (giving Congress the power "[t]o regulate commerce with Foreign Nations, and among the Several States, and with the Indian Tribes"). *See* United States v. Wheeler, 435 U.S. 313, 322–23 (1978) (holding that tribes maintain a limited sovereignty that "exists only at the sufferance of Congress and is subject to complete defeasance").

201. COHEN, *supra* note 55, at 217–20.

202. WILKINSON, *supra* note 51, at 78.

resulted in longstanding tribal frustration and diminishing tribal sovereignty through: the doctrine of discovery,[203] the defining of tribes as domestic dependent governments,[204] the divestiture of tribal land through allotment,[205] and Congress' ability to unilaterally abrogate Indian treaties.[206] Congressional and executive authority over Indian tribes, and thereby their ability to manage their natural resources, is subject to three limitations: the United States Constitution,[207] the inherent responsibilities contained within the trust relationship,[208] and express statutory limitations.[209]

The Supreme Court has held that the Fifth Amendment,, prohibiting the taking of private property for public use without just compensation,[210] pertains to Indian property rights "recognized" by Congress through treaty or statute.[211] The Court has also found that mismanagement of Indian property interests can constitute an "act of confiscation," which requires compensation.[212] Congress, however, does not need to compensate for altering or destroying *individual rights* in tribal property[213] or extinguishing *aboriginal* property rights.[214]

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203. Johnson v. McIntosh, 21 U.S. (543 Wheat.), 573–74, 591–92 (1823). Wilkinson describes this doctrine as a strong-arm rule that "transmutes Indian fee title into a 'right of occupancy' not protected by the Fifth Amendment at the moment an explorer's flag is tentatively planted on an isolated shore." WILKINSON, *supra* note 51, at 79.

204. Cherokee Nation v. Georgia, 30 U.S. (1 Pet.), 17–18 (1831). Wilkinson states that the product of this definition restricts the Indian tribe's "direct access to the international community." WILKINSON, *supra* note 51, at 79.

205. Lone Wolf v. Hitchcock, 187 U.S. 553, 566, 568 (1903) (discussing loss of tribal lands through allotment and abrogation of treaty rights).

206. WILKINSON, *supra* note 51, at 79, 79 n.137.

207. GETCHES ET AL., *supra* note 22, at 4. "Exercies of federal legislative power over Indian matters flows primarily from authority delegated to Congress by the Indian Commerce Clause of the United States Constitution . . . ." *Id.*

208. Mary Beth West, *Natural Resources Development on Indian Reservations: Overview of Tribal, State, and Federal Jurisdiction*, 17 AM. INDIAN L. REV. 71, 73 (1992).

209. ALLEN H. SANDERS & ROBERT L. OTSEA, JR., PROTECTING INDIAN NATURAL RESOURCES: A MANUAL FOR LAWYERS REPRESENTING INDIAN TRIBES OR TRIBAL MEMBERS 38 (1982).

210. U.S. CONST. amend. V.

211. West, *supra* note 208, at 73 n.16 (citing United States v. Sioux Nation, 448 U.S. 371, 422, 424 (1980); Shoshone Tribe v. United States, 299 U.S. 476 (1937)). *Shoshone Tribe* involved an action in the Court of Claims against the United States for money damages for settling the Arapahoes on an area reserved by treaty for the Shoshone. COHEN, *supra* note 55, at 217 (citing *Shoshone Tribe*, 299 U.S. at 497–98). A majority opinion written by Justice Cardozo upheld the congressional statutes, mandated the relocation of the Arapahoe, and stated that the "[p]ower to control and manage the property and affairs of Indians . . . for their betterment and welfare may be exerted in many ways and at times even in derogation of the provisions of a treaty," but this power cannot be used to take tribal land without providing compensation because "[s]poliation is not management." *Id.*

212. SANDERS & OTSEA, *supra* note 209, at 44 (citing United States v. Sioux Nation of Indians, 448 U.S. 371, 422 (1980)).

213. *Id.* at 44 (citing United States v. Jim, 409 U.S. 80, 82–83 (1972)).

214. *Id.* at 44 (citing Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279, 285 (1955)). The

The Court has also held that the First Amendment's Free Exercise Clause does not prevent the government from constructing a road or harvesting timber through a National Forest area that a tribe has traditionally used for religious purposes.[215] The Court refused to acknowledge the tribe's religious claim because it did not want to "reconcile the various competing demands on government . . . that inevitably arise in so diverse a society as ours."[216] The Court stated this policy determination is a task for the legislature, not the judicial system.[217] Basically, the Court wanted to avoid opening Pandora's Box and acknowledging all religious claims concerning sacredness. This is especially important when tribal religion is inextricably tied to land, which also happens to be the most productive natural asset.

The judicial standard of review requires executive and congressional actions relating to Indian tribes be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians" because of the government's "special trust relationship" with Indian tribes.[218] The trust doctrine embodies this special relationship and "aris[es] from the transfer of native lands to the federal government—whether by conquest, treaty, executive order, or congressional fiat."[219] Courts apply this doctrine with a deferential rational basis standard of review to uphold statutes favorable to Indians, such as employment preferences in the Bureau of Indian Affairs (BIA).[220]

The trust doctrine provides additional protection from the government's taking of tribal property. To establish whether an unconstitutional taking has occurred, the Supreme Court determines whether Congress acted as trustee for Indians or whether it exercised its sovereign power of eminent domain.[221] In *United States v. Sioux Nation of Indians*, the Court held that

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Court did not want to diverge from the principles laid down in *Johnson v. McIntosh*, 21 U.S. (8 Wheat.), 543 (1823): "Indian occupancy, not specifically recognized as ownership by action authorized by Congress, may be extinguished by the Government without compensation." *Tee-Hit-Ton*, 348 U.S. at 288–89. The Court did not want to compensate Indians for aboriginal lands lost and instead maintained "the policy of Indian gratuities for the termination of Indian occupancy of Government-owned land." *Id.* at 291.

215. *See* Lyng v. Northwest Indian Cemetery Protective Ass'n., 485 U.S. 439, 451–52 (1988) (arguing that "the Constition simply does not provide a principle that would justify" the prohibition of timber harvesting or road building that affects sacred sites because it does not violate religious beliefs of penalize religious exercise).

216. *Id.*

217. *Id.* at 452.

218. West, *supra* note 208, at 73 (citing COHEN, *supra* note 55, at 217–18).

219. Wood, *supra* note 48, at 742.

220. *See* Morton v. Mancari, 417 U.S. 535, 551–55 (1974) (concluding that the employment preference for qualified Indians in the BIA provided by the Indian Reorganization Act of 1934 was constitutional).

221. United States v. Sioux Nation of Indians, 448 U.S. 371, 408 (1980).

Congress acts as trustee for the Indians when it makes "a good faith effort to give the Indians the full value of the land and thus merely transmutes the property from land to money, [and] there is no taking. This is a mere substitution of assets or change of form and is a traditional function of a trustee."[222] As a good faith trustee, Congress may change the form of the trust assets from property to money as long as the Indians are provided with compensation of equivalent value.

This view of property revives the ever-present Western notion of fungible property seen in *Lone Wolf v. Hitchcock*: as long as real estate has been altered into money or another productive form, no harm results and compensation is not required.[223] When the federal government determines property is not being utilized according to its determination of the best use of the land, as a trustee, it can transmute tribal property into another form, so long as it was done in good faith.[224] Therefore, the dominant society's belief in economic development systematically diminishes the sustainable use of forest resources.

The special trust relationship does favor the tribes when courts resolve ambiguities within treaties, statutes, and executive orders affecting tribes.[225] The United States, as trustee of seven Indian tribes, sued the State of Washington in *Washington State Commercial Passenger Fishing Vessel Association v. United States*.[226] The United States sought an interpretation of treaties made with Indian tribes and an injunction to protect the Indians' share of anadromous fish.[227] The Supreme Court noted that the parties created the treaties in English using white negotiators and that there is "no evidence of the precise understanding the Indians had of any of the specific

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> Congress cannot simultaneously (1) act as trustee for the benefit of the Indians, exercising its plenary powers over the Indians and their property, as it thinks is in their best interests, and (2) exercise its sovereign power of eminent domain, taking the Indians' property within the meaning of the Fifth Amendment to the Constitution . . . . Congress can own two hats, but it cannot wear them both at the same time."

Id. at 408.

222. Sioux Nation of Indians, 448 U.S. at 409 (citing the standard of review contained in *Three Affiliated Tribes of the Fort Berthold Reservation v. United States*, 390 F.2d 686, 691 (Ct. Cl. 1968)).

223. Lone Wolf v. Hitchcock, 187 U.S. 553, 568 (1903) (holding that Congress has the power to abrogate treaty rights).

224. *See Three Affiliated Tribes*, 390 F.2d at 691 ("Where Congress makes a good faith effort to give the Indians the full value of the land and thus merely transmutes the property from land to money, there is no taking.").

225. West, *supra* note 208, at 73.

226. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979) (holding that Indian treaties gave Washington tribes a right of up to 50% of fish harvested).

227. *Id.* at 658.

English terms and phrases."[228] Historically, the Court has interpreted treaties to include the tribe's use of the natural resources for subsistence that was not explicitly stated because of the tribes' disadvantaged negotiating position during the treaty formation.[229]

Essentially, the Court has upheld the special trust requirements of the federal government to protect tribal interests, which requires the government to interpret treaties in light of the Indian tribe's original understanding.[230] Thus, while the government's power is broadly acknowledged when establishing new Indian rights, it becomes much narrower when limiting established rights.[231] Congress assumes a fiduciary "role of protector of the Indian tribes," and acts as a "guardian" protecting his "ward."[232] This dictates that the government must interpret treaties in light of tribal interests that may have not been voiced during the treaty process. Congress acknowledges this trust doctrine in certain federal statutes.[233] Still many of the standards contained in these statutes promote the "needs of a highly industrialized majority society with vastly different needs [over] those of tribes continuing a land-based way of life."[234]

2. Brazilian Management of Yanomami Forest Resources

The first Brazilian governmental agency created to deal with the "Indian question" was the Indian Protective Service in 1910.[235] Since that time, various governmental provisions have created an umbrella of

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228. *Id.* at 666–68.

229. *Id.* at 675–76. The Court emphasized that it is the "intention of the parties, and not solely that of the superior side, that must control any attempt to interpret the treaties." *Id.* at 675. When the United States is the party "with the presumptively superior negotiating skills and superior knowledge of the language in which the treaty is recorded, [it] has a responsibility to avoid taking advantage of the other side." *Id.* at 675–76.

230. "[T]he treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." Jones v. Meehan, 175 U.S. 1, 11 (1899).

231. West, *supra* note 208, at 73.

232. *Id.* (citing Worcester v. Georgia, 31 U.S. (515 Pet.), 555 (1832); Cherokee Nation v. Georgia, 30 U.S. (1 Pet.), 17 (1831)).

233. Statutes with express federal trust responsibilities include the Indian Self Determination Act, 25 U.S.C. §§ 450(f),(n) (2000); 25 U.S.C. § 185 (2000) (noting a duty to protect "quiet enjoyment" of treaty Indian's allotted lands); and 25 U.S.C. § 1601(a) (2000) (regarding health care). SANDERS & OTSEA, *supra* note 209, at 39.

234. Wood, *supra* note 48, at 745. "Due to the unique nature of tribal land tenure and tribal culture, tribes cannot simply relocate to new areas when their reservation lands become contaminated, or their water polluted, or their wildlife resources decimated as a result of ecological abuse by the non-Indian sector." *Id.*

235. Barroso, *supra* note 130, at 651.

regulations over Indian actions: the 1988 Constitution,[236] Brazil's Civil Code governing civil rights, the classification of indigenous peoples under the Indian Statute,[237] and legislation creating FUNAI.[238] As discussed previously, these laws do not adequately protect the Yanomami's rights and actually "deprive those communities of effective control over the natural resources necessary for their independent economic subsistence and cultural survival, even within those lands to which they have a formally recognized right of occupation."[239] In contrast, the Brazilian government has developed "Our Nature," a forest management plan, which will "allow a company to extract a fixed volume of each species of timber per year from the area covered under the plan with the aim of preserving the forest and enabling regeneration."[240] This plan requires that FUNAI authorize each proposal to protect the tribes' interests from infringment by forestry operations.[241]

Unlike the United States, Brazil has never legally recognized its tribes' right to self-government. Under the Brazilian Civil Code Indians have always been considered "relatively incapacitated" and "legally minors under the guardianship of the Brazilian state," subject to a special regime of tutelage.[242] Given that the United States' guardian relationship with their Quinault wards empowers the government to extinguish tribal sovereignty, there is arguably no difference in Brazil's respective treatment of Yanomami autonomy.

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236. The Constitution addresses creating indigenous legislation; federal court jurisdiction for indigenous rights; the Public Ministry's position to defend indigenous peoples; indigenous peoples' right to retain culture, language, and traditions; and the property issues of ownership, possession, and use of indigenous lands. *Id.* (citing C.F. arts. 20, 22, 49(XVI), 109(0)(XI), 129(0)(V), 176(1), 210, 215, 231, 232, *translated in* INSTITUT FÜR ÖFFENTLICHES RECHT, BRAZIL-CONSTITUTION (1998), *at* http://www.oefre.unibe.ch/law/icl/br00000_.html (last visited Feb. 4, 2003)).

237. *Id.* (citing C.C. 6.001).

238. *Id.* (citing C.C. 5.371).

239. Pallemaerts, *supra* note 106, at 385.

> The use of natural resources by the Yanomami is the result of a long tradition transmitted through many generations and reaching such an admirable balance that even in soils that are recognizably poor, they have managed to develop a sustainable livelihood for centuries on end. The Yanomami have developed a social, political, and economic system that favors a dispersed settlement pattern, for they know that any demographic concentration will lead to resource depletion.

Alcida Rita Ramos, *Paradise Gained or Lost? Yanomami of Brazil*, *in* THE LAW OF THE MOTHER, PROTECTING INDIGENOUS PEOPLES IN PROTECTED AREAS 92 (Elizabeth Kemf ed., 1993).

240. FORESTS FOREVER, BRAZIL AS A SUPPLIER OF THE TIMBER TO THE UK: FOREST POLICY AND LEGISLATION (2000), *at* http://www.forestsforever.org.uk/forestpolicies.html#brazil (last visited Feb. 20, 2003).

241. *Id.*

242. Pallemaerts, *supra* note 106, at 378 (citing C.C. 6.001).

The Indian Statute explicitly gives rights to Brazil's indigenous people guaranteeing "permanent possession of the land they inhabit, recognizing their right to exclusive usufruct of the natural wealth and all the utilities existing on that land."[243] However, the government's guarantee of "usufruct" is internally inconsistent in that it states "commercial exploitation by outsiders of natural resources on Indian lands [is] compatible with the Indian right of usufruct, as long as the Indians nominally derive some revenue from such activities."[244] This concept displaces the Yanomami interpretation of their usufruct right to retain their health and the protection of forestry resources for subsistence. Furthermore, the Brazilian Congress' tutelage protection allows the government to determine what is in the best interests of its minor wards.[245] Thus, the Yanomami have been given the right to use, occupy, and obtain wealth from their lands, but non-Indian exploiters may freely "destroy the very forest resources on which they depend for their subsistence."[246]

Under the Brazilian Constitution, Congress has the authorization to exploit hydric and mineral resources anywhere on indigenous lands[247] despite the constitutional mandate giving Indians exclusive use of their natural resources.[248] The Brazilian Congress may remove Indian groups from their lands in the "interest of Brazilian sovereignty"[249] despite the constitutional mandate that traditional lands remain in the Indian's "permanent possession."[250] To further insulate the government, it may only be sued under certain exceptions for exploiting natural resources in violation of public interest.[251] Therefore, notwithstanding the recognition of Indian rights and the government's duty to protect indigenous land and resources, the provisions carve these rights into pieces. Little is left of Indian self-determination or sovereignty because the Brazilian Congress can unilaterally extinguish their constitutionally mandated rights, in a manner similar to the United States' plenary power.

Brazil's Forestry Code[252] is the basic legal framework for the production and management of indigenous forestry resources.[253] The Code

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243. C.C. 6.001, art. 2(IX).

244. Pallemaerts, *supra* note 106, at 385.

245. *Id.* at 378 ("Indians are legally minors under the guardianship of the Brazilian state.").

246. *Id.* at 386.

247. C.F. art. 231(3), *translated in* INSTITUT FÜR ÖFFENTLICHES RECHT, BRAZIL-CONSTITUTION (1998), *at* http://www.oefre.unibe.ch/law/icl/br00000_.html (last visited Feb. 4, 2003).

248. *Id.* art. 231(2).

249. *Id.* art. 231(5).

250. *Id.* art. 231(2).

251. *Id.* art. 231(6).

252. C.C. 4.771, *cited in* Pallemaerts, *supra* note 106, at 386.

253. *Id.*

establishes that forest resources "on Indian lands are 'subject to the regime of permanent preservation' . . . for the purpose of 'maintaining the environment necessary for the survival of the forest-dwelling populations.'"[254] Once again, this textual provision seemingly provides extensive protection of indigenous resources. However, the Indian Statute chips away at this concept of "permanent preservation" by "expressly authorizing deforestation of Indian lands" for various development opportunities.[255] The statute's authorization of large-scale livestock ranches results in the most "ecologically destructive and unsustainable of all land uses in the Amazon region."[256] FUNAI runs stock-raising projects itself or leases operations to cattle developers using "Indians as cheap labor," despite the long-term destruction cattle ranching causes to the rainforest.[257] Thus, FUNAI, acting as an executive agency, accommodates the government's economic development goal while seemingly abiding by legal mandates that protect the Indian's best interests.

B. Executive's Role

1. Executive Agency Management of Quinault Forest Resources

The trust responsibility provides a framework for the Executive branch's relationships and interactions with tribes.[258] Historically, the President negotiated with tribes as sovereign nations in executing treaties and executive orders to establish Indian policy.[259] In 1871, Congress altered the President's ability to enter into tribal treaties and prohibited the President to enter into treaties with the tribes.[260] In 1919, Congress dictated that reservations be created by statute and not by executive order.[261]

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254. C.C. 4.771 art. 3(g), para. 2.

255. Pallemaerts, *supra* note 106, at 386. The Indian Statute allows certain development schemes that ultimately destroy the resource base required by the Indians:

> The felling of timber in the native forests considered to be under the regime of permanent preservation, in accordance with Item g and Paragraph 2 of Article 3 of the Forestry Code, is conditioned on the existence of programs or projects for developing the respective land by crop and stock farming, industry or reforestation.

Id. (citing C.C. 6.001 art. 46).

256. *Id.*

257. *Id.* at 387.

258. Wood, *supra* note 48, at 735–36.

259. *Id.* at 738. "Nineteenth-century Presidents also controlled Indian affairs through their constitutionally-derived power as commander-in-chief of the military forces." *Id.* (citations omitted).

260. COHEN, *supra* note 55, at 105–07.

261. WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 353 (3d ed. 1998) (citing 43 U.S.C. § 150 (2000); 25 U.S.C. § 211 (2000)).

Currently, the President interacts with the tribes through administrative agencies created to oversee interactions between the government and the more than five hundred federally recognized tribes.[262] In 1994, President Clinton recognized the relationship between native nations and the environment when he pledged to fulfill federal trust obligations.[263] The President signed an executive directive, which required "all federal agencies and departments to implement their programs in a 'sensitive manner respectful of tribal sovereignty.'"[264] The directive prescribed executive agencies to carry out programs on a "government-to-government" basis and to "consult the affected tribes when federal actions impact tribal lands or resources."[265]

President Clinton simultaneously shrunk the power of the administrative agencies by signing the Tribal Self-Governance Act of 1994,[266] which "redirect[ed] federal funding from BIA to tribes, enabling tribal governments to administer their own programs on reservation lands."[267] Thus, the executive department has power not only to implement congressional policy through administrative agencies, but it may also shape Indian policy through agency administration as well as the signing or vetoing acts of Congress.

The Supreme Court has recognized the ability of tribes to govern their resources through the doctrine of tribal sovereignty implemented through a self-determination policy.[268] The National Indian Forest Resources Management Act (NIFRMA) explicitly outlines this doctrine.[269] NIFRMA mandates that BIA conform its actions with the "trust responsibility and with the objectives of the beneficial owners"[270] and proposes that

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262. Wood, *supra* note 48, at 738. There are three distinct components of the President's role in Indian affairs: (1) figurehead role of setting the tone for national Indian policy through Presidential statements (President Nixon announcing a new era of "Self-Determination"); (2) duties as a "trustee" of Indian lands and resources that are held in federal trust (management performed through the BIA); (3) agency administration of bureaucratic programs of general applicability (many federal programs affect tribal land or resources). *Id.* at 739.

263. *Id.* at 734–35.

264. *Id.* at 737.

265. *Id.*

266. Pub. L. No. 103-413, §§ 201–204, 401–407, 108 Stat. 4270, 4270 (1994).

267. Wood, *supra* note 48, at 739.

268. The Supreme Court has long recognized that limited tribal sovereignty existed. "By treaties and statutes of the United States the right of the Cherokee nation to exist as an autonomous body, [is] subject always to the paramount authority of the United States . . . ." Talton v. Mayes, 163 U.S. 376, 379–80 (1896).

269. 25 U.S.C. §§ 3101–3120 (2000). NIRFMA became effective October 5, 1995, and a scholar described it as "*the* organic act for Indian self-determination by allowing tribes to create the forest management plans on their respective reservations." Mondou, *supra* note 73, at 268.

270. 25 U.S.C. § 3102(1) (2000).

subsequent management activities occur under the Indian Self-Determination Act.[271]

The Department of the Interior (DOI) includes the four administrative agencies that have the largest impact on tribes: the BIA, the United States Fish and Wildlife Services (USFWS), the Bureau of Reclamation, and the Bureau of Land Management (BLM).[272] In 1993, the Secretary of the Interior, who initially addresses tribal concerns, issued a departmental order requiring all agencies to "'operate within a government to government relationship' with tribes and consult with tribes, BIA, and the Office of the Solicitor if any of their anticipated actions will affect Indian trust resources."[273] The DOI's actions to protect Indian resources through the BIA implicitly acknowledges federal trust responsibilities.[274] The trust responsibilities embody a standard of conduct that applies to all executive agencies protecting and managing Indian interests[275] or administering federal programs.[276] The federal trustee has greater fiduciary obligations than those of an ordinary trustee.[277] The federal trustee must exercise the highest degree of care and all the skill at his disposal to protect trust property from loss or damage,[278] fully investigate and protect tribal resource rights,[279] protect tribal interests without requiring the tribe to extensively demonstrate that protection is necessary,[280] and embody undivided conflict-free loyalty to the Indian tribes.[281]

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271. *Id.* § 3104(a) (citing the Indian Self-Determination Act, 25 U.S.C. § 450(f) (2000)).

272. Wood, *supra* note 48, at 753–54.

273. *Id.* at 754 (citing U.S. Dep't of Interior, Order No. 3175, Departmental Responsibilities for Indian Trust Resources (Nov. 8, 1993), *available at* http://www.doi.gov/oait/docs/policy.pdf (last visited Jan. 24, 2003)).

274. SANDERS & OTSEA, *supra* note 209, at 39. The Department of the Interior administers federal statutes and regulations as part of their "trust services" meant to "preserve and enhance the tribe's forest, forage, land and water resources." *Id.*

275. *See* Seminole Nation v. United States, 316 U.S. 286, 296–97 (1941) (recognizing the "distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people," which embodies "moral obligations of the highest responsibility and trust" and should "be judged by the most exacting fiduciary standards.").

276. *See* Morton v. Ruiz, 415 U.S. 199, 236 (1974) (holding that Congress did not intend to exclude from the BIA general assistance program full-blooded, unassimilated Indians living in an Indian community near their native reservation, and who maintain close ties with the reservation).

277. The *Seminole* Court held that "federal officials have 'moral obligations of the highest responsibility and trust' in managing Indian property and are subject to 'the most exacting fiduciary standards.'" SANDERS & OTSEA, *supra* note 209, at 41 (citing *Seminole Nation*, 316 U.S. at 296–97).

278. Duncan v. United States, 667 F.2d 36, 45 (Ct. Cl. 1981) (holding that the United States breached its fiduciary duty when the government failed to disclose the Indians' statutory rights on congressional funds).

279. "Trust responsibilities require more than a 'judgment call.'" SANDERS & OTSEA, *supra* note 209, at 41 (citing Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252, 256 (D.D.C. 1973)).

280. United States v. Creek Nation, 295 U.S. 103, 110 (1935) (holding that the power of the United States to manage tribal property and affairs did not enable the government to give tribal lands

The DOI manages, through the BIA, forest resources on tribal trust lands and exercises "comprehensive" control over Indian timber harvests.[282] The BIA "decides . . . how much timber will be cut, which trees will be felled, which roads are to be used, which hauling equipment . . . should [be] employ[ed], the speeds at which logging equipment may travel, and the width, length, height, and weight of timber loads."[283] In addition to the BIA, other federal agencies and general applicability laws impact the use of forestry resources on native lands.[284]

Indians on trust lands may only sell timber after the Secretary of the Interior consents.[285] Congress also authorizes the Secretary to represent Indian minors or those not present in making determinations concerning timber sales.[286] Under these federal timber regulations, the Secretary can deduct administrative fees from timber revenues paid to Indian allottees for his services.[287] Therefore, under this scheme, the Indians must pay for the government's land and resource management services on the Indians' own land.[288]

In abiding with the trust doctrine, timber sales and money accrued from native lands must be "based upon a consideration of the needs and best interests of the Indian owner and his heirs"[289] for the tribes to maintain "self-sustaining communities."[290] Despite the congressional mandate that

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away without just compensation).

281. United States v. Truckee-Carson Irrigation Dist., 649 F.2d 1286, 1310 (9th Cir. 1981). "When an irreconcilable conflict exists between tribal property rights and other interests, an agency should prioritize tribal rights because it lacks the authority to abrogate such rights." Wood, *supra* note 48, at 747.

282. 25 U.S.C. §§ 405–407 (2000); 25 U.S.C. §§ 3101–3120 (2000).

283. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 147 (1980).

284. Mondou, *supra* note 73, at 265 n.24.

> Within the Department of the Interior, other agencies and federal statutes also impact the use of timber resources on native lands: the United States Fish and Wildlife Service, the Bureau of Reclamation, and the Bureau of Land Management as well as the Department of Agriculture, the National Environmental Protection Act (NEPA), 42 U.S.C. § 4321 (1994) and the Endangered Species Act (ESA), 16 U.S.C. § 1536 (1994).

Id.

285. 25 U.S.C. § 406(a) (2000) (describing the sale of timber on lands held under trust).

286. *Id.* § 406(d) (authorizing representation for "any Indian owner (1) who is a minor, (2) who has been adjudicated non compos mentis, (3) whose ownership interest in a decedant's estate has not been determined, or (4) who cannot be located . . . .").

287. *Id.* §§ 406(a), 413.

288. *Id.* § 413 ("The Secretary of the Interior is hereby authorized, in his discretion, and under such rules and regulations as he may prescribe, to collect fees and cover the cost of any and all work performed for Indian tribes or for individual Indians.").

289. *Id.* § 406(a).

290. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 147 (1980).

> Among the stated objectives of the regulations is the "development of Indian

the BIA adhere to principles of sustained-yield forestry on native lands, its actual practice of natural reforestation has proved to be a less effective method and has actually caused increased deforestation in certain areas on the Quinault reservation.[291] In practice, the BIA does not adequately implement forestry management methods to fulfill its sustainability mandate. Thus, the Quinault stewardship land practices are stifled by U.S. management of their forestry resources.

2. Executive Management of Forest Resources on the Yanomami Reserve

Brazil's Constitution authorizes the National Security Council, an arm of the executive branch, to "'indicate the areas that are indispensable to the national security' and to control land use and economic activities in those areas."[292] This mandate is especially harmful to the Yanomami because they reside in the Amazon rainforest overlapping the borders of Brazil and Venezuela.[293] The federal government has already abused its power "to appropriate Indian lands in Amazonia for highway construction, agriculture settlement and livestock projects."[294] The Indian Statute emphasizes that any rights of the Indians over natural resources are "entirely subordinate to the 'national interest,'"[295] and it allows presidential intervention to carry out this broadly defined interest.[296] Brazil's President has discretion, within the

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> forests by the Indian people for the purpose of promoting self-sustaining communities, to the end that the Indians may receive from their own property not only the stumpage value, but also the benefit of whatever profit it is capable for yielding and whatever labor the Indians are qualified to perform."

Id. (citing 25 C.F.R. § 141.3(a)(3) (1979).

291. Stocks Telephone Interview, *supra* note 33 (discussing the BIA's unsustainable forestry method of natural reforestation when the tribe utilized the more sustainable practice of aggressive replanting of over two million seedlings per year).

292. Pallemaerts, *supra* note 106, at 382 (citing C.F. art. 89, *translated in* INSTITUT FÜR ÖFFENTLICHES RECHT, BRAZIL-CONSTITUTION (1998), *at* http://www.oefre.unibe.ch/law/icl/br0000_.html (last visited Feb. 4, 2003)).

293. *See* Ramos, *supra* note 239, at 89 ("[The Yanomami] traditional territory straddles the international boundary between southern Venezuala and northern Brazil in what is known as the Guyana Shield, part of the Amazon rain forest.").

294. Pallemaerts, *supra* note 106, at 382 n.45 (citing Decree-Law No. 1.164 (Apr. 1971)).

295. Pallemaerts, *supra* note 106, at 385.

296. C.C. 6.001 art. 20, § 1.

> Intervention may be decreed: (a) To put an end to fighting between tribal groups; (b) To combat serious outbreaks of epidemics that may lead to extermination of the native community or any disease that may endanger the integrity of the forest-dwellers or tribal group; (c) For the sake of national security; (d) To carry out public works of interest to national development; (e) To repress widespread disorder or deforcement; (f) To work valuable subsoil deposits of outstanding interest for national security and development.

Id.

broad police powers of the federal government, to force temporary or permanent[297] removal, notwithstanding the fact that "Amazonian Indians generally do not survive forced relocation."[298]

The President appoints the directors of FUNAI, the executive agency that governs Indian tutelage.[299] The enactment of the 1988 Brazilian Constitution limited the role of FUNAI and the Executive Branch and gave Congress the authority to determine the extent of all interventions on indigenous land.[300] This has given Congress a supervisory role over Indians and suppressed the power of FUNAI in indigenous affairs. Still, the primary purpose of FUNAI remains the representation and protection of indigenous communities and their interests.[301] Yet, as previously discussed, outside influences and the potential for dismissal looms over FUNAI officials and their ability to make decisions in the best interests of the Indians.[302]

FUNAI has a much more comprehensive role through its "tutelage"of the Yanomami when compared to the BIA's guardian role over the Quinault tribe. The "tutelage" system extinguishes Yanomami legal rights to a much greater extent than the guardian system. Basically, the Yanomami have no legal rights because under both the Brazilian Constitution and the Civil Code, as "Indians are legally incompetent to own land and cannot initiate legal proceedings in their own right to defend their precarious rights of 'possession' . . . of the lands they inhabit."[303] The Brazilian Constitution does give attorneys from the Public Ministry standing to intervene to defend the rights and interests of any Indian who brings a procedural action.[304] This is a powerful form of protection because the head of the Public Ministry is comparable to the Attorney General of the United States and is therefore a highly influential official capable of giving the Yanomami a voice in the judicial system.[305] FUNAI is also bound to assume "judicial or

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297. C.C. 6.001, art. 20, §§ 2(b), (c).

298. Pallemaerts, *supra* note 106, at 386.

299. Barroso, *supra* note 130, at 652.

300. Wiessner, *supra* note 111, at 76.

301. *See* Barroso, *supra* note 130, at 652 ("The tutorship of the Indians is carried on by the federal government, through FUNAI . . . .").

302. *See* Pallemaerts, *supra* note 106, at 378.

303. *Id.* at 378; C.C. 6.001, art. 6.

304. Barroso, *supra* note 130, at 655–56 (noting that although the agencies are not directly analogous, the Prosector-General of the Public Ministry shares similar functions with the U.S. Attorney General).

305. *See id.*

> Since indigenous populations usually do not have access to complete information on their rights and to legal assistance, and FUNAI efforts being always insufficient, it is especially useful for the Indians that the Constitution gives public attorneys of the Public Ministry standing to represent them in court and file lawsuits to protect their rights.

Id. at 656.

extrajudicial defense of the rights of the [I]ndians."[306] FUNAI, however, may be asked to represent the best interests of both the Yanomami and the government.

The federal government bestows police powers on FUNAI through the use of "interdiction decrees."[307] The purported purpose of these temporary interdictions is "to avoid violent confrontations between Indians and trespassers and to enable FUNAI officials to 'pacify' the Indians."[308] Some scholars, however, have denounced the use of interdiction decrees as "disguised genocide" because "these [pacification] campaigns almost invariably resulted in the annihilation of entire tribes" when the Indians become obstacles for development.[309] Thus, the Yanomamis' professed protector in the executive branch became their greatest threat. By serving two masters, FUNAI ultimately gives the Yanomamis short shrift in favor of the government's vision of development and use.

C. Judiciary's Role

1. Judicial Review of the Bureau of Indian Affairs' Management of Quinault Forest Resources

Although the United States Congress has the plenary power to manage tribal trust lands, the majority of this power actually lies with the ultimate decision making body, the Supreme Court.[310] This delegation of plenary power occurs because of the inherently subjective agency determinations, which the Supreme Court must decide whether it has fulfilled the requirements of the trust doctrine as well as what compensation or action the agency should take if it infringes on that trust doctrine.[311] When the Quinault tribe was dissatisfied with BIA's management of timber on its reservation, the tribe brought suit against the United States in *Mitchell v. United States* and claimed a breach of the fiduciary duty owed by BIA

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306. C.C. 6.001 art. 35.

307. Pallemaerts, *supra* note 106, at 383. The government requires that FUNAI "'prevent or restrict . . . *during the period necessary for the pacification of the tribes*, the access, transit or stay of persons or groups, whose activities are deemed inconvenient for the establishment of contact with the tribes.'" *Id.* (alterations in original) (citing Decree No. 62.995 art. 2 (1968)).

308. *Id.*

309. *Id.* The effects of this genocide are drastic; for example, "[i]n Brazil approximately 90 native groups (nearly 300 existed at the start of the century) have become extinct. In the Amazon some ethnic groups have a total population of 20 or fewer individuals." Tresierra, *supra* note 121, at 137.

310. Mondou, *supra* note 73, at 263. Mondou discusses the spectrum of trust doctrine holdings from the Supreme Court, which leave "the doctrine open to reconstruction every time an Indian case reaches the bench." *Id.*

311. *Id.*

under the trust doctrine.[312] The tribe's dissatisfaction stemmed from BIA's blatant mismanagement of their forestry resources demonstrated by BIA's general failure to protect the tribe's economic interest in obtaining fair market value for timber, its divergence from methods of sustainable harvesting, and its expensive administrative fees charged for these inadequate BIA services.[313] The claim was first heard in the Court of Claims, which has jurisdiction "to render judgment upon any claim against the United States founded . . . upon . . . any regulation of an executive department."[314] The Court of Claims held that the General Allotment Act (GAA) created a fiduciary duty on the United States to manage timber resources properly, and therefore the United States could be held liable for damages stemming from any breach of this duty.[315] The Supreme Court reversed, holding that the GAA mandates "only a limited trust relationship" and imposes no fiduciary trust duties upon the United States to provide compensation.[316]

On remand, the Court of Claims held that other federal statutes and regulations governing agency actions, "including legislation covering timber management, road building, and the Indian trust fund monies, subjected the federal government to fiduciary duties regarding the supervision of the allotted lands timber resource."[317] These federal acts granted Indians the right to benefit from the selling of timber on reservation land.[318] The acts also reversed a previous Supreme Court ruling, which had extinguished the tribe's ability to sell timber and limited them to only cutting

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312. United States v. Mitchell, 463 U.S. 206, 210 (1983).

313. *Id.* The Quinault brought six claims alleging that the government:

> (1) [F]ailed to obtain a fair market value for timber sold; (2) failed to manage timber on a sustained-yield basis; (3) failed to obtain any payment at all for some merchantable timber; (4) failed to develop a proper system of roads and easements for timber operations and exacted improper charges from allottee for maintenance of roads; (5) failed to pay any interest on certain funds from timber sales held by the Government and paid insufficient interest on other funds; and (6) exacted excessive administrative fees from allottee.

Id.

314. 28 U.S.C. § 1491 (2000). A counterpart for claims brought by Indian tribes exists under 28 U.S.C. § 1505 (2000).

315. Mitchell v. United States, 591 F.2d 1300, 1304 (Ct. Cl. 1979).

316. United States v. Mitchell, 445 U.S. 535, 542 (1980).

317. Billee Elliott McAuliffe, Note, *Forcing Action: Seeking to "Clean Up" the Indian Trust Fund: Cobell v. Babbitt, 30 F. Supp. 2d 24 (D.D.C. 1998)*, 25 S. Ill. U. L.J. 647, 655 (2001).

318. Act of June 25, 1910, ch. 431, §§ 7, 8, 36 Stat. 855, 857 (codified as amended, 25 U.S.C. §§ 406, 407 (2000)). "Congress recognized that [the inability of natives to sell timber from their land] was undesirable 'because in many instances the timber is the only valuable part of the allotment or is the only source from which funds can be obtained for the support of the Indian or the improvement of his allotment.'" *Mitchell*, 463 U.S. at 219–20 (quoting a letter from the Secretary of the Interior printed in H.R. REP. No. 61-1135, at 3 (1910)).

timber if it was "in good faith for the improvement of the land."[319] In contrast, the federal acts retained BIA's the ability to sell timber from the trust lands and apply the proceeds for the benefit of the Indians,[320] but it also allowed the Indians to sell their own timber with the Secretary's consent.[321] In light of the BIA's tribal obligations, it developed specific regulations to "manag[e] the Indian forests so as to obtain the greatest revenue for the Indians consistent with a proper protection and improvement of the forests."[322]

Faced with glaring federal trust responsibilities in multiple timber management statutes, the Supreme Court agreed on its second hearing of the case that the government owed a fiduciary duty to native beneficiaries.[323] The Court determined that two sources of fiduciary duty existed: (1) the trust relationship outlined in statutory and regulatory Indian timber management standards; and (2) the fiduciary relationship arising when the government assumes "such elaborate control over forests and property belonging to Indians."[324] The Court found that the BIA demonstrated this elaborate control, and "given the existence of a trust relationship, it naturally follow[ed] that the Government should be liable in damages for the breach of its fiduciary duties."[325] The ultimate result seemed apparent at the outset of the initial Supreme Court appeal, the Court concluded that under the trust responsibilities contained within the GAA: a trustee should be accountable for the breaches of its fiduciary duties, including "pervasive waste and mismanagement of timber lands on the Quinault Reservation."[326] Thus, the U.S. judiciary expanded the trust relationship to require sustainibly in managing forest resources.

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319. United States v. Cook, 86 U.S. (591 Wall.), 593 (1873). Congress subsequently allowed cutting dead and downed timber on the reservation as long as the natives did it in good faith. 25 Stat. 673, Chap. 172 (*cited in* Pine River Logging & Improvement Co. v. United States, 186 U.S. 279, 280 (1902)).

320. Act of June 25, 1910, § 7.

321. *Id.* § 8.

322. *Mitchell*, 463 U.S. at 220 (quoting OFFICE OF INDIAN AFFAIRS, REGULATIONS AND INSTRUCTIONS FOR OFFICERS IN CHARGE OF FORESTS ON INDIAN RESERVATIONS 4 (1911)).

323. *Id.* The Supreme Court found that "the statutes and regulations now before us clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians." *Id.* at 224.

324. *Id.* at 224–25; *see also* Laura Rowley, Comment, *NRD Trustees: To What Extent Are They Truly Trustees?*, 28 B.C. ENVTL. AFF. L. REV. 459, 474 (2001) (concluding that courts have not held executive natural resource trustees to a common law fiduciary duty, but instead grant them agency deference).

325. *Mitchell II*, 463 U.S. at 226; *see also* McAuliffe, *supra* note 317, at 655 (analyzing how a Native American class action suit fits into the larger scheme of Indian property and trust fund law).

326. *Mitchell*, 463 U.S at 210.

2. Judicial Control of Forest Resources on the Yanomami Reserve

Prior to the 1988 Constitution, the Yanomami tribe had no legal standing to represent their legal rights without assistance by the FUNAI.[327] Therefore, if the Yanomami had a legal claim against FUNAI for mismanagement of their forestry resources or abuses of any other kind, they had limited recourse.[328] Ironically, despite the mandate of the FUNAI to protect the best interests of the Indian, the "avowed policy of FUNAI [was] not to express and defend the interests of the Indians as defined by the Indians themselves, but rather to balance these interests against the 'national interest' of the Brazilian state."[329] This policy is similar to the United States use of plenary power to extinguish tribal rights in the tribe's best interests.[330]

Within Brazil, the Yanomami "do not enjoy any 'inherent right' of 'self-government'" based on their "legal[ly] minor [status] under the guardianship of the Brazilian State, and subject to a special regime of tutelage."[331] Brazil's tutelage voids any act or contract by a non-integrated Indian not assisted by FUNAI unless "the Indian had the consciousness and knowledge of his attitude and it is not harmful to him in any way."[332] Individual Indians or tribes may also gain more rights, individuals by court-ordered emancipation if they can fulfill four prerequisites[333] and tribes by executive order if they can demonstrate they have been fully integrated into the Brazilian nation.[334] Indians may challenge a federal act by obtaining a judicial ruling in federal court.[335] Still, access to the judicial system by the Yanomami "wards" is difficult and requires the Public Ministry to intervene.[336] Concerns about judicial access has prompted the Inter-American Commission, representing the international community, to grow "more protective of group rights by offering clear recommendations in response to complaints by indigenous populations."[337]

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327. Pallemaerts, *supra* note 106, at 378.

328. *Id.*

329. *Id.* at 379.

330. *See infra* note 200–09 and accompanying text (explaining federal authority over tribes).

331. Wiessner, *supra* note 111, at 74.

332. Barroso, *supra* note 130, at 652–53.

333. *Id.* at 653. Emancipation occurs by fulfilling four prerequisites: "(1) attaining 21 years of age; (2) having knowledge of Portuguese language; (3) the ability to work; and (4) a reasonable understanding of the uses and customs of the national society." *Id.* (quoting C.C. 6.001 art. 9(I)–(IV)).

334. *Id.* at 653 (citing C.C. 6.001 art. 11).

335. *Id.*

336. Barroso, *supra* note 130, at 655–56.

337. Li-ann Thio, *Battling Balkanization: Regional Approaches Toward Minority Protection Beyond Europe*, 43 HARV. INT'L L. J. 409, 436 (2002).

In 1986, NGOs sued on behalf of the Yanomami, claiming they "were being harmed by the destruction of their ancestral land base through settler invasion, infrastructural expansion, and natural resource exploitation."[338] The Inter-American Commission concluded that "this encroachment displaced the Yanomami from their villages and exposed them to disease and death," and "concluded that Brazil had violated the Yanomami's rights to life, liberty, personal security, health, residence, and movement by failing to take timely and effective measures on their behalf."[339] The Commission "recommended that Brazil adopt appropriate measures to protect the Yanomami . . . ."[340] The Yanomami, according to the report, needed to obtain individual legal rights viable within Brazil's judicial system for adequate protection. The 1988 Constitution provided those rights, mandating that "Indians, their communities, and organizations have standing to sue to defend their rights and interests,"[341] with the Public Ministry able "to represent them in court and file lawsuits to protect their rights"[342] and "intervening in all the procedural acts."[343] Still, the Public Ministry's role is limited because its attorneys "may act as plaintiff or as *custos legis*, an impartial party who issues an opinion which must be weighed (although not necessarily followed) by the court."[344]

Furthermore, despite gaining access to courts, the judicial process has not provided any protection to the Yanomami from deaths caused by miners and plantation owners because these cases are either not tried or not resolved.[345] In 1993, gold miners "attacked the Haximu village—killing 10 children, five women and at least two men, slashing arms, legs and heads with machetes—and set the village on fire."[346] The Yanomami engage in a

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338. *Id.* at 437 (citation omitted).

339. *Id.* (citation omitted).

340. *Id.* (citation omitted).

341. C.F. art. 232, *translated in* INSTITUT FÜR ÖFFENTLICHES RECHT, BRAZIL-CONSTITUTION (1998), *at* http://www.oefre.unibe.ch/law/icl/br00000_.html (last visited Feb. 4, 2003).

342. Barroso, *supra* note 130, at 656.

343. C.F. art. 232, *translated in* INSTITUT FÜR ÖFFENTLICHES RECHT, BRAZIL-CONSTITUTION (1998), *at* http://www.oefre.unibe.ch/law/icl/br00000_.html (last visited Feb. 4, 2003).

344. Barroso, *supra* note 130, at 656.

345. Posting of Debra Guzman, debra@igc.apc.org, to NATIVE-L mailing list (Aug. 29, 1993) (posting Press Release, Amnesty International, Brazil: Amnesty Calls for Protection of Indigenous Communities Following Massacre of Yanomami Indians (Aug. 20, 1993)), *at* http://www.nativenet.uthscsa.edu/archive/nl/9308/0309.html (last visited April 23, 2003).

> To Amnesty International's knowledge, of 16 cases of killings of Yanomami between 1984–92 in which police investigations were actually opened, not one has come to trial. . . . A case brought against [a] plantation owner for the killings has languished in the courts for thirty years and has still not come to trial.

Id.

346. *Id.*

battle much bigger than control over their forestry resources; they must initially battle for their lives. In a landmark decision, the Superior Court of Justice (the highest court in Brazil) upheld the conviction of gold prospectors in Roraima for the genocide of Yanomami Indians.[347] The Court held that "the historic conflicts between the Yanomami and the prospectors that resulted in the death of 16 Indians" were genocide and a punishable crime.[348] The Court defined this instance of genocide as a "crime against the Indian Ethnic group of Yanomami"[349] and sentenced the prospectors to twenty years in prison.[350]

Therefore, out of the three branches of the federal government, only the judicial branch has stepped up to the plate and protected Brazil's Indians from genocide.[351] In contrast, the U.S. judiciary has never acknowledged that genocide occurred to Native Americans during our periods of colonialism.[352] Unfortunately, what Brazil's judiciary protects in one decision, another branch can take away. President Cardoso's Genocide Decree No. 1775[353] implemented "a response to a Brazilian Supreme Court case brought by an agribusiness firm that occupies the land of the Guarani Indians. This firm ha[d] argued that the demarcation and registration of Indian land is unconstitutional because it does not provide for adversarial process."[354] Decree No. 1775 agreed with this view and repealed 1991's

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347. LILIA TOLEDO DINIZ & FERNANDO BABTISTA, SOCIO-ENVIRONMENTAL INSTITUTE, DECISION OF THE SUPERIOR COURT OF JUSTICE—STJ ACKNOWLEDGES CRIME OF GENOCIDE AGAINST THE YANOMAMI (2000) (summarizing the Superior Court of Justice's decision regarding Yanomami genocide at the hands of prospectors), *at* http://www.socioambiental.org/website/noticias/english/rights/20000920.html (updated as of Sept. 21, 2000).

348. *Id.*

349. *Id.* "The mass murder of the Yanomami, took place in a conflicting framework between the community and predatory presence of the prospectors in the region, that nurture feelings of retaliation and vengeance against an ethnic group." *Id.* The Court defined genocide in racist terms because the crime "has a connotation of impersonality, affecting an entire community or a part thereof or even an individual, and this solely due to the fact that the people against whom the crime is directed belong to an ethnic group and share the community's life." *Id.*

350. *Id.*

351. *See id.*

352. Lindsay Glauner, *The Need for Accountability and Reparation: 1830–1976 The United States Government's Role in the Promotion, Implementation, and Execution of the Crime of Genocide Against Native Americans*, 51 DEPAUL L. REV. 911, 925–26 (2002).

> The United States was reluctant to sign and ratify the Genocide Convention . . . . Because the language of the Convention allowed for the prosecution of acts committed with the intent to destroy the group "in part,"various members of Congress were concerned that . . . forced transfer of Native American children to boarding schools would be perceived as having had the intent to destroy these groups "in part."

Id. (citations omitted).

353. *See infra* note 183–87 and accompanying text (discussing the Genocide Decree).

354. Wiessner, *supra* note 23, at 843–44 (citation omitted).

Decree No. 22, which had "ensured the primacy of indigenous rights to ancestral lands based on aboriginal habitation alone."[355] The Brazilian judicial branch proved unable to resist "Brazil's turbulent internal politics" and provided no other adequate protection to the Yanomami.[356] In the end, it was the government's economic development interests that whittled away at what little protections were left to the Yanomami, who suffered the resulting crimes and loss of land.

III. STATE JURISDICTION OVER YANOMAMI AND QUINAULT FOREST RESOURCES

A. State Jurisdiction Over Forest Resources on the Quinault Land

Despite Supreme Court Chief Justice Marshall's mandate that state law did not apply to Indian affairs within Indian Territory, the federal government has gradually eroded this sovereignty protection by allowing state jurisdiction within tribal reservations for more and more circumstances.[357] Many of the erosions of this protection from state infringement on tribal sovereignty can be tied to the GAA and the resulting checkerboard patterns of Indian and non-Indian settlement on Indian reservations.[358] The Supreme Court developed the infringement test within *Williams v. Lee*,[359] which looked at "whether the state action infringed on the right of the reservation Indians to make their own laws and be ruled by them."[360] This test blatantly leaves tribes open to the imposition of state jurisdiction through the consideration of a state's legitimate interest in regulating non-Indians.[361]

The Supreme Court opened the door wider as it moved the bar to state jurisdiction away from inherent tribal sovereignty and toward federal

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355. *Id.*

356. *Id.*

357. West, *supra* note 208, at 74 (citing Cherokee Nation v. Georgia, 30 U.S. (1 Pet.), 17 (1831)). The Supreme Court expanded state jurisdiction in limited circumstances in *Williams v. Lee*, 358 U.S. 217, 220 (1959) and *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 171 (1973).

358. *See* STORM, *supra* note 28, at 175.

> The [Act] provided for each Indian family to receive 80 acres of land for agricultural or 160 acres for grazing purposes. . . . Once all members of a tribe had selected and received their allotments, the Secretary of the Interior with the 'consent' of the tribe could sell the remaining, i.e. 'surplus land.'

Id.

359. *Williams*, 358 U.S. at 217.

360. *Id.* at 220.

361. *McClanahan*, 411 U.S. at 171.

preemption in *McClanahan v. State Tax Commission of Arizona*.[362] The Court stated that "*absent Acts of Congress*, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them," and held that the "appellant's rights as a reservation Indian were violated when the state collected tax from her which it had no jurisdiction to impose."[363] Under the preemption doctrine, "[c]ases rejecting assertions of state law over Indians have repeatedly emphasized the primacy of federal law in the field of Indian policy."[364]

Currently, more opportunities exist for states to take jurisdiction over non-Indians on reservations as long as the federal government has not preempted it in treaties or statutes.[365] This opportunity may also allow the tribes to increase their sovereignty through specific treaty provisions.[366]

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362. *Id.* at 172.

> "The relation of the Indian tribes living within the borders of the United States . . . [is] an anomalous one and of a complex character . . . . They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relastions; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided."

Id. at 173 (alterations in original) (quoting United States v. Kagama, 118 U.S. 375, 381–82 (1886)).

363. *McClanahan*, 411 U.S. at 171–72, 181 (emphasis added).

364. GETCHES ET AL., *supra* note 22, at 432. Indian law preemption "determines which government—federal, tribal, or state—has jurisdiction in Indian country." *Id.* at 433.

365. *Id.*, at 435.

> The presumption against state law is applied with less force when non-Indians are involved. . . . The Supreme Court has given greater value to state interests in regulating non-members on non-Indian land within the reservation . . . . State regulation may not be preempted even though the tribe has a comprehensive regulatory scheme, at least on parts of the reservation where there is heavy non-Indian land ownership and activity.

Id.

366. *See* Elizabeth Roat, Comment, *Analyzing Conflict Between Indian Treaty Rights and Federal Conservation Regulations: Are State Regulation Standards Appropriate?*, 84 MARQ. L. REV. 701, 704 (2001).

> Treaty terms are interpreted in a way that Indians at the time of the treaty would have understood them. When ambiguities exist, the United States must construe treaties in favor of the Indians to compensate for United States negotiators' superior knowledge of the language in which the treaty was recorded.

Id. (citations omitted). The Supreme Court held that Indian treaties are at the same status as treaties with foreign nations, taking "precedence over conflicting laws by virtue of the Supremacy Clause of the United States Constitution." *Id.* (citing Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559–61 (1832)). The United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or

While treaty enforcement is clearer than more amorphous ideas of sovereignty, treaty interpretation is still ultimately under the control of the federal through preemption and interpretation.[367]

The pervasive nature of the BIA's forest resource management on reservations preempted state jurisdiction in *White Mountain Apache Tribe v. Bracker*, where the state could not "identify a legitimate regulatory interest served by the taxes they [sought] to impose."[368] The Supreme Court did acknowledge that when "on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest."[369] Therefore, the state may still be able to obtain jurisdiction if its regulatory interest is heavier than federal or tribal interests.[370]

The Supreme Court refined the interest-balancing test in *Puyallup Tribe v. Department of Game*, where the State of Washington claimed its conservation interest outweighed Indian treaty-based fishing rights.[371] The Supreme Court held that the State's fishing regulations are constitutional, provided they meet appropriate standards and do not discriminate, because the State's interest in conservation outweighs the tribes' treaty rights.[372] Once a treaty right has been found to exist, the court must determine if the state legislation abrogated the treaty right.[373] If there is no abrogation of the treaty right, the validity of the regulation must be evaluated in a three-step process determining: (1) "whether the regulation is reasonable and necessary for conservation of the resource";[374] (2) "whether its application to Indians is necessary in the interest of conservation";[375] and (3) "whether the

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Laws of any State to the Contrary nothwithstanding.

U.S. CONST. art. VI, cl. 2.

367. *See* GETCHES ET AL., *supra* note 22, at 433. "In Indian law, the federal act that results in preemption can be extremely general in nature. Preemption commonly has been based on general federal action setting aside land for a tribe—either by treaty, agreement, statute, or executive order." *Id.*

368. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 150 (1980).

369. *Id.* at 144.

370. *Id.*

371. Puyallup Tribe v. Dep't of Game, 391 U.S. 392, 396–97 (1968) (litigating whether fishing rights from the Treaty of Medicine Creek, created in 1854 with the Puyallup and Nisqually tribes, include using commercial set nets).

372. *Id.* at 398.

373. Roat, *supra* note 366, at 706. "The treaty conflict analysis consists of three steps. In the first step, a court must determine whether a treaty right in fact exists. . . . If a treaty right exists, a court moves on to the second step and determines whether the legislation imposing regulations actually abrogates the treaty right." *Id.* (citing *Puyallup Tribe*, 391 U.S. at 398; United States v. Dion, 476 U.S. 734, 738 (1986)).

374. *Id.* (citing *Puyallup Tribe*, 391 U.S. at 401).

375. *Id.* (citing *Puyallup Tribe*, 391 U.S. at 401 n.14).

regulation discriminates against Indians in its application."[376] Thus, superior state interests that conflict with tribal treaty rights can potentially cause problems between each party's divergent economic interests. This analysis embodies the policy that tribal sovereign immunity exists both "to sustain tribal self-determination and encourage economic development," but can still be waived by Congress.[377]

Any analysis of state involvement in tribal affairs will reflect the underlying tensions between tribes, settlers, and state government. The State of Washington, for example, has a long history of "conflict, confrontation and litigation" between Indian tribes and the timber industry, with the state government being caught in the middle unable to adequately support either side.[378] Natural resources are ultimately the loser. From the ashes of extensive conflicts, however, awareness by the State has sprung up to grasp that the lines of tribal communication should be open to allow joint decisionmaking.[379] State decision-makers in Washington have realized that a better forest management system may exist within the Timber/Fish/Wildlife Agreement (TFW),[380] which would result in "win/win answers" for both parties.[381] Representatives from environmental groups, industry, the state, and tribes met in "the most integrated and comprehensive approach to natural resource management ever put together" to determine the parameters of the TFW.[382] After over one hundred meetings, extensive

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376. *Id.* (citing *Puyallup Tribe*, 391 U.S. at 398).

377. GETCHES ET AL., *supra* note 22, at 383.

378. Northwest Renewable Res. Ctr., *The Washington Timber/Fish/Wildlife Agreement*, *in* NATIVE AMERICANS AND PUBLIC POLICY 319 (Fremont J. Lyden & Lyman H. Legters eds., 1992) (discussing development of the Washington TFW Agreement).

379. STORM, *supra* note 28, at 260.

> The Quinault Nation and the State, for example, had become accustomed to fighting bitterly each year around tables and in the courtroom over the allocation and escapement levels of the steelhead. . . . [However, today] QIN biologists work closely with their State counterparts and together, amiably, they project expected run sizes and determine the required number of spawners for the coming year's runs. The policy representatives from the Tribe and State then negotiate a package from the management options developed by the technical staffs.

Id. One tribal member discussed this change as follows:

> There is too much work to do to waste time fighting. We must be able to sit down with non-Indian fishery management people and make plasn that will lead to more fish for everyone. Not just us! No! ALL of us! Now, the comprehensive management plans that come out of all of our efforts provide the greatest hope for the fish to come back.

Id. at 261 (attributing quote to Billy Frank) (citation omitted).

380. *See id.* at 266–70 (discussing the requirements of the TFW).

381. *Id.* at 321. During cooperation between the Washington and Quinault fisheries, "Washington State's Forest Practices Board offered its proposed revision of the State's Forest Practices regulations," which "view[ed] all the resources as a single entity." *Id.* at 261–62.

382. *Id.* at 263. In an enlightening interaction between the tribe and the timber industry, their

negotiations, and trust building, the new Forest Practices Act sailed through the legislature for implementation in 1988.[383]

The agreement created a new central entity under the Northwest Renewable Resources Center to oversee and implement the TFW agreement.[384] The new entity's board of directors encompassed representatives of four natural resource interests: public lands, fisheries, the timber industry, and Indian nations.[385] This agreement embodies what the tribes have been practicing within their forestry management techniques, viewing natural resources as a whole and with common sense because "trees are but one part of the forest community; the single part that provides greatest financial return."[386] The comprehensive regulatory system attempts to understand the equilibrium that must exist between fish and timber—"[y]ou cannot cut trees and ignore the fish nor can you harvest the fish and ignore the forests."[387] Thus, the state of Washington responded in a proactive manner to prevent future conflicts between the state and tribal interests by incorporating the tribe's native stewardship and interdependency with the earth into the regulatory system.

B. State Jurisdiction Over Forest Resources on the Yanomami Reserve

Under Brazil's federal system of government, a concentration of power over land use is allocated to the local decisionmakers.[388] The local government is also empowered to "implement land use programs and regulatory standards that are established at the national level."[389] Ironically, this is also the level at which "opposition to rainforest protection may be

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previous miscommunications and mutual distrust became apparent:

> [W]e asked, "Who builds the roads up in the mountains?" Industry answered, "We do. It is very expensive to maintain them." We said, "If it is so expensive why build them?" They said, "Because you make us" . . . . The timber people said, if you would let us go through this corridor, we wouldn't have to build ten roads to get over to the other side. We said, "Why didn't you ask us?" . . . . They never asked us. They simply assumed we'd say no.

Id. at 264 (citing Interview by Curt Stanley with Billy Frank, Quinault tribal representative (1988), *in* Audio tape: An Interview with Billy Frank, (1988) (Quinault Historical Foundation, Taholah, WA)).

383. *Id.* at 265.

384. *Id.* at 266 ("The [TFW] Agreement created a central entity . . . and a board . . . to oversee its objectives.").

385. *Id.*

386. *Id.* at 272. "The people have chosen to be responsible and so we [as tribes] must assume our obligations to the land to assure the return of the forest community." *Id.* at 273.

387. *Id.*

388. Findley, *supra* note 147, at 22.

389. *Id.*

strongest."[390] The State of Roraima[391] has supported extensive cattle ranching within its borders and has been seen as a "cattle frontier."[392] Roraima did nothing during the *garimpeiro* gold-rush while "Indians suffer[ed] from malnutrition because their traditional game was frightened off by the miners' air traffic; [t]heir rivers were poisoned by mercury used in the gold-panning process" and "the Yanomami [were] suffering violent aggression to their culture by being exposed to uncontrolled and promiscuous contact with the *garimpeiros*."[393] Instead, a senator serving the state of Roraima actually advocated for a bill that would provide amnesty for the *garimpeiros* charged with crimes on the Yanomami reserve.[394] The senator felt these illegal gold miners were only "exercising their profession in indigenous or environmental conservation areas."[395]

During the implementation of the "National Integration Plan," the Governor of Roraima greatly supported the development of the Amazon rainforest, stating that this area rich in natural resources "cannot afford the luxury of conserving half a dozen Indian tribes who are holding back the development of Brazil."[396] Inadvertently, the Constitution has made "Indians pawns in a power struggle between the states and the federal government" because Indian occupied lands are federal property.[397] The Indian Statute states that whenever Indian tribes cease to occupy an area of land, the land reverts to the federal government, not the state.[398] Roraima has a "vested interest in promoting illegal encroachment on Indian lands in order to reduce federal power within their borders."[399] Therefore, the state's economic incentive to develop outweighs its desire to enforce any regulation protecting the Yanomami that will infringe on this interest. The Brazilian federal and state governments posses an edge over the Yanomami and other indigenous tribes demonstrated by the judicial department's protection. The Yanomami are left between the two to battle for control over their forestry resources.

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390. *Id.*
391. *See supra* note 110–17 (describing Roraima and its culture).
392. Hemming, *supra* note 114, at 52.
393. *Id.* at 48.
394. Blazdell, *supra* note 11.
395. *Id.*
396. Pallemaerts, *supra* note 106, at 376 (citation omitted).
397. *Id.* at 381.
398. *Id.*
399. *Id.*

IV. TRIBAL JURISDICTION OVER YANOMAMI AND QUINAULT FORESTRY RESOURCES

A. Quinault Jurisdiction over Tribal Forestry Resources

The Quinault Nation viewed the 1856 Quinault River Treaty as an acknowledgement by the United States government of the Quinault Nation's sovereignty over their culture and natural resources.[400] The Quinault Nation has exhibited a long history of stewardship in which they have utilized the land and its resources in a sustainable manner and began active pursuit of the self-management of its natural resources in the 1900s.[401] Under the management of the BIA in the 1960s, the tribe "witnessed the devastation of the forest, fisheries, and wildlife resources of the Quinault Reservation," which led the tribe to aggressively reassert its sovereignty over their natural resources.[402] The tribe initially used zoning and sanitation ordinances to control its natural resources.[403] These tools later developed into a vision to "preserve and rebuild the foundations of Quinault culture through proper management and orderly development of its resources."[404]

Two major federal events created a window of opportunity for the Quinault Nation to implement a forestry program in the mid-1970s: congressional passage of the Indian Self-Determination and Education Assistance Act of 1975 and Congress' heightened awareness from the General Accounting Office's study of the BIA's deficiencies in forestry management.[405] Congress responded to Quinault testimony regarding the need for development programs on timbered reservations by earmarking a $475,000 appropriation to establish the Quinault Forestry Program.[406]

Despite the fact that the Quinault Forestry Program would operate concurrently with the BIA, its approach included other vital functions the BIA had not performed in the past, including two primary goals: to reestablish productive forests on thousands of acres and to create a tribally-directed Forestry Division to address comprehensive forestry manage-

400. STORM, *supra* note 28, at 209.

401. *Id.* at 211.

402. *Id.*

403. *Id.* Examples of the tribe's actions include: closing the beach to non-Indians to prevent "littering, pollution of clam beds, and desecration of sacred sites"; stopping construction of State Road 109; and blockading Chow Chow Bridge to protest the mismanagement of forest and fishery resources by the BIA. *Id.* at 211.

404. *Id.* at 212.

405. *Id.* at 225.

406. *Id.*

ment.[407] Overall, the comprehensive approach of the Quinault Nation in developing its Forestry Division began by establishing a firm foundation, seeking foresters with expertise and talents who were "committed to sound forest management, wise conservation and the belief that the future of the Quinault people depend[ed] on prudent stewardship of the land and its resources."[408] To fund the forestry regeneration program, the BIA and the Quinault Nation changed federal policies to "enable administrative deductions collected from timber sales on allotments to be used for forest management purposes," instead of returning the collected deductions to the United States Treasury.[409] Joint BIA and Quinault program operation eventually led to sole tribal responsibility.[410] The Quinault Nation admits that its knowledge of the intricate forest ecosystems "lags far behind" the rate of exploitation of the forests, but it is willing to maintain diversified management to respond to the ever-changing world and sustainability needs.[411] Due to it situation, the Quinault Nation has successfully carved out a jurisdictional niche for tribal forestry resource management.

B. Yanomami Jurisdiction Over Tribal Forestry Resources

The Yanomami tribe exercises no control over the forestry resources on their indigenous land, an area roughly the size of Washington State.[412] Under Brazil's system, "Indians do not enjoy any 'inherent right' of 'self-government'" and are "relatively incapacitated."[413] Their legal status as minors, however, contrasts with the 1988 Constitution, which explicitly grants Indians the right to permanently inhabit their traditional lands[414] and to control their forestry resources.[415] Brazil's "paternalistic and assimila-

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407. *Id.*

408. *Id.* at 225–26.

409. *Id.* at 231, 233.

410. *Id.* at 233. The forest rehabilitation has divided into two departments: (1) site preparation, which prepares land for reforestation; and (2) regeneration, which supervises the planting of over one million trees each year. *Id.* at 233–34.

411. *Id.* at 236.

412. Wiessner, *supra* note 23, at 842.

413. Wiessner, *supra* note 111, at 74–75.

414. C.F. art. 231(1), *translated in* INSTITUT FÜR ÖFFENTLICHES RECHT, BRAZIL-CONSTITUTION (1998), *at* http://www.oefre.unibe.ch/law/icl/br00000_.html (last visited Feb. 4, 2003) ("Lands traditionally occupied by Indians are those inhabited by them permanently; those used for their productive activities; those indispensable for the preservation of the environmental resources necessary for their well-being; and those lands necessary for their physical and cultural reproduction, according to their uses, customs, and traditions.").

415. *Id.* art. 231(2) ("The lands traditionally occupied by Indians are intended for their permanent possession, and they shall be entitled to exclusive use of the riches of the soil, rivers, and lakes existing thereon.").

tionist state policies have been replaced by policies facilitating the autonomous development of indigenous groups."[416] For the Yanomami, the question is how to exist within these contrasting characterizations of indigenous rights, especially when domestic pressure has so effectively pressured the Brazilian government to deny preemptive indigenous rights and not to support the new constitution's protections.

The Inter-American Commission acted for indigenous rights protection in the amended Brazilian Constitution because of "Brazil's failure to protect the Yanomami from incursions by miners and others into their ancestral lands [which] threatened the Indians' physical well-being, culture, and traditions."[417] The Commission "determined that, because environmental degradation in the Amazon rainforest can violate the right to life, the Brazilian government, in approving development there, violated that right and rights to health, liberty, personal security, residence and freedom of movement."[418] The Commission recommended, "that the government secure the boundaries of a reserve for the Yanomami to protect their cultural heritage."[419] The international community advocated for the 1988 constitutional amendments and also to establish the Yanomami Reserve.[420] Decree No. 22 of 1991 brought accompanying protections, which "ensured the primacy of indigenous rights to ancestral lands based on aboriginal habitation alone."[421] Despite these empowering constitutional protections, other pressures affect "Brazil's turbulent internal politics [which] did not help the plight of the Yanomami."[422]

Intense internal political pressure for economic development ties the hands of Brazil's decision-makers in protecting Yanomami resource jurisdiction.[423] Government officials, who protect the Yanomami's constitutional interests, do not stay in office long.[424] In May of 1992, President Collor de Mello attempted to protect the Yanomami's rights by signing a decree to demarcate 9.66 million hectares of Yanomami

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416. Thio, *supra* note 337, at 433.

417. S. James Anaya & Robert A. Williams, Jr., *The Protection of Indigenous Peoples' Rights Over Land and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33, 52 (2001).

418. Mark Allan Gray, *The International Crime of Ecocide*, 26 CAL. W. INT'L L. J. 215, 256 (1996).

419. Anaya & Williams, *supra* note 417, at 52.

420. *Id.*

421. Wiessner, *supra* note 23, at 843.

422. *Id.*

423. *Id.* (noting that Brazil's politics caused the government to allow private interests the right to contest non-demarcated Indian land boundaries).

424. *See id.*

territory[425] (as required in article 231 of the 1988 constitution), reducing the number of miners on Yanomami territory to 300.[426] Brazil impeached President Collor seven months later, the "government vigilance ended," and the miners increased to 11,000.[427] The trend protecting economic interests is also demonstrated by FUNAI's dismissing President Syney Possuelo after he engaged in "a serious effort to protect these indigenous peoples from economic interests encroaching on their habitat."[428]

Even the Minister of Justice succumbed to "political and economic pressures" by arguing that "Decree 22 does not provide *direito do contraditorio*, or 'the right to contest,' on behalf of private economic interests."[429] He succeeded when Decree No. 22 "was ruled unconstitutional because it does not incorporate the adversarial process."[430] However, the most detrimental action occurred when the government replaced Decree No. 22 with Decree No. 1775, the "genocide decree."[431] This decree exposed "presidentially-approved and demarcated areas to legal challenge . . . ."[432]

Ironically, the court ruled Decree No. 22 unconstitutional even though its replacement, Decree No. 1775, is more blatantly unconstitutional in that it allows "firms to invade indigenous lands for the purpose of . . . mahogany extraction. These types of unsustainable forest practices historically facilitate infrastructure development, thereby opening up remote and often pristine areas of forest which have long been considered the sacred lands of numerous indigenous peoples."[433] "Decree 1775 allows 'states, municipalities and other interested parties' to appeal 'to demand indemnization or show errors' in demarcation of indigenous land."[434] This decree directly contravenes article 231 of the Brazilian Constitution, which mandates indigenous ownership of occupied lands.[435]

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425. Barroso, *supra* note 130, at 662 n. 62; *see also* Wiessner, *supra* note 23, at 843.

426. Wiessner, *supra* note 23, at 843.

427. *Id.*

428. *Id.* "Possuelo was widely credited with pursuing demarcation with a democratic sensitivity, maintaining close lines of communication with the Indian nations and their supporters in the ecology movement." BILL WEINBERG, AMANAKA'A AMAZON NETWORK, INDIGENOUS PEOPLES OF BRAZIL ASK FOR INTERNATIONAL OUTCRY AGAINST DECREE 1775 (1996), *available at* http://www.amanakaa.org/ 1775.htm (last visited Apr. 25, 2003).

429. Barbic, *supra* note 186.

430. *Id.*

431. *See infra* notes 182–87 and accompanying text.

432. Wiessner, *supra* note 23, at 844 (citation omitted).

433. Barbic, *supra* note 186.

434. WEINBERG, *supra* note 428.

435. C.F. art. 231(1), *translated in* INSTITUT FÜR ÖFFENTLICHES RECHT, BRAZIL-CONSTITUTION (1998), http://www.oefre.unibe.ch/law/icl/br00000_.html (last visited Feb. 4, 2003). "Brazil's Indigenist Missionary Council (CIMI) says Decree 1775 is unconstitutional because it aims to

The Brazilian government argues "Decree No. 1775 has given these Indian titles heightened legal protection and has made the process more transparent."[436] Although this argument supporting Decree No. 1775 sounds persuasive, this "'recipe for tragedy' . . . has served only to encourage illegal invasions, massacres, selective killings, abductions, and other serious assaults on the original inhabitants and guardians of the Amazon."[437] Brazil's indigenous groups demanded that the "decree be revoked, saying it has opened a 'hunting season' on Indian land, with settlers, speculators and pirate miners scrambling to stake a claim."[438] Despite explicit constitutional protections afforded Brazil's indigenous groups, "[t]he destruction of Brazil's Indian tribes and Indian lands continues as tens of thousands of gold miners are still permitted to take over Indian lands and destroy the ecosystem in which the Indians traditionally have made their existence."[439] Brazil's actions provide little protection from economic incentives to Amazonian development; incentives which supercede indigenous interests.

In 1999, the biggest immediate problem for the Yanomami is the intrusion by the *garimpeiros*, who brought illnesses that continue to decimate the Indian population.[440] The Yanomami want to keep the forest alive because "they know it is important for the salvation of planet Earth."[441] A most delicate ethical issue arises in the dilemma of "how can people help the Yanomami without making them dependent."[442] The international forum has provided a platform and attentive ears to the plight of the Yanomami, has extended protections through the United Nations and international NGOs, and attempted to pressure the Brazilian government to abide by its laws and constitution dedicated to the protection of their indigenous tribes.

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legalize existing title deeds on Indian land, which Article 231 of the Constitution renders null and void." WEINBERG, *supra* note 428.

436. Wiessner, *supra* note 23, at 845 (citation omitted).

437. *Id.* at 844 (citation omitted).

438. WEINBERG, *supra* note 428.

439. John Batt & David C. Short, *The Jurisprudence of the 1992 Rio Declaration on Environment and Development: A Law, Science, and Policy Explication of Certain Aspects of the United Nations Conference on Environment and Development*, 8 J. NAT. RESOURCES & ENVTL. L. 229, 280 (1993) (citation omitted); *see also* Bravo, *supra* note 105, at 570–71 ("The apparently solid constitutional protections granted to Brazil's indigenous peoples have proven to be empty promises. . . . [L]awlessness prevails in their remote ancestral lands and the tribes are decimated by diseases, violence, and despair.").

440. Batt & Short, *supra* note 439, at 302. Among the illnesses are flu, TB, venereal diseases, AIDS, and malaria. *Id.*

441. *Id.* (quoting Davi Kopenawa Yanomami, "[w]e do not want to live without trees, hunting, fish, and clean water. If this happens misery will come to my people").

442. SALAMONE, *supra* note 124, at 2.

The most important question is whether the Brazilian government is hearing indigenous groups' complaints. Indigenous voices in Brazil are much louder through international involvement. Following the 1988 constitu-tional amendments, the "ILO Committee of Experts on the Application of Conventions and Recommendations indicated a need for remedying the 'dangers of paternalism' within the FUNAI and for consultation with indigenous peoples."[443] Brazil responded by decreasing FUNAI's role overseeing the "rights to the exploitation of mineral resources existing in indigenous areas" and instead requiring "authorization from the National Congress pursuant to public hearings, 'taking into account the interests of the affected communities."[444] The hearings allow indigenous groups to state their concerns over their mineral resource exploitation.[445] In practice, "[t]here is no evidence, however, that any consultative mechanisms have been set up specifically to consider the interests of indigenous peoples in the Congress or in FUNAI."[446]

Brazil listened to the international community, explicitly provided protection for indigenous' land and resource rights, and then repeatedly withdrew protection. The Yanomami cannot maintain control over their forestry resources when even the international community falters. One activist for Yanomami rights argues that the Yanomami may be able to organize through various "activists groups and [by] becoming politically astute. They have no desire to go back to the days before steel knives, cooking utensils, flashlights, and radios, but they do want protection and the right to determine their own destiny."[447] Davi Kopenawa Yanomami became the spokesman for the Yanomami Indians and projects his tribe's voice to the world.[448] He states that "[i]f the gold-miners continue to invade our forest, if they don't go back to where they belong, the Yanomami will die, they will be truly finished."[449] The Yanomami need an independant tribal voice because FUNAI, suffering under a conflict between tribal

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443. Laurie Sargent, *The Indigenous Peoples of Bolivia's Amazon Basin Region and ILO Convention No. 169: Real Rights or Rhetoric?*, 29 U. MIAMI INTER-AM. L. REV. 451, 485 (1998) (citation omitted).

444. *Id.* (citation omitted).

445. *Id.* (citation omitted).

446. *Id.* at 485–86 (citation omitted).

447. Andy Thomason, *Yanomami*, SUITE101.COM E-ZINE, May 21, 1999, *at* http://www.suite101.com/article.cfm/3665/20044 (last visited Apr. 15, 2003).

448. *See, e.g.*, *Hearing on Brazil's Indigenous People*, *supra* note 22.

449. DAVI KOPENAWA YANOMAMI, XAWARA—THE CANNIBAL GOLD AND THE FALLING OF THE SKY (Alex Shankland trans., 1991), *at* http://www.amanakaa.org/yanomami/xawara.htm (attributing original publication by the Comissão Pro-Yanomami, available in Bruce Albert, *Xawara: O Ouro Cannibal e a Queda do Céu*, *in* POVOS INDÍGENAS NO BRASIL 1987–90, at 169–170 (C. A. Richardo ed., CEDI 1991)).

interests and development policies, does not adequately represent their interests.[450] The international support for indigenous natural resource rights produced positive changes within Brazil's legal system, but these words must translate into federal, not state, action for the Yanomami to actually gain their constitutional resource protections.

CONCLUSION

The United States and Brazilian governments have utilized colonialism with regards to their indigenous populations at different historical time periods and at different economic levels, but both have come to roughly the same resolution regarding indigenous control over forestry resources: economics win over tribal interests. The United States has congressionally mandated self-determination as a goal of the federal government.[451] Despite this idealistic goal of allowing the tribes to once again govern themselves and control their resources within their own territory, judicial interpretation combined with a lack of BIA implementation restricted and virtually carved the land into pieces. Likewise, Brazil explicitly recognizes its constitutional ability to grant tribes exclusive resource control within their reserve.[452] This goal has been thwarted by contradictory definitions within Brazil's Constitution and Civil Code that basically label the Indians as minors and then provide inadequate FUNAI guardianship protection for their minor wards.[453] FUNAI has demonstrated that in applying the balancing test between governmental economic policy and Yanomami rights, the apparent economic benefits always win.[454] The State of Roraima has also proved itself as an adamant supporter of both the miners and economic growth in their State, regardless of the extensive massacres of indigenous people or slower disease based genocide.[455]

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450. *See infra* Part II.2.

451. *See* Morton v. Mancari, 417 U.S. 535, 542 (1974). The Indian Reorganization Act of 1934's "overriding purpose . . . was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Id.* (citation omitted).

452. *See infra* Part IV.B and accompanying notes.

453. *See infra* Part II.2 and accompanying notes.

454. *See infra* Part IV.B and accompanying notes.

455. The Indianist Missionary Council developed a chronology of Yanomami genocide: in 1974–77 the Perimetral Norte highway caused the deaths of eighty Yanomami Indians from influenza, measles, and tuberculosis; in 1981 two thousand miners invaded the Yanomami Reserve after the Governor of Roraima insisted that formal prohibitions of their mining should be lifted, causing eighteen Yanomami to die of measles; in 1982 miners murdered five Yanomami; in 1984 after Roraima's federal deputy signed a bill permitting mining ore on the Yanomami Reserve, a miner shot a Yanomami Indian in the back; in 1987 the Brazilian government launched a campaign to prove that the they needed the miners' presence in the Indian area to prevent the Yanomami from establishing an independent state, which caused four Yanomami Indians to be "clubbed, stabbed, and shot to death by miners"; in 1988

Tribal sovereignty and Indian cultural preservation embodies a distinctive flavor in Brazil due to vast unexplored areas of virgin rainforest, which contrasts with the United States where no natural resource rock is left unturned. But, the two tribes are less separated than they appear as the United States has moved some of its colonial aspirations to the Amazon where American markets exploit forest resources and cheaper import prices from indigenous lumber.[456] The Quinault Nation felt negative effects from imported pirate lumber increases through its own timber sale decreases as markets moved to South American rainforests.[457]

United States' tribes and Brazilian Indians are similar in the generalized word applied to their groups: they are all Indians.[458] In actuality, each tribe has a distinct culture, language, social and political organization, patterns of occupation, land use, dress, and housing.[459] Historical treatment in both the United States and Brazil indicates that the dominating cultures treated Indians as a disposable group which could either be extinguished for development benefits or civilized and incorporated into greater society.

In conclusion, the ultimate goals of the dominant society, to colonize and increase economic development, have won over the opposing goals of indigenous survival and sustainability. The United States may have attempted to provide rights to the Quinault Nation to develop their own forestry

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miners protected by the ex-president of FUNAI, who became the Governor of Roraima, killed nine Yanomami Indians; in 1990 miners killed two Yanomami Indians while the government denounced the extermination of fifteen percent of the Yanomami population by the miners; in 1992 two thousand miners invaded causing 150 Yanomami Indian deaths from disease and one Yanomami Indian murder; in 1993 FUNAI denounced the massacre deaths of seventy three Yanomami Indians. CIMI—INDIANIST MISSIONARY COUNCIL, CHRONOLOGY OF THE YANOMANI GENOCIDE (Aug. 27, 1993), *available at* http://nativenet.uthscsa.edu/archive/nl/9308/0275.html.

456. Press Release, Rain Forest Action Network, *supra* note 12.

457. Barroso, *supra* note 130, at 648 (citing Stocks Telephone Interview, supra note 33). Max Stocks, the Quinault Nation Economic Development department's head, commented that the United States began importing more South American trees because the trees grow faster and are cheaper than in the United States. *Id.*

458. "As Anthony Seeger has observed, in anthropology, 'empirical generalizations, like the good wines, do not travel well.'" Anthony Seeger, OS INDIOS E NOS (1980), *cited in* Barroso, *supra* note 130, at 648 n.7.

459. This is to say that any analysis of the Yanomami should beware of generalizing its comparasions. Darcy Ribeiro, one of Brazil's most revered anthropologists, described three general attitudes of members of the dominant culture: ethnocentric, i.e. "sees indigenous peoples as primitive beings, endowed with biological, psychological and cultural features which are undesirable and should be changed by means of assimilation of a new pattern of living"; romantic, i.e. "conceives Indians as bizarre peoples who cannot be mixed in with the national society and should be preserved with their original features, even if only to be displayed as a rarity that the nation must preserve"; laissez-faire, i.e. "considers that the expansion of the national society will eventually and inevitably lead to the acculturation of all indigenous peoples, even those who are still isolated at the present time." *Id.* at 649 (citing DARCY RIBEIRO, OS INDIOS EA CIVILIZACAO 255–56 (1979)).

resources, but this seemingly positive action may soon be negated through current U.S. exploitation in the Amazon rainforest and of the Yanomami Indians residing there. Ultimately, each country should realize that indigenous tribes want to develop and not remain preserved as national parks with the rest of their respective rainforest resources. The resources that are available on the Quinault and Yanomami Reservations could be utilized in a sustainable manner by tribes because they have practiced stewardship with the earth for thousands of years. Once the dominant culture realizes that they could still develop economically, but in a more sustainable manner through lessons from the tribe's uses of natural resources; the exploitation may end. Until then, human rights advocates, scholars, academics, and international spheres can debate what should be done by each government, but the national government must want to actually change their policies towards indigenous people. The country must feel as though it is not losing anything, but gaining valuable sustainable techniques that will allow it to continue economic growth and modernization.

Samara D. Anderson[*]

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