Integrated Resource Management Planning with the Ute Mountain Ute Tribe: Property, Place, and Governable Space

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INTEGRATED RESOURCE MANAGEMENT PLANNING WITH THE UTE MOUNTAIN
UTE TRIBE:
PROPERTY, PLACE, AND GOVERNABLE SPACE

By

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B.S., University of California, Berkeley, 2008
J.D., University of Colorado, Boulder, 2014

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Integrated Resource Management Planning with the Ute Mountain Ute Tribe:  
Property, Place, and Governable Space  
written by Jacquelyn Amour Jampolsky  
has been approved for the Department of Environmental Studies

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Joseph H. Bryan, PhD

________________________________________
Kristen A. Carpenter, JD

Date _________________

The final copy of this thesis has been examined by the signatories, and we find that both the content and the form meet acceptable presentation standards of scholarly work in the above mentioned discipline.

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Abstract

This dissertation seeks to give agency back to Tribes as conscious and deliberate actors in the resource management debate. It examines how the Ute Mountain Ute Tribe is implementing an Integrated Resource Management Plan and Cultural Resources Management Plan on the reservation through the lens of legal geography to argue that federally guided resource planning is both good and bad, but more importantly, is best for doing something else. This dissertation shows that the Tribe engages in resource planning to employ the governing power of property vis-à-vis resources in order to increase its power as a sovereign through new governable spaces outside of the reservation boundaries. By reconsidering the utility of resource management this dissertation suggests a ‘third-movement’ of property as a tool for re-ordering traditional relationships with the federal government that can be multiply employed both within and outside of the nomosphere of the state, broadly construed. In examining how the Tribe navigates the enmeshment of space, law, and power as means for asserting itself as a sovereign outside of reservation boundaries, this dissertation submits a model of Native territoriality that exists outside of traditional lands. In doing so, this dissertation pushes on the traditional role of place as necessarily generative and limiting of tribal sovereignty to promote a shift from an absolutist and land-based understanding of sovereignty towards an understanding of tribal sovereignty as a diffuse mode of governance.
To Rose.
First and foremost, I would like to thank Celene Hawkins.

Without Celene this project would not have been possible. Thank you for making this possible, and for all the amazing work you do.

To Terry Knight, Lynn Hartman, Jim Potter and all of the Ute Mountain Ute employees who guided me through this project.

Thank you to my friends, family, and my fiancé Nicolas Blevins. Your indelible patience and support carried me through my graduate career.

And finally I would like to thank my committee, Joe Bryan, Kristen Carpenter, Charles Wilkinson, Mara Goldman, and Jim Enote for your invaluable assistance, mentoring, and inspiration on this and other projects.
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<td>AIARMA</td>
<td>American Indian Agriculture Resource Management Act</td>
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<td>AIRFA</td>
<td>American Indian Religious Freedom Act</td>
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<tr>
<td>ALP</td>
<td>Animas-La Plata (water reclamation project)</td>
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<tr>
<td>ARPA</td>
<td>Archeological Resources Protection Act</td>
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<tr>
<td>BIA</td>
<td>Bureau of Indian Affairs</td>
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<tr>
<td>BLM</td>
<td>Bureau of Land Management</td>
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<tr>
<td>BOR</td>
<td>Bureau of Reclamation</td>
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<tr>
<td>CAA</td>
<td>Clean Air Act</td>
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<tr>
<td>CERCLA</td>
<td>Comprehensive Environmental Response Compensation and Liability Act</td>
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<tr>
<td>CFR</td>
<td>Code of Federal Regulations</td>
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<td>CRMP</td>
<td>Cultural Resources Management Plan</td>
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<tr>
<td>CRS</td>
<td>Colorado Revised Statute</td>
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<tr>
<td>DOE</td>
<td>Department of Energy</td>
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<tr>
<td>DOI</td>
<td>Department of Interior</td>
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<tr>
<td>EDSA</td>
<td>Tribal Energy Development and Self-Determination Act</td>
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<tr>
<td>EPA</td>
<td>Environmental Protection Agency</td>
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<tr>
<td>EPCRA</td>
<td>Emergency Planning and Community Right to Know Act</td>
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<td>EPD</td>
<td>Environmental Programs Department</td>
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<td>ESA</td>
<td>Endangered Species Act</td>
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<td>FERC</td>
<td>Federal Energy Regulatory Commission</td>
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<td>FIFRA</td>
<td>Federal Insecticide, Fungicide and Rodenticide Act</td>
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<td>FPA</td>
<td>Federal Power Act</td>
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<tr>
<td>GDSC</td>
<td>Geographic Data Service Center</td>
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<tr>
<td>GIS</td>
<td>Geographic Information System</td>
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<tr>
<td>GPS</td>
<td>Geographic Positioning System</td>
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<tr>
<td>IIRMA</td>
<td>Indian Integrated Resources Management Act</td>
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<tr>
<td>ILTLA</td>
<td>Indian Long Term Leasing Act</td>
</tr>
<tr>
<td>IMDA</td>
<td>Indian Mineral Development Act</td>
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<tr>
<td>Abbreviation</td>
<td>Full Form</td>
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<tr>
<td>IMLA</td>
<td>Indian Mineral Leasing Act</td>
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<td>IOU</td>
<td>Investor-Owned Utility</td>
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<td>IRA</td>
<td>Indian Reorganization Act</td>
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<td>IRMP</td>
<td>Integrated Resources Management Plan</td>
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<td>ISDEAA</td>
<td>Indian Self-Determination and Education Assistance Act (Public Law 93-638)</td>
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<td>KW</td>
<td>Kilowatt</td>
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<tr>
<td>MOU</td>
<td>Memorandum of Understanding</td>
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<td>MW</td>
<td>Megawatt</td>
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<td>NAGPRA</td>
<td>Native American Graves Protection and Repatriation Act</td>
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<td>NEPA</td>
<td>National Environmental Policy Act</td>
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<td>NHPA</td>
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<td>NIFRMA</td>
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<td>PUC</td>
<td>Public Utility Commission</td>
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<td>PURPA</td>
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<td>RCRA</td>
<td>Resource Conservation and Recovery Act</td>
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<td>SDWA</td>
<td>Safe Drinking Water Act</td>
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<tr>
<td>SHF</td>
<td>State Historic Fund</td>
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<td>SHPO</td>
<td>State Historic Preservation Office</td>
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<td>SWCA</td>
<td>SWCA Environmental Consultants</td>
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<td>TAS</td>
<td>Tribes as States (status under the Clean Air and Clean Water Acts)</td>
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<td>TCP</td>
<td>Traditional Cultural Property</td>
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<td>TERA</td>
<td>Tribal Energy Resource Agreement</td>
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<td>THPO</td>
<td>Tribal Historic Preservation Office</td>
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<tr>
<td>TSCA</td>
<td>Toxic Substance Control Act</td>
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<tr>
<td>TSGA</td>
<td>Tribal Self Governance Act</td>
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<tr>
<td>USC</td>
<td>United States Code</td>
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<tr>
<td>USDA</td>
<td>United States Department of Agriculture</td>
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<td>WCA</td>
<td>Weeminuche Construction Authority</td>
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Chapter I:

Introduction & The Theoretical Significance of Four-Wheelers

Driving across the 600,000 acres of unallotted high desert plateau of the Ute Mountain Ute reservation feels otherworldly. Deep canyon walls and abrupt Mesas create disproportionate dimensions in shapes that are hard to imagine occurred naturally. Rich clay pressed with wrinkles and rough like sand bears striking resemblance to skin, like through the tress the elders are always watching. Scarcely any water exists, save for what flows during the monsoon seasons and remains in the small ditches and cattle ponds dotting the landscape. This is a landscape of forced compromise; the parched hills reflecting a series of paper trades—including a priority date for water on the Mancos River. Now up-stream development chokes the mesas. Sage, juniper, yucca, and shrub provide the only contrast to the deep red, orange, and yellow hues of earth that scratch your skin like thirst as you walk by.

The landscape, rough and old, can only be described as breathtaking. It took me a few months to internalize the magnificence of it all. The technicolor sunsets in the canyons, the snow capped San Juans, the vastness, the quirks and crooked teeth smiles, and the wildflowers—pink, and red, and blue—defiantly and strategically there, commanding a majestic respect like everybody I met at Ute Mountain Ute. But in the dry, winded heat, one wonders how people could ever inhabit this region. The history of the place proves otherwise though. The Four-Corners once supported a bustling population of Ancient Puebloan people that likely exceeds the number of people that live there today. In addition to the Ancient Puebloan, modern Pueblos,
Navajos, plains tribes, and of course the Ute’s frequented the area from at least 1100AD and likely much, much longer.

The Ute Mountain Ute reservation is a place almost entirely undeveloped, one that boasts the longest recognized history of human occupancy in the United States, and one that hosted many histories of diverse Native peoples before being designated as the Ute Mountain Ute reservation. The reservation holds the highest concentration of the best-preserved archeological sites in the United States (Field Visit B, October 21 2013), and the diverse mixture of socio-ecological relationships dwarf the importance of the boundaries that define the reservation although those boundaries are inexorable from the future of the Tribe. Despite the incredible and diverse interest in the reservation as a place, interest in the people that live there is far less apparent. The 1,800-person community of Towaoc, the capital of the Ute Mountain Ute reservation, is comprised almost exclusively of tribal members and suffers from a host of challenges including substance abuse, violence, abject poverty and hunger.

The Ute Mountain Ute Tribe embodies the landscape: rough, confusing, but beautiful and commanding of an unexpected respect that is at once abrasive as it is calm and hopeful. This analogy is as symbolic as it is suggestive of real meanings that grow from an inextricable relationship with the landscape that is continuously redefined by legal disputes over boundaries, power, and place. Any understanding of how the Tribe attempts to ameliorate hardships within its community must acknowledge a problem made of equal parts law, landscape, and tradition.

Although I didn’t know it at the time, this was made abundantly clear to me on my first visit to the reservation on Friday, November 9th 2012. The meeting came after a few months of communicating with the Tribe in varying capacities—starting with the Justice Department, after having taken a seminar with one of the general counsel—and finally being referred to the Tribal
Historic Preservation Office or “THPO” as the most appropriate place to conduct my research. It took some time to agree on an appropriate date, so after a seven and a half hour drive from Boulder, Colorado, I arrived on time, and ready to go.

What proceeded next was probably the closest experience I would ever have to a stakeout. I waited in my car for almost four more hours, awkwardly anticipating somebody to appear at the THPO office. Towaoc, is a small, tight-knit, and protective community, so needless to say I was also being ‘staked out’ by pretty much everybody who drove or walked by me wondering who this stranger was and what she was doing here. This was not my first experience working with Native communities so I had prepared to be scrutinized and to wait for a little while. What I hadn’t prepared for was the THPO officer apparently having no idea who I was when he finally did show up at the office for our meeting. After speaking various times on the phone and through e-mail, I had to reintroduce myself, the reason I had come to visit, and what exactly I had intended to do there. Really, that included about a 30 second description of myself and the project—until it was abruptly cut short when I said the word property.

“What do you know about property? What do you mean when you say that to me?” asked the THPO officer. The question caught me off guard, so I responded with the first thing that came to mind, “it is an Anglo concept, a way of ordering peoples relationships with each other according to things and controlling all of us.” However crude my definition was, I must have said something right, because the THPO officer smiled that mischievous smile I would grow to love, and then began telling me his own story about property.

“You see, we are having a big problem on the reservation right now with four-wheelers. We just got a big settlement from a court case of ours, and all the money got distributed in per cap to the tribal members. Most of us bought cars and trucks and things, but the kids who can’t
drive yet- they all got four-wheelers.” The story went on for about an hour- covering every detail from the physical inadequacy of the tribal police to run fast enough to catch the kids, to the destruction the four-wheelers were causing to the reservation, to the most recent tragedy of a 16 year old tribal member who had been rendered “a vegetable” from falling off and hitting her head just the day before. All of this was tied up in a semi-objective analysis of substance abuse on the reservation and the state of the youth generally. Just when I was starting to lose focus, the THPO officer looked at his watch.

He continued, “The way that Ute society works is that we all used to own everything. Sort of like communism or socialism, but different- because we all had equal rights to everything all the time. You know I know what that is because I got a degree in political science. Anyway, if there was a conflict it had to be worked out between the two families or people because they had equal rights to it. So the leader—the chief of whatever—couldn’t interfere. It was inappropriate for anybody but an immediate member of your family to tell you what to do or where you could do it.” And then, at exactly 11:59 am and just in time for lunch, he finished. “That is why we are having a hard time doing anything about the four-wheeler issue, because of property.”

The THPO officer then asked me if any of this could fit into what I was trying to do, and of course I said yes—not really having a clue about what he meant—and we planned on me coming to work and stay full time that summer. Over the next months I visited the reservation a few more times to hammer out the details of my stay and my research. Each time I returned to the reservation, the THPO officer said he didn’t remember me and I had to start over again. I’m still not sure I have recovered from the insecurity and confusion that stirred within me—but with the help of the Tribe’s Justice Department we worked everything out. I moved to Dolores, a
small town about a half-hour from the reservation, in June of 2013 where I stayed until mid-November commuting to the reservation every day.

Looking back, the THPO officer likely knew what he wanted to teach me that first day. Over the next year I would come to realize that the issue of four-wheelers would prove the overarching anecdote for the type of questions I asked, and the type of answers I received during my work with the Ute Mountain Utes. The way the Weenuche people organized their social and cultural life inherently expresses how they traditionally conceived of access to land and resources spatially. The challenge for the Tribe—to resolve the four-wheeler issue, sustainably manage their resources, or what have you—has everything to do with how the shifting narrative of property as representative of the intersection between boundaries, place and power.

A. The Empirical Puzzle

Conventional wisdom views the issue of four-wheelers, as analogous to Native property more generally, as a problem that should be resolved through one of two major approaches: either the Ute Mountain Utes have nothing resembling what the law recognizes as property and therefore any attempt to recognize it as such deleteriously affects tribal tradition and should be avoided; or the Ute Mountain Utes do have traditions that resemble what the law recognizes as property and therefore should be amended or used creatively to protect it. These approaches propose opposite solutions within a singular property dichotomy. They both frame a solution in terms of the law, for a problem that is also and equally spatial and cultural. Neither approach fully grasps the problem. The reason why any stance within this conventional approach to Native property must fail is because it necessarily renders the spatio-cultural and the legal as separate things. They aren’t and to the extent that we continue to see space and law as separate we
reinforce an impossible situation for the Tribe. This is not just a theoretical misconstruction, but rather a fundamental mischaracterization of how the Tribe understands and lives the issues involving ‘property’ every day.

B. The Approach: Critical Legal Geography

This dissertation writes against the dominant framework by examining Ute Mountain Ute resource management, through the development of the federally funded Integrated Resources Management Plan (‘IRMP’) and Cultural Resources Management Plan (‘CRMP’), as a proxy for understanding Native property as an enmeshment of law, space, and power. Critical legal geography provides the theoretical grounding for interpreting law and space as one and the same.

1. The Discipline

Traditionally, lawyers study law and geographers study space. The conventional understanding of space and law as separate categories relies in part on the implicit differences between the disciplines. Legal interpretation traditionally focuses on discursive analysis as necessarily closed to external influences, where geographic inquiry focuses primarily on the lived effects of the law after it has been applied (Blomley & Bakan 1992). Scholarship in both camps effectively silenced the study of space in law and the study of law in space by obliquely accepting that some separation between the material and the social exists. Adhering to these disciplinary categories does not so much reflect any real boundaries but fabricates them, lending an incomplete understanding of both spatial and legal processes and reifying entrenched ways of understanding either (Delaney 2010).
Space is not a discernable external or a-cultural entity (Massey 1984; Shome 2003). The material or lived character of space is at once produced by our reactions to it (Lefebvre 1991). Legal norms shape these reactions by categorizing, naming, prohibiting or encouraging certain interactions among people and things (Cover 1983). But those actions and reactions are enacted through legally delineated spaces (Manderson 2005; Delaney 2010; Chouinard 1994). The law writes, and re-writes social relationships by anchoring them in space and time, mutually constituting both. Understanding the law as an isolated a-spatial matter of discourse equally obscures the spatial relationships of power (Blomley 1989), and ignores “how law is everywhere in space… [and]… space is everywhere in law” (Stramignoni 2004).

The nexus of space, law, and power is where the scholarship in critical legal geography originates. Critical legal geography began as parallel subfields in law and geography in the early 1990s, but has quickly gained momentum as a stand alone trans-disciplinary framework (Delaney 2010). Early scholarship focused primarily on the spatio-legal nexus of cities through issues such as zoning, landlord tenant, and vagrancy (see e.g. Blomley et. al. 2001). Today the discipline has changed to reflect new synergies between critical geography and critical legal theory to tackle larger questions of land reform, geopolitical order, social justice, political economy, and environmental studies (Kedar 2003; Mitchell 2001; Hariss & Hazen 2009; Buchanan 2001). Increasingly, legal scholars have engaged with critical legal geography as an analytical framework for understanding both the operation of law as an institution (Aoki 2000), and as a practice through lawyering (Martin et. al. 2009). As a whole, critical legal geography stands for the proposition that the conventional separation of the law from the lived, or physical, characteristics of space is not only inadequate but skews deliberate and deep-rooted structures of power (Chouinard 1994). This process is necessarily partial and prohibitory whereby the law
streamlines multiple spatialities and multiple subjectivities into one, singular normalizing function consistent with liberal rights as universal norms used to order society (Foucault 2009).

Notwithstanding the myriad case studies and theoretical contributions, the vast majority of inquiries in critical legal geography implicate property as the indispensible component of the complex and overlapping spatio-legal systems of power. Property is used to “assign order to the world, categorizing and coding spaces and people according to their relationship to property” (Blomley 2003, 122). The law codifies peoples’ political status in relationship to property and structures social relations of power by identifying who can claim what rights, and where. This is most clearly demonstrated through the production of boundaries and operation of jurisdiction (Delaney 2005). Legal boundaries, whether they are national borders or fences between neighbors, delineate space over which recognizable owners retain control and everybody else respects. The entire concept of property grew out of competing sovereign interests fighting to establish jurisdictional control over lands and people (Elden 2013). This attaches any understanding of property to broader systems of power because property, through regulations or individual rights, anchors socio-economic and racial inequities in materially cognizable space (Ford 2001; Chouinard 1994).

2. My Take

This dissertation adopts the theoretical approach espoused by the nascent discipline of legal geography as a jumping-off point for seeing how space and law are not just related, but also mutually and concomitantly generative of each other and inextricable from broader systems of power. Specifically, it adopts David Delaney’s concept of the “nomosphere” to investigate the ways in which law inscribes meaning over spaces to encourage certain types of behaviors and
relationships among people within and outside of it. Delaney’s idea of the nomosphere incorporates the iconic legal theory of Robert Cover to describe how the law generates normative narratives that define the world in which we live, by examining how those meanings are enacted through space (Cover 1983). Recent legal scholarship has extended Cover’s theory of legal nomos as means for understanding how Native communities both absorb and generate laws as sovereigns through shared commitment for maintaining autonomy within settler-states (see e.g. Carpenter & Riley 2014; Resnik 2006; Williams 1994-95). This dissertation similarly draws from that legal scholarship, but focuses on Delaney’s distinct concept of the nomosphere to understand property as a way of naming space, which dictates how that space is lived, interpreted, and understood by others. To understand the nomosphere, Delaney argues that the spatial and the legal must be “braided together in a way that highlights the worldly, pragmatic processes of their mutual constitututivity” (Delaney 2010, 23).

Delaney’s singular ‘braiding’ of law and space however, fails to encompass the constant multi-scalar and deliberate ways tribes, as distinct political sovereigns, can negotiate categories of space and law to generate numerous nomospheres all the time. This dissertation strays from an understanding of property as generative or reflective of a singular nomosphere. Instead it argues for an unbraiding and reconstituting of space and law as categories that can be morphed, merged, re-appropriated, and multiply applied. This approach both affirms the importance of the spatial as a way of understanding, enacting, and constituting the legal (we have real material and cultural interactions in the world and need to ground all of this somehow); and the legal as a way for defining, producing, and disciplining the spatial (it is the dominant way for naming space and tool for re-renaming it and we have to acknowledge the law can be useful and it isn’t going away regardless), while simultaneously challenging them both. This dissertation adopts an
understanding of legal geography that problematizes how the Ute Mountain Ute Tribe uses space and law, as separate or singular, which both emancipates and limits how it simultaneously exists within and outside of the nomosphere.

To support a shift away from Delaney, this dissertation uses Karl Polanyi’s concept of the double-movement to develop a dualistic understanding of property (Polanyi 2001). In *The Great Transformation*, Polanyi traces the rise of fascism to the collapse of the “free” market economy. He argues that the entire concept of a self-regulating market is not only farcical, but also fabricated by industrialized states beginning with the separation of society and economy and actuated through the commodification of land, labor, and money with legal regulatory and technological interventions. The inevitability for the market economy to exploit land and labor spurred the “double-movement” inherent in the origins of the market economy—with the opposing forces of unhindered market expansion on one hand and the necessary and reciprocal protectionist interventions on the other.

Although Polanyi makes a broader argument about political liberalism as confined by the market economy, a basic understanding of property proves fundamental to his argument of the double-movement. Polanyi describes the double-movement:

> [T]he action of two organizing principles in society, each of them setting itself specific institutional aims, having the support of definite social forces and using its own distinctive methods. The one was the principle of economic liberalism… the other was the principle of social protection aiming at the conservation of man and nature as well as productive organization, relying on the varying support of those most immediately affected by the deleterious action of the market… and using protective legislation, restrictive associations, and other instruments of intervention as its methods” (Polanyi 2001, 138-39).

Property was both necessary for the development of the free market- and ultimately the state, because it allowed for the ownership and sale of land. At the same time, property developed as a counter-movement regulated by the state to protect against the market’s complete exploitation of
land. Property both organized society to facilitate economic liberalism by allowing for the commodification of nature for the market, and as the “protective legislation” to protect land from the destructive forces of the market. The development of resources was equally inextricable from Polanyi’s argument, because it allowed the transformation of nature into ownable and alienable commodities on a market. Resources, and property more generally, simultaneously exist within and outside of a singular nomosphere demonstrating the multiple and contradictory characteristics of property at its core.

Although Polanyi introduces a useful way for understanding property as both generative of the free market and means for protecting against it, he confines the double-movement as either supporting or refuting the exploitative nature of the market. Furthermore, Polanyi argues that the best entity to intervene to regulate property and protect against the exploitative nature of the free market is the state. This assumes a benevolent state and obscures the other socio-spatial relationships of power that exist within it. Polanyi’s approach basically ignores the existence of Tribes as internal sovereigns with overlapping and conflicting interests with the overarching state. This dissertation builds off of Polanyi’s basic case broadly applying the concept of the double-movement, but ultimately argues for a ‘third’ movement of property. Instead of viewing property as necessarily wedged between the market and the state, this dissertation argues that property can be re-appropriated by tribes as a third movement to negotiate new social and spatial relationships with the state itself, with surrounding political sovereigns, and other entities through the market.

Nikolas Rose’s (1998; 1999) concept of governable space, later adopted by Michael Watts (2003; 2004; 2005; 2010), embodies a legal geography understanding of property as equally generative and reflective of the social spaces that uphold it, and demonstrates the third
movement of property. Governable spaces are the “modalities in which a real and material governable world is composed, *terraformed*, and populated” (Rose 1999, 32). For Watts, governable spaces are produced by the multiple interactions between identity, land, and resources. These spaces are contingent on the territorializing, or anchoring of government thought and practice to an identifiable parcel of land, and are equally constrained and morphed on multiple scales by the political economy of resource development (Watts 2005, 107). These spaces are not just reflective of the economic or legal framework of resource development, but also generative of diverse and contested “forms of rule, conduct, and imagining” (Watts 2004, 61). Governable spaces describe a third movement of property because they reveal the potential for generating new spaces that equally reinforce and contest the broader political framework of the state.

This dissertation adopts Rose and Watts’ concept of governable spaces to demonstrate how the Tribe manages resources and generates new spaces of Ute Mountain Ute ‘conduct and imagining’ through the re-appropriation of property. In other words, the IRMP and CRMP as federally funded resource management plans, represent a state-led property intervention that disciplines how the Tribe uses the reservation as a particular nomosphere. At the same time however, the Tribe re-appropriates the IRMP and CRMP to generate resources as properties and produce new spaces of governance that re-define its relationship with the broader state itself. This theoretical approach to resource management and tribal property more generally thus repositions an inquiry of an enmeshment of space, law, and power as a system that is fundamentally *navigable* and potentially *useful* for the Tribe.
C. The Methods

This dissertation is based on one year and four months of participant observation, and five months of intensive work living in the four-corners region and helping the Tribe develop its Integrated Resource Management Plan (“IRMP”) and Cultural Resources Management Plan (“CRMP”). I initiated the work, requesting that the Tribe host my research in exchange for volunteering with the Tribal Historic Preservation Office (“THPO”) and to a lesser extent with the Tribe’s Justice Department. The work that I did however, was done on the Tribes’ terms. This reflected an attempt to redefine a traditional research agenda through the lens of critical indigenous theory. Specifically, I adopted critical indigenous theory as part of my methods to guide the research I did while working with the Tribe—which influenced my broader theoretical approach by anchoring critical legal geography within a uniquely Native context.

Critical indigenous theory traces its roots to Native scholars writing within American Indian Studies departments and in cross-disciplinary engagement with Native issues—and specifically the seminal works of Vine Deloria, Jr. Vine Deloria Jr. challenged the broader academy on issues of Indian stereotypes, theology, government policies, and ways of knowing (see e.g. Deloria 1969, 1994, 1997). Today scholarship in critical indigenous theory ranges from legal theory (see e.g. Williams 2012; Turner 2006; Carpenter et. al. 2009; Christie 2003), to modern Indian identity (see e.g. P. Deloria 2004, 1998); from research methodologies (see e.g. Tuhiwai-Smith 2012; Brown & Strega 2005) to queer studies (see e.g. Driskill et. al. 2011). Whether critical indigenous theory can be considered a stand-alone discipline within the academy (Hokowhitu 2009), and whether the adoption of a transnational Indigenous theory is beneficial to the theoretical work about Native people in the various sub-disciplines (Anderson
2009; Champagne 2007), enthruses continued debate. Dale Turner points out the dilemma in forging a critical indigenous philosophy,

> [I]ndigenous intellectuals need[ing] to ask themselves what it means for them to claim they have unique ways of understanding the world, and that differences matter, both legally and politically; at the same time, they must insist on greater participation in what the dominant culture deems to be exclusively non-indigenous intellectual practices (2006, 101).

As scholarship dealing with these tensions continues to grow however, a discernable set of ideas and scholars are beginning to define a new trajectory for Native scholarship both methodologically and theoretically.

For critical indigenous theorists, “the word itself, ‘research,’ is probably one of the dirtiest words in the indigenous world’s vocabulary” (Tuhiwai-Smith 2012, 1). Historically, non-Native researchers harvested information from Native people in a one-way flow controlled by a colonialist agenda. This agenda manifests both blatantly, as is seen through the evidentiary substantiation of Native people as a savages through craniology (Thomas 2000), subtly, like through the marginalization of Native ecological understandings in science narratives (Deloria 1995), and silently, as through the colonization of gender identity and the struggle of two-spirits in Native communities (Rifkin 2011). Traditional social theory and research methods perpetuate a defensible understanding of ‘Indianess’ locked in a colonialist framework because they anchor ‘the Native’ as something to be studied. In this way the ubiquity of the Native in modern research does more to silence grounded meanings of identity, of rights, of past struggles and future dreams than it does to elucidate them (Byrd 2011). Even critical scholarship on Native issues largely tracks this stagnant research agenda by painting Native people as passive victims within the oppressive neocolonial state (Niranjana 1992; Te Kawehau Hoskins 1997). Not only is
this not true, but it conceals the immediate reality of both specific and universal experiences for Native people within the broader political systems (Hokowhitu 2009).

Both as a method and as a theory, critical indigenous theory reintroduces the Native voice into Native research. Methodologically, this encourages research methods that practically benefit the community at least as much as they do the researcher (Tuhiwai-Smith 2012). Theoretically, this means reconceptualizing space and history where the Native voice plays a central role to make visible what settler colonialism seeks obscures (Byrd 2011). Critical indigenous theory guided my daily interactions with the Tribe and guided how I interpreted those interactions as an underlying theoretical theme throughout this dissertation.

Employing critical indigenous theory as the guiding methodological principle for my research proved both liberating and limiting. I was adamant about my time in Towaoc being useful to the Tribe in some way to attempt to balance out the one-way flow of traditional dissertation research. This resulted in me largely working as an intern, volunteering hours on everything from getting the mail, to writing a tribal ethnology, from drafting responses to consultations, to making fry-bread for a field visit with potential developers. It took nearly two months of being a general intern before I was invited on a field visit—or really able to leave the THPO or Justice Department offices. But trust takes time and relationships take work, and I was resolute about conducting myself in a way that felt respectful to the Tribe and honoring of their willingness to let me in.

As time went on I found myself invited on more field visits, into more meetings, and the trajectory of my research on tribal resource management took shape. By the time I left Towaoc in mid-November of 2013, I had assisted tribal contractors on multiple site visits for resource development plans, attended various meetings on resource development, attended regional tribal
consultation proceedings for resource development on federal lands, and ultimately took over work on the IRMP when the person contracted went on an extended leave.

All the work I did however, involved the tribal government. The THPO basically prohibited me from engaging with the membership for fear of stirring up distrust in the community, for fear of causing political unrest during an election year, unofficially to be able to control what I was doing, and because the THPO felt the general membership would not contribute anything useful to my project. This dissertation thus provides a narrow narrative of tribal resources management that reflects my time working with the tribal government exclusively. That narrative is my own. This dissertation in no way attempts to speak on behalf of the Tribe, any individual government agency, or the Ute Mountain Ute people. It is just one, limited perspective on what I observed and only begins to portray the true cultural, social, spatial, or political richness of resource management on the reservation.

D. Chapter Outlines

Rather than seeking to answer a series of discrete research questions, this project unfolds as a process in five major theoretical steps organized into chapters:

Chapter two demonstrates that property, the free market, and modern nation-states grew hand in hand. By tracing the origins of property, markets, and states to a singular and reciprocal moment, this chapter seeks to make three fundamental arguments about property in the context of this project. First, it argues that Native property should be understood in terms of Karl Polanyi’s double-movement. It shows how property was developed as a tool for mobilizing land as a commodity on the market, which concomitantly generated a counter-movement to protect land against exploitation by it. The dual-development of property and the free market reveals
why nature is understood in terms of resources, framing a major theoretical tenant of this
dissertation. Second, it argues that the role of property in driving the market expansion in the
New Word was a violent and racist project largely positioned against Native people. This
complicates the double-movement of property by calling the role of the state as the medium for
protecting land and people into question. Third, this chapter argues that property functions as a
tool of governance. It disambiguates property and territory, and highlights three ways property
facilitates governance: as technology, as narrative, and as spaces of inclusion and exclusion. This
chapter establishes a framework for examining Native property and Native spaces that guide the
remainder of the dissertation.

Chapter three argues that the Ute Mountain Ute reservation is a spatio-legal construct
created by the United States to set up a specific relationship with the Ute Mountain Ute Tribe. It
argues that the Tribe, as the unified sovereign government we see today, didn’t exist prior to the
United States. Instead this chapter shows that the Tribe grew out of a complex and contested
process of boundary making with the newly forming federal government in which the reservation
system played the central role. To do this, this chapter investigates Ute history as a series of
nomospheric changes actuated through property and materialized through the de- and re-
possession of land. The first nomospheric change was the domestication of the horse and early
contact the Spanish. It describes Ute territoriality as inexorable from a deep-rooted relationship
with the physical landscape based on moving, which simultaneously described traditional
culture, kinship, land use, and social organization. Ute territoriality changed as the horse enabled
new interactions with the landscape, the Spanish, and other tribal groups which changed how the
Utes and organize themselves socially. The second nomospheric change was the fifty-year period
of treaty making that created the Ute Mountain Ute reservation. This chapter looks at Ute treaty
making and resistance as a process of de- and re-territorialization of land to demonstrate how by changing who owned newly defined areas of land, the federal government could change how that space was expressed. The third nomospheric change was the making of the Ute Mountain Ute Tribe as a sovereign government. This period marked a shift towards the re-appropriation of the federally mandated tribal structure and involvement in a series of major court cases that led to a monetary settlements, and also a major water and treaty rights settlement establishing infrastructural projects and use of property outside of the reservation boundaries. Ultimately this chapter seeks to demonstrates that the Ute Mountain Ute reservation is a space that is confined by a history of dispossession, but one that is constantly negotiated and renegotiated by the Ute people and the Tribe in order to set up the spatio-legal and regulatory framework for resource management discussed in the next chapter.

Chapter four argues that by engaging in resource planning with the IRMP and CRMP, the Tribe simultaneously reifies the hierarchical patterns of jurisdictional control based on the reservation system while challenging them. The Tribe must abide by federal guidelines and comport with the jurisdictional and regulatory framework based on the reservation system, which both disciplines the reservation space and reproduces the reservation boundaries by enacting the laws that uphold them. At the same time, the legal and regulatory framework of the IRMP and CRMP provides a clear and cognizable channel for asserting rights that push against the social and landed boundaries of reservation. To do this, chapter four first outlines the complex and overlapping jurisdictional matrix that confines the IRMP and CRMP spatially. It describes the jurisdictional scope of the Tribe to manage resources on tribal lands, federal lands, and Colorado state lands. Second, chapter four lays out the legal regulatory framework that applies to resource management on tribal lands. In doing so it discusses how the IRMP and CRMP reflect a broader
political strategy towards tribes to encourage self-determination and mitigate liability of the federal government while simultaneously increasing federal control through the application of federal laws. Third, this chapter connects the content of the IRMP and CRMP to the political agenda of the federal government. Finally, chapter four emphasizes how resource management governs the reservation space by looking at the co-management debate. This chapter sets up a point of departure from the majority of literature by asking why, despite the limited, deleterious, and disciplining potential of federally funded resource management, does the Tribe do it anyway.

Chapter five refocuses the debate about tribal resource management on the Tribe as a knowing and deliberate political actor, and then answers the question posed in chapter four. It argues that the Tribe engages in the IRMP and CRMP to produce resources as tribal property and generate new governable spaces to assert itself as a sovereign. To do this, it identifies three major processes for producing resources as properties that are consistent with the market. The IRMP/CRMP produces resources as property by visualizing them, creating maps and collecting GIS data to distinguish individual resource on the landscape; separating and classifying them through the literal act of fencing or distinguishing rhetorical difference between different natural, or natural and cultural resources; and valuing them, by assigning monetary and non-monetary values to resources and ordering management priorities according to those rankings. Second, it argues that the Tribe uses the governing power of property to generate new spaces both on and off the reservation. The IRMP/CRMP heterogenizes the reservation space by producing spaces of governance within its own political structure, and also creates spaces to assert itself as a sovereign outside the reservation boundaries. In doing so this chapter marks a major departure from the literature and looks at how resources operate as tools for governance that are severable from a traditional land base. This suggests a re-characterization of dominant understandings of
Native territorial expression as contingent on traditional lands but also equally removable from them, and shows how resource management can mitigate the significance of landed boundaries as a limiting factor of tribal sovereignty. Finally, this chapter seeks to show how the Tribe uses property to re-appropriate the federal framework to renegotiate its relationship with- and outside of the broader nation-state demonstrates a third movement of property.

The final substantive chapter, chapter six, investigates solar energy development on the Ute Mountain Ute reservation to make a broader argument about power, in a political sense, through the production of power, in a physical sense. Specifically, it argues that the Tribe engages in renewable energy generation to increase its influence as a sovereign through new governable spaces outside of the reservation boundaries and into non-Native communities. To do this, this chapter broadly employs the arguments substantiated in the previous chapters as spatially consequential steps that are inexorable from the law and necessary to understand the utility of property-based resource management as a whole. First, it relays a brief history of energy development in relation to property, the state, and the market to demonstrate the connection between energy and governance. Second, it tells a legal geography of the regulatory framework governing the generation and distribution of solar energy on Tribal lands drawing on the theme of the double-movement. Third, it discusses how solar energy is produced as a resource through the IRMP/CRMP and examines how energy development creates new governable spaces for the Tribe to expand its role as a sovereign as the third movement of property, and in doing so, suggests a re-imagining of Native territoriality and the meaning of reservation boundaries.
F. The Point

This dissertation seeks to give agency back to Tribes as conscious and deliberate actors in the resource management debate. It examines how the Ute Mountain Ute Tribe is implementing an Integrated Resource Management Plan and Cultural Resources Management Plan on the reservation through the lens of legal geography to argue that federally guided resource planning is both good and bad, but more importantly, is best for doing something else. This dissertation shows that the Tribe engages in resource planning to employ the governing power of property vis-à-vis resources in order to increase its power as a sovereign through new governable spaces outside of the reservation boundaries. By reconsidering the utility of resource management this dissertation suggests a ‘third-movement’ of property as a tool for re-ordering traditional relationships with the federal government that can be multiply employed both within and outside of the nomosphere of the state, broadly construed. In examining how the Tribe navigates the enmeshment of space, law, and power as means for asserting itself as a sovereign outside of reservation boundaries, this dissertation submits a model of Native territoriality that exists outside of traditional lands. In doing so, this dissertation pushes on the traditional role of place as necessarily generative and limiting of tribal sovereignty to promote a shift from an absolutist and land-based understanding of sovereignty towards an understanding of tribal sovereignty as a diffuse mode of governance.

F. A Caution

In many ways, “Native property” is a paradox. Understanding how the Tribe can accept a resource management framework antithetical to traditional culture in order to preserve it, utilize the reservation boundaries to move beyond them, and adopt a system of property confined by the state to contravene it, requires a willingness to see the possibility of simultaneous opposites. I say this as a caution to the reader in attempts to dispel any tendency for frustration upfront. Giving creed to paradox requires an honest development of all of the inapposite parts. This
dissertation will build an idea up, argue the opposite to break it down, and then conclude that both are true. It will develop multiple definitions of what property is, what property should be, and equally conclude how it is and isn’t all of those things. There is an art to writing about Native issues that is difficult to achieve—perhaps another paradox that forces nonlinear and a-temporal moments into a systematic framework of academic argument. I can confidently say that I have not mastered that art yet, nor that I ever will, but equally that I tried my best. So I ask the reader to follow the arguments lightly, hold them in your mind, but wait until the end to make your judgment about what I have to say.
Chapter II: 

The Double-Movement of Property

Property rights grant control over a particular place, thing, or idea to a legally cognizable owner. With property ownership comes the standard ‘bundle of rights,’ guaranteeing the owner the right to alienate- or transfer, use, and exclude most non-owners from their property (Singer 1997). But “property rights do not constitute a pre-existing socio-spatial order” that the law describes (Bryan 2009, 40). Properties are made; and they are made to order the world by mandating who can do what, with what, and where (Blomley 2003; Delaney 2010). To understand how and why property orders the people and space the way it does, it must be considered within the political and economic project it originates in.

This chapter demonstrates that property, the free market, and modern nation-states grew hand in hand. By tracing the origins of property, markets, and nation-states to a singular and reciprocal moment, this chapter seeks to make three fundamental arguments about property in the context of this project. First, it argues that Native property should be understood in terms of Karl Polanyi’s double-movement. It shows how property was developed as a tool for mobilizing land as a commodity on the market, which concomitantly generated a counter-movement to protect land against exploitation by it. The dual-development of property and the free market reveals why nature is understood in terms of resources, framing a major theoretical tenet of this dissertation. Second, it argues that the role of property in driving the market expansion in the New Word was a violent and racist project largely positioned against Native people. This complicates the double-movement of property by calling the role of the state as the medium for
protecting land and people into question. Third, this chapter argues that property functions as a tool of governance. To do this, it disambiguates property and territory, and highlights three ways property facilitates governance: as technology, as narrative, and as spaces of inclusion and exclusion. This chapter establishes a framework for examining Native property and Native spaces that guide the remainder of the dissertation.

A. The Origins of Property and the Double-Movement

The first reference to property, as a legal construct of ownership and exclusion, can be traced to the late seventeenth century works of John Locke (Elden 2013). In 1690, Locke published his seminal work “Of Property” as the fifth chapter of the second treatise in *Two Treatises of Government* as an attempt to justify the link between ownership in land and labor (Elden 2013, 305). He argued that God gave the world to men in common and that individuals could secure ownership over land at the exclusion of others by working it (Locke 1965). However, Locke’s theory of property must be considered a direct response to the growing class of poor, landless peasants increasingly pushed into wage labor as a result of the enclosures in England.

The English enclosures, beginning in the fourteenth century, describe a process by which the wealthy class fenced off parcels of land in the countryside historically held in common, physically and often violently excluding the rural class. The self-proclaimed owners then converted those lands from agriculture to pasture largely to raise sheep for the production and sale of wool, but also to harvest iron, coal, or whatever other resource might exist there (Polanyi 2001). The enclosures peaked during in the sixteenth and seventeenth centuries when the price of
wool on an increasingly international market skyrocketed, as did the legitimacy of property in the British common law.

The enclosures introduced the idea of land as something that could be owned privately and moreover, valuable and alienable in terms of money- a critical invention for the free market (Polanyi 2001). The value of property in land was calculated by what could be produced from it, fundamentally shaping how the landscape is viewed in terms of resources today. Property grew hand in hand with the free market, which continuously fractionated nature into individual resources that were equally owned, sold, and excluding of the societal forces that produced them. Any understanding of property or environmental management today thus must acknowledge how resources came to be viewed as manageable commodities through, and as properties valued on the market.

The disaster that befell the English countryside as a result of the enclosures and increasing exploitation of land and labor inspired Locke’s understanding of property as a necessary solution to safeguard the commons. William Blackstone solidified Locke’s understanding of property in the British common law with his treatise entitled *Commentaries on the Law of England*. Like Locke, Blackstone also described the evolution of property out of a state of pristine nature where God bequeathed ownership over all things to mankind alone. Blackstone too largely wrote in response to an increasingly frightening scenario in the British countryside as individualistic rights of possession conflicted. For Blackstone law coevolved with government to protect those rights and maintain order through property (Blackstone 1765-1769). What resulted for Blackstone, and consequently the common law, is a notion of property as the “sole and despotic dominion which one man claims and exercises over the external things of the
world, in total exclusion of the right of any other individual in the universe” (Blackstone 1765-1769, 1).

What Locke and Blackstone failed to understand however, is the risk of the destruction of the commons likely had less to do with the propensity of man as it did with the propensity of markets (Polanyi 2001). Karl Polanyi argued that it was the market that required an institutional separation of society and economy to allow for the transformation of land, labor, and money into commodities that could be bought, sold, or *owned*. Because land, like labor and money, is a fictitious commodity it is uniquely vulnerable to exploitation by the market and therefore required legal intervention to protect it.

Although Locke, Blackstone and Polanyi may disagree on the force driving the destruction of the commons, they agreed that property was a necessary function of government to protect it. Unlike Locke or Blackstone however, Polanyi argued that the state was equally interested in protecting property to preserve the commons as it was with protecting landed interests and the functioning of the free market (Polanyi 2001, 71). In other words, property proved reciprocally generative of markets and vise versa, which necessitated the development of an active state as an overarching regulating force to mitigate the destruction of land and labor by the market.

This is what Polanyi described as the “double-movement.” As the market economy continued to grow through improved trade technology and the Industrial Revolution, it was equally met by a social countermovement to check market expansion and protect against the complete annihilation of land and labor (Polanyi 2001, 138). Although the double-movement originated in society—and primarily the landed classes, it spurred reciprocal actions by the state to solidify the ‘instruments of intervention’ in the form of protective legislation (Polanyi 2001,
Applying Polanyi’s double-movement to property thus positions it as a state protected regulation that was both necessary for organizing land and labor in terms of commodities and the expansion of the free market, but also as an intervention to protect against it. The double-movement frames the dualistic nature of property as both an inherently destructive and protective mechanism at its core.

For Polanyi, the best mechanism by which to mitigate the destructive effects of the free market was the state. However, examining the role of property as protective and generative of the market mechanism during colonialist expansion in North America calls Polanyi’s ultimate recommendation into question.¹

B. Complicating the Double-Movement with Colonialism, Violence, and Race

American colonialism was born out of the protectionist backlash of the double-movement coupled with a limited geographic setting for market expansion in Europe that forced the wealthy class to look elsewhere to sustain growth (Arendt 1976, 125). The market sought new places of accumulation and new spaces to invest surplus capital in order to keep the political economy going (Harvey 2001). Property proved the fundamental mechanism by which Europe colonized the Americas as a multi-faceted enterprise in search of commodities, accumulation, and religion (Williams 1990). The essential role of property in driving market expansion in the New World embeds any understanding of property—Native or otherwise—in a history of cultural violence.

Whether the colonist needs land as a site for the sake of wealth buried in it, or whether he merely wishes to constrain the native produce of surplus of food and raw materials, is often irrelevant; nor does it make much difference whether the native works under the direct supervision of the colonist or only under some

¹ It is important to acknowledge that there are different approaches to the evolution of property that may challenge or enhance this version of the story. For a full account of the different jurisprudential approaches to the origins of property, see Alexander and Peñalver 2012.
form of indirect compulsion, for in every and any case the social and cultural system of native life must first be shattered (Polanyi 2001, 188).

Here, Polanyi uses colonialism to demonstrate how the market economy requires the destruction of the traditional embeddedness of society and economy. Colonialism, as originally a capitalist endeavor, must begin by violently breaking up traditional patterns of kinship and culture through the commodification of land and creation of property.

Although colonialism may not have started out as a racially motivated project, it quickly became one. Colonists used race to justify the shattering of Native lifeways as primitive or backwards under the guise of progress and political disputes (Arendt 1976, 186). To be clear, because property, government, and the free market were born as a singular and reciprocal movement, progress was largely viewed in terms of economic growth. This necessitated and justified the imposition of market mechanism through property in the colonies based on race. Thus the very idea of progress discursively produced a racial understanding of the Native as the inferior other (Williams 1990). “Western notions of property … in a colonial geography, is a white mythology, in which the racialized figure of the savage plays a central role” (Blomley 2003, 124). The racial othering of Native people further justified the hierarchy of rights afforded to settlers as the legitimate property owners and anchored perceived racial differences in the landscape.

The traditions and resistance by Native people to the state-backed market mechanism in the New World generated a system of laws cloaked in a violent record of genocide, conquest, and racial ordering (Williams 1990). The legal mechanism of property equally enacted and obscured those violences. The literal taking of Native lands can be justified as a mere transfer of title, muting the lived effects of disembedding people from it with the law. The system of rights that property does afford reifies the racial project of othering. The origins of property and
motivation of colonialism was largely dictated by the (white) wealthy class of Europe, which premised a history of systematic exclusion of ethnic minorities from holding the same property rights (Harris 1993). For Native people, even as property owners the law only offers a particular set of rights based on individual ownership that efface traditional ways of using those lands and resources to maintain a collective way of life (Carpenter, et. al. 2009).

The necessarily violent and racial aspects of property complicate Polanyi’s understanding of the double-movement in a Native context. Property cannot be a mitigating force to protect land and people against markets if the state has an equal interest in annihilating them. Even if the state’s interests were aligned with Native peoples, the double-movement confines any reciprocal countermovement for or against property within the political fabric of the broader nation-state. From this perspective, Native people can only be considered rights holders within a singular paradigm wedged between the market and the state, broadly construed.

In other words, property may protect Native lands and resources from the market but it does not protect them from the state. Within this framework, if Native people were to use property to counter-act encroaching market interests, they are required to do so within the political framework of the nation-state and property may do more to reinforce colonial hegemonies than reverse them (Wood 2010; Wainright & Bryan 2009). In fact, the violent and racist history of property played the foundational role in how Europe maintained control over their respective colonies in the New World, and continues to function as a tool of governance today (Williams 1990).

Consider the criminal case of *Hagen v. Utah*, 510 U.S. 399 (1994). Mr. Hagen, a Ute citizen of the Uintah reservation in Utah, pleaded guilty to selling marijuana in the town of Myton after he was caught and prosecuted by Utah state officials. Before he was sentenced
however, Mr. Hagen withdrew his guilty pleading on the grounds that he was an Indian and the alleged crime occurred in Indian Country. Under 18 U.S.C. §§ 1151-1153, if an Indian commits a crime in Indian Country and no non-Indian person is victimized, the state (of Utah) lacks criminal jurisdiction to prosecute the crime. This case eventually made it up to the Supreme Court where the question became whether or not the town of Myton, which was within the original reservation boundaries of the Uintah reservation, was still “Indian Country.” In brief, the justices found that the history of white settlement on the southern portion of the reservation and the fact that 85% of Myton’s inhabitants today are non-Indian meant that the reservation had been diminished. Myton was no longer Indian Country, Mr. Hagen’s ‘Indian-ness’ did not matter, and Utah’s jurisdiction was upheld.

The diminishment of the Uintah reservation—the literal de-legitimation of its original boundaries—in *Hagen* demonstrates the enmeshment of space, law, and power in the context of Native property rights because it interprets a dispute over jurisdictional control as an objective interpretation of boundaries (Delaney 2010). The debate over criminal jurisdiction was predicated on reservation boundaries, as delimited by the 1864 Act of Congress confirming the executive order to reserve about two million acres to Uintah, White River, and Tabeguache bands of Utes. However the Court’s analysis as to whether the original boundary could still be considered Indian Country for jurisdictional purposes was predicated on a deeply racial and contextual understanding of space having to do more with who was living in Myton rather than where Myton fell on the landscape. The Court’s decision had less to do with disputed title or legislative history than it did with power-laden interpretations of which governing body should have control over the majority of non-Indians living there. Yet through an ostensibly objective
interpretation of property law, the Court carved off a discernable chunk of the reservation, and with it tribal authority, by handing jurisdiction over to Utah.

The *Hagen* case unveils the patterns of violence latent in Native property and demonstrates how property necessarily engenders racial violence as a tool for governance. Law does not exist if it does not “imply in itself, a priori, in the analytic structure of its concept, the possibility of being ‘enforced’, applied by force” (Derrida 1990, 925). The force of law is the structure and root of sovereign power, which both produces and preserves institutionalized violence by including certain types of people within the law while excluding others (Agamben 1998). Property then, as the materiality of the law, does not just rely on the force of law as the threat of violence (Rose 1994), but also enacts and protects it. Property functions as a tool of governance through the giving and taking of places, things, legal protections, and reordering of social relations, but is hidden within a legal discourse of objectivity (Brealey 1998).

**C. Property as a Tool of Governance**

Property and governments grew hand in hand as the double-movement. The birth of property in the late seventeenth century marked the epitome of colonial imperialism, the birth of the modern nation-state (largely attributed to the 1648 Treaty of Westphalia), and the nascent inklings of the modern capitalist economic structure, all largely stemming from conflicts over land (Polanyi 2001). Internal conflicts over land in Europe were increasingly matched by conflicts with colonial nation-states in the New World. Property—violent, racist, and persuasive—became the central medium for securing rights to land against others (Williams 1990). Property provided the political means for profiting from land in the budding market
economy, and territory secured the sovereign jurisdiction of newly competing nation-states to
govern the colonies (Polanyi 2001; Elden 2013, 329).

Before moving into the specific ways property is used as a tool of governance, it is
important to disambiguate property, space, place, and territory. Property, as discussed earlier,
refers to the legal means by which states ordered social relations spatially, disembodying land
from man, excluding other man from that land, and ultimately transforming land and resources
into commodities for sale on the free market (see e.g. Soja 1971). Space and place help define or
interpret these relationships. Although the precise meanings of space and place are the source of
much scholarly debate in geography, this dissertation treats place as physical location that can be
interchangeable with land, and space as physical or non-physical spheres of relations (see Agnew
2011; Elden 2010). These concepts constantly overlap both experientially and discursively.

Territory on the other hand, embodies a uniquely political connotation that is inherently
related to property (incorporating concepts of space and place), yet distinct from it (Elden 2010).
By the end of the scientific revolution, budding nation-states employed territory as the primary
political technology to define and extend their power (Elden 2013; Delaney 2005). Territory
refers to a geographic area made legible and therefore governable through the technical and
juridical metrics of the broader state (Bryan 2011; Watts 2003). Because territory was born as a
political technology for sovereign state-making, it is largely understood as the spatial mechanism
by which sovereigns extend their power over people vis-à-vis control over space (Elden 2013,
284; Foucault 2009). Territory thus can be established with property, but doesn’t have to be, and
property can exist within territory in multiple forms (Elden 2010).

Understanding territory as an exclusive mechanism of the state obscures the multiple and
overlapping ways non-state actors establish and maintain it (Agnew & Oslender 2010).
Territories are not necessarily spatially exclusive and often exist in contravention or at least agnostic to the political geography of the modern nation-state (Baletti 2012). A broader understanding views territory as “the space in which to build a new social organization collectively, where new subjects take shape and materially and symbolically appropriate space” (Zibechi 2012, 19). Territory is a lived space that is reflective of traditional cultural relationships with place, but also amenable to change and adapt with new ones.

Keeping with the theme of the double-movement, this dissertation sees territory as both. It is both a modern political tool for extending the power of the state and modernity more generally, and a way for non- and extra state actors to work against it. Territory describes how certain entities exercise and maintain control over lands and with it the political implications on appurtenant relationships of power. *Territoriality* then, is the active expression of territory (Elden 2010). It is the means by which people, groups, or governments establish, exercise, and produce territory as a mechanism for control. Territory is contingent on and reflective of territoriality. It changes and grows as temporally contingent expressions of territoriality that originate as cultural interactions with the landscape - but can also exceed it (Elden 2010; Soja 1971; Agnew 1994).

Property and the development of the modern nation-state are reciprocal and mutually generative of the legal interventions that order social relationships according to space, create territories, and discipline territorial expressions to facilitate governance. The relationship between property, territory, and governance has been the source of a wide range of inquiries in both law and geography (*see e.g.* Smith 2002; Singer 1997; Rose 1990; Delaney 2005; 2010; Blomley 2005; Keenan 2010; 2013; Bryan 2009; 2011). This dissertation looks at three narrow but interacting ways property functions as a tool of governance in relation to territory in a Native
context to see what property does, or can do. Property functions as a tool of governance as technology, as narrative, and by generating spaces of inclusion and exclusion.

1. Property as technology

“ Territory should be understood as a political technology, or perhaps better as a bundle of political technologies... Territory comprises techniques for measuring land and controlling terrain” (Elden 2013, 323). Property is one of techniques for establishing territory, and as discussed previously, proved the dominant technique in governing Native people in both the colonial governments of the New World. For property to function as a technique of territory or individual form of governance, properties must be legible (Bryan 2009). Be it as a discernable web of relations, real property, or indispensible part of personal or group identity—any theory of property necessitates that property exist in some medium, and therefore must be generated as such (Mitchell 2002). Although property as a political technology has been the source of important scholarship (see e.g. Bryan 2011, Elden 2010; Mitchell 2002), the techniques by which properties are generated have been the source of little attention. This section discusses property technologies as something specific. It highlights the technological mechanisms by which properties are generated, which presuppose how property can function as a tool of governance—something to be imposed on and through the landscape to order people and place.

The failure for scholarship to address the specific ways in which properties are made highlight the time-old tension between the interaction between science and the law. Just as science is popularly considered a neutral basis for truth free from the influence of culture, law is considered reason independent from irrational emotion and divorced from the changing tenets of science. Science influences the law only insomuch as it can be interpreted through the credibility
of the experts (Jasanoff 2009). This tension between law and science can be traced to the earliest theories about property. “[H]owever much … early modern theorists hoped to ground political economy as science, one notices that their discussions of property at some point take a striking turn towards the narrative or “diachronic” explanatory mode…” (Rose 1990, 38).

But the boundary between the scientific and the diachronic is not so clear. Lines drawn between law and science are necessarily arbitrary and unreflective of the hybrid nature of all problems (Latour 1992). History and technology are in fact so entwined, that today it is “unclear who makes and who is made in relation between the human and the machine” (Haraway 1991, 177). Acknowledging the fabricated dualisms between nature and culture does not argue towards any new universalism, but rather provides a different perspective in understanding why those boundaries are there in the first place (Haraway 1991). Property, as a function of both physical and figurative boundaries, embodies the tensions between law and science at its core. Couching property as isolated from science obscures the processes by which property is created, and as a result obscures what property does (Blomley 2003). “The implicit acceptance of proposed boundaries is therefore a key way in which either propositional truth claims about reality, or historical observations of pattern, may become accepted as fact” (Forsyth 2003, 90).

Property law is inextricably dependent on the technologies by which properties are made. These technologies allow property to function as a tool of governance by organizing bodies, things, and place into an organized disciplinary mechanism that can be controlled by the broader state (Blomley 2003, 122). I define the ways in which properties are made as property technologies, or the pseudo-scientific techniques used to legitimate and sustain properties. These include early technologies for demarcating boundaries between neighbors such as fences, as well as modern technologies such as city grids, surveys, and patent registries. These mechanisms are
essential to both creating and maintaining property as a form of governance because they legitimate and document boundaries of ownership, and render space calculable (Mitchell 2002). Perhaps no property technology has been more influential in both producing and legitimating property law or the governance more generally, than the modern map.

The origins of mapmaking share in the origins of property law and making of the modern state. In the sixteenth and seventeenth centuries, countries in Europe ushered in a surge of mapmaking as sovereigns competed for superior navigation, military strategy, resources, and political jurisdiction and legal control (Wood 2010). For example, to combat the superior cartographic progress of England and the Netherlands, in 1661 King Louis XIV of France commissioned a national survey to “restore France’s interests and to strengthen the authority of the state” (Crampton 2010, 67). The survey depicted political boundaries for the first time, and included images of defeated soldiers and competing colonial interests to portray a supreme royal sovereign (Crampton 2010).

Competing colonial interests drove improvements in technology that shifted the project of mapping the sovereign from a royal, to a decisively territorial affair. The cartographers of France focused on using new tools and more advanced geographic surveys to accurately fix territorial boundaries rather than narrowly categorizing royal assets. French cartographers also demonstrated a heightened interest in foreign maps—especially maps of territory in the colonial Americas—and worked to more accurately map their territory in relation to others (Crampton 2010). Nascent nation-states used maps to create sovereign space based on property, and establish a systemic regime of control based on mapped lands that was mirrored by all of Europe and parts of Asia (Wood 2010).
Maps demarcated territory, maps defined property, and property underpinned control over mapped lands and resident people. As the nascent states increasingly asserted dominion over lands, citizens were reciprocally forced to assert their property rights against them, against the market, and other citizens. “In all cases, maps are linked to what Foucault called the exercise of ‘juridical power.’ The map becomes a ‘juridical territory’: it facilitates surveillance and control” (Harley 2001, 165). In other words, maps do not reflect property; they create property to govern (Mitchell 2002; Bryan 2011).

Property functions as a tool of governance as technology by visually marking where people are permitted to do certain things, and who are permitted to do them (Rose 1994). Property then, is not just an external system of governance that we adhere to, but also co-produced by our reaction to how we see it (Lefebvre 1991). Understanding property as a site of co-production, as a double-movement, is essential to understanding how property orders social relations (Jasanoff 2004). Property law, through technologies such as mapping, orders social relations by drawing representative boundaries onto the natural world and between people. “Mere accumulation of the hard indices of power—guns, laws, armies, revenues—may not be sufficient to build or maintain robust dominion unless the state also has the means to exert a continuous, centripetal pull on its citizens’ imaginations” (Jasanoff 2004, 26). Property is essential to this imaginary because it provides the spatial and material medium for people to justify hierarchical views about exclusion, access, and control without questioning the mechanisms behind it.

Property technologically confines how people interact with each other according to space, which for Native people, is inextricably linked with collective history, culture, morals, and identity (Basso 1996). Native spatiality “can be understood as a momentary expression of
multiple social-ecological relations acting across scale,” where boundaries are fluid, and economic and cultural livelihoods concurrently create and affirm multi-dimensional interests and systems of access (Roth 2009, 211). Custodial and communal expressions of territory reflect traditional social interactions with the landscape. It underlies patterns of kinship, culture, governance, and all external relationships (Rifkin 2011).

Property translates Native conceptions of space into a static format that can be rationally understood, and therefore governed by the broader state (Bryan 2011). Recognizing property in Native land, for example, elicits the use of maps as property technologies where protectable property must be demarcated and titled. Maps draw property as homogenous polygons to “prescribe changes in land management, create conflict between households and communities, and make more static what were once dynamic social and environmental relationships” (Roth 2009, 210). Property forces the multiple and interrelated ways Native people organize themselves socially, culturally, with relation to space into a singular static relationship of exclusion so they can be governed. Property works as a tool for governing Native people by confining how Native people interact socially and culturally and forcing them into the political fabric of the state (Bryan 2011).

2. Property as narrative

Property functions as a tool of governance by physically streamlining multiple understandings of space through property technologies, but also as narrative, by discursively producing a dominant way of seeing and enacting that space. The visual and spatial nature of property produces a particular type of “legal-consciousness” that conditions how we understand ourselves, how we view others, how we conceive of our relationships, and consequently how we
think about all of it (Blomley 2005). “Just as eyes are the window of the soul, so property stories are windows of the way people describe a proper life and the role that they think rights should play in helping them maintain that life” (Milner 1993, 251). The property narrative underlies societal relations to such an extent that it fundamentally orders how we view the world.

Property facilitates governance by instilling a particular understandings of people and place within the popular consciousness (Cover 1983). Locke and Blackstone told a story of property as a necessary intervention for preventing the individual appropriation of a preexisting and plenteous state of nature. Polanyi told a similar story of the vulnerability of nature that needed to be protected from humans. This paints a picture of man (or market) as a self-interested individual who will always favor himself over others. As property holders, we not only can but also should exclude others to protect the commons and ourselves. Property narrates how we act in public versus private places by generating assumptions based on rights, and justifies how we treat others as rights holders (Blomley 2005). The assumptions latent in social orderings of property simultaneously justifies the role of government—and property itself—as a necessary and even natural mechanisms for protecting those assumptions.

The property narrative tells a story about man that concurrently produces a dominant understanding about nature. Nature does not exist as an independent a-cultural space preexisting man, but rather is culturally produced through property (Delaney 2001). The idea of natural resources as the definitive way of viewing the environment evinces this in no small part, because resources were produced as commodities for the sole purpose of accumulating capital and valuing property on a market. But the narrative goes further. Most of the national parks in the United States for example, were reserved to preserve a pristine nature for future generations to visit. What this means is that ownership of the park was transferred to the federal government,
and a management regime was set in place to prohibit certain human actions within the park boundaries. Thus, for the United States to both to secure legitimate property rights and to produce a story of wild nature, the creation of national parks necessitated a history devoid of human inhabitants. To sustain this narrative, the Native people who had lived and used the parks area since time immemorial, the most notorious example being Yellowstone, needed to be removed (Rutherford 2011). The property narrative justified the removal of people and produced a particular and public understanding about nature that facilitated governance of that space as a park.

The property narrative also produced a story about Native people that both justified and actuated their violent removal in the making of the modern United States. This narrative resonates particularly with the Utes because Mesa Verde National Park is almost entirely former Ute Mountain Ute reservation land. In 1906, President Theodore Roosevelt took 14,520 of Weenuche land to create a national monument under the 1906 Antiquities Act (16 U.S.C.A §§ 431-433), which became Mesa Verde National Park. The official justification of the creation of Mesa Verde varies slightly from the creation of the other national parks. Rather than preserving natural beauty, President Roosevelt created Mesa Verde to “preserve the works of man”. Mesa Verde was the first of its kind, and features the rock dwelling, homesites, rock art, and other cultural artifacts of the Ancient Puebloan people that had been subject to mass looting in the late nineteenth century (Mesa Verde Colorado). When I visited the Park however, there was no mention of the Utes, or any other Tribe or Pueblo for that matter. Instead, the Park signs and exhibits celebrate the history of the Nations’ “first people” focusing on their mysterious depopulation around 1300 (Mesa Verde Site Visit 2013).
Modern Native people are completely left out of park tours and exhibits to produce a public narrative about the history of human occupancy that desisted—seemingly completely—well before the arrival of the Europeans. The federal government stripped the Ute Mountain Ute of its land and removed their presence from the region. This obscures the violent history of dishonest conquest in Colorado while reinforcing the romanticized view of the “historic Indian” in the public consciousness (Deloria 2004). Property tells a story of the West that was devoid of human inhabitancy to justify its conquest and facilitate how it is governed.

3. Property as spaces of inclusion and exclusion

By telling a story of self-interested individualism and utilitarianism, Locke and Blackstone engrained the right to exclude as perhaps the fundamental tenet of property. Although property grants a variety of rights to owners and the right to exclude is tempered by conflicting rights of non-owners and legislation, the right to exclude weighs heavy on the public consciousness and defines the contours of social relationships daily. Private property owners can use lethal force on uninvited people entering their home; city councils can pass ordinances to prohibit homeless people from living on city-owned streets; the federal government can fine Native people for collecting berries in national forests (Delaney et. al. 2001). The law codifies hierarchies of rights based on the principle of exclusion, and orders what certain people can or cannot do, in certain places.

Property grants individuals rights to exclude others from spaces, relationships, and things. The state legitimates individual property rights and therefore the rights of individual property owners to exclude others. The right to exclude diffuses the power of the sovereign through individual rights holders to maintain control and facilitate governance (Foucault 2009). The law
does not govern the juridical subject as a threshold for asserting a political voice, but rather through the subversive embodiment of complex and interrelated systems of power that are both promulgated and produced through the disciplinary mechanisms of modern institutions. The law is a deep-rooted structural technique for expanding disciplinary control over individual bodies, which in turn, facilitates the management of people as a group. Property, as a function of the law, normalizes multiple understandings of the world into a single narrative used to order society (Foucault 2009; Cover 1983).

Property scholars however, often place the right to exclude on the opposite end of the property spectrum from broader systems of governance actuated by the state (Smith 2002). Whereas the right to exclude limits what can be done, the state, broadly construed, can also use property to prescribe how people use certain places or things are by regulating it (Smith 2002). Thus property also governs as a space of inclusion. It operates through individuals as a rubric for mass normalization. “There is not the legal age, the disciplinary age, and then the age of security,” the ‘technologies’ or ‘apparatuses’ of security arranges society in such a way that what we do, or do not do, is neutral and normalized (Foucault 2009, 8). In other words, law (the right to exclude) tells us what must not be done, discipline (regulation) tells us what must be done, and security (the broader state) regulates the population as a whole.

Viewing exclusion and regulation on two ends of a property spectrum however, fails to recognize that property is necessarily both. Property simultaneously excludes and includes in order to mediate the market, to legitimate the broader state, and to contravene all of it. The double-movement of property creates spaces of inclusive exclusion to govern both as a way to diffuse power and discipline individual bodies, and as a way to establish an overarching framework of regulation (Keenan 2010). The modern state actuates these relationships of control
materially through property. Property operates as a tool of governance by simultaneously including and excluding people and organizing their relationships between each other and with place. In this way, property can be considered spatially contingent relationship of belonging (Keenan 2010).

A relational and spatial understanding of property deemphasizes the conventional focus on the propertied subject and accompanying rights of exclusion according to the law, and adopts a more holistic understanding of property as spatially and temporally malleable, and one that is mutually reflective and generative of space made up by relationships of belonging. These relationships become embedded in space to such an extent, that over time they become inevitable or natural (Keenan 2010, 434). “Property thus has the power to govern beyond the direct control that a subject exerts over her object. The space that property produces governs the conceptual, social, and physical shape of the various elements which constitute it” (Keenan 2013, 491).

Property functions as a tool of governance by producing governable spaces by anchoring government thought in land (Rose 1999).

To govern is to cut experience in certain ways, to distribute attractions and repulsions, passions and fears across it, to bring new facets and forces, new intensities and relations into being… involves novel ways of cutting up time in order to govern productive subjects: we must learn to count our lives by hours, minutes, seconds, the time of work and the time of leisure, the week and the weekend, opening hours and closing time… it is also a matter of space, of the making up of governable spaces: populations, nations, societies, economies, classes, families, schools, factories, individuals (Rose 1999, 31).

Although other factors contribute to the formation of different types of governable spaces, namely political economy, legal complex, cultural traditions, and ethnic identities, governable spaces require a visible land base (Rose 1999; Rose & Valverde 1998; Watts 2003, 2004, 2005). The specific amalgamations of territory, subject identity, and rule leads to different group
geographies, be it physical, social or ideological, and do not just reflect institutional techniques of power, but generate new sites that produce different ways of being and seeing the world (Watts 2004, 53). Tools of governance define spaces where political ideologies and personal conduct are anchored to a recognizable land base, controlling population vis-à-vis geospatially discernable districts. In this way, property heterogeneously territorializes control over groups to create governable enclaves dependent on conceptions of space and time prescribed through the institutional disciplinary and legal techniques of governance.

The United States used property to both dispossess Native lands and create governable spaces to order and control Native people through the reservation system. This topic will be developed more fully in the next chapters, but for now, consider how enclaves of Native versus non-Native property through the reservation system underlie the system of Indian Law. Tribal sovereignty is legally premised on a recognized tribal land base. Property secures the right to self-determination and therefore the ability create laws that govern tribal members and apply within the reservation space. At the same time, that space exists within the political fabric of the United States and establishes a government-to-government relationship that premises a myriad of federal statutes and underlies principles of federal Indian law that also apply on the reservation (Goldberg-Ambrose 1991; Krakoff 2006). Property generates the reservation as a governable space by including and excluding, which allows the federal government to confine Tribal authority to the reservation and govern it (Delaney 2010, 141).

D. Conclusion

This chapter aimed to prove three major points by demonstrating the simultaneous and interrelated origins of property, the free market, and modern nation-states. First, that property
was developed as a tool for mobilizing land as capital on the market, which concomitantly
generated a counter-movement to protect land against exploitation by it embodying Polanyi’s
double-movement. Second, that the role of property in driving the market expansion in the New
Word was a violent and racist project largely positioned against Native people, calling the
double-movement into question, to be addressed later in the dissertation. And third, that property
functions as a tool of governance as technology, as narrative, and as spaces of inclusion and
exclusion. This sets up the major ideas that the next chapters will employ to examine the spatio-
legal framework of the reservation, resource management, and ultimately how the Tribe uses the
property to navigate it.
Chapter III:  
The Spatio-Legal Construction of Ute Mountain Ute

This chapter argues that the Ute Mountain Ute reservation is a spatio-legal construct created by the United States to set up a specific relationship with the Ute Mountain Ute Tribe. It argues that the Tribe, as the unified sovereign government we see today, didn’t exist prior to the United States. Instead this chapter shows that the Tribe grew out of a complex and contested process of boundary making with the newly forming federal government in which the reservation system played the central role. To do this, this chapter investigates Ute history as a series of nomospheric changes actuated through property and materialized through the de- and re-possession of land. “Nomospheric investigations and the unconventional conceptions of social space that inform them insist on the proposition that territories are not simply (inert) “things”—they *mean*. They signify. They are communicative” (Delaney 2010, 139). Nomospheric changes thus refer to shifts in spatial and social meanings enacted on and through interactions with the landscape. As discussed in chapter two, property assigns meaning to place- through technology, narrative, or spaces of inclusion and exclusion- and serves as a critical tool for governance that simultaneously legitimates the United States.

To do this, this chapter draws on historic events to describe three major nomospheric changes that produced the Ute Mountain Ute reservation and the Ute Mountain Ute Tribe as they exist today. The first nomospheric change was the domestication of the horse and early contact the Spanish. It describes Ute territoriality as inexorable from a deep-rooted relationship with the physical landscape based on moving, which simultaneously described traditional culture, kinship, land use, and social organization, and sets up a point of reference for distinguishing
change from the original Ute nomos. Ute territoriality changed as the horse enabled new interactions with the landscape, the Spanish, and other tribal groups which changed how the Utes and organize themselves socially. The second nomospheric change was the fifty-year period of treaty making that created the Ute Mountain Ute reservation. This chapter looks at Ute treaty making and resistance as a process of de- and re-territorialization of land to demonstrate how by changing who owned newly defined areas of land, the federal government could change how that space was expressed. The third nomospheric change was the making of the Ute Mountain Ute Tribe as a sovereign government. This period marked a shift towards the re-appropriation of the federally mandated tribal structure and involvement in a series of major court cases that led to a monetary settlements, and also a major water and treaty rights settlement establishing infrastructural projects and use of property outside of the reservation boundaries. Ultimately this chapter seeks to demonstrates that the Ute Mountain Ute reservation is a space that is confined by a history of dispossession, but one that is constantly negotiated and renegotiated by the Ute people and the Tribe in order to set up the spatio-legal and regulatory framework for resource management discussed in the next chapter. But first, let’s start at the beginning.

A. The Beginning

In the beginning, all that existed was a vast expanse of sky. Senawahv, the Creator, lived alone amongst the clouds, rain, and sunshine; no trees, no mountains, no animals, no men. One day, Senawahv tired of shining the sun and blowing the wind, and decided to dig a big hole in the heavens to see what lay below. He looked down at the vastness and began to pour the dirt and stone into the hole and see what happened. After some time, he peered into what was once
nothingness to see great mountains in the west and plains to the east. He was pleased with his handiwork, and crawled through the hole onto the biggest mountain to rejoice.

But the barren dirt and stone was not beautiful enough for Senawahv. So he touched the earth and lifted trees and forests from the ground; he patted the plains with his palms and there appeared grass; he shined the sun and melted ice into rivers and lakes, which flowed east or west off the mountains into the great holes that formed the oceans. Senawahv returned to earth every day to bask in its beauty and ponder things with his magic cane.

Soon, Senawahv grew lonely. For some company, he broke off a piece of his magic cane and made fishes that he put in the streams. Pleased, he wandered into the forest to collect some leaves. They were beautiful colors, and as he blew on the leaves cradled in his hands they began to grow wings, then feathers, then flew away; each leaf a different bird. Then he made antelope from the middle of his cane, then buffalo, rabbits, squirrels, the coyote, and every other animal. Everything was peaceful until the mischievous coyote caused all of the animals to start fighting and killing each other. Senawahv decided there needed to be one animal to look after all the rest and keep order. That is when he made the bear, with strength and wisdom to take care of all the rest and stop them from fighting. Coyote still causes problems, but most of the animals live in peace. Pleased with his work, he returned to heaven to rest a while.

One day Senawahv decided to cut up sticks and place them in a large bag. He left the bag with Coyote to tend to other things, but Coyote to become very curious. Coyote refused to wait any longer to see what was inside and he opened the bag when Senawahv was away. From the bag scattered many people unevenly across the earth. They all spoke one language, and now everybody speaks different languages. Senawahv had planned to spread the people across the earth evenly and because of Coyote, the people would war over lands. There were some people
left in the bag when Senawahv returned however, and as he examined them he picked up them and placed them in the mountains. These people would be the Utes, and although there weren’t many, they were strong and brave and able to defeat the rest (Pettit 1990; Wood 1980; Wilkinson 1999; Daniels 2008).

**B. Early Ute Traditions and the Induction to the Nomosphere**

The Utes have no migration story. Archeologists argue about how long the Utes have been on their traditional lands and evidence fails to either confirm or refute that the Utes have been here for thousands of years (Pettit 1990, 5). The people allegedly preceding the Utes, the Basketmakers, Ancestral Puebloan, and Fremont people, prove equally mysterious. Excavations and carbon dating of homesites in the region generally show that for unknown reasons and with an unknown destination, the Ancestral Puebloan people abandoned their homes by 1280 (IRMP 2013, 37). Archeologists generally agree that the Utes arrived in the Four Corners region by 1300 (Simmons 2000; Pettit 1990; Daniels 2008), although Ute oral history says they were contemporaries with the Puebloan people. Whichever account you believe, for thousands of years the Ute people have inhabited the vast region of the present day states of Utah, Colorado, northern New Mexico and northern Arizona, maintaining their land base.

Early Ute territoriality created a *nomos* that was inexorable and deep rooted relationship with the land based on moving, which simultaneously described Ute traditional culture, kinship, land use, and social organization. Although there were no formal laws, the Ute people maintained their territory through a complex system of interactive nomadism as at least seven² distinct but related bands: the Mouache, Capote, Uncompahgre, Yampa, Uintah, Grand River.

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² The number of bands varies from as few as four to as many as sixteen in the literature. Seven is the number listed in the IRMP and the majority of historical or archeological accounts warranting its use here, although there were likely many more.
and Weenuche (IRMP 2013, 36). The Mouache Band lived in southern Colorado and northern New Mexico. The Capote Band inhabited the San Luis Valley in Colorado near the headwaters of the Rio Grande and northern New Mexico. The Uncompahgre Band lived in the valleys of the Gunnison and Uncompahgre Rivers in Colorado and Utah. The Yampa Band inhabited the Yampa River Valley and the Uinta Utes inhabited the Uinta Basin. And the Weenuche occupied the valley of the San Juan River and its tributaries in Colorado and northwestern New Mexico (IRMP 2013, 36). Although the Ute bands moved into the Colorado Plateau, the Utes are Mountain people.

Although the Ute territoriality included a clear system of ordering access to lands based on mutual subsistence and patterns of kinship, traditionally the Utes “had no property, or rather [they] had no concept of property” (Interview A, July 29 2013). The Utes managed their land and material goods communally, where everybody in the band had equal rights to use everything. The system functioned because of strong Ute values of non-interference and mutual respect, where individual families could use the camps of others so long as they left everything as they found it. The bands traveled on foot, setting up intermittent camps where they would stay to collect berries, wild plants, and hunt wild game until “the grass got low” (Interview B, July 29 2013) or the season dictated another move. The Utes were not agriculturists but they occasionally planted small corn crops (Simmons 2000, 21). Although stories and ethnographies of the early Utes do not reflect contentious relationships with other groups, Ute territoriality was sustained internally as relationships amongst the bands were predicated by interlocking patterns of movement based on geophysical constraints.

The domestication of the horse in the 1600s drastically changed Ute life and ushered in a new meaning of Ute territoriality as interactions with other Native and colonial groups threatened control over their land—marking the first nomospheric change, or shift in the way spatial and social meanings were enacted through relationships with the landscape. Although the Spanish recorded contact with the Utes in territorial records in Santa Fe as early as 1626, the horses they brought moved north far earlier (Marsh 1926, 7). The Utes were the first North American Native group to domesticate the horse and are known for establishing the Pinto breed (Interview B, July 29 2013). Horses changed Ute territoriality firstly, because Utes kept horses privately. Private possession interwove a new concept of individuality analogous to the system of property maintained by the new neighboring settlers. Horses became the definitive symbol of
wealth and status. Individuals acquired most horses by raids, “so having horses meant you were a good thief—highly revered by the Utes and hated by everybody else” (Interview B, July 29 2013). Secondly, horses enabled the Utes maintain more immediate control over their land. The Utes constantly warred with other tribes and Spanish settlers for horses, but also for land as the Spanish increasingly pushed the Navajos, the Pueblos, Comanches, Apaches, Paiutes, Arapahos, Cheyennes, and Sioux onto Ute land (Simmons 2000, 29). These new interactions fundamentally changed the meaning of Ute lands into something that was exclusively theirs and that needed to be protected from others.

Interactions with the Spanish and other tribal groups caused reciprocal changes to Ute territoriality and systems of governance. Individual bands had always practiced a system of centralized governance, but the authority was diffuse and changed often. Each band would elect a cabinet of leaders to be in charge of the task he was particularly suited to like hunting or war. A council of elders in turn advised that group of leaders. Singular band or intra-band leaders rarely emerged and if they did, did not stay in power for long. After the domestication of the horse singular elected bandleaders became more common (IRMP 2013, 36-8). The loosely confederated bands began ally to protect Ute land against others. Shifting territorial expressions thus reciprocated socio-cultural and political changes as the need to represent a unified front increased ushering a new Ute nomos.

Even as discernable band—and in rare cases inter—band leaders emerged however, the Utes still “practiced ultimate freedom” (Interview B, July 29 2013). In other words, the leader retained power only insomuch as he provided good leadership for the band. His job was to lead families to productive hunting grounds, make good decisions in peace and war, and was ultimately responsible for the wellbeing of the band. At the same time however, no individual
family or individual was obligated to listen to the leader or stay with the band and all. In fact it was taboo for almost anybody except for an elder member of the nuclear family to interfere in the decisions of others. If one family did not like the decision of the chief, they were free to go. Reciprocally, if the chief were not serving the interests of the band members anymore, he would be ousted. Ute territoriality fundamentally inscribed social meanings over the landscape and defined how they organized themselves politically.

Ute territoriality was “fundamentally constitutive of the social orders whose features they express… cultural formation or social order is unintelligible without reference (if only tacit) to how it is territorially expressed” (Delaney 2005, 10). For the Utes, seasonal movement amongst shared camps at places selected by bandleaders, raiding other tribes or bands for horses, and generally practicing the system of integrated stewardship imbued a social meaning in the landscape that fundamentally connected the organization of Ute society to the territorial enactment of their traditional land base. This was both the source of their tenure, and underlying framework for governance. Internal governance could only be maintained should the leader effectively utilize the landscape, which in turn expressed that territory as Ute externally to other tribal groups and new colonial powers.

By the time Mexico gained independence from Spain in 1821, the Utes presided over an enormous land base. They had successfully defended their land from the Spanish—and even in kicking the Spanish of Pueblo land in the 1680 revolt, from colonial settlers, and from neighboring groups. They were well armed, politically savvy, and kept large herds of horses throughout the region, but “were generally content to keep amongst themselves… nomadic loners more covetous of their independence than even their proud Indian neighbors on the plains” (Marsh 1926, 19). At the same time, the Ute stronghold over such an incredible swath of
land made all of the bands into obstacles to Western conquest. Although drastic change would hit the eastern Ute bands before their sister bands to the west, the 19th century would try the resilience of all the Ute people. When the United States secured Ute lands from Mexico with the 1848 Treaty of Guadalupe Hidalgo, efforts to strip the Utes of their land shifted away from physical violence to a decisively more derisive type of conquest through treaty-making and the dispossession via property.

C. Treaties, De-Territorialization, Re-Territorialization, and the Reservation Nomosphere

Between 1849 and 1895, the United States legally dispossessed the Utes of nearly all of their land, divided and consolidated all the bands into three distinct Tribes, and forced them onto three separate reservations. This marked the second moment of nomospheric change. Treaties, new politicizations of western Territorial governments, the Homestead Act, and 1895 legislation systematically de- and re-territorialized almost all of the Utes’ land in only a generation’s time, and established the three Ute reservations as they exist today. By drawing new political boundaries and asserting overlapping authority on Ute lands, the United States used property as the legal “proliferation and dispersal of the territorial nation-state [ie the United States government] as the sole legitimate expression of political identity and authority” (Delaney 2005, 21). By changing how the territory was governed, the United States could start to change how that territory was expressed.

In 1849, James Calhoun, the governor of New Mexico Territory and ex officio superintend of Indian Affairs, negotiated the first treaty between the Utes the United States government (Treaty with Utah, 9 Stats. 984, Dec. 30, 1849, proclaimed, Sept. 9, 1850). Establishing New Mexico as a Territory on Ute lands demonstrated the first major step in
extending the power of the United States to govern the Utes as people. Twenty-eight ‘chiefs’ signed the treaty establishing a peace accord and free passage for trade and military posts, granting jurisdiction over Ute land to the United States government, and mandating the return of all U.S. and Mexican prisoners and property to the government. In exchange, the Utes retained rights to use and live on their land, as well as homes, and other incentives. This was a peace treaty and no boundaries were negotiated (Simmons 2000, 86-7). Without boundaries, property rights remained in flux, and the Utes were largely able to maintain their traditional lifeways. However, the treaty did secure federal jurisdiction over Ute lands—it was a territorial treaty that legally subsuming the Utes into the political fabric of the United States.

The United States government determined the first official boundaries of Ute lands in 1861 in the present-day state of Utah. As a result of violent clashes between the Utes and the ballooning population of Mormon settlers, President Lincoln declared a small, infertile section of the northeast portion of modern-day Uintah Valley Reservation in 1861 according to a survey conducted by Bingham Young himself (Decker 2004, 27). The Utes refused to move, and in 1865, Utah Superintendent Oliver Irish and Bingham negotiated an agreement with Utah Utes to move onto the Uintah Valley Reservation in exchange for $900,000 paid over the next 60 years, education, and the continued right to hunt and fish in their usual and accustomed places (Pettit 1990, 108).

For the western bands, the influx of settlement did not drastically increase until 1858 after gold was discovered in present-day Denver, Colorado. The discovery of gold ushered in a swarm of unwelcomed wealth-seeking settlers onto Ute lands, causing increased resentment amongst the settlers and the Utes. The discovery of gold began to change the meaning of that space in the eyes of the United States and new American public. Ute land quickly became
valuable and vulnerable, necessitating the role of the federal government to regulate mining
claims with property, though almost exclusively at the expense of the Utes. This prompted
Congress to establish the Territory of Colorado in 1861; further proliferating the power of the
United States onto Ute lands while simultaneously erecting a political boundary between the
eastern and western bands (Pettit 1990, 110). The new Territorial government invited an influx
of white settlers onto Ute lands, justified its taking, and protected that taking with property
simultaneously legitimating the role of the overarching United States.

Colonial tactics to eradicate the Ute people by dispossessing Ute territory came to head in
1862, when President Lincoln passed the Homestead Act. Under the Act, the federal government
granted 160-acre plots to any applicant who had not taken up arms against the United States, and
gave them title after five years of residency if the applicant had made improvements to the land
Now property did not just serve to expand the role of the United States as a sovereign, but to
slowly and legally break apart Ute society by giving their land to Anglo settlers as property and
protecting it. This both constrained Ute territorial expression and cultural integrity, but perhaps
more importantly, equally enabled another.

For the Western Territories of the nineteenth century, the Homestead Act fostered a
competing territoriality between Utes and homesteaders that served the political purposes of
forging a new nationalism in the United States. Propertied acre plots operated as both the spatial
and legal mechanism for Manifest Destiny, and also the rhetorical shift of the venerable self-
starting pioneer as the poster-child for a new American modernity. Practically this meant taking
Ute land and re-assigning it to Anglo-settlers, emerging states of Utah, Colorado, and New

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3 To the extent that these patents were issued, they were later determined to be invalid due to the Utes’ valid
Mexico, and the federal government to supplant “communal or ‘tribal’ affiliations” and reforming Native and non-Native territoriality in the West through the reservation system (Delaney 2005, 22).

The negotiation process and resulting treaties of 1863 and 1868 solidified the project of social and physical dispossession for the western bands and facilitated the making of a new American identity. In 1863 the Colorado Territorial governor John Evans brought thirteen Ute leaders to Washington D.C. to help coax the Utes to sell their land east of the Continental Divide (Decker 2004, 29). Not all bands were represented in the thirteen delegates however, and the proposed boundary negotiation disproportionately affected the Capote bands land in the San Luis Valley who outright refused to attend. The Uncompaghre chief Ouray did attend however. Ouray spoke fluent Spanish, English, Ute, and Apache, and federal officials lauded his poised and reasonable position in negotiation agreements. As a result, President Lincoln selected Ouray as the primary negotiator for all the Ute bands, disregarding the bands’ autonomy and objections amongst the other band chiefs.

By choosing Ouray as the representative to negotiate on behalf of all Utes, the federal government imposed a new system of political governance that was antithetical to Ute traditions of leadership and tenure amongst the bands. Although the Ute bands had strategically allied in the past, the foreign imposition of a singular leader pitted the bands, with differing patterns of land use and therefore interests, against each other. This demonstrates how dispossession served a dual function of colonial expansion: the reservation system simultaneously dispossessed the Utes of internal territoriality by legitimating property rights contingent on a new system of governance, while at the same time, it dispossessed the Utes of non-reservation lands and encouraged a new territoriality through the protection of white settlers.
Equally surprising to the Ute delegates in attendance, Ouray agreed to negotiate. Ouray signed the 1863 treaty and ceded all of Ute land in Colorado already occupied by white settlers in exchange for a reservation and yearly stipends of twenty thousand dollars in goods and provisions for ten years, which were never allocated (Decker 2004, 30). 1,500 members of the Uncompaghre band, one Capote chief, and three Mouache chiefs attended the treaty negotiation in 1863, and the Weenuche, Capote, and Utah Utes all refused to participate (Simmons 2000, 117). This demonstrates a continued push from the side of the federal government to unify the Utes as a “Tribe” while the independent bands continued to assert their difference and dissatisfaction.

The boundaries of the 1863 treaty remained in flux until 1868, when Ouray led the boundary negotiations. Although Ouray’s concessions deeply angered the Ute people, he succeeded in securing “what was, from the tribal side, perhaps the most favorable Indian treaty in American history” (Wilkinson 1999, 132). The 1868 treaty established the Consolidated Ute Reservation, which reserved nearly twenty million acres in the territory of Colorado from its boundaries with Utah and New Mexico, east to the 107th meridian (about 10 miles east of present-day Aspen), and north to the 40th parallel in exchange for $60,000 per year in annuities including food (Rockwell 1956, 81). But the 1868 Treaty would not last long.
In 1873 the Utes were forced to negotiate yet another treaty that would further diminish the Ute reservation after gold was discovered in the San Juan Mountains. The Utes had asked the federal government for assistance in removing the influx of miners from their land. Instead of enforcing the original treaty however, the U.S. Commissioner of Indian Affairs Felix Brunot demanded concessions and forced a new agreement on the Utes. The Brunot Agreement remains contested. Some bands understood the agreement as ceding only mining claims in the region; some understood the cession as only temporary; none agreed that the federal government could carve out all of the San Juan Mountains, nearly a quarter of the reservation (Brunot Agreement, Act of Apr. 29, 1874, ch. 136, 18 Stat. 36). In exchange the Utes would receive $25,000 per year to be held in trust for the Utes in perpetuity, and would be able to continue to hunt on the ceded lands provided they preserved peace with the settlers and game continued to abound (Rockwell 1956, 99).
The treaties, negotiations, and concessions of the 1863, 1868, and 1873 changed the meaning of Ute lands in at least three major ways. First and foremost, the Utes are mountain people. Divesting the Utes of the San Juans proved perhaps the most devastating of the land grabs not just because it confined Ute territoriality geographically, but also because the federal government gave it to white people to mine for gold, which was a direct affront to Ute cultural traditions. Second, the exchanges set up—or at least attempted to—a relationship of dependency between the Utes and the federal government. The federal government essentially replaced the Utes’ ability to subsist on their traditional lands with federally allocated concessions. At the same time however, the treaties established a specific government-to-government relationship with the Utes that would enable future legal proceedings, to be discussed in the next chapter. Beyond the physical violence of dispossession, the 1863, 1868, and 1873 treaty negotiations challenged the social organization of the Utes. The federal government dually imposed a sense of unity over the Utes, vis-à-vis Ouray, but also introduced new contentions among them.
These changes were not so much a result of the reservation system, but the primary purpose for creating the reservations in the first place. The federal government used property to establish a relationship of dependency as part of a broader political strategy to assimilate the Ute people as modern citizens. To change Ute people, the federal government focused on changing Ute space- and more specifically to turn them into sedentary farmers. This process began by restraining how the Utes could use their reservation lands. Indian agents converted pasturelands to plow, prohibiting Utes from exercising traditional territoriality of subsistence on the reservation. Changing how territory was used would change how territory is expressed, and fundamentally alter Ute society (Delaney 2005). Conflicting territorialities often devolved into conflict as the Utes continued to resist.

The tension between escalating inter-band conflict and a unified resistance to the reterritorialization of Ute lands by the federal government erupted into outright war in 1879, which would lead to yet another treaty for the Utes. The so-called “Meeker Massacre” exploded out of perhaps the most infamous series of increasingly hostile interactions between agent Nathan C. Meeker of the White River Indian Agency and the White River Utes. Despite the mounting resentment amongst the Utes, Agent Meeker insisted on converting the prime pasturing ground into agriculture plots. He chose to convert one particular parcel where Nicaagat, a prominent leader of the White River Utes, kept his horses. Nicaagat, a mixed blood Apache-Ute who had been enslaved by a Mormon family as a child, stormed into the agency to threatened Meeker. Nobody was hurt during this altercation, but Meeker sent an urgent telegram to the Interior Department seeking military assistance (Wilkinson 1999).

As a result, Washington D.C. sent federal troops under the supervision of Major Thornburgh to assist agent Meeker on the reservation. Communication between Meeker, Ute
leaders and Major Thornburgh broke down soon after his arrival. Nicaagat met with Major Thornburgh and warned him not to enter the reservation with his troops. Thornburgh decided to enter the reservation with a small dispatch. Nicaagat and Lieutenant Cherry met at the skirmish line to negotiate when an unidentified gunshot ended peaceful negotiation and sounded the alarm for war. The Utes killed Major Thornburg, ten soldiers, a wagon master, and wounded another twenty-five. The government desperately messaged for help. Three days after the battle had begun, 200 cavalry troops, 150 infantrymen, and supplies traveled 170 miles to Milk Creek. The exhausted troops were equally outmatched by the tenacity of the Utes, but were met by the “buffalo soldiers” three days later and quickly gained momentum. After more than six days of fighting, 450 troops arrived at Milk Creek and the Utes finally withdrew from battle (Decker 2004, 136-144).

On September 29, 1879, just after the battle at Milk Creek had commenced, twenty-five Utes surrounded the agency at White River (Decker 2004, 138). The Utes killed Meeker and nearly all of the other agency employees, torched the Agency and all adjacent buildings, and took the surviving hostage. The hostages included Meeker’s wife and daughter, as well as the wife of the agency blacksmith, and were released a few days following the denouement of the battle (Rockwell 1956, 137). In the end the Meeker Massacre and the battle at Milk Creek resulted in the death of at least twelve US soldiers (after 43 were injured and the troops kept hostage for five days), thirty-seven Utes, Meeker, all other agency employees, and six other white men (Wilkinson 1999, 142-43).

In 1879, the Utes federal government forced the Utes to renegotiate their treaty again. This time, the federal government gave the Utes little room to negotiate. On March 6, 1880 nine Ute Indians including Ouray, and Weenuche leader Ignacio signed an agreement that removed

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4 Buffalo soldiers were slaves forced into the cavalry during the “Indian Wars.”
the White River Utes from Colorado to the Uintah Valley Reservation in Utah (Rockwell 1956, 166-168). The Uncompaghre Utes were removed to allotted lands around present-day Grand Junction under the condition that sufficient agricultural land were available—and if not—then to the unoccupied agricultural land in Utah. Perhaps predictably, that spring federal troops escorted the Uncompaghre Utes along with the White River Utes to Utah (Marsh 1926, 101). The removal of the Utes from Colorado was brutal and devastating to the Ute people. Many Utes died in passage, and Uncompahgre chief Ouray refused to go passing in Colorado without witnessing the devastation of removal he spent his life trying to prevent.

Although the story of the northern Utes dominates the removal narrative, the removal of the southern bands was equally visceral and complex. The federal troops were pushing the southern bands out of the Uncomphagre forest south where they were met with violent resentment from settlers in Colorado. The settlers in Colorado were trying to push them north into Utah and southwest into New Mexico under the guise of a political campaign entitled “The Ute’s Must Go” (Decker 2004). New Mexico proved equally resentful and resisted Ute settlement by pushing them back into Colorado. Although the 1880 Treaty officially confined the Mouache, Capote, and Weenuche bands to the southernmost part of the Consolidated Ute Reservation in Colorado, the removal was further complicated by the fact that the legislation didn’t include a physical boundary of the northern end of the Southern Ute Reservation, which would become particularly relevant for the Ute Mountain Ute during the formation of Mesa Verde National Park discussed later. Nonetheless, the United States affirmed the remainder as the Consolidated Ute Reservation (Decker 2004).

Following the Treaty of 1880, the Weenuche attempted to live on the Southern Ute reservation for almost ten years, but in doing so, became increasingly estranged from the other
bands (Wood 1980, 16). The Weenuche refused to take up farming. Instead the Weenuche kept to the rocky canyon and piñon sprinkled plateaus of the western end and most ignored the reservation boundaries altogether. But the steady influx of settlers continued to tax the land, made living conditions difficult, and consistent conflicts with the settlers frightened Ignacio of losing the land altogether. So Ignacio went to Washington D.C., together with the Mouache Buckskin Charlie and Capote Tapuche to negotiate a move to Utah. The hearings did not sway Congress however, and the Utes were never authorized to move. That did not stop Ignacio or the Weenuche however. In 1887 the Weenuche left the reservation en masse to live in Utah. In 1894 however, the Weenuche were forced back to Colorado (Daniels 2008).

Ute dispossession did not end with treaty making. In 1887 Congress passed the General Allotment Act, or the Dawes Act, which called for the division and distribution of all tribally owned land to individual Native men in fee (General Allotment Act of 1887 (Dawes Act), ch. 119, 24 Stat. 388). Reservations across the nation were sectioned off as 160 acres-plots to male heads of families, 80 acres to single male adults, and 40 acres to male minors. Any Native male who accepted allotment would become U.S. citizens, but were still unable to vote. The federal government then took all of the remaining reservation lands that were not individually assigned through allotment into the public domain and opened it up for non-Indians to file claims (see e.g. Hoxie 1984; Prucha 1973).

The stated purpose of the allotment acts was to change Native people into modern individuals that would adopt the culture of surrounding Anglo society (Wilkinson 1999). This continued the process of assimilation through the attempted conversion of the Ute territorial expressions from subsistence to sedentary agriculturists on the reservation, by extending it off the reservation. The idea was that by dispossessing Utes of their land and re-territorializing it to
white settlers, the Utes “would disappear as distinctive peoples… that over time, as indigenous cultures withered, reservations- the territorial expressions of indigenous sovereignty- would be abolished” (Delaney 2005, 22).

In 1895 Congress passed legislation that applied allotment to the Ute reservation. The 1895 legislation required that the majority of male adult Southern Utes agree to allotment in order for it to apply (1895 Legislation, ch. 113, 28 Stat., 677). Only 153 of the 301 adult males of the Southern Ute reservation agreed to allotment, falling shy of the majority requirement. The 153 Utes who did vote comprised of nearly all of the Mouache and Capote band members eligible to vote, and no Weenuche. The Weenuche, under chief Ignacio, adamantly refused allotment foreseeing the influx of white settlers and government presence it would bring to the band (Simmons 2000, 218). To side step the obstinence of the Weenuche and other bands that refused allotment and secure another 523,079 acres (the allotments only comprised about 72,811 acres), the government divided the reservation in two. The Mouache and Capote received their allotments at the eastern end, and the majority Weenuche remained on the unallotted lands at the western end of the reservation. The 1895 legislation also added the New Mexico portion to the Ute Mountain Ute reservation (1895 Legislation, ch. 113, 28 Stat., 677).
The Ute bands strategically asserted oneness or difference throughout the history of treaty making with the federal government, continuing to express the loose pseudo-libertarian federalism of Ute territoriality, and resisting dispossession as a people. The Ute bands share the same essential beliefs, creation stories, social organization, history of displacement and relocation, and stories of resistance. At the same time however, the individual bands championed very different trajectories in their relationship with the federal government based on how they engaged in the process of treaty making and how they honored or interpreted those agreements. The Weenuche band, today the Ute Mountain Ute Tribe, was notoriously different from the other Ute bands.

There is no record that the Weenuche signed, participated in, or acknowledged any of the treaties of 1849, 1863, or 1868. Under Chief Ignacio the Weenuche opposed moving to a
reservation at all costs. The Weenuche did appear in the 1873 Brunot Agreement, but not as party to the negotiation as a whole. Instead, during the negotiations Ignacio independently made a private agreement with a Captain John Moss that granted him the right to farm and mine on a portion of the upper La Plata River about thirty-six square miles large. In exchange Ignacio received a hundred horses and blankets for the Weenuche alone (Simmons 2000, 146). Other than the independent deal made between Ignacio and the Capitan, the Weenuche only became more reclusive, moving away from the land most that attracted white farmers and continuing to roam the Four Corners. It wasn’t until the Treaty of 1880 that Ignacio agreed to cede any land at all, and even then, it was not the traditional territory of the Weenuche.

The 1895 legislation solidified the boundaries of the three Ute reservations, save the negotiation of Mesa Verde National Park in 1913\(^5\), and a boundary dispute with Navajo in 1986\(^6\). The federal government used property to take Ute lands and make new ones. It re-territorialized Ute lands to Anglo settlers and relocated diverse bands onto singular reservations putting them to plow, imposing whiteness on the landscape in attempt to assimilate the Utes both in terms of how they used their land, and in terms of how they governed themselves. Legally, the reservation system set up a government-to-government relationship with the federal government that disenfranchised the Utes of some rights, but also secured others and affirmed their sovereign statuses.

But despite the systematic efforts to use property to create a neat, governable space with assimilated citizens, this moment of nomospheric change was clearly wrought with conflict. The

\(^5\) In 1906, President Theodore Roosevelt took 14,520 of Weenuche land to create a National Monument under the 1906 Antiquities Act (16 U.S.C. 431-433), which became Mesa Verde National Park. President Roosevelt justified the creation of the park as means to preserve the cave dwelling, homesites, rock paintings, and other cultural artifacts that were subject to mass looting in the late nineteenth century. Under the leadership of the last standing chief, Jack House, the Ute Mountain Utes received 20,150 acres of land including all of their sacred Sleeping Ute Mountain and some more land at the northern border. Recall though that the northern border of the reservation was never legislated so the Tribe already thought that Sleeping Ute was a part of the reservation.

\(^6\) 1968 Navajo-Ute Boundary Dispute Act (Public Law 90-256, 82 Stat. 15).
Utes resisted federal assimilation at every level of physical, civil, and political life as both warriors and negotiators. Moreover, the treaties and legislation largely failed to establish specific and static boundaries. That is to say that while this moment can be defined by the imposition of a relationship with the federal government forcing dependence and cultural assimilation through boundary making, it must also be understood as constantly contested. Any understanding of the reservation as a fixed or homogenous polygon represented on a map not only fails to account for the layers of social resistance—but also for the fact that the boundaries in the legislation were unclear. The boundaries have always been contested. The reservation nomos is one of federal conquest—but also of Ute contest.

D. The Ute Mountain Ute Tribe and Re-Making the Reservation Nomosphere

In 1914 the federal government installed an Indian Agency in Towaoc, and the federal government officially recognized the Ute Mountain Ute Reservation in 1915. Today, the Ute Mountain Ute consists of about 600,000 acres of unallotted land primarily overlaps Montezuma County, Colorado but extends into northern New Mexico, with a section of allotted lands in Utah at White Mesa. The reservation borders Mesa Verde National Park to the northeast, the Southern Ute Indian Tribe to the east, the Navajo Nation to the south and west, and a mix of U.S. Bureau of Land Management (BLM) public lands and private lands, including the City of Cortez, to the north.

Despite the success in sustaining such a large reservation, adapting to live on a sedentary land base, without the cultural base of the mountains, and after an attempted total dismantling of Ute culture in just 50 years, the early 20th century was rough for the Weenuche. By 1930 hunger, syphilis, gonorrheal arthritis, trachoma, and tuberculosis stripped population to only 450 people
Federal assimilationist policy was at its height, and the government erected a boarding school in Towac and Ft. Lewis to take Ute children from their home and force them to attend school where their hair would be cut and their culture literally beaten out of them with grammatical rules (see e.g. Prucha 1976; Szasz 1977).

But the Weenuche continued to resist. The final nomospheric change summarizes this resistance and the steps towards building the Ute Mountain Ute Tribe, as the unified sovereign government we see today. These maneuvers came from both the federal and tribal sides, reifying the nomos of conquest and contest; demonstrating the double-movement. Specifically, this moment can be defined through four major events: the Indian Reorganization Act, the Confederated Ute Land Cases, the Brunot Settlement, and the Ute Water Settlement. This moment demonstrates the push-pull process of forced tribal government making and resistance as generative of the Tribes’ internal structure and its relationship with the federal government today.

In 1934, Congress passed the Indian Reorganization Act (IRA) as a response to the 1928 Lewis Meriam report, which exposed the utter human and political failure of the federal assimilationist policy (Merriam 1928). The IRA officially ended Indian allotment and incorporated Indian tribes as political entities within the legal and political systems of the United States (25 U.S.C.A. §§ 461). The IRA endorsed a new federal policy to promote tribal self-government, and articulate the responsibilities of the government-to-government relationship between tribes and the United States. The federal government did this primarily by imposing tribal governments, tribal constitutions, and new forums for tribal economic development.

In essence, the IRA created the Ute Mountain Ute Tribe as a government. The federal government extended diffuse control over tribal lands by imposing a federal and largely Anglo
system of management, politics, and values through broiler-plate constitutions. Recall the tradition of leadership among the Ute bands. It was rare for there to be a singular leader, and when there was, he generally only maintained authority so long as his decisions benefited the individual families. As a result, the Ute Mountain Ute adopted a version of the stock IRA constitution in 1940 that was in many ways incompatible with Weenuche tradition. The Ute Mountain Ute constitution established the jurisdiction and powers of the Tribal Council and laid out the fundamental structure for tribal governance that still exists today. The Tribal Council consists of seven Tribal Council members who each hold three-year terms with no limit on how many terms one may serve. Council members are elected by vote by the tribal membership every two years (Ute Mountain Ute Constitution 1940).

As per the Constitution, the powers of Tribal Council include negotiating with federal, state and local governments; preventing the sale, disposition, lease or encumbrance of tribal lands, interests in lands, or other tribal assets, and regulating those properties; managing the tribal herds and protecting them and the range against encroachments; pass ordinances; employ attorneys; and conduct other ordinary legislative functions (Ute Mountain Ute Constitution 1940). The Tribal Council has adopted numerous changes since 1940, mainly with regards to who is eligible to run for Tribal Council, but the general duties of Tribal Council and membership provisions remain unchanged (IRMP 2013, 71). Like most IRA constitutions, the Secretary of Interior must approve decisions regarding contracts with outside agencies or developers, unless otherwise negotiated by another contract in accordance with federal law discussed in the next chapters. Furthermore, even though the Tribe secured its Constitution and new form of governance by 1940, the Tribe still largely practiced a traditional lifestyle and
officially or unofficially followed their last traditional chief, Jack House, until his death in 1971 (Simmons 2000, 255).

Although the 1934 IRA did not completely extricate the Tribe from the control of the federal government, it did establish a new momentum for all tribes to seek redress for past wrongs. In 1938, President Roosevelt signed the Adams Act into law, which waived the sovereign immunity of the United States and allow for Tribes to sue the United States in the U.S. Court of Claims over those land claims (Young 1997, 134-5). As a result, the Utes of Colorado and Utah sued the federal government in the U.S. Court of Claims seeking compensation for ceded lands sold after 1909 (most of the pre-1909 cessions and treaty breaches were litigated and settled in 1910), commencing a series of lawsuits against the government that wouldn’t be fully decided until the 1991. The following is not a full accounting of all the legal and procedural details of every confederated Ute case or settlement against the federal government. Instead the following provides a narrow a selection of the dispositive outcomes with respect to how those cases and settlements influenced the reservation nomosphere through interactions between the federal government and the Ute Mountain Ute Tribe.

The first favorable judgment of the Confederated Ute Cases, the Court found that

[Under the agreement of 1880, the plaintiff Indians retained an interest in the lands, which interest was completely destroyed by the United States when it inserted the Adams amendment in the 1938 act. And we think that the way to fairly compensate the Indians for the taking of that interest, which taking finally deprived them of any further right to receive the proceeds from the sale or rental of the land, is to pay them the value of the land as of 1938, the time of the taking of their interest (Confederated Bands of Ute Indians v. United States 1943, 432).

The Court then mandated that the value of the land be calculated so that it may award proper compensation, initiating voluminous investigation and testimony in four major cases, nos. 45585, 46640, 47564, and 47566 (Confederated Bands of Ute Indians v. United States 1950, 434). This
first favorable judgment also marked the first conflict these land cases would cause amongst the Ute Tribes. Deciding how to assess the value of the land, who would pay for the assessment of lands, and then how the monies would be distributed amongst the three Ute Tribes spurred great distrust both between the Tribes, and more generally of lawyers. This was especially true for the Ute Mountain Ute. When the Tribe was asked to appropriate more funds for the lawsuit, chief Jack House exclaimed

> At the meeting last summer, I understood that Mr. Wilkinson [Earnest Wilkinson was the Utah-based lawyer who initiated the land claims] was going to look for everything on the land that was taken away from the Utes by the Government…. I am getting old and some of the other old Council Members I used to be with are no longer here. Mr. Wilkinson has not gotten any money for us yet” (Young 1997, 139).

The failure of Ernest Wilkinson to quell concerns and the protracted and painful experience of the land claim cases instilled lasting distaste of outsiders for the Ute Mountain Utes. Negotiations between the Ute Tribes and the federal government proceeded nonetheless, and in 1950, *Confederated Bands of Ute Indians v. United States*, 117 Ct. Cl. 433, 434 (1950), the Court of Claims stipulated to a total settlement for the four judgments in the amount of $31,938,473.43, for “the taking by the United States of more than six million acres of land, much of which contained valuable minerals” (*Confederated Bands of Ute Indians v. United States* 1951, 609). Ernest Wilkinson received nearly 10% of the total judgment, earning him a cool 3.1 million dollars personally (*Confederated Bands of Ute Indians v. United States* 1951, 609). The Uncompaghre and White River bands of the Uintah and Ouray Reservation in Utah received 60% of the judgment, and the remaining 40% would be split between Southern Ute and Ute Mountain Ute (Young 1997, 141).

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7 Because the Utes brought their claims prior to the creation of the Indian Claims Commission in 1946, they proceeded primarily in the Court of Claims.
Despite the adverse judgment, the federal government used the award to continue to extend control over how the Tribes could use the money and how the Tribes could use its’ land. The federal government refused to appropriate any of the judgment money until the Tribes submitted a development plan demonstrating how the money would be spent. This marks a key way in which this moment of nomospheric change sought to create the reservation as a particular type of space according to a federal assimilationist agenda. The “Rehabilitation Program” required Secretarial approval before any of the money could be allocated to the planned uses (Young 1997, 141). The Ute Mountain Ute Rehabilitation Program passed through Tribal Council unanimously and with no objections, suggestions, or comments from the general membership (Young 1997, 149). The plan allocated $3,500 in per capita payments, 1 million dollars for future land purchases, 1.1 million dollars for a credit program, $321,000 for irrigation projects, $100,000 for education, $10,000 for college scholarships (Young 1997, 150), and some moneys were allotted for the construction of houses at White Mesa- the small section of the reservation residing in Utah (IRMP 2013, 51). Congress approved the Ute Mountain Ute Rehabilitation Program on August 12, 1953 (Young 1997, 150).

The IRA momentum may have led to a large monetary settlement and judicial proof that the United States not only retained legal obligations with the Ute Tribes but also breached them, but the willingness for the federal government to litigate land claims and distribute money en masse represented a decisively new moment in federal Indian policy. The 1940s-60s marked the “termination era”, where the Government sought to end the government-to-government relationship by exchanging traditional tribal society for disaggregated communities of self-sufficient and assimilated citizens (Cohen’s 2005, §1.06). The Ute Mountain Ute Rehabilitation Program was born out of this moment, and brought reciprocally dualistic changes to the
reservation. Housing conditions improved drastically on the reservation where 187 new houses were constructed by 1960 (Young 1997, 158); but the traditionally nomadic lifestyle of Weenuche would officially come to an end. One tribal member recalls growing up in camps, but laments that he is the last of his generation to remember that (Interview B, July 29 2013).

In 1953, for first time in eleven years a school opened in Towaoc helping to bridge the education gap between the Ute Mountain Ute and general public; but more and more students would be transferred to public schools, and by 1961 all Ute Mountain Ute students would be bussed to public school off the reservation (Young 1997, 160-1). In 1955, the federal government transferred health care from the BIA to the U.S. Public Health Service and created Indian Health Services, which forced Ute Mountain Ute to contract with off-reservation hospitals for health care (Young 1997, 161). Despite the infrastructural changes the federal government mandated on the reservation, it simultaneously funded the Indian Relocation Act of 1956 to encourage Ute people to leave the reservation and move to cities. Many Ute Mountain Ute members left the reservation during this time, mostly migrating to Los Angeles and Cincinnati (Interview B, July 29 2013).

All of these changes were supplemented by large per capita payments from the land claims settlements (these per capita payments were accentuated by royalties from oil and gas development authorized by the Indian Mineral Leasing Act, discussed in the next chapter). The influx of spending money coupled with new legislation in 1953 that officially legalized the sale of liquor to Indians ushered in surge of alcohol abuse debilitating the Ute Mountain Ute community- despite the Tribal Council’s immediate decision to ban alcohol on the reservation (Young 1997, 166). A shift to sedentary housing proved a direct assault to traditional Weenuche culture, while young people shipped off reservation to be educated in public schools.
adjacent town of Cortez and elders shipped off the reservation to be swallowed by cities. The Ute Mountain Ute Tribe may have survived legal termination, but the new dynamics of the 1950s and 1960s changed Weenuche tradition and life on the reservation forever.

Despite the rapid societal changes occurring on the reservation as a result of the land cases and contemporaneous change in federal Indian policy, the Ute Mountain Ute Tribe boasted nearly four decades of stable leadership following the passage of the 1940 constitution. The stability can be largely attributed to the fact that only four Chairmen presided over Tribal Council until 1978 (Young 1997, 227). The Weenuche unified against the federal government and to mitigate the harmful affects on tribal culture by appropriating the framework of the Tribe with a traditional leader and system of leadership. This ended rather abruptly as the elder generation of leaders began to step down and step over to the other side. The last traditional chief Jack House died in 1971, giving way to a new generation of tribal leaders with a new generation of tribal struggles.

The Ute Mountain Ute Tribe faced extreme financial struggles in the 1970s and 80s. Oil and gas revenues were steadily declining while the membership increasingly pressured Tribal Council for distribution per capita payments out of other government funds (Young 1997, 237). At the same time, the 1975 Indian Self-Determination and Education Assistance Act of 1975 (Public Law 93-638, 25 U.S.C. § 450, discussed in the next chapter) reduced BIA oversight on tribal projects by giving the Tribe the authority to manage federal funds for government programs. New leadership, new cultural struggles, new authority, and new demands by the membership challenged Ute Mountain Ute Tribal Council and spurred a new type of internal struggle for the Tribe.
In April of 1977 FBI agents raided the Ute Mountain Ute government offices in Towaoc to freeze tribal accounts and seize all financial records as part of an investigation into the embezzlement and mismanagement of tribal funds (Young 1997, 243). Two former tribal employees reported the Tribal Council after a $483,000 deficit emerged in the tribal account, alleging all seven councilmembers had personally withdrawn money and allowed tribal members to overdraw their personal accounts beyond what their per-capita payments would cover in a year (Wood 1980, 40). Stories of nepotism, bribery, and faulty accounting soon emerged and the FBI recommended that U.S. attorney try the case, finding that anywhere between twenty three and sixty million dollars disappeared in less than twenty years (Wood 1980, 47). The Tribe fired almost all of their Tribal employees during the investigation, breeding more resentment and distrust amongst the membership. Although the FBI strongly urged prosecution, a grand jury failed to indict any of the accused members of Tribal Council and the U.S. Justice Department refused to prosecute based on lack of evidence, the desire to stay out of tribal politics, and perhaps more so—to save face, as all of the accounting was supposedly under the purview of the BIA (Wood 1980). The investigation did little to change the attitudes of Tribal Council, but did much to enliven the internal scrutiny membership levied on Tribal Council and fortify the difficult reputation the Weenuche garner with the federal government.

Ute Mountain Ute tribal politics showed little improvement in the 1990s and early millennia. In 1989 the Ute Mountain Ute elected Judy Knight-Frank as the first female Chairperson largely due to her progressive politics favoring economic development, education, and anti-corruptionist attitude (Young 1997, 242). In 2002, while serving as Chairperson Judy Knight-Frank was accused of four counts of making false statements on loan and credit applications, three counts of falsifying tax returns, and four counts of embezzlement and theft.
from tribal accounts between January 1996 and November 1999 totaling $274,536.82 (U.S. Department of Justice May 7, 2002). This time, the investigation would not end with the status quo. In 2004, Judy Frank-Knight resigned as Chairperson. She entered a guilty plea to one count of falsifying her 1998 federal income tax returns by failing to disclose as income approximately $153,000.00 in net salary advances that she received from the Ute Mountain Ute Tribe, and the Government agreed to dismiss the remaining counts (U.S. Department of Justice May 7, 2002). Judy Frank-Knight was sentenced to serve five months in federal prison, five months of home detention with electronic monitoring, and 150 hours of community service as a result (U.S. Department of Justice May 7, 2002).

Notwithstanding the legal mistakes Judy Knight committed during her reign as Chairperson, the Ute Mountain Ute leadership of the late 1980s through early millennium championed lasting economic achievements for the Tribe. The Tribe opened two major enterprises: the Weeminuche Construction Authority (“WCA”), a tribally owned and operated construction company that is contracted for large public works opened in 1985, and the 30,000 square-foot low-stakes Tribal Casino Hotel and Resort in 1992. The Tribe established a completely new Farm and Ranch Enterprise, including developing advanced irrigation technology and training programs for research and cultivation of crops such as alfalfa, corn, and what on more than 7,700 acres of land, and managing more than 700 heads of Black Angus and Gelbvieh bulls across a series of ranches. Finally the Ute Mountain Tribal Park, originally established in 1974 to protect the areas unique archeological and natural resources and provide public access by giving tours of ancient Puebloan cliff dwellings to the public, experienced a surge in business with an influx of tourism generated from the casino. In addition to
developments on the reservation, the last decades of the twentieth century marked unprecedented participation in developments off the reservation (IRMP 2013).

This moment of Tribal infrastructure building resulted from the new financial freedoms and legal trajectory from the early land cases and as means for negotiating the constant tension with the federal government. This trajectory continued through the late 1980s and early 1990s as the Tribe negotiated a major water settlement with the state of Colorado and the federal government. The legal complexity of the water settlement falls outside the scope of this paper, but to generally summarize it began with the U.S. Supreme Court Case *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976) that interpreted the McCarran Amendment McCarran Amendment McCarran Amendment, 43 U.S.C.A § 666, to mean that the federal courts must defer to the Colorado state court water adjudications system for Tribal claims to water. That prompted a major settlement negotiation between the federal government, the state of Colorado, and the Ute Tribes which resulted in the “Colorado Utes Indian Water Settlement Act” (Settlement) passed in 1986 and affirming Ute Mountain Ute and Southern Ute’s federally reserved right to water. There were congressional overrides to affirm the Settlement in 1988 and the consent decrees were not officially finalized until 1991.

In addition to securing tribal water allocations, the Settlement provided for two major public works to secure water for the Tribes: the Animas-La Plata (ALP) and the Dolores Federal Reclamation Projects (Dolores Project). Both the result and the Tribes’ major involvement in these projects proved essential in developing the Tribal infrastructure and meaning of the reservation space at they exist today. Firstly, prior to the completion of the Dolores Project in 1990, the Tribe hauled water from Cortez. The Dolores Project flooded a narrow valley about a half an hour northwest of the reservation from which the Tribe receives its allocation through a

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8 Waives the U.S. sovereign immunity for cases involving water rights.
municipal pipeline. The water from the Dolores Project was essential for new economic projects for the Tribe— including the Casino and Farm and Ranch Enterprise.

Secondly, the Tribe’s administration of the Animas-La Plata project ushered in a surge of tribal infrastructure building and new presence in the region as a legitimate sovereign. The Tribe took over ALP from the federal government through PL-638 contracts\(^9\), hiring its’ own Weeminuche Construction Authority to build project, and hiring SWCA Environmental Consultants to lead the mitigation of the cultural resources unearthed during the construction of the project. To-date, this is the largest project a Tribe has ever administered on behalf of the federal government, and is largely heralded as one of the most environmentally and culturally sensitive dam projects ever completed in the American West. The Tribe and its constituents worked closely with federal agencies, other Tribes, and non-Indian enterprises during the duration of the project, and employed nearly 300 workers—70% of whom were Native American. ALP uncovered more than 9,000 ears of history, preserved hundreds of artifacts, and stewarded thousands of uncovered remains in collaboration with other Tribes for reburial.

The water provided by the Dolores Project and the Tribes’ involvement in administering project ushered in a new ethic of Tribal governance internally, because economic conditions continued to improve and the flagrant instances of corruption lessoned amongst Tribal leaders. It also changed the perception of the Tribe externally, because state and federal agencies looked to the Tribe for leadership in the construction of a monumental public work. While the federal government essentially created the Tribe through the IRA in the early twentieth century, the Tribe began to re-appropriate that structure in the late twentieth century to assert sovereign control over its development and re-make relationships with abutting state and federal agencies.

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\(^9\) A result of the Indian Self-Determination and Education Assistance Act of 1975, which allowed for the transferring administrative control of an otherwise federal program the tribal government through a “638 contract.” This is discussed in detail in the next chapter.
Property was the silent yet pervasive driver of all of this, as the reservation provided the spatial medium for enacting the contested relationships of control. Where the federal government used property to push a federal agenda on, and through the Tribe, the Tribe used property to push back against the federal government. The Dolores Project and ALP emphasize this point because neither project was anywhere near the reservation. ALP specifically, was more than an hour and a half’s drive away, and yet the Tribe asserted full administrative control over the construction and ethical trajectory of the project.

Tribal government infrastructure continues to improve. Today, in addition to the Tribal Council and Office of the Executive Director, tribal administration includes a Justice Department, with three general counsels and a tribal court, as well as a division of Education, Economic Development, Health and Human Services, Financial Services, Community Services, Natural Resources, Human Resources, and White Mesa (a separate division to serve the needs of the White Mesa community in Utah) (IRMP 2013, 72). Each of these divisions oversee smaller tribal programs spanning topics such as youth education in the Education Division, to energy administration in the Natural Resources Division, and a recreation center in the Community Services Division (IRMP 2013, 73). In 2009, following the Tribe’s unprecedented leadership in managing the cultural resources implicated in the ALP, the Tribe applied to the National Park Service to become the first Tribal Historic Preservation Office (THPO) in the state of Colorado and was approved 2009.

The final major historical event exemplifying this moment of nomospheric change came in January of 2013, when the Tribe signed an historic agreement with the state of Colorado with regards to tribal hunting and fishing rights in the Brunot Area originally ceded in 1873 (recall this area was allegedly ceded to settler mining claims in the state of Colorado, arguably deeming
it outside of federal jurisdiction, see Maps 1 and 2 for reference). Disputes over Ute rights to the Brunot Area represent over a century long saga of dishonest dealings and constant conflicts between both the Southern Ute Indian Tribe, the Ute Mountain Ute Tribe, Colorado state and federal agencies. In January of 2013, the Ute Mountain Ute Tribe signed a memorandum of understanding finally affirming the Tribes the right to hunt, fish, enact, and regulate wildlife for tribal members within the Brunot Area according to their own laws unless otherwise limited by Congress. Colorado maintains jurisdiction over non-members in the Brunot area, but would no longer be able to regulate or enforce those regulations against tribal members.

Like the Dolores Project and ALP, the Brunot negotiations demonstrate how the Ute Mountain Utes have fully appropriated the Tribal framework to both self-govern and leverage itself as a rights-bearing sovereign against the state and federal governments. The Brunot Area is a 3.7 million acre range outside of the Ute Mountain Ute reservation, spanning nine counties and encompassing such populous cities as Durango, Pagosa Springs, Ouray, and Cortez. The Tribe was able to secure its sovereign right to hunt, fish, and regulate its members as superseding state regulations in an area outside of the reservation. Although the Tribe secured control against the Colorado, the federal government still has ultimate control as the overarching sovereign over both state and tribal activities in the Brunot Area. The overlapping jurisdictional and regulatory framework regarding tribal resource management will be discussed in detail in the next chapter, but what is important here is to demonstrate how property fundamentally underlies those patterns and with it, social and political relationships of control.

The IRA, confederated Ute land cases, the water settlement, and the Brunot negotiation demonstrates how the Ute Mountain Utes have politically adopted the foreign framework of the

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10 The Southern Ute Indian Tribe signed a similar memorandum of understanding with the State of Colorado in 2008.
Tribe to unify against the state and federal forces. This demonstrates the last nomospheric change towards the making of the modern Ute Mountain Ute Tribe showing how the forced consolidation of Ute Mountain Ute lands was followed by the forced consolidation of Ute Mountain Ute people to change the meaning of Ute territorial expression by rendering it Anglo and therefore governable within the broader political framework of the United States. While this process necessarily causes internal conflicts, those have not superseded the Tribes’ ability to present a unified front to affirmatively take back control for its people. The reservation plays the central role for navigating these tensions, demonstrating the double movement of property. But moreover, the ways in which the Ute Mountain Utes have adopted the tribal framework largely skirts the meaning of the reservation as means for legitimating the Tribe in the eyes of the Colorado state and federal governments. The Tribe used its political status to refute the spatial-relationships of control by asserting its rights in spaces outside of the reservation showing how these boundaries are constantly contested and renegotiated.
E. A Note About Limits of a Tribal Nomos

Despite the unification of the Tribe as a sovereign government and the incredible triumphs the Tribe has achieved on behalf of its people in the last fifty years, the current condition of the Ute Mountain Ute community deserves some attention. Marked development in economic and administrative infrastructure has not necessarily reciprocated improved living conditions for Ute Mountain Ute tribal members. The community of Towaoc remains one of the most violent places in the country, where members fight poverty, hunger, lack of inhabitable housing, and severe substance abuse problems. In the two-year FBI investigation of 1977, there
were no natural deaths on the reservation—every single one was alcohol related (Wood 1980, 60).

Thirty years later, the majority of the deaths on the reservation were still alcohol related, but most were homicides. In 2007, there were less than 2,000 people living on the reservation, and at least six murders were reported to federal agencies (Draper 2007). This is a yearly murder rate comparable to 250 or 300 killings per 100,000 people on the reservation, where the average homicide rate for the entire state of Colorado is about 4 per 100,000 (Draper 2007). To give an idea of the level of palpable violence on the reservation, Flint, Michigan was considered the deadliest city of 2012 and claimed a rate of about 64.9 murders for every 100,000 people (Galik 2013). Like anywhere, it is small minority of people committing crimes that make a bad reputation for everyone, and of course, these statistics are skewed because there are so few people that live here. Moreover, the rampant crime rate can largely be blamed on the spatio-legal problem of criminal jurisdiction in Indian Country. Federal limits on what the Tribal courts can and cannot prosecute on the reservation coupled with the abhorrent lack of federal presence in prosecuting crimes where the Tribe does not have the jurisdiction or resources to do so basically enables these crimes to take place\textsuperscript{11}. Be this a condition of some deliberate pattern or not, the comparison is what it is and imbues meaning into the reservation space that largely refutes the idea of the Tribe as cohesive social space for the membership.

The murder rate on the reservation has been steadily declining over the last five years, but a recent $42.6 million dollar settlement has introduced a new set of problems to the community mimicking the changes circa 1950. On April 11, 2012 Attorney General Eric Holder and

\textsuperscript{11} A full accounting of criminal jurisdiction in Indian Country falls outside the scope of this paper. For a good overview of this issue, see e.g. Robert T. Anderson. 2003. Criminal jurisdiction, tribal courts and public defenders, \textit{Kansas Journal of Law & Public Policy}, (Fall):142.
Secretary of the Interior Ken Salazar settled a series of lawsuits by 41 federally-recognized tribes against the United States, in which the tribes alleged that the Department of the Interior and the Department of the Treasury had mismanaged land, oil and gas, timber, and other natural resources, as well as trust fund dollars held in trust by the United States for the benefit of the tribes (Department of Justice, Office of Public Affairs 2012). Ute Mountain Ute Tribal Council and Chairman Gary Hayes proposed a settlement plan resembling the Ute Mountain Ute Rehabilitation Plan of the 1950s. Hayes planned to invest the majority of the settlement money in a long-term investment fund, improved tribal infrastructure, education, and other public service, while allocating about 10% of the settlement to be distributed in per capita payments of $2,000 dollars to each adult tribal member and $1,000 to each minor (Cowan 2012).

This time however, the tribal membership vehemently opposed settlement plan. One tribal member posted in a public forum discussing the settlement that

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Our chairman is so greedy, we only got $2,000.00 out of all of that. There are a lot of tribal members that don't live on or around the reservation. Gary Hayes you need to think about all of us that don't live around there. And don't get everything cheap like you do. Think about your tribal members and not just your damn self (Brave 2012).
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Another tribal member told the Durango Herald that “[t]he money helped us to see that people haven’t been given a voice and that things haven’t been done right” (Cowan 2012). As a result, the membership pooled enough signatures threatening to recall Chairman Hayes unless he and the Tribal Council agreed to distribute all of the settlement money to the tribal membership in per capita payments. During this time, Chairman Hayes requested 45-day administrative leave while the referendum vote was considered and the Tribal Council decided how to address the demands of the membership. Tribal Council eventually headed the demands of the membership, and decided to distribute 100% of the settlement in individual payments to tribal members. After
attorneys fees, the Tribe reserved 28% of the money to cover potential costs and taxes in case the Internal Revenue Service decided to consider the settlement monies as taxable income, and replaced $3.7 million into the tribal funds which had been dispersed as advanced per capita payments before the settlement money had arrived. In the end, the 2,110 members were given a choice to receive a one-time payment of $12,500, or the same amount in installments to avoid being disqualified from income-based programs such as Medicare (Cowan 2012(b)). The Tribe distributed checks on July 20, 2012.

One year later, the $42 million dollar settlement is largely gone. The membership used their payments to pay off outstanding bills, and to purchase cars and appliances in the nearby city of Cortez. One local business owner of an auto-shop reported that the day the checks were distributed, “we broke our one-day sales record and sold 17 cars and trucks” (Mimiaga 2012). But where the settlement proved great for business outside of the reservation, it proved slightly more complicated for life on the reservation. Towaoc saw a surge in alcohol-related crimes, accidents, and drug or alcohol related deaths on the reservation. The issue of the four-wheelers can be attributed to this settlement.

Despite the incredible hardships on the reservation, the Ute Mountain Utes never stopped dancing. They gather for Bear Dance every year following the first thunder of spring. For three or four days families gather to celebrate the return of the bear from hibernation, visit with relatives, play handgame, mourn the loss of relatives, feast, and generally have a good time. They have continued to practice a strong Peyote culture and hold the Sun Dance, despite its initial prohibition by federal agents. For three or four days dancers dance with no food, and no water, to gain strength from the community and bring good health and flourishing to the community (Pettit 1990).
Understanding the present moment of the Ute Mountain Ute must also encompass a healthy sense of humor, and a non-linear understanding of space and time that breeds a sense of light-heartedness amongst the community despite all evidence to the contrary. Through ceremony, dance, shared stories, and outright refusal to adopt colonial culture the Weenuche expressed a Native territoriality combining traditional practice with a unified Tribal resistance. These practices animate and imbue the assimilationist space the federal government attempted to impose on the Weenuche by placing them on the reservation with heterogeneous and multiple spaces of culture and place. This complicates the common story of dispossession, because it demonstrates how although political taking of lands vis-à-vis legal title confined the Ute Mountain Utes to 600,000 acres of land in the arid southwest; it also spurred new manifestations of spatial organization that both accentuate the importance of those boundaries as generative of a culture that is distinctively Ute Mountain Ute.

F. Conclusion

This chapter aimed to show that the Ute Mountain Ute reservation is a spatio-legal construct that was created by the United States to set up a specific relationship with the Ute Mountain Ute Tribe. It told a history of the Utes as a series of nomospheric changes; the first being the domestication of the horse and new contacts with outsiders, the second the treaty making of the late 1800s, and the third moment as series of legal maneuvers from both the federal government and the Tribe tending towards tribal infrastructure building—namely the IRA, the confederated land cases, the water settlement, and the Brunot agreement. Each moment led towards a new nomos of the Tribe as the unified sovereign government that we see today, but each moment was wrought with conflict, and each boundary—physical or cultural—contested
and actively negotiated by the Ute Mountain Utes at every stage. In doing so, this chapter sought to prove that although the federal government used property to create the reservation and set up a relationship of dependency and jurisdictional control with the Tribe, the Tribes’ resistance created a space of contested meanings. Those meanings of federal failure and control, of tribal unity and disunity, manifest spatially as they are dually enacted all the time.

The next chapter will explore how resource management plays into this complexity, both reifying the finite jurisdictional structure of the reservation while creating reciprocal opportunities for the Tribe to create new ones.
Chapter IV:

Tribal Resource Management and Reservation Space-Making

This chapter argues that by engaging in resource planning with the IRMP and CRMP, the Tribe simultaneously reifies the hierarchical patterns of jurisdictional control based on the reservation system while challenging them. The Tribe must abide by federal guidelines and comport with the jurisdictional and regulatory framework based on the reservation system, which both disciplines the reservation space and reproduces the reservation boundaries by enacting the laws that uphold them. At the same time, the legal and regulatory framework of the IRMP and CRMP provides a cognizable channel for asserting recognized rights that push against the social and landed boundaries of reservation. This represents the double-movement of property. On the one hand, tribal resource management seeks to protect the tribal landscape against the destructive forces of the market, and on the other hand, it creates the legal channels for developing them (i.e. including them in the market). The limitation being that the role of the federal government in regulating how resource management can take place firmly anchors the Ute Mountain Ute Tribe’s planning efforts within the social and political fabric of the United States.

To do this, this chapter first outlines the origins of the Ute Mountain Ute IRMP and CRMP by way of introduction. Second, it outlines the complex and overlapping jurisdictional matrix that confines the IRMP and CRMP spatially. It describes the jurisdictional scope of the Tribe to manage resources on tribal lands, federal lands, and state lands. Second, it lays out the legal regulatory framework that applies to resource management on tribal lands. In doing so it discusses how the IRMP and CRMP reflect a broader federal policy to encourage tribal self-
determination and mitigate liability of the federal government while simultaneously increasing federal control through the application of federal laws. Third, it outlines the content of the IRMP and CRMP and connects them to the political agenda of the federal government describing how resource management attempts to discipline the reservation according to the federal ethic. Finally this chapter emphasizes how resource management disciplines the reservation space by looking at the co-management debate. This chapter sets up a point of departure from the majority of literature by asking why, despite the limited, deleterious, and disciplining potential of federally funded resource management, does the Tribe do it anyway.

A. Introduction to the IRMP and CRMP at Ute Mountain Ute

Traditionally, the Utes are subsistence-based mountain people, who traveled and hunted seasonally over a vast land base that dwarfed the reservation in both size and abundance. Despite decades of pressure from the federal government, the Weenuche largely maintained their nomadic lifestyle until the 1960s (Interview B, July 29 2013). When asked how the Tribe traditionally conceived of ‘resources’ one tribal employee responded by saying that “there was no natural resources…. we did not harvest them- it was there to use and if it wasn’t then you moved on” (Interview D, September 17 2013). But dispossession of seasonal lands restricted to the Ute Mountain Ute to an arid 600,000-acre reservation in the four-corners challenging the efficacy of the use-and-move ethic. The reservation system imposed constraints on Ute territoriality that made this problem inevitable, setting up a social and legal relationship of dependency on the federal government while granting it jurisdictional control over the reservation land base.
As a result, overlapping and conflicting exercises of territoriality in the twentieth century allowed for the unmitigated exploitation of natural resources on the reservation as the federal government engaged in resource extraction with no attention to environmental issues (Interview D, September 17 2013). Cultural resources were equally threatened. The majority of cultural sites on the reservation are Ancient Puebloan archeological sites and traditional management practices followed a policy of non-disturbance. As a result, Indian antiquities dealers looted or demolished cultural sites at astounding rates. Leading up to the 21st century, all resources were “managed to a minimal extent” and the Tribe admittedly lacked “the knowledge and expertise to do this” on a sedentary land base (Interview D, September 17 2013).

The state of reservation resources in the 21st century left the Tribe in a quandary: how to maintain a traditional ethic of resource use while restricting resource use by tribal members and non-members alike and preserve natural and cultural resources for the future. One tribal employee described attempts to manage resources on the reservation the following way:

Some things are not viewed as resources, and there is a lot of, kind of push-back against kind of the outsiders coming in and telling them how to regulate something- but then there’s things like, we have a tamarisk removal project in the canyon that has a lot of sensitive issues- there’s a lot of um, archeological sites, its part of the tribal part, and there’s a lot of uses in the riparian uses, so the environmental programs department is doing a lot of tamarisk removal in there, and my understanding is that there hasn’t been a lot of push back on this tamarisk removal because the tamarisk has interfered with Native plants that the tribal members have been using and they are seeing the impacts, and because it has no traditional use they would like to see it gone and the willow and the cotton wood come back (Interview C, September 15 2013).

The Tribe has demonstrated a nuanced understanding of environmental conditions and a new interest in engaging in resource management on the reservation. The extent of resource management on the reservation thus far however, both natural and cultural, can be summarized as a piecemeal approach based on separate management plans and permitting housed in separate
departments with minimal collaboration. This reflects the overlapping and incomplete pattern of control left over from a history of dispossession externally as well as the imposition of a foreign system of governance leading to unstable leadership internally. Thus despite the management efforts by the different departments they have proven difficult to implement, and many of the tribal members and other departmental officials were unaware of these efforts (Interview C, September 15, 2013; Interview D, September 17, 2013).

For example, the Environmental Programs Department (‘EPD’) “is responsible for administering public health and environmental protection programs on the Ute Mountain Ute Tribal Lands,” and runs environmental programs such as a well-developed water quality monitoring programs, and nascent solid waste, recycling, hazardous waste, education campaign, air quality, pollution, and public health programs (Ute Mountain Ute Environmental Programs 2013). These include efforts such as tamarisk removal, fencing, and the issuance of grazing permits. However, the BIA manages all woodland resources on the reservation through its own Forest Management Plan. The major purpose of the plan is to convert rangeland back into woodlands, and issue free-use permits to tribal members who want to harvest fuel wood for heating in the winter (IRMP 2013, 125). At the same time, the THPO, only officially approved in 2009, is responsible for managing all cultural resources on the reservation and issues permits for visiting, use, or excavation on lands containing known cultural sites. In practice, the management plans from each department overlap, and often conflict in terms of known uses as well as information gaps. Despite clear overlaps, communication amongst departments can be described as strained, at best, and information sharing confronts what one tribal employee described as ‘empire problems.’
In 2004, as a result of a desire to improve resource use on the reservation, and in response to a recommendation by the Bureau of Indian Affairs (BIA) Natural Resources Adviser to better integrate planning efforts, the Tribe initiated an Integrated Resource Management Plan on the reservation. The BIA was under a new directive to implement integrated resource management plans across Indian Country and ultimately steered the Tribe towards securing the federal funding to do so. The Ute Mountain Ute procedures for securing grant monies requires Tribal Council approval before a department can apply for a grant. In 2004, Tribal Council enacted Resolution 2004-27 to enable implement an IRMP to assess current conditions of the Tribe’s resources. Following the resolution, the Environmental Programs department applied to the BIA for a grant to complete an IRMP. Upon receiving the grant, Tribal Council enacted Resolution 2004-105, which authorized a 638 contract with the BIA for the Tribe to fund and develop an IRMP (IRMP 2013, 24). These plans must follow strict federal guidelines, comport with all federal laws, and are primarily considered planning documents to consolidate information of all the natural and cultural resources on the reservation (discussed infra section D).

After the Tribe received the money, the IRMP lay dormant for almost six years. This was partially due to lack of human resources within the Tribe, but also because of the necessarily molasses rate at which BIA grant funding proceeds. As the IRMP lay dormant, development in cultural resource management peaked. In 2009, the Tribe successfully applied to the National Park Service to establish a Tribal Historic Preservation Office (“THPO”) following its unprecedented work in administering the cultural resources program of the Animas-La Plata water project, discussed in the last chapter. The THPO operates according to a Memorandum of Understanding (“MOU”) between the National Park Service and the Tribe in accordance with National Historic Preservation Act (“NHPA”), 16 U.S.C.A. § 470, which authorizes THPOs to
take over responsibilities of the State Historic Preservation Offices (“SHPO”) in the administering of federal cultural preservation laws on the reservation. Pursuant to the MOU with the Park Service and in compliance with NHPA § 101(b)(3), the THPO must “develop and implement a comprehensive, reservation-wide historic preservation plan.” A Cultural Resources Management Plan (“CRMP”) fulfills this mandate and becomes the defining document of the THPO.

Ute Mountain Ute resource management thus consists of two major documents: the IRMP and the CRMP. These are by no means the only resource plans taking place on the reservation, quite the contrary. But they are the first and only efforts, funded by the federal government, to integrate the other official or unofficial planning efforts taking place on the reservation, and demonstrate a new trajectory for how tribal resource planning will take place in the future. Although the THPO completed the CRMP first, the CRMP is considered one part of the IRMP. Where the IRMP assesses all the resources on the reservation and consolidates management decisions, the CRMP specifically outlines the procedures for cultural resources in accordance with the responsibilities of the THPO under the NHPA. Recognizing the new role of the THPO and the anticipated work on the CRMP, the Tribal Council transferred IRMP from Environmental Programs to the THPO in 2010. The THPO established a “core team,” comprised of the department heads of all departments with an interest in the IRMP including the THPO, the Tribal Park, Environmental Programs, Planning, Farms and Ranch Enterprise, Oil & Gas, Construction, Wildlife, Housing, Land Use, Tribal Employment Rights, White Mesa, Community Services, and two representatives from the BIA. It then hired a private contractor to carry out the rest of work on the IRMP.

\[12\] Accordingly, this dissertation will refer to the two documents as one “IRMP/CRMP” unless discussing the documents individually.
While work progressed on the IRMP, the THPO received two grants totaling more than $200,000 dollars from the Colorado State Historic Fund ("SHF") to develop its CRMP in 2011. The THPO hired a separate contractor to complete a draft of the CRMP, which was completed in July of 2013. In February of 2013 however, the contractor hired to complete the IRMP abruptly stopped work on the project due to personal and professional reasons. The Tribe was left with a semi-completed draft of the IRMP. The THPO hired yet another contractor out of the Durango, CO office of SWCA Consultants later that year. In September of 2013 however, the contractor in charge of the IRMP went on a prolonged absence, leaving the interim responsibilities of the IRMP to me. As part of my tenure with the Tribe, I volunteered work on the IRMP Draft until the contractor returned.

B. The Jurisdictional Matrix of the IRMP/CRMP

The operation of varied and overlapping jurisdiction in Indian Country represents the enmeshment of space, law, and power and reflects the relationship between the Tribe, state, and federal government set up by the reservation system. Enacting laws over tribal lands proves the critical way by which the federal government disciplines the reservation space. Where a particular action occurs can prove dispositive—or at least justifiably so—of who controls the consequence of such action dictating relationships between people according to race-based and power-laden patterns of control based on property (Keenan 2013). Resource management is predicated on the same general principle of relational control and dualistic enactment of person and place, where the Tribe can only enact certain regulation over resource depending on where those regulations apply and who they apply to. Territorial jurisdiction functions as “a foundational technology of political liberalism... defin[ing] the liberal concept of ‘self-
government’… with the marginal power of an individual to influence government” (Ford 2001, 208).

From a legal perspective, “the general rule is that a Tribe has the authority to conduct, regulate, and zone the activities it chooses [on the reservation] unless expressly limited by an Act of Congress” (Eichman 2011, 18; Williams v. Lee, 358 U.S. 217 (1959)). But the origin and extent of this rule stems from a violent history of the reservation system and reflects the spatio-legal process of nomospheric changes meant to assimilate Native people. Ute dispossession and the resulting re-territorialization of land to the Tribe, settlers, the state, and the federal government set up a pattern of overlapping jurisdictions that exist simultaneously and are constantly in conflict (Agnew & Oslander 2010).

The abutting and intersecting properties create the spatial foundation for the social pattern of jurisdictional control and set-up the major contradiction inherent in tribal resource management, and actually Indian law more generally. Tribal territorial jurisdiction, as a property-based means for exercising a sovereign right to self-govern, represents the double-movement because it simultaneously constrains and encourages the development of tribal resources. This both reflects a continuation of the assimilationist goals of reservation era while also providing Tribes with the tools, namely property, to navigate this framework in a way that is recognized by the broader state. The law largely interprets disputes over jurisdictional control as conflicting property rights over land.

1. Tribal Lands

The inherent sovereignty of Ute Mountain Ute Tribe to self-govern coupled with the unique government-to-government relationship tribes retain with the United States and as part of
it, establishes a simultaneous and split resource management regime on the reservation between tribes and federal agencies. The authority for the Tribe to manage natural and cultural resources on the reservation derives from its inherent sovereign authority to self-govern. Sovereignty, as a political and place based concept originating from early legal interactions with the federal government, equally bounds and encourages a particular type of resource management that largely exists as a way to navigate the boundaries of what is reserved for tribal control (Bruyneel 2007). “Perhaps the most basic principle of all Indian law... is the principle that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which as never been extinguished” (Cohen’s 2005, §401[1][a]). The right of the Ute Mountain Ute Tribe to regulate resource use by all people, member or non-member, on tribal trust lands generates from tribal inherent sovereignty to self-govern and has been confirmed by the Supreme Court (Lee, 358 U.S. at 217).

The United States directed its earliest interactions with Indian tribes as independent nations, respecting their sovereignty as derived, sustained, and delimited by early expressions of territoriality on traditional lands (Lee, 358 U.S. at 217). When the United States re-territorialized Ute lands through dispossession vis-à-vis treaty making and allotment, it subsumed tribes as independent sovereign nations entering into a sort of “sovereign trusteeship” (Wood 1994, 1498). This principle was first articulated in the Marshall Court, where Justice Marshall qualified the relationship between tribes and the federal government as one that “resembles that of a ward to his guardian” (Cherokee Nation v. Georgia, 30 US 1, 17 (1831)). Although the trust doctrine has changed and evolved over time, one of the most basic tenants of federal Indian law remains that
the federal government has an obligation to manage all assets for the benefit of the tribes with a heightened standard of care.

The federal trust relationship underlies the framework of tribal resource management on the reservation. Basically, the United States retains legal title to all tribal lands, where tribes and individual allottees retain the beneficial right to those lands (*Johnson v. M’Intosh*, 21 U.S. 543 (1823)). Tribal beneficial ownership extends not only to resources on lands within Indian Country, but to all resources that are “constituent elements of the land” including mineral subsurface and above soil resources such as timber (*United States v. Shoshone Tribe of Indians*, 304 U.S. 111 (1938)). Accordingly the Ute Mountain Ute Tribe generally retains the inherent sovereign authority to manage all of the resources on the reservation (Reynolds 1984, 793). However, because of the split fee and beneficial ownership of tribal trust lands, no resources can be sold, restricted, or otherwise encumbered without authorization from the federal government, unless otherwise authorized by contract or federal law. This relationship was deliberately set up by the federal government vis-à-vis property and the reservation system to facilitate governance. Reciprocally however, the federal government must make management decisions about those resources for the benefit of the Tribe in accordance with fiduciary standards of care (Cohen’s 2005, § 15.03-06). If the government fails to uphold that duty, it may give rise to a cause of action against the federal government.

For example, in the 1980s, the Quinault Tribe brought suit against the federal government in a series of cases seeking money damages for breaching its fiduciary duty to properly manage tribal forest resources (*United States v. Mitchell*, 445 U.S. 535 (1980) (“Mitchell I”); *United States v. Mitchell*, 463 U.S. 206 (1983) (“Mitchell II”)). The Tribe accused the government of failing to obtain fair market value for timber sold, harvest sustainably or rehabilitate after
harvest, and failing to pay or overcharging allotees (Mitchell I, 445 U.S. at 537). In Mitchell I the Court held that for the United States to have waived sovereign immunity and open itself up for money damages under the (Indian) Tucker Act, the Tribe had to prove that a specific fiduciary existed beyond what may arise from the common law of trusts (Mitchell I, 455 U.S. at 547). In Mitchell II, the Court found in favor of the Tribe, holding that the Indian Reorganization Act 25 U.S.C.A. § 466 imposed specific duties as to how the Secretary of Interior should manage tribal timber resources and failed to uphold that duty (Mitchell II, 463 U.S. at 220-23). After Mitchell I and II however, tribes have been less successful in holding the federal government accountable for mismanaging tribal resources on the reservation (see e.g. United States v. Navajo Nation, 537 U.S. 488 (2003) (no breach of trust under the Indian Mineral Leasing Act when the government renegotiated lease terms on behalf of the tribe for below market value).

Also by virtue of the government-to-government and trust relationships, Congress retains plenary power over all Indian affairs. “Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government” (Lone Wolf v. Hitchcock, 187 U.S. 553 (1903)). ‘Plenary,’ referring to a unified enactment of federal power, evinces the spatial nature by which the government extends its role over tribal lands. Congress maintains the authority to manage Indian ‘properties’, giving it the power to enact laws, including resource management and environmental laws, that may trump both treaty rights and sovereign control to manage their resources (see also United States v. Kagama, 118 U.S. 375 (1886)). “Under domestic law, the federal government can exercise whatever regulatory authority it pleases on the reservation, either under its arrogated plenary power to regulate
natives directly, or pursuant to the judicially created rule permitting general federal legislation to be applied to tribes” (Royster & Fausett 1989, 612).

The legal authority of federal agencies to enact regulations, enforce federal laws, and implement federal programs on tribal lands demonstrates how property expresses the double-movement and variegates the reservation space while confining it within a two-way relationship with the United States. By engaging in the IRMP/CRMP the Tribe upholds the significance of the reservation boundaries as limiting the scope of resource management by enacting laws that only apply within that delimited space. At the same time the Tribe may enact regulations based on traditional relationships and understandings of resource use or for new desires for economic development, expressing a sovereign territoriality that sustains tribal authority as an independent political actor within the United States. But Congress maintains the plenary authority to enact laws governing tribal resources that overlap and trump tribal regulations notwithstanding reservation boundaries, sustaining a broader national sovereignty that confines Ute Mountain Ute political mobility within the colonial United States. The IRMP/CRMP thus embodies multiple levels of reservation space-making as the Tribe must comport with jurisdictional restrictions while generating a new type of territorial expression that bolsters the Tribes’ political authority as a sovereign.

2. Federal Lands

Political and place-based jurisdictional laws generally restrict the scope of the CRMP/IRMP within the reservation boundaries. Those boundaries also provide a semi-static legal matrix that the Ute Mountain Ute Tribe can navigate to push on the confines of federal control. Generally, Tribes can participate in resource management outside the reservation
boundaries and on federal lands through four potential legal and regulatory pathways: (a) the assertion and control of off reservation hunting and fishing rights, (b) the assertion of non-owner property interests on federal lands, (c) Public Law 93-638 (“638 contracts”) contracts authorized by the 1994 Tribal Self Governance Act (“TSGA”), and (d) through consultation measures mandated by a myriad of federal land laws and the 2000 Executive Order 13175 “Consultation and Coordination with Indian Tribal Governments”.

First, when many tribes ceded their territory to the United States, they negotiated the right to continuously hunt and fish on their aboriginal territories outside of reservation boundaries which the courts have affirmed in varying capacities (see e.g. United States v. Winans, 198 U.S. 371 (1905); United States v. Williams, 898 F.2d 727 (9th Cir. 1990); Settler v. Lameer, 507 F.2d 231 (9th Cir. 1974)). However, federal laws and agency decisions may trump treaty or otherwise limit those rights feeding the constant tension between abutting jurisdictional spaces as the Tribes continue to push back. In United States v. Hicks, 587 F. Supp. 1162, 1163 (W.D. Wash. 1984), two members of the Quinault Indian Tribe were convicted for killing bull-elk on their 1855 treaty protected hunting grounds. The Olympic National Park subsumed the treaty-protected hunting grounds when it was created in 1938, and the Park Service had banned hunting inside the park when the tribal members took the Elk. The court held that

the "privilege of hunting" set forth in the Treaty of Olympia is not an absolute right … lands available for Indian hunting would change with the times… A withdrawal of lands to preserve its natural beauty and indigenous wildlife is one example of a use that is incompatible with all hunting (Hicks, 587 F. Supp. at 1167).

The court deemed a change in land status as dispositive of what laws applied and to whom, enmeshing the significance of place, law, and power. Tribes continue to exercise and attempt to regulate off-reservation hunting and fishing rights asserting jurisdictional control over resource
management on federal lands although with varying success (see Goodman 2000; Kenny 2012). Tribal authority to manage treaty secured hunting and fishing resources off reservation lands does not generally apply to non-members, however, if non-member practices interfere with the tribes’ right this may give rise to a cause of action.

Second, although tribes may lack ownership rights on off reservation federal lands, they retain certain rights as non-owners by which they may assert some regulatory control and continue to use resources on federal lands (Carpenter 2005). Tribes who have continuously used and occupied certain resources on federal lands may be able to assert common law property rights to continue to do so through prescriptive easements. If tribes can establish “actual, open and notorious, continuous and uninterrupted” possession of the property for a period of a statutorily determined period of time, they can assert a right to a prescriptive easement to continue to use that land (Carpenter 2005, 1095). Although prescriptive easements are most utilized against private property owners, 43 U.S.C.A. § 1068 establishes a narrow exception for actionable possession claims against the federal government (Carpenter 2005, 1098). With a prescriptive easement, tribes may be able to assert certain forms of regulatory control over resource use by prohibiting certain activities interfere with their use rights (Carpenter 2005, 1096).

Third, the 1994 TSGA and expanded the scope of 638 contracting with federal agencies and provided a new tool for tribes to participate in resource management on federal lands (King 2007, 476). Mary King describes two ways tribes can participate in public land management vis-à-vis the TSGA.

First, it establishes a government-to-government negotiation process that obligates agencies to negotiate [although they are not required to enter into agreements with them as is the BIA] with tribes… The second way the TSGA expands tribes’ ability to manage public land is by allowing them to exercise
Congressionally delegated federal authority through Annual Funding Agreements ("AFAs"). AFAs are instruments negotiated pursuant to the TSGA that govern the transfer of federal programs and funds to tribes. Although the delegation of federal authority to tribes is not new, the TSGA may permit the delegation of authority over federal programs and federal land for the first time. (King 2007, 477-78).

AFAs are regulatory agreements that allocate federal funds to implement federal programs on federal lands to tribes (King 2007, 478), thereby extending tribal regulatory control over resource management outside the reservation and onto federal lands. At the very least, although the TSGA neither establishes nor reflects a possessory right to manage natural resources on federal lands, it does mandate that tribes be able to participate in decisions and manage programs of “special geographic, historical, or cultural significance” (25 U.S.C.A. § 458cc(c)). The Ute Mountain Ute Tribe exemplified the power of 638 contracts through its work on the Animas-La Plata water project, where the Tribe assumed complete administrative control over a federal project conducted far outside the reservation boundaries.

Finally, the federal land laws of the 1970s created new environmental and cultural preservation laws that included provisions mandating consultation between tribes and federal agencies. “By the 1990s, all of the major federal land management agencies such as the Bureau of Land Management, National Park Service, U.S. Forest Service, and U.S. Fish and Wildlife Services were promoting federal-tribal ecosystem management approaches” (Suzuki & Knudston 2003, 436). The 1997 Secretarial Order 3206, “American Indian Tribal Rights, Federal-Tribal Trust Responsibility, and the Endangered Species Act” required that federal agencies consult with tribes about decisions affecting their lands and resources and encouraged co-management agreements between tribal and federal agencies to protect endangered species and their habitat.

In 2000, Executive Order 13175, “Consultation and Coordination with Indian Tribal
Governments” was enacted to establish regular and meaningful consultation and collaboration with tribal officials in the development of policies with tribal implications.

Under the National Historic Preservation Act (“NHPA”), tribes retain the right to “consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to [impacted] properties…” (16 U.S.C.A. § 470a). The NHPA was initially enacted in 1966 to protect historical resources and information about the past by administering “federally owned, administered, or controlled prehistoric and historic resources in a spirit of stewardship for the inspiration and benefit of present and future generations” (16 U.S.C.A. § 470-1). The 1966 NHPA attempted to achieve these goals primarily through § 106, which requires federal agencies to address the impact of federal projects on historic properties either listed, or eligible to be listed\(^{13}\) on the National Historic Register. The meaning of consultation in 106 proceedings however, has been construed narrowly and generally does not require that the tribe consent to a particular project, but rather that the federal agencies go through the ‘procedure’ of consultation- which has no substantive implication (Narragansett Indian Tribe v. Warwick Sewer Auth., 334 F.3d 161, 166-67 (1st Cir. 2003); Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800, 805 (9th Cir.1999); Nat’l Mining Ass’n v. Fowler, 324 F.3d 752, 755 (D.C.Cir.2003); 36 C.F.R. § 800.3).

Nonetheless, tribes have achieved some success in leveraging NHPA consultations to derail federal projects that may deleteriously affect off reservation resources. In Quechan Tribe

\(^{13}\) The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association and (a) that are associated with events that have made a significant contribution to the broad patterns of our history; or (b) that are associated with the lives of persons significant in our past; or (c) that embody distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or (d) that have yielded, or may be likely to yield, information important in prehistory or history (36 C.F.R. § 60.4).
of Fort Yuma Indian Reservation v. U.S. Dep’t of Interior, 755 F.Supp.2d 1104, 1106 (S.D. California 2010) the Quechan Tribe sued the Department of Interior to enjoin a solar project on federally-owned land after the Bureau of Land Management failed to properly consult with the Tribe under NHPA and various other federal laws. The court ruled to enjoin the project finding that the BLM failed to properly and timely consult with the Tribe under NHPA and other applicable laws, and that allowing it to proceed would irreparably harm “hundreds of known historical sites on the land, and the Tribe attaches cultural and religious significance to many if not most of these” while divesting the tribe of a procedural right under the law (Quechan Tribe, 755 F.Supp.2d at 1120). How the Ute Mountain Ute Tribe engages with the NHPA to participate in projects on federal lands will be discussed in more detail in the following chapters.

Tribal attempts to use and manage resources on federal lands demonstrate how tribes spatially embody legal regulatory pathways that demonstrate the double-movement of property. Tribal resource management enacts the legal significance of jurisdictional boundaries by abiding by them, playing into the hierarchical relationship the reservation system set up between the Tribe and the federal government. At the same time, the Tribe can use the hierarchical social and legal framework inherent in resource management to navigate the meaning of those jurisdictional boundaries by asserting control on federal lands. Again the dualistic function of the reservation system as property largely locks the scope of tribal autonomy within a two-way relationship with the United States. The IRMP/CRMP plays into these spatio-legal tensions by reifying sovereign

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14 In addition to the environmental and cultural resources law extending tribal control onto federal lands, a myriad of other legislation affecting tribal interests extends tribal control outside of the reservation boundaries more generally. For an accounting of the legislative ways tribes can indirectly assert control outside of the reservation boundaries see e.g. Alex Tallechief Skibine, Tribal Sovereign Interests Beyond the Reservation Borders, 12 Lewis & Clark L. Rev. 1003 (2008).
restrictions—simply engaging in IRMP/CRMP planning acknowledges those place based restrictions at its core—while also creating the internal infrastructure by which to refute them.

3. State Lands

Like on federal lands, the Ute Mountain Ute Tribe may attempt to yield authority to participate in resource management off the reservation on state lands by asserting off reservation hunting and fishing rights—exemplified by the Ute Mountain Ute Tribe’s involvement in the Brunot Agreement discussed in chapter two; by asserting non-owner property rights, through federal land laws such as “Tribes as States” or TAS provisions (see e.g. City of Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1996); Montana v. U.S. EPA, 137 F.3d 1135 (9th Cir. 1998); Arizona Public Service Co. v. EPA, 211 F.3d 1280 (D.C. Cir. 2000)), and through consultation proceedings or other federal laws authorizing it (although the TSGA does not apply to state agencies). These pathways to securing regulatory control over resources on state lands however, are more limited than those on federal lands, primarily because states do not retain the same trust responsibility to Indian tribes as the federal government does. Generally, courts have favored state regulatory control in disputes with tribes (see Royster et. al 2013).

Furthermore, the pattern of allotted Indian lands within reservation boundaries and mixed demographic of Indian and non-Indian residents within state and tribal boundaries complicates patterns of regulatory control. In Montana v. United States, 450 U.S. 544 (1981), the Supreme Court highlighted two major factors when determining whether the state or tribe retains regulatory authority to make resource management decisions. The first is the status of the person subject to the regulation. The court will consider whether the person is Indian or non-Indian. The second major factor is the status of the land to which the regulation applies, i.e. whether it is
tribal trust land, tribal fee land, or non-member fee land within the reservation boundaries. In addition to establishing a general presumption against tribal authority to regulate non-member activity and non-member fee lands within the reservation, the Montana Court set up two narrow exceptions to the rule. Montana permits tribal jurisdiction over non-member activity within reservation boundaries if there is a ‘direct effect’ on the tribe, interpreted as applying only if the conduct directly threatens sovereignty (Plains Commerce Bank v. Long Family Land and Cattle Co., Inc., 554 U.S. 316 (2008)); or if there is a ‘consensual relationship’ between the non-member and the tribe, which has been interpreted as applying only to private (not government contracts) (Nevada v. Hicks, 533 U.S. 353 (2001)), contracted and commercial (Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001)), and if the relationship gives rise to the case at hand and doesn’t involve the selling or regulation of fee land (Plains Commerce 554 U.S. at 316). Some lower court cases have interpreted the direct effects exception to apply to resource management (see e.g. Confederated Salish and Kootenai Tribes v. Naamen, 655 F.2d 951 (9th Cir. 1982); Lumni Indian Tribe v. Hallauer, 9 Indian L. Rep. 3025 (W.D. Wash. 1982)), although tribes have had notoriously little success in asserting either exception in courts. The 1895 legislation creating the Ute Mountain Ute reservation after the Weenuche refused allotment mitigated some jurisdictional conflict between the Tribe and the state in the development and implementation of their IRMP/CRMP, but the vast majority of other tribes are allotted and must navigate these tensions warranting the discussion of such here.

The dispute between state and tribal civil regulatory jurisdiction over fee lands on the reservation is probably the most egregious example of how the law both masks and produces spaces of hierarchical power based on race. Land status alone is not dispositive of whether a tribe can assert regulatory authority over lands owned in fee title on the reservation—but also whom
those laws would apply to. The majority of disputes over civil regulatory jurisdiction play out between tribes and non-Indian landholders. The individual embodiment of fee parcels on the reservation as white spaces precludes Native control and re-produces the history of dispossession as tribes attempt to unify a sovereign political space against the larger national landscape.

However like tribes, states are subject to Congressional authority, which can extend tribal jurisdiction over non-members and fee land within the reservation. For example, in *Arizona Public Service Co. v. EPA*, 211 F.3d 1280 (D.C. Cir. 2000), petitioners challenged whether tribes could implement air quality regulations through TAS status in the Clean Air Act (“CAA”) over all land within the reservation, including non-member fee. The court held that Congress expressly delegated tribes to implement air quality programs over the entire reservation, regardless of land status, extending tribal regulatory jurisdiction over non-members living on fee lands within reservation boundaries. The Ute Mountain Ute Tribe achieved TAS status under the Clean Water Act (the same procedures as the CAA), and uses that provision to participate in state water management in varying capacities.

By engaging in resource planning with the IRMP/CRMP, the Ute Mountain Ute Tribe simultaneously reifies the hierarchical patterns of jurisdictional control based on land while challenging them. Engaging in the IRMP/CRMP affirms the significance of reservation boundaries by enacting the social space that upholds the jurisdictional scope of tribal resource management by the tribe, state, or federal government based on property. This firmly anchors any attempt to implement a management regime that reflects Ute territoriality within the social and political fabric of the United States. At the same time, it provides a clear and cognizable channel for asserting recognized rights that push against both the social and landed boundaries of the jurisdiction in Indian Country—demonstrating the double-movement. The significance of
jurisdiction does not end at mechanizing patterns of where the Tribe can manage resources or who those laws apply to. It establishes what resources the Tribe can manage and how the Tribe can manage those resources by justifying the application of the overarching federal political and legal framework on the landscape.

C. The Legal and Regulatory Framework of the IRMP/CRMP

To remedy the failure of past policies—or more realistically, in an effort to reduce tribal dependency and mitigate liability, the government enacted a series of laws to encourage tribes to take control of civil and social programs on the reservations as part of the “self-determination era” of federal Indian policy of the late 1970s to the early 1990s (Royster et al 2013, 56). In doing so however, the federal government mandated how tribes could manage their resources through the imposition of federal environmental laws and by making funding for tribal plans contingent on federal guidelines. These programs included resource management regimes, and in 1988 the BIA initiated a goal for every tribe to develop an IRMP for their reservation (Hall 2001, 1-6).

In the 1990s, the federal government codified “integrated resource planning” into a series of laws that delimited new hierarchies of control. In 1994 the Senate enacted the Indian Integrated Resources Management Act (“IIRMA”). IIRMA was introduced by (Republican) Senator John McCain, and authorized the Secretary of the Interior to fund Indian tribes to develop and implement overarching resource management plans for resources on the reservation (103rd Congress Session 2d, S. 1936). The general purpose of the IIRMA is to assist in the creation of long-term management plans for all resources on the reservation in a manner that is consistent with tribal culture and values and consistent with applicable federal laws. The IIRMA
directly followed the 1993 American Indian Agricultural Resource Management Act ("AIARMA"), 25 U.S.C.A § 3701, and the National Indian Forest Resource Management Act ("NIFRMA") in 1990, 25 U.S.C.A § 3101, which first incorporated IRMPs into law by mandating that any new forest or agricultural management plan conform to tribal IRMPs. Today, at least 26 tribes have developed IRMPs since the passage of the IIRMA.

The Senate enacted IIRMA contemporaneously with Congress’s passage of the 1994 Tribal Self-Governance Act ("TSGA") demonstrating how the federal government used resource management in disciplining the reservation space towards a specific type of self-governance in accordance with federal agreements. The TSGA precipitated a series of amendments to the 1975 Indian Self-Determination and Education Assistance Act ("ISDEAA"), Public Law 93-638\(^\text{15}\) at 25 U.S.C.A. § 450, to promote new synergies between tribes and federal agencies to enhance tribal governance and refresh the era of self-determination in federal Indian policy (King 2007, 476; 494). Most notably, Title I of the ISDEAA authorized eligible tribes to contract with the federal Government to operate BIA programs on the reservation that served tribal members.

The TSGA promulgated specific and important changes for tribal land and resource management by expanding the scope and effect of the ISDEAA and 638 contracting to include other federal agencies in addition to the BIA, expand tribal eligibility, allow for contracting of programs that benefit more than individual tribal membership, and most importantly—to allow for tribal management of tribal and federal natural resources on and in some cases off the reservation (King 2007, 476). For example the TSGA authorized tribes, or consortiums of tribes, to petition non-BIA agencies within the Department of Interior to manage federal programs available to Indians because of their unique political status, or programs with special geographic, historical, or cultural significance (25 U.S.C.A § 458cc). The TSGA also increased tribal

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\(^{15}\) Hence the colloquial reference to "638 contracts."
involvement in federal land management through consultation proceedings by mandating that all federal agencies in addition to the BIA consult with Tribes on projects affecting lands either on or near the reservation.

The CRMP equally reflects the larger policy context towards tribal self-government through tribal infrastructure building and consultation initiated in the 1990s. In 1990, Congress passed the Native American Graves Protection and Repatriation Act ("NAGPRA") at 25 U.S.C.A §§ 3001-3013. Congress passed NAGPRA primarily to stop the pervasive looting of Native American graves, and to establish a procedure for consultation and repatriation of Native American skeletal remains and other items of cultural significance after they are unearthed (25 U.S.C.A §§ 3003-3005), and to affirm tribal “ownership or control of Native American cultural items which are excavated or discovered on Federal or tribal lands after November 16, 1990” (25 U.S.C.A § 3002). It established criminal penalties for “whoever knowingly sells, purchases, uses for profit, or transports for sale or profit” of Native American human remains or cultural items including fines and imprisonment of up to 5 years for a second offense (18 U.S.C.A § 1170).

Two years later, Congress amended the NHPA to include Indian Tribes by authorizing THPOs to take over state historic preservation duties and making “properties of traditional religious and cultural importance to an Indian tribe” eligible for the National Registry and mandating new consultation proceedings (25 U.S.C.A § 470a). The entire purpose of the THPO is thus to take over the enforcement of federal regulations from state governments on reservation lands.

In addition to NAGPRA and the NHPA, Congress passed the American Indian Religious Freedom Act ("AIRFA") at 42 U.S.C. § 1996, which affirmed the right for Native Americans to practice their traditional religions and have continued access to ceremonial sites. Following AIRFA, the president Clinton enacted “Indian Sacred Sites” Executive Order No. 13007 in 1996
to ensure access and ceremonial use of sacred sites on and off the reservation and that agencies provide reasonable notice of proposed actions or land management policies that may restrict or adversely affect the integrity of such sites. Through this legislation Congress reintroduced the role of tribes as patrons over their cultural resources and continued with the spirit of self-determination spirit by mandating consultation with tribes over cultural resources found or affected outside the reservation.

Furthermore, the Ute Mountain Ute is developing its resource plan with federal funds, pursuant to a 638 contract with the BIA, and therefore must comply with all other federal laws and regulations (BIA 2001; BIA 2005). According to the BIA, “[t]he IRMP cannot change these regulations, per se, but can be used to meet stipulations included within them as they relate to strategic planning” (BIA 2001, 4-27). A full analysis of every applicable law is beyond the scope of this dissertation (see Royster et al. 2013 for a full account). The following table lists the area of applicability and statutory authority for the major federal laws applying to the IRMP/CRMP on the reservation.
<table>
<thead>
<tr>
<th>Regulation</th>
<th>Citation</th>
<th>Area of Application</th>
</tr>
</thead>
<tbody>
<tr>
<td>National Environmental Policy Act (“NEPA”)</td>
<td>42 U.S.C.A. § 4321</td>
<td>Environmental planning</td>
</tr>
<tr>
<td>Clean Air Act (“CAA”)</td>
<td>42 U.S.C.A. § 7401</td>
<td>Air pollution prevention and control</td>
</tr>
<tr>
<td>Comprehensive Environmental Response Compensation and Liability Act (“CERCLA”)</td>
<td>42 U.S.C.A. § 9601</td>
<td>Hazardous substances (Superfund)</td>
</tr>
<tr>
<td>Emergency Planning and Community Right to Know Act (“EPCRA”)</td>
<td>42 U.S.C.A. § 11001</td>
<td>Emergency planning and notification</td>
</tr>
<tr>
<td>Endangered Species Act (“ESA”)</td>
<td>16 U.S.C.A. § 1531</td>
<td>Threatened and endangered wildlife and plants</td>
</tr>
<tr>
<td>Federal Water Pollution Control Act, or Clean Water Act (“CWA”)</td>
<td>33 U.S.C.A. §1251</td>
<td>Restoration and maintenance of the Nation’s water</td>
</tr>
<tr>
<td>Safe Drinking Water Act (“SDWA”)</td>
<td>42 U.S.C.A. § 300</td>
<td>Safety of public drinking water</td>
</tr>
</tbody>
</table>

Table 1: Federal Environmental Laws on Tribal Lands *(reproduced from BIA 2001).*

The imposition of federal laws regarding resource use often conflict with tribal practices.

For example, in *U.S. v. Dion*, 476 U.S. 734 (1986), Dwight Dion, Sr., a member of the Yankton Sioux Tribe, was convicted of shooting four bald eagles on the Yankton Sioux Reservation in South Dakota in violation of the Endangered Species Act (“ESA”) at 16 U.S.C.A § 1531. Dion took the eagles for ceremonial use. The Court held that although the Yankton Sioux had legitimate treaty rights to hunt and fish on their reservation lands, when Congress passed the ESA, those rights were abrogated by the legislation. The Court stated that “[t]hose treaty rights, however, little avail Dion if, as the Solicitor General argues, they were subsequently abrogated by Congress. We find that they were” (*Dion*, 476 U.S. at 734). The Supreme Court declined to address whether that abrogation violated Indian religious freedoms (*Dion*, 476 U.S. at 746).

Since *Dion*, most of the major federal environmental laws have been amended to include Indian tribes (Royster et. al. 2013, 218). The Environmental Protection Agency (“EPA”) has amended many of its environmental statutes to include tribes as authorities for implementing federal environmental programs on the reservation and including tribal input in creating federal...
environmental laws (Suzuki & Knudston 2003, 432). Between 1986-1990 the EPA amended the CWA, CAA, and SWDA to include TAS provisions, which authorized tribes to impose their own environmental standards provided they comply with the federal minimums outlined in the acts (Royster et al. 2013, 227). In 2005, Ute Mountain Ute Tribe successfully applied for TAS under the CWA and SWDA, and that authority is reflected in the IRMP. The conflict between tribal values and federal laws are far from resolved however (see Royster et. al. 2013).

The federal laws codifying and defining the development and scope of the IRMP/CRMP do two simultaneous things. On the one hand, the legal and regulatory framework attempts to protect tribal resources from exploitation by transferring federal control to the Tribe so that it can implement federal laws on the reservation. This functions to govern the reservation space towards a federal agenda, limiting how the Tribe can enact resource planning or development on its own terms. On the other hand, the legal and regulatory framework carves out a new legal space for tribes to embody through resource planning. By establishing means for tribes to legally secure control from the federal government over projects and planning on reservations lands, tribes are given the space (and financial ability) to explore new expressions of territoriality by re-writing relationships with federal agencies and amongst membership that surround resource use.

In other words, the IRMP/CRMP grew out of the self-determination policy context but are equally confined by it. Tribal IRMPs are defined by the guidelines set up by the BIA, and the CRMP establishes the procedures for fulfilling federal mandates under the NHPA. Tribes do have the freedom to set up their own management priorities based on individual values and according to their unique economic and cultural goals, but the same federal laws that authorize and fund the IRMP/CRMP also limit those actions. Thus by engaging in federally funded and designed resource planning, tribes enact a particular type of territoriality based on what the
federal government authorizes them to do. In doing so, tribes are re-anchored within the legal and political landscape of the United States, which may do more to reinforce colonial hegemonies than reverse them (Wainright & Bryan 2009). This double-edged process is further reflected in the development and content of the IRMP/CRMP.

D. The Content of the IRMP and CRMP

The federal government defines the content of the IRMP, disciplining the reservation space towards a federal and largely Anglo ethic for resource management that views the tribal landscape in terms of resources. The BIA Guidelines outlined in the “BIA IRMP Handbook” and the “Tribal Executive Guide to IRMPs,” each available directly from the BIAs website dictate the overarching purpose and content of the IRMP. Basically, an IRMP is a tribe's strategic plan for the comprehensive management of a reservation's resources. It is a tribal policy document, based on the visions that the tribe and tribal landowners have for their reservation. It serves as the base for all resource management decisions (BIA 2001, 12).

The overarching goal is to compile information about tribal resources in order to identify conflicts, streamline management decisions, and establish a long-range plan for how tribal resources should be managed on the reservation. IRMPs are to adopt a ‘whole-system’ approach, “viewing all resources—natural, social, cultural, and economic—as being interrelated in such a manner that management actions directed at one resource also affect others” (BIA 2005, 2). Ultimately IRMPs are tribal policy documents meant to catalogue information and guide how development of natural resources should, or should not take place on the reservation.

Accordingly, the major body of the IRMP consists of an “assessment” of all resources of cultural or economic significance to the Tribe on the reservation. “This assessment should include a description of the reservation at a point in time that will assist in presenting a clear
picture of how resources have changed, as well as a description of resource use practices over that period of time” (BIA 2005, 8). Once the resource assessment is completed, the IRMP is to identify individual goals, objectives, and management strategies for each resource in a “goals and objectives matrix” (BIA 2005, 9).

Substantively, the resource assessment should include textual descriptions of resources that encompass tribal member experience in the document itself, but more importantly, in addition to a qualitative description the IRMP necessitates the development of Geographic Information System (“GIS”) (BIA 2001, 4-36-4-40). The BIA describes GIS as being comprised of four basic components: a spatial database, map creation, spatial data analysis, and qualified personnel. “IRMPs take advantage of all of the components” (BIA 2001, 4-39). Tribes are encouraged to apply for funding to house their own GIS, contract outside companies, or to take advantage of the BIA's free Geographic Data Service Center (“GDSC”) out of Lakewood, Colorado (BIA 2001, 4-40). This data should be used to survey and map the location, use, and condition of all land-based resources on the reservation for the IRMP itself, and to develop a GIS that compiles information from all departments for future planning and management decisions.

Although the BIA encourages each tribe to develop an IRMP according to its own needs and values, the relatively restrictive framework results in most tribal IRMPs looking very similar (see e.g. Spokane, Snoqualamie, Coeur d’Alene, Colville, Fun du Lac). The Ute Mountain Ute IRMP follows the generic framework almost precisely, but acknowledges its limitations at the outset. It begins with a vision statement background that states the problem, namely that the state of resources on the reservation is dismal and due to the fact that “[b]ecause of the necessities of modern life, our tribal membership has slowly changed from a communal-first and sustainable use ethic to an individualistic wealth accumulating ethic” (IRMP 2013, 20). It discusses the
inability for the reservation to sustain past resource use and how their traditional relationship with the land is “hampered by our restricted land base and further fettered by outside regulations” (IRMP 2013, 20). These human changes, according to the vision statement and background, degrade natural resources as much as cultural ones. The IRMP begins by essentially admitting that the plan has nothing to do with Ute tradition, but is necessary for remedying past ways with a sustainable modern management regime.

The IRMP continues with all the inclusions dictated by the BIA guidelines including a comprehensive 200-plus-page resource assessment. The Tribe is also in the process of developing its own GIS on a server in the THPO. Private contractors have begun compiling shapefiles, or the digital points, lines and polygons that represent geographic features and their locations on the reservation, through previous work with the THPO and other departments. Currently though, this information is split between the EPD, private contractors, and the BIA. The THPO seeks to compile all of the information in one place to finish the IRMP and to maintain the information for use in future projects—demonstrating the purported purpose of the IRMP to integrate all the plans and information about resources on the reservation. Once the IRMP is complete, the Tribe must draft code that adopts the IRMP into law. Due to the sensitive nature of the information contained in the IRMP, information about specific resources or unique procedures must not be disclosed.

The CRMP is the part of the IRMP that surveys, assesses, and establishes management procedures for all cultural resources on the reservation. Similarly to the IRMP, the CRMP follows guidelines set up by the federal government. In this case the Park Service, in accordance with the NHPA and accompanying sections of the Code of Federal Regulations, outlines the content of the CRMP. Like the IRMP, the CRMP must include a resource assessment that
surveys the location, historical use, and current condition of all the cultural resources on the reservation in accordance with the NHPA at 42 U.S.C.A. § 470(a). Also pursuant to the NHPA, the CRMP must focus on identifying historic sites either listed or eligible for listing on the Historic Registry to facilitate the process of nominating sites and communicating with the National Advisory Board. This emphasizes the role of property, as legally cognizable by the federal government, in defining how the CRMP takes shape on the reservation.

In addition to mandating what the CRMP must include, the NHPA outlines how the consultation process will be implemented on tribal lands, and as referenced in 42 U.S.C.A. § 470(a)(d)(2)(D), establishes the THPO Officer as the consulting officer for federal agencies (CRMP 2013, Section 4). Following suit, the CRMP is the foundational document of the THPO and must delineate how the THPO will carry out its federal mandates. It details specific procedures for projects on the reservation that implicate cultural resources in accordance with federal laws including the NHPA, NAGPRA, and the Archeological Resources Protection Act “ARPA” in 1978, at 16 U.S.C.A. § 470aa-mm. ARPA holds that any person conducting excavations on lands tribal lands must secure must obtain “consent of the Indian or Indian tribe owning or having jurisdiction over such lands. The permit shall include such terms and conditions as may be requested by such Indian or Indian tribe” (16 U.S.C.A. § 470cc). The CRMP outlines the permitting procedure under ARPA (CRMP 2012, section 5). Additionally, the CRMP establishes the THPO as the coordinator for repatriation under NAGPRA and establishes a repatriation policy as to how the THPO plans to treat human remains, unassociated funerary objects, sacred items and objects of cultural patrimony in accordance with the act. Due to the sensitive nature of the information contained in the CRMP, nothing about any specific cultural resources or unique procedures for managing them can be disclosed.
The major consequence of all of this is that federal government—through funding, BIA guidelines, federal laws, and the limits of jurisdictional scope—employs the IRMP/CRMP as a way to discipline how the Tribe expresses Ute territoriality on reservation lands. The IRMP/CRMP complies with federal laws and carries out federal mandates on the reservation. This reflects less of a transfer of control from the federal government to the Tribe as it does a re-packaging of the federal assimilationist agenda sold back to the Tribe, slowly and subversively altering the Tribes’ perception of itself (Byrd 2011). In this way, the legal and policy directives dictating the content of the IRMP/CRMP produce a new nomoscope of resource planning that limits its applicability as something uniquely Weenuche (Delaney 2010).

That is, nomic regimes, and their spatial expression as nomoscapes, are commonly instituted so as to generate these social (ultimately, existential) effects. Nomoscapes may be analyzed in terms of how spatialities are constructed, crafted, and modified in order to bring about these desired social effects, and how well or poorly they succeed in realizing these ends in the worlds of experience (Delaney 2010, 115).

The IRMP/CRMP process biases the creation of Ute Mountain Ute resource management plan to reflect the broader federal nomos. Because the Tribe is reproducing a federal agenda by implementing it on the reservation, resource management serves as a tool to discipline the reservation towards that agenda.

The IRMP/CRMP stresses GIS data as fundamental for integrating resource management planning on the reservation, which proves the technical means for disciplining the reservation space. The emphasis on GIS projects spearheaded by tribes comes out of the self-determination era and is largely heralded as the vital tool for the BIA to remedy its past failures of resource management on the reservation, and the Ute Mountain Ute Tribe equally views the most important outcome of the IRMP/CRMP. Although this information is incredibly valuable for the Tribe and may well facilitate resource development on the Tribes’ own accord, compiling this
information *for* the federal government and *with* federal technological assistance reproduces the relationship of dependency set up by the reservation system. In reality,

GIS deployment in Indian Country proceeded by following an internal colonial model featuring misuse of funds, top-down policy impositions without consultation, and maintaining Indian dependency by repeated efforts to sustain the agency’s position as an obligatory point of control (Palmer & Rundstrom 2013, 1153).

By training, funding, and mandating that the Tribe complete a resource assessment for the IRMP/CRMP may do less to encourage internal management as it does to enable the new technological era of ‘internal colonialism’ (Palmer & Rundstrom 2013).

The role of GIS in the IRMP/CRMP reproduces the relationship of dependency between the Tribe and the federal government in two ways. Firstly, the Tribe becomes reliant on external technological assistance. Although the Ute Mountain Ute Tribe is trying to develop the internal infrastructure to collect and house its own information, it simply does not have the human resources to do that now. As a result, the Tribe is completely reliant on contractors and government financial and technical assistance. Secondly, the IRMP/CRMP resource assessment reveals exactly what type of resources exist on the reservation and where to the federal government. The IRMP/CRMP is basically resource prospecting on behalf of the federal government, because it generates specific information about the quantity, quality, and whereabouts of potentially valuable resources on the reservation. Although the Tribe has legal protections as to what sort of development the United States could do on tribal lands, Congress retains plenary power opening up new potentials for exploitation. The content of the IRMP/CRMP underwrites the relationship of dependency and control under the guise of reversing it, and as such disciplines the reservation space. Again, GIS does provide information
for the Tribe to engage in resource development and planning on its own accord, but any potential for that development is firmly anchored within the political fabric of the United States.

The role of the resource management in disciplining the reservation space and reproducing hierarchical relationships of control between tribes, states, and the federal government manifests front and center in the co-management debate.

E. The Co-Management Debate

Co-management describes the sharing of responsibility between the state and federal governments and tribal resource users (Berkes 2009, 1692). The idea is that “co-management may offer a pathway for resource users to obtain a proprietary share in the authority and decision-making powers that underwrite management” (Castro & Nielson 2001, 231). Proponents of co-management generally argue that partnerships between tribes and states, or tribes and the federal government will increase stakeholder participation, and facilitate better and more culturally appropriate management decisions through institution building and communication (Castro & Neilsen 2001; Berkes 2009). The IRMP/CRMP fits into the co-management debate both as part of the political push towards self-determination, and because the IRMP/CRMP can be considered a co-management agreement itself. The IRMP/CRMP is funded by the federal government and must adhere to BIA Guidelines and federal law through a 638 contract with an emphasis on collaboration.

Co-management emphasizes the role of the IRMP/CRMP in disciplining the reservation space in two major ways. First, by using ‘resources’ as the common language for environmental management challenges how tribes traditionally view the environment. Recall that for the Ute Mountain Utes (or really any pre-market society) that the concept of resources simply did not
exist traditionally. Through co-management agreements, or state-collaborations for resource management more generally, tribes use resources as means for translating Native understandings of land use into a language cognizable by state and federal agencies (Nadasdy 2003, 2005; Watson 2013, Goldman 2007). Requiring that the Tribe manage the reservation in terms of resources for the purpose of facilitated collaborations with state and federal governments disciplines the Tribe to fit into the broader political framework of the United States. And second, positioning co-management as means for broader institution building demonstrates how the IRMP/CRMP reproduces traditional relationships of control. Although co-management agreements are intended to introduce more balanced participation among stakeholders, that those agreements require an internal infrastructure based on the political fabric of the broader nation-state may serve to reinforce reservation hierarchies than refute them.

Paul Nadasdy looks at the land claims process and subsequent co-management agreements between the Canadian government and Aboriginal Kluane people of the Yukon to exemplify that potential (Nadasdy 2003). According to Nadasdy, the Kluane people don’t traditionally believe that anybody can “own” the land at all. Instead, “they were—and in many cases still are—enmeshed in a complex web of reciprocal relations and obligations with the land and the animals upon it” (Nadasdy 2003, 223). Like for the Ute Mountain Utes resource “management” followed a detailed and communally oriented use regime that clearly delineated who could use what, when, and where—but did so without adopting concepts of resources or property. Communal stewardship did not constitute the dominant understanding of property or resources because no individual had rights that could trump any other, but at the same time they all had equal rights to use all the communal land and resources (Nadasdy 2003, 227).
However, when the Kluane chose to participate in the land claims process and co-management agreements, they were forced to adopt the property model for understanding land and resources requiring “translating cultural beliefs, values, and practices into a language that can be understood and acted upon by Euro-Canadian bureaucrats, lawyers, and politicians (in this case, the legal language of property)” (Nadasdy 2003, 223). This eroded the traditional cultural life of the community by dramatically changing their relationship with one another, with the land, and a mis-matched management agreement based on divergent understandings about resource use and expectations about practices (Nadasdy 2003, 2005).

Annette Watson comes to similarly drear conclusions about co-management-like regimes for tribal resources as means for improving the community land base or environmental condition. Watson worked on greater white-fronted geese co-management with the Koyukon Athabascans in Alaska (Watson 2013). Like Nadasdy, she argues that the general failure of co-management regimes results from incongruent understandings between tribes and state and federal managers about ‘nature’ as being manageable as resources at all. Straying from Nadasdy, Watson focuses on the co-management regimes as a site for knowledge production for government practices, i.e. the “data-gathering and representational practices” used for decision-making (Watson 2013, 1436). Watson and Nadasdy generally flout the utility of this and other enlightenment-based concepts of data formation and resource decision-making by managing resources as property through co-management or otherwise, as essentially misrepresentative of Native interests.

Arguments against tribes engaging in the IRMP/CRMP or other similarly federally funded programs for resource planning fail to consider the full range of consequences—good or bad—in a major way. Critics assume that the tribe or community engaging in co-management or other state-collaborative resource planning, such as the IRMP/CRMP, do not understand the
deleterious affects of engaging in a Western management regime before they engage in it. At Ute Mountain Ute, I encountered nobody, within the tribal government or otherwise, that failed to recognize the ‘neo-colonial’ potential of property-based resource planning through the IRMP/CRMP. In fact, everybody seemed to recognize the irony, if not the inadequacy of it all. Interviews and informal discussions about the IRMP/CRMP and other state or federally-funded projects always tracked a dualistic understanding about their potentials and effects, a sort of ‘yes, we are doing it’ but ‘yes, it is antithetical to Ute traditions and culture.’

By recognizing that the Tribes’ engagement in state-centric systems of resource management is not so much misinformed, but rather deliberate, calculated, and directed changes the type of questions we ask about the efficacy of the IRMP/CRMP by thinking about the why the Tribe is doing it anyway. This shifts a research agenda away from questions analyzing how the United States may be using property to push an Anglo management agenda and further assimilate the Tribe into mainstream culture and governance, and towards how the Tribe may be engaging in this framework to reverse or at least mitigate such efforts.

First and foremost, the IRMP/CRMP, like other collaborative agreements, brings much needed grant money to the Tribe. Although the Tribe does not profit directly from the grants, grants provide the funding to develop the IRMP/CRMP and generates jobs on the reservation. Once the IRMP/CRMP is developed, the goals and objectives matrix provides new opportunity for federal funding to implement those objectives (Meeting A, August 7 2013). The IMPR/CRMP also improves tribal infrastructure, such as the creation of the THPO, essential for engaging in negotiations with state and federal agencies (Interview C, September 15 2013). However ‘federal’ and ‘Anglo’ these infrastructures are, they increase the legibility and therefore legitimacy of the Tribe within the political framework of the United States. At the very least,
tribal officials maintain a generally positive attitude about the potentials of the IRMP/CRMP because “right now we have nothing, so this is better than nothing” (Interview D, September 17, 2013.)

Secondly, a narrowly critical view on the utility of federally funded or state-collaborative regimes like the IRMP/CRMP, ignores the governing power of resources as properties. As discussed in chapter one, property serves as a tool of governance that fundamentally orders people and space. Property is not a function of the law alone; it is enacted, sustained, and malleable based on peoples relationships and spatial reactions to it (Keenan 2010). Thus although a resources approach to environmental management affirms the Tribes’ essential rights to manage and exclude as a propertied subject, the spatial and social enactments of managing those resources demonstrates that the IRMP/CRMP does much more than that. Federally funded resource management regimes can be seen as replicative of the status quo, but the Tribe can also use the governing power of property to ‘unsettle’ spaces and subvert the dominant hegemony.

F. Conclusion

This chapter aimed to prove that the structure and content of the IRMP/CRMP simultaneously legitimize and refute the legal and jurisdictional bounds that confine it. It outlined the jurisdictional and legal-regulatory bounds of the IRMP/CRMP in order to connect the structure, content, and purpose of the IRMP/CRMP to the broader political agenda of the federal government on the reservation. By engaging in resource planning with federal funds, and in accordance to federal law, federal guidelines, and jurisdictional constraints, the Tribe spatially enacts the meaning of the legal framework and disciplines the reservation space and the IRMP/CRMP further enrenches the Tribe within the federal framework, which may serve to
reinforce racial and colonial ideals that drive the dominant spatio-legal systems of power (Delaney 2010, Byrd 2011, Bryan 2009). But at the same time, the legal and jurisdictional bounds create the structure for tribes to push against those limitations. This demonstrated how property reflects the double-movement. The co-management debate exemplified the dualistic nature of the IRMP/CRMP while also introducing the resources approach as means for leveraging the governing power of property. Taking a tribal agency perspective to examine the full spatio-legal ramifications of engaging in resource management through the IRMP/CRMP reveals new utility in tribal resource management that both embodies an earnest hope that such planning will in fact improve the quality, productivity, and sustainability of Ute Mountain Ute resources; but that also proves a deliberate and tactical move in utilizing the governing power of property. Lifting the critical veil of mismatched property paradigms and giving agency back to Tribes reveals that IRMP/CRMP is good and bad, but moreover it is best for doing something else.

The next chapter answers why, despite the limited, deleterious, and disciplining potential of federally funded resource management, the Tribe does it anyway.
Chapter V:
Making Resources and Making Governable Spaces

This chapter repositions the inquiry into tribal resource management on the Tribe, as a savvy and deliberate political actor, and answers *why* the Tribe engages in the IRMP/CRMP despite the limited, disciplining, and potentially deleterious effects of doing so. To answer this question, this chapter argues that the Tribe engages in the IRMP/CRMP to produce resources as tribal property and generate new governable spaces to assert itself as a sovereign. To do this, it first identifies three major processes for producing resources as properties that are consistent with the market and reflective of the use of property technologies introduced in chapter two. The IRMP/CRMP produces resources as property by visualizing them with maps and GIS data to distinguish individual resources on the landscape; separating and classifying them through the literal act of fencing or distinguishing rhetorical difference between different natural or natural and cultural resources; and valuing them, by assigning monetary and non-monetary values to resources and ordering management priorities according to those rankings.

Second, it argues that the Tribe uses property as a tool of governance to generate new spaces both on and off the reservation. The IRMP/CRMP heterogenizes the reservation space by producing spaces of governance within its own political structure, and also creates spaces to assert itself as a sovereign outside the reservation boundaries. In doing so this chapter marks a major departure from the literature and looks at how resources operate as tools for governance that are severable from a traditional land base. This suggests a re-characterization of dominant understandings of Native territorial expression as both contingent on traditional lands but also
equally removable from them, and shows how resource management can mitigate the significance of landed boundaries as a limiting factor of tribal sovereignty. Finally, this chapter seeks to show how the Tribe uses property to re-appropriate the federal framework to renegotiate its relationship with—and outside of the United States demonstrates a third movement of property.

A. Making Resources as Properties

In my work with the Ute Mountain Ute Tribe on the composition and application of the IMRP/CRMP, I participated in distilling a vast, unified, and interrelated landscape of social, cultural, and ecological phenomenon into a recognizable set of resources to be managed. Resources do not reflect an a-social or natural landscape. The entire idea that resources are ‘individually manageable things’ requires that they be fungible, alienable, and executable of the same bundle of rights attributed to other properties. The Tribe’s right to manage resources at all largely derives from the fact that it owns the lands under or overlying those resources to begin with. Scientific classifications of resources reinforce this approach by imbuing the individualization of certain ecological processes or natural phenomenon with technological justifications for management.

The process of making resources manifested both through writing, discussing, and planning the IRMP/CRMP, as well as through site visits, and fieldwork. This broad planning effort can be categorized into three major steps: visualizing, or the process of making certain resources legible through property technologies such as GIS and mapping; separating and classifying, or removing certain resources from others using property technologies such as fencing and distinguishing difference between resources; and finally valuing, or assigning unique
values through property technologies such as economic analysis and conflict mapping to order management priorities accordingly.

1. Visualizing

The first step in writing the IRMP is to break down and simplify the landscape and make visible the myriad of interrelated natural and cultural resources that exist there (Rose 1994). This is mandated in the BIA Guidelines (Hall 2001; BIA 2005), and includes conducting a broad GIS survey of all the resources on the reservation. Compiling information about tribal resources through GIS data and map-making is one of the primary purposes and tangible result of the IRMP/CRMP (Interview C, September 15 2013). Using GIS technologies to survey Native lands places Indigenous resources within the “typical set of cartographic abstractions that treat the world as an object comprised of spaces – polygons manipulated in a GIS – that are universally definable in terms of a set of points, lines, and polygons defined by latitude and longitude, scale and projection” (Wainright & Bryan 2009, 155). This serves to translate the complex immateriality of vast cultural, ecological, and spatial relationships into cognizable chunks of data that can be mapped according to Western property concepts legible by the broader nation-state and other non-Native interest groups. Visualizing resources through property technologies separates nature from man and assigns singular tribal ownership over a particular process or thing producing it as a alienable and ownable resource (Polanyi 2001).

Before the Tribe engages in any development on its land, it must conduct a survey of the cultural resources both as part of the IRMP/CRMP and in compliance with federal law. For Ute Mountain Ute, a major part of this process is documenting Ancient Puebloan, and in some cases Ute archeological sites on the reservation. The primary way a site is identified is by a particular
geo-physical pattern on the landscape. Before moving into the iconic cave dwellings seen in Mesa Verde, the Ancient Puebloan people lived in homesites on top of mesas (CRMP 2013, 21-40). Many of these sites on the Ute Mountain Ute reservation typically consisted of a great room, or kiva, which is a circular architecture surrounded by above floor rooms, a midden, or trash site, and other surface structures depending on the time of occupation (CRMP 2013, 21-40).

In my time working with the archeologists contracted by the Tribe, I participated in the documenting of three major archeological units (I cannot divulge any more specificity due to the sensitive nature of cultural resources) (Field Visit A, July 24, 2013; Field Visit B, August 27 2013; Field Visit C, October 21 2013). The typical archeological unit refers to a nuclear familiar unit, and consists of a kiva, a midden- or trash dump, and room block. I assisted the archeologist in a detailed recording of a particularly large site that was being threatened by a road on the reservation. To document this site as a unit we used GPS data to amalgamate individual family units into a village or district on a map. We recorded the site by dropping a GPS point at the center of each kiva. We then used the GPS to draw a line between the coordinate points to map the village or district. Once we mapped the sites as a district, we assigned it a number to be catalogued in the CRMP/IRMP.

After mapping the district, we then proceeded to date the site by ‘tagging,’ or taking a semi-circular transect about 20 feet long at each midden, and collecting between 100-200 pottery shards. We sorted those shards in phases according to their characteristics. Our sorting process consisted of first separating corrugated and smooth, then painted or non-painted, then mineral or organic paint, and finally whether the rims of the shards were thin and triangulated, or thick and squared. Each characteristic is associated with a different temporal occupation based on past
research done by archeologists. We then counted up the respective piles for the archeologists to make calculations using predetermined formulas about the time period of the entire site according to the percentage of shard characteristics and their associated use period. Dating places the site within the broader timeline and storyboard of Ancient Puebloan inhabitancy in the region. This accentuated the process of abstraction mapping the geographical location by discerning thousands of years of history through piles of pottery shards, the majority of which were less than an inch in diameter.

Yet through the abstract process of mapping and dating, we created this particular site as Ancient Puebloan. Although the physical evidence exists, the site was once an undefined part of the broader landscape. By manipulating GPS data through GIS, we used property technologies to visualize this site by documenting it and attaching that vision to a particular story about how the space was used based on pottery shards. This process produces both past and present space on the reservation, while creating a cultural property as a distinct resource for the Tribe to manage.

There are two primary purposes of visualizing the site in this way that reflects the broader property narrative. First, it is “to do just that… to map it” (Field Visit C, October 21 2013). There are no plans to excavate or do further research. The primary objective is to generate data about the site, to map the individual units and larger village, and to catalogue it as part of the CRMP for the Tribe’s internal use. This is generally reflective of the Tribes intention to move away from gathering information through excavation and towards restoration of traditional stewardship practices of non-disturbance. However, visualizing the sites vis-à-vis GIS and mapping equally generates information as it eliminates it. The way we documented the landscape for the CRMP creates a particular type of homesite as Ancient Puebloan—one that is based on interpretations of architecture and objects, and one that is abstracted from anything else. This is
especially significant when considering the importance of the surrounding natural environment and sacred features for Native peoples. By visualizing cultural sites as resources according to anthropological and legal standards of property, the CRMP filters certain types of information as it generates it. In the words of one of the archeologists I worked with, “so much is left out” (Field Visit C, October 21 2013).

Second, once the site is visualized as a resource, it becomes eligible for listing as a Traditional Cultural Property (“TCP”) with the National Registry under the NHPA, guided by 36 C.F.R. 60. This adds a layer of protection to the site not by disallowing development altogether, but by mandating consultation should a future project threaten to damage the site. In this way, the operation of federal law animates the purpose of materializing the site as a resource, constituting a property because its eligible for listing as a TCP under the NHPA guidelines and accompanying code of federal regulations. Thus although the Tribe does not intend to excavate, the information in the CRMP becomes important “for [other] people who want to do projects on the reservation” (Field Visit A, July 24 2013). The information is shared, and implemented as means for justifying permitting processes and other legal ways for managing the reservation space publically and privately. By visualizing sites as cultural properties, the IRMP/CRMP establishes ownership over those properties to the Ute Mountain Ute Tribe by placing it within the reservation boundaries and on tribal land.

Beyond any conflict with traditional understandings of property, the unique cultural importance of those properties produces a new aspect of Ute Mountain Ute tradition by associating the Tribe with stewardship of Ancient Puebloan sites (Johnson 2007). This is particularly significant because these sites are not traditionally Ute. The Utes have no genealogical relation to the Ancient Puebloan people or close cultural affiliation with them. To
the contrary, many elders on the Ute Mountain Ute reservation find it taboo to meddle with Ancient Puebloan sites at all for fear that harm may come from disturbing the spirits (Johnson 114-15, 2007; Interview A, July 16 2013). The THPO engages in this process of visualizing nonetheless, thereby producing cultural resources as properties, and with that, new traditions of tribal resource management and Ute territoriality.

2. Separating & Classifying

In addition to visualizing resources by surveying and compiling GIS data, the IRMP_CRMP requires that each resource be separated and classified according to legal and ecological management norms. This reflects the second major step to property making, categorizing and differentiating resources generating hierarchical levels of control through management activities. This process further visualizes resources as alienable things that can be managed and ultimately valued as properties.

Separating and classifying resources in the IRMP_CRMP is the underlying and definitional format of the IRMP. The purpose of this is to create a legible and specific planning document that allows the Tribe to establish proposed actual plans for resource management, “which grants the Tribe access to a whole bunch of federal monies to do those things” (presumably through grants) (Meeting A, August 7 2013). During my tenure with the Tribe, I was tasked with reviewing and re-writing the first draft of the IRMP while the second contractor took an extended leave. On August 7th, 2013, a THPO employee, the second contractor, and I met with the goal of “providing the proper instructions and tools” for me to review the IRMP. The contractor writes IRMPs for tribes almost exclusively, and shared the boilerplate step-by-step formula I was to follow that comports with the BIA Guidelines.
Primarily, I was to separate and classify each individual resource that had been either mismatched or “conflated” in the original draft and create a “goals and objectives matrix,” or outcome based management plan, for each separate resource (Meeting A, August 7 2013). This was a tiered process. First, I had to distinguish between the resource and the resource use. BIA Guidelines define each aspect of the resource in the following way:

**Resources of Value**—Resources considered by the tribe as being important for cultural, historical, and economic reasons. The resources of value will be different for each tribe.

**Resource Uses**—Actions that take place which utilize a resource. Uses can be spontaneous or planned (BIA 2005, 8).

For example, the IRMP identifies “rangelands” as a resource of value, with “grazing” as its resource use. “Livestock,” however, is also listed as a resource of value in the IRMP, with “economic revenue for individual members and the Tribe” as the primary resource use. “Agriculture” is also listed as a resource of value, as well as a use of rangelands (IRMP 2013, 75; 126-39). This is the type of conflation I was asked to clarify. Grazing and agriculture were each considered resource uses of rangelands, the resource of value, so that the Tribe could establish a specific goal, objective, and plan for rangeland management that directly addresses grazing and agriculture as resource uses.

The rhetorical separation and classification between resources as objects and the practice of resource use mimics the dominant property paradigm and produces tribal resources as property. Resource management reflects an exercise of rights afforded to real property owners. Property law bifurcates both the protection and adjudication of real property- fungible, visible objects or places, from intangible property- or uses, processes, and other types of intellectual labor (Becker 1993, 609-12). This split broadly falls into the two categories of real versus intellectual property law. By separating and classifying Ute Mountain Ute resources vs. resource
uses, the IRMP/CRMP creates real property rights by producing resources as real property. This affirms the right for the Tribe to manage those properties as the owner, forming the basis of resource management on the reservation. The IRMP/CRMP engages this system of separation and classification on multiple scales, including through the production of distinct resources themselves. The IRMP/CRMP separates natural and cultural resources through the separate documents at its core, and goes as far as to classify water in terms of three different resources: surface, ground, and wetlands (IRMP 2013).

The rhetorical process of separating and classifying resources as property is actuated as a physical process on the landscape. Re-consider the rangeland example. Rangeland comprises the majority of the reservation, and refers to “non-cultivated land that produces native, or reseeded, vegetation and is managed for livestock grazing” (IRMP 2013, 127). Of the more than 561,957 acres classified as rangeland, the IRMP/CRMP classifies about 436,850 as suitable for grazing, based on an ecological assessment by the USDA in 1966 (IRMP 2013, 127). This classification defines how specific lands can be used. Based on those classifications, those lands are further separated into individual grazing units. Each unit is then fenced, actually separating the rangeland into discernable blocks; and then permitted, classifying each unit in terms of its ecological condition and separately mandating how it can be used. This is specifically enacted on the landscape, resulting in areas where tribal members can graze their cattle and where they cannot producing rangeland as real property on the reservation.

But this is not how the Tribe views the landscape at all. For the Ute Mountain Utes, everything is related and everything is related to property (Interview A, July 16 2013). In meetings and discussions about resource uses and management, the membership doesn’t manifest any definitive separation between resources, or natural and cultural resources. But
rather they express sort of a sliding scale of significance based on how the members have traditionally or still view that place or resource in question. Concerns are equally spiritual as they are economic, and those importances dwarf the fabricated boundaries established in the management regime. At the same time, the Tribe and membership clearly understand the importance of producing and adhering to these classifications for the purpose of securing their rights against the broader state or surrounding settlers, and for getting more funding through the IRMP/CRMP (Interview C, September 15 2013).

3. Valuing

Another primary goal of the IRMP/CRMP “is to tie all decisions which affect a tract of land together so that each decision’s impact is weighed against all others” (BIA 2005, 3). For Ute Mountain Ute, this means establishing a set of internal priorities based on how the Tribe values each resource, primarily to guide decisions about development. By weighing decisions about resource use against each other, the IRMP/CRMP assigns both internal intrinsic and ultimately monetary value to individual resources and produces them as properties within the broader property paradigm by making them fungible.

A major use of the GIS data surveying all the resources on the reservation is to create “conflict maps,” or maps that overlay resource shape files to compare the presence of different resources and resource uses that overlap and potentially conflict on the landscape. By mapping resource conflicts, the Tribe can then direct management decisions based on the comparative values of the overlapping resources. But these maps do not just reflect potential conflicts; they also produce them. The conflict maps demarcate the physical location of resources with homogenous lines and polygons that visually separate traditionally interrelated systems of
viewing the landscape as a singular socio-spatial continuum. Through conflict maps the IRMP/CRMP define the types conversations that take place on the reservation based on those maps.

In meetings about resource management, conversations about use conflicts are almost always about competing economic values. The conversation about large resource extraction projects, namely whether and where such a project would take place invariably pits the potential for economic gain for the Tribe against individual economic gain for tribal members (I cannot disclose the particular type of extraction projects due to the sensitive nature of project development). The IRMP/CRMP animates this discussion by visualizing resource conflicts for the Tribe to assess whether a particular parcel is suitable for extraction by comparing the economic value of developing the land with the ramifications for tribal members. Surface extraction may disturb surface grazing rights, or conversely, expanding grazing rights could interfere with other potential development projects on the same lands. This process literally assigns monetary value to individual resources by calculating proposed and comparable economic gain, producing them as fungible and alienable properties in a market-based economy. This forces the Tribe to choose between pursuing economic development on behalf of the Tribe versus the tribal members, which invariably leads to more conflicts regardless as to which choice the Tribe makes.

Property law generally understands properties as valued by money, where remedies for infringement generally results in pecuniary remuneration. However, the inadequacy of the market-based model to address the multiple and non-pecuniary values of property is a common source of conversation among property scholars (Radin 1982; Carpenter et al. 2009; Alexander & Peñalver 2012). The inadequacy of the market-based approach to property largely fails to
encompass the non-fungible values all people associate with certain properties, and proves especially inadequate for Native people (Carpenter et. al. 2009, 1048). “Even in cases where American Indian land claims were later vindicated, particularly in cases that required compensation for the taking of treaty-recognized lands, the tribes refused to accept payment” (1049). For Native people, certain properties are so important they become inexorable to individual identity and Native peoplehood as communities (see also Riley 2005).

Ute Mountain Ute is no exception. Debates about resource management equally weigh tribal and individual economic potential against the importance of culturally significant resources in terms of both place and practice. In fact, in meetings about resource development the cultural importance of certain sites generally trumped economic potential. Any survey for potential resource development had to clear the THPO office, at least informally, to eliminate potential tracts that were of special cultural significance. Thus although the general assessment of value—fungible or not—produces resources as property cognizable with the dominant paradigm, the Tribe’s decision to value the non-marketability of certain resources above economic ones within the IRMP/CRMP produces resources as properties that are specially Ute. This demonstrates the dual nature of tribal resource planning through the IRMP/CRMP that is both corrosive of traditional understandings of property while being constructive of new ones.

B. Using Resources to Make New Governable Spaces

The Tribe makes resources by managing them through the IRMP/CRMP and engages in the power of property to govern. The way resource management generally, and the IRMP/CRMP specifically, discipline the reservation space and create resources as properties exemplified the power of property to govern as technology and narrative. The spatial consequences of property-
based resource management equally reveal how the Tribe uses property to reorder relationships with the state government, federal government, and with the broader community through spaces of inclusion and exclusion. Re-considering the benefits of property-based resource management as generative of tools of governance, rather than as a continued unilateral attempt at assimilation, uncovers new ways the Tribe exercises and expands its role as a sovereign through governable spaces that challenge dominant ways of understanding the reservation spatially.

Before discussing how the Tribe engages in the IRMP/CRMP and manages resources as properties to create new governable spaces both on and off the reservation, it is important to highlight a point of departure from the dominant scholarship (summarized in chapter two). Rose, Watts, Keenan and the majority of scholars discussing the spatial and governing power of property all similarly—if not tacitly, adopt an understanding that those processes are fundamentally rooted in land. This couches common discussion of territory, “as a two-dimensional bounded space or mosaic of ‘like’ spaces…ways of marking mutually exclusive ‘insides’ and outsides” (Delaney 2005, 31). Whatever nuance about the spatial or temporal malleability of property as reflective of the right to exclude, include, or otherwise order and reorder social relations, the major cases cited in the Indigenous context invariably engage theories of property and governance as it relates to a physical and recognizable landscape (see e.g. Ford 2001; Delaney 2001, 2005; Keenan 2013; Bryan 2009).

Recent work by Sarah Keenan demonstrates this point by exploring Australia’s 2007 Northern Territory National Emergency Response Act (“NTNERA”) to argue, “that property is productive of temporal and spatial order and so can function as a tool of governance” (Keenan 2013, 464). NTNERA granted the federal government long-term leases over aboriginal lands as means to enact legislation to combat the alleged widespread sexual abuse of children by banning
alcohol, mandating income management for welfare recipients, installing anti-pornography philters on public computers, and etc. (Keenan 2013, 466-67). The curious aspect of these leases, according to Keenan, is that the federal government never actually exercised its right to exclusive possession, thereby challenging the dominant way of understanding the use of property as centering on the propertied subject’s right to exclude. Instead, she argues that “what was at stake in the contested leases was not so much possession of land, as it was the time and space of belonging that property produces” (Keenan 2013, 465). Keenan ultimately, and eloquently argues that property is a spatially, temporally, and socially contingent tool of governance that functions by indirectly producing spaces of belonging and exclusion.

Although Keenan offers a more holistic understanding of property as concomitantly generative of space, inexorably tied to governance, and replicative (or deconstructive) of broader relationships of power—the argument fails to provide an understanding of such interactions as removable from a physical landscape. These more nuanced discussions highlight the ‘verticality’ of territory, or “the distribution of power among conceptually distinct entities with respect to some discrete segment of social space but still refer to those overlapping social relationships of power as ‘above’ or ‘surrounding’ a particular parcel of land ” (Delaney 2005, 32; see also Bryan 2011).

This demonstrates perhaps the most obvious way property functions as a tool of governance: property in land, whether through actual exclusion or not, serves as the basis for civil regulatory jurisdiction for a sovereign to enact rules. Using property to exert jurisdictional control was the federal government’s primary purpose of establishing the reservation system. The extent of which was clearly demonstrated through the jurisdictional and legal regulatory framework of Ute Mountain Ute resource management. This is not a new understanding of how
property functions as a tool for governance. Assuming that landed property is always necessary for generating governable spaces limits social and spatial conceptions of Native territoriality as being primarily generative or regenerative of landed boundaries.

Instead, this dissertation focuses on the governing power of un-landed properties, or properties that can be disassociated and mobilized from the landscape as means to de-emphasize reservation boundaries as a limiting factor of tribal sovereignty. It considers territorial jurisdiction, as a broad symbol for sovereign governance, as “simultaneously a material technology, a built environment and a discursive intervention” (Ford 2001, 201). It looks at resources as means for generating new governable spaces across, agnostic to, or in spite of landed boundaries. Yes, the ability to generate resources as properties belonging to the Tribe necessitates that they be produced from tribal land in the first place. However, through the IRMP/CRMP the Tribe creates resources as properties that can also be detached from, and utilized as tools of governance that are distinct from land-based jurisdiction. In doing so, this dissertation seeks to highlight modern expressions of Native territoriality that both honor and exceed traditional conceptions of Native relationships to place.

1. On the Reservation

Governable space making through property-based resource management redefines the relationships between Tribe, state, federal governments and the broader community based on landed boundaries by creating heterogeneous jurisdictional spaces. The production of resources through the IRMP/CRMP generates new governable spaces within the political structure of the Tribe that fragments and rearranges the reservation as a homogenous space, beginning with the composition of the IRMP/CRMP. The Tribe selected a core team, comprised of the department
heads of all departments with an interest in the IRMP including the THPO, the Tribal Park, Environmental Programs, Planning, Farms and Ranch Enterprise, Oil & Gas, Construction, Wildlife, Housing, Land Use, Tribal Employment Rights, White Mesa, Community Services, and two representatives from the BIA as representatives to determine the content and application of the IRMP/CRMP. The core team not only determined the set of resources to be surveyed, but also the goals, objectives, and general discourse about the resource condition and future use on the reservation (IRMP 2013).

The core team is exclusive of the general membership, but inclusive of a few key members of the tribal government. This demonstrates how property functions as a tool of governance as a space of inclusion and exclusion (Keenan 2010). The core team manages resources and upholds a space of inclusion in relation to who is excluded from management decisions. The ability for the core team to determine the content of the IRMP de-emphasizes the role of property as a tool for jurisdictional or claims-based governance because neither the core team nor any individual member possesses a property right to regulate how people use the reservation. Instead, the Tribal Council simultaneously generates the core team as a governable space by giving it the authority to produce resources as separately governable things, demonstrating how property can function as a tool of governance that exceeds a relation to land alone. The Tribal Council retains authority over the core team, its members, and its decisions. In this way the core team is not only governing, but also governable by the Tribal Council, creating interacting and overlapping spaces on multiple scales.

In addition to the core team, the IRMP/CRMP creates governable (and governing) spaces around specific resources, further heterogenizing the reservation space. For example, the Tribe has two distinct committees that manage renewable and non-renewable resources separately.
Once energy is generated, it all functions in the same way— it electrifies, illuminates, and otherwise energizes residential and industrial infrastructure. The way power is generated however, is not the same. The IRMP/CRMP creates renewable energy resources generated from sustainable processes such as solar and wind, as something distinct from non-renewable energy resources generated by harvesting finite material such as mineral resources such as coal and natural gas. The renewable energy committee governs all renewable projects, and the mineral committee governs all non-renewable projects, respectively. The Tribe created separate committees to govern renewable and non-renewable energy resources separately, simultaneously generating the resources as property by producing the social space to manage them as such.

Although these committees are split in terms of what they manage, the members of the committees overlap and are in constant conversation formally and informally. The director of all energy projects on the reservation leads the minerals committee but also sits on the renewable energy committee. Like the core team, the creation of separate committees to produce and manage energy generated on the reservation as resources variegates the reservation space by including and excluding members from management decisions. Who is included and excluded in each of these committees is generally based on individual experience with different development projects, and informally how people tend to get along. But these spaces always overlap, both reflecting and re-ordering the webs of social relations that uphold them.

The management of energy resources as both separate (renewable and non-renewable) and equal (power is power, and the committees managing it follow the same basic structure) further demonstrates how the governing power of property can function as distinguishable from rights to land. Renewable energy is managed through the same, albeit parallel, spaces as non-renewable energy, and both resources are attributed to the Tribe as property through the
IRMP/CRMP. However, where non-renewable energy is generated from mining materials that exist exclusively within reservation boundaries, renewable energy is generated from the sun or wind, which are ubiquitous. The Tribe does not ‘own’ the wind that passes through the reservation or the sun that shines there as it does the coal beneath its subsurface. Instead, the Tribe derives its right to ‘own’ or manage renewable energy as a resource by producing it, literally and discursively, by managing through the IRMP/CRMP in according to the dominant framework, and with it, the social space by which it is managed. Creating renewable energy as a tribal resource therefore both animates and exceeds the significance of the reservation boundaries by generating a tribal resource that is dissociable from tribal land.

The reciprocal spaces of inclusion reflect and sustain the governing power of property, and opens new opportunities for power plays among them. As discussed earlier, the CRMP is the founding document of the THPO and surveys all the cultural resources on the reservation. The first draft of the CRMP proposes that any resource development that is to take place as part of the IRMP must first pass a cultural survey (CRMP 2013). Every environmental project goes through a rigorous permitting process, and the first draft of the CRMP authorizes the THPO to grant all of those cultural permits. The first draft of the CRMP thus indirectly funnels all management decisions about tribal resources through the THPO office. This marks an attempt to grant the THPO office a substantial say on whether resource development can take place. It is important to reiterate that the IRMP/CRMP are in draft form and still subject to Tribal Council approval. It is unlikely that such a power grab would be approved, and if it is, there will be clear parameters to limit the power of the THPO office. However the attempt to use a shared importance of cultural resources to the Tribe as a tool for leveraging the authority of the THPO demonstrates the power of property to govern by shaping and re-shaping relationships among
people, variegating a unified jurisdictional landscape by producing resources that are also distinct from it.

The willingness for state and federal agencies to fund management plans reflects the value of tribal resources as property at the outset, and demonstrates a sort of pre-constructed economic space for the tribe to inhabit by applying for and receiving the grants. The Tribe received a grant from the BIA to implement the IRMP, bringing important funds to support a notoriously indigent Tribe. The CRMP similarly received its own set of grant funding from both the state historic preservation office and the National Park service. These monies do as much to sustain pre-determined infrastructural and economic spaces as generate new ones, as the majority of the departments at Ute Mountain Ute are grant funded. Ninety-nine percent of the Environmental Programs Department employees are entirely contingent on yearly grant funding primarily from federal solicitations. However, neither the Tribe nor any of the departments working on the CRMP/IRMP make any money off the grants. Instead the grants fund projects to employ tribal members, creating new opportunities for doing and producing the social space that legitimates and sustains the value tribal resources as property.

How the Tribe manages grant monies and implements grant projects represents new territorial expressions that reflect modern Ute values. Interacting with Ancient Puebloan sites, for example, remains controversial on the reservation. The THPO agent told me about a conversation with the elders seeking advice about engaging with the Ancient Puebloan sites at all. They asked, “why do you want to mess with that, whatever the circumstances were, they are gone now—if you want to preserve it that’s fine, but don’t start digging around because all you will find is questions you can’t answer…you can never answer the questions of others” (Interview A, July 16 2013). When I probed as to why the THPO office did so anyway, the
The answer was “because it is my job, it is what I am employed to do and how I make money” (Interview A, July 16 2013). Producing Ancient Puebloan sites as property concomitantly generates the space to manage them as such and encourages new ways of engaging with the landscape that challenge traditional Ute conceptions of place. Where traditional expressions of Ute territoriality may have included avoiding Ancient Puebloan sites, the IRMP/CRMP prioritizes them.

The IRMP/CRMP variegates the reservation space and unbinds expressions of territoriality from legal boundaries imposed on the landscape. This is demonstrated through the creation of new governable and governing spaces as seen through the core team, the mobilizing of resources as both part of but distinct from tribal lands as seen through renewable energy, and finally, as generative of new ways that individual members utilize and value the landscape. The Tribe’s production of resources through the IRMP/CRMP affirms the importance of a tribal land base by increasing its legibility within the United States as a formidable property owner, and unbinds the power of property to govern through jurisdiction as it pertains to reservation land alone. By managing resources as property, the Tribe expresses a new form of Ute territoriality that exists through participation in new spaces both within and outside of the reservation that can exist independently from the reservation boundaries. In this way, generating resources through the IRMP/CRMP diversifies the reservation and blurs the landed boundaries of the reservation as limiting of tribal sovereignty. The diversification of the reservation space internally reciprocates concomitant changes in how the Tribe engages in other jurisdictional spaces outside of those boundaries.
2. Off the Reservation

The Tribe utilizes the governing power of property to extend its authority beyond the reservation boundaries and diversify off reservation spaces in two primary ways: first, by producing resources on tribal lands that non-reservation communities seek to control, and second, by producing resources off the reservation that that the Tribe seeks to control.

The production of Ancient Puebloan sites on reservation lands exemplifies how the Tribe heterogenizes off reservation spaces by identifying properties on Ute lands that other communities seek to control. Although the traditional cultural value of the sites to the Tribe remains contested, the concentration of Ancient Puebloan archeological sites is of incredible importance to state and federal governments, Pueblos, and the broader public. This is evidenced in the least through the creation and continued popularity of Mesa Verde National Park discussed in chapter three. By producing these sites as tribal property, the Ute Mountain Ute buys into the shared significance of Ancient Puebloan sites to increase the “prestige of the Tribe” (Field Visit A, July 24 2013). In other words, the space surrounding and sustaining Ancient Puebloan sites as tribal properties invites other non-Ute stake holders to engage in conversation with the Tribe, re-ordering the web of social relationships around those properties instead of, or rather in addition to, the Tribe’s property in land.

The CRMP also identifies and protects Ute burial sites as cultural resources on the reservation. This establishes Ute ownership or interest in those properties that exist off the reservation enabling the Tribe to assert legitimate rights over in decisions that may affect those properties. The CRMP generates Ute burials as distinctively Ute property by highlighting how the bands uniquely interred their dead in crevasses. By identifying cultural properties that are uniquely Ute on the reservation, the Tribe establishes rights to those same or similar properties
that exist outside the reservation boundaries. Ute burial sites are scattered throughout their traditional lands, the majority of which is now federal land. The presence of Ute burials on federal land triggers a set of special laws, regulations and procedures that allow the Tribe to participate governance over those lands even though they fall outside of its jurisdictional bounds, discussed in chapter four.

I attended the three-day annual consultation proceeding between the Bureau of Reclamation, Park Service, Bureau of Land Management, and the twenty-four (only about twelve tribes actually attended) affiliated tribes about projects on federal lands that would potentially affect tribal cultural resources, which demonstrates how this manifests practically. The tribal representatives present were contacted because of the potential for upcoming federal projects to impact the cultural property of those affiliated tribes (Consultation, September 9-11 2013). At the consultation, the tribes inhabited this space as rights holders, objecting to the proposed projects affecting tribal rights to properties on federal lands. The tribes also used that space to teach the federal agencies and to re-define the role of tribes as sovereign authorities with rights outside of their reservations.

At some point in the discussions one tribal member asked the federal agencies if they were considering this consultation “as government to government” to which the federal agency representatives responded with an unwavering “yes.” The tribes then proceeded to correct the agencies, in turn, manifesting their unique perspective and governmental structure while sharing in heated agreement that whatever it was the agencies were doing, it was not government-to-government consultation.

No, its not [government-to-government], we each have entire governments with their own programs that manage mineral development and etc… we need an entire separate consultation with our own tribes because none of us here have the
authority to say yes, this is government-to-government- we can’t make any official decision on behalf of our tribes. Tribe A

This is not government-to-government consultation. We need a formal setting with a quorum. You are just making presentations. What’s happening here is that you have told us, you have told us what’s going on, you have not consulted. You may get away with this, but only for a short time until we catch up with you. This system of agreement and trust is very fragile. Tribe B

I know there is a push for domestic energy development under the Obama administration. I know there is a push for energy and there are so many requests for permits. But we are all thinking we are here to talk about NAGPRA, but that’s not what is going on. This is about energy development. Tribe C

We were not aware of all of this. Federal Agency (Consultation, September 10 2013)

This dialogue represents how Tribes are using properties to govern both social and physical space off the reservation and re-write the web of both federal-tribal, and inter-tribal relations surrounding resource use. Throughout the consultation the tribes strategically formed alliances when correcting the federal agencies’ understanding of tribal governmental structures. But the tribes also conflicted when specific procedures for re-burial were being discussed. This demonstrates the multi-scalar and overlapping ways tribes use property as a tool of governance on and off their reservation. In this way the IRMP/CRMP extricates the tribes from the confines of territorial boundaries by producing resources as properties that generate new spaces for asserting sovereign authority in other jurisdictional spaces.

The Tribe similarly employs the governing power of property through the development and application of the IRMP/CRMP to re-write political relationships with the surrounding community. The IRMP/CRMP produces resources that generate new value on the reservation by making marketable properties and spaces for employment to sustain and manage them. Previous discussion focused on how the development of the IRMP/CRMP generated new jobs for tribal members, but the Tribe equally employs non-members. The Tribe hired exclusively non-Indian
contractors to draft the IRMP and CRMP and employs many non-Indian employees in tribal
government and resource management positions. So although the Tribe does not secure any legal
civil regulatory or jurisdictional control outside the reservation boundaries by employing non-
Indians, it perhaps equally expands its influence as a governing body in the surrounding
community as one of the largest employers in the county. The community has become reliant on
the Tribe to provide jobs and other economic activity in the region to support the local economy
and individual needs.

The Tribe uses the IRMP/CRMP to create resources as properties and generate spaces of
governance to assert itself as a sovereign on federal lands, in the surrounding community, and
within management conversations with other tribes. This demonstrates how the Tribe
disassociates resources from its reservation land base and disseminates them across new political
and economic landscapes to re-write dominant socio-spatial relationships of power. How the Ute
Mountain Ute employs the IRMP/CRMP encourages an understanding of Native territoriality as
something distinguishable from a traditional relationship to place alone. This affirms the
importance of understanding Native lands as something originally derivative of cultural
interactions with the landscape, but goes beyond that, by demonstrating how the Tribe utilizes its
resources as mobile properties to assert itself as a sovereign in new spaces that diminish the
significance of the reservation land base.

In other words, the IRMP/CRMP may, or may not do anything to protect tribal traditions
or resources, but that is not necessarily the point. The Tribe flips the federal mandate on its head
to a certain degree, by using the federal management framework, federal funds, and the
romanticized idea of integrated resource management to develop its resources to move away
from federal control and assimilationist agendas. This encourages an internal deconstruction of
the federal framework promulgated through the IRMP/CRMP, and contests the assumption that property-based resource planning is for the purpose of conserving natural resources at all. Instead, the Tribe engages in the IRMP/CRMP to negotiate the constraints and tensions with surrounding state, tribal, and federal governments by capitalizing on the governing power of property to create new spaces for inclusion and exclusion, both on and off the reservation.

C. A Third Movement of Property

This dissertation broadly applied Polanyi’s concept of the double-movement to demonstrate the dualistic nature of property. The double-movement showed how resource management, as a broad state-led intervention, both protected the tribal environment against the destructive forces of the free-market while simultaneously sustaining it; by violently undoing Ute society while concurrently unifying it; by confining the Tribes’ ability to engage in resource development while providing the legal framework to push against it. At this same time, this dissertation showed how the double-movement anchors any attempt to use the property framework to assert its rights within the political fabric of the United States. The role of the federal government in mitigating society, nature, and the market proved both a fundamental component Polanyi’s original argument, as well as a dominant theme of critique throughout this dissertation. The inexorable role of property in legitimating and sustaining the power of the United States challenges an understanding that property can reverse, or even moderately reorder the relationship with the Tribe, because it relies on the political fabric of the nation-state itself.

This critique remains valid, but the way the Tribe re-appropriates the federal framework of the IRMP/CRMP to re-negotiate its relationships with and without the broader nation-state through governable spaces demonstrates a third movement of property. Instead of viewing
property as necessarily wedged between the market and the state, broadly construed, the Tribe appropriated resource management to (re)negotiate its relationship with the state itself. Examining how the Tribe uses property to generate governable spaces to assert itself as a sovereign in management decisions on federal lands or as an employer within the broader community suggests that the spatial nature of property transcends a rights-based or jurisdictional understanding of what property does, and what property can do. Property reorders social spaces by generating new ones within, outside, or beyond the physical settings that property rights, as the basis for exclusion or regulatory control, are generally applied.

The third movement of property embodies a non-binary mapping of Native sovereignty in the United States that demonstrates the current and constantly changing ways Tribes express territoriality to both protect and progress their traditions. “In resistance, indigenous political actors speak against and across the boundaries of colonial rule by articulating and fighting for a third space: a space of sovereignty and/or citizenship that is inassimilable to the modern liberal democratic settler-state and nation” (Brunyeel 2007, 217). But in refusing to assimilate, the Ute Mountain Ute demonstrated how Tribes buy into the settler-state and national framework in order to refute it. This simultaneous resistance manifested through an expression of tribal territoriality that both affirms and contests the meaning of the reservation boundaries in terms of physical place alone. The third movement of property then, advocates for an understanding of tribal sovereignty as not just derivative of geographic boundaries, but also as a practice of contested meanings that exist within, outside, and agnostic to the Tribes’ relationship with the broader state—and constantly generative of new boundaries that overlap, exceed, and ultimately reorder those political relationships all the time. The Tribe thus affirms traditional conceptions of sovereignty as absolute control, while also moving towards a mode of governance based on
diffuse power that can be employed in new spaces existing outside of tribal lands. Property engenders governance that is equally spatial as it is legal, providing Tribes with a tool to do so.

D. Conclusion

This chapter aimed to prove that the Tribe engages in the IRMP/CRMP to produce resources as tribal property and generate new governable spaces both on and off the reservation. It demonstrated how the IRMP/CRMP generates resources as property consistent with the free market by using property technologies through three major steps. The IRMP/CRMP visualizes resources through maps and GIS data to distill individual resources from the vast interrelated landscape; separates and classifies them through physical acts on the landscape or rhetorical means in the documents themselves; and values them by ranking management priorities in terms of monetary and non-economic worth. Then, this chapter argued that the Tribe employs the governing power of property vis-à-vis resource management to generate new spaces both on and off the reservation. In doing so, it argued for a new understanding of Native territoriality as distinguishable from a traditional land base. And finally, this chapter demonstrated how in doing so, the Tribe demonstrates a third movement of property to re-appropriate the federal framework and re-negotiate its relationship with the broader nation-state. Ultimately, it explained that the Tribe engages in the IRMP/CRMP despite the limiting and potentially deleterious effects in doing so to generate new spaces to assert its power as a sovereign.

The next chapter summarizes the broad arch of this, and all the other arguments substantiated in this dissertation through the development of one resource on the reservation: solar power.
Chapter VI: Power.

This chapter investigates solar energy development on the Ute Mountain Ute reservation to make an argument about power, in a political sense, through the production of power, in a physical sense. Specifically, it argues that the Tribe engages in renewable energy generation to increase its influence as a sovereign through new governable spaces outside of the reservation boundaries and into non-Native communities. To do this, this chapter broadly employs the arguments substantiated in the previous chapters as spatially consequential steps that are inexorable from the law and necessary to understand the utility of property-based resource management as a whole. First, it relays a brief history of energy development in relation to property, the modern nation-state, and the market to demonstrate the connection between energy and governance. Second, it tells a legal geography of the regulatory framework governing the generation and distribution of solar energy on Tribal lands drawing on the theme of the double-movement. Third, it discusses how solar energy is produced as a resource through the IRMP/CRMP and examines how energy development creates new governable spaces for the Tribe to expand its role as a sovereign as the third movement of property, and in doing so, suggests a re-imagining of Native territoriality and the meaning of reservation boundaries.

A. The Electricity & the Nomos of the Grid

The development of energy infrastructure shares in the common origin of property, nation-state, and the free market. Timothy Mitchell traces the dual development of energy and
government and amplifies the colloquial meaning of energy dependency by showing how energy is inexorably engrained in modern society and systems of rule (Mitchell 2005; 2009). As discussed in chapter two, property and the free market emerged hand-in-hand as the double-movement in the early nineteenth century (Polanyi 2001). The twentieth century however, introduced new technologies and techniques for calculation that organized people through their relationship to place through property (Blomley 2003). Mitchel analyzes how this facilitated a system of governance over large territories and populations according to the new political system of the sovereign nation-state, of which energy development played a central role.

Modern electricity “depended upon networks that tied together humans and electrons, the flow of electric current and the flow of capital, imagination and illumination, the calculation of the cost of copper wiring and of its conductivity” (Mitchell 2008, 1117). The modern economy, and therefore nation-states, relied on a sustainable flow of energy to meet increasing demands. The network of modern electricity, largely attributed to Thomas Edison, did not just fit in to the market economy- it was produced through it and dually used to sustain the flows of influence, capital, and connectivity (Mitchell 2008; 2009). Historic changes in energy infrastructure dually reflected and produced changes in political power, which set up a relationship of dependency on the state, broadly construed (Mitchell 2009).

These changes in energy infrastructure can be considered major nomospheric changes in energy use and generation, which affected how society (and economy) were organized spatially and governed politically. First, solar radiation gave way to coal as industrial growth of cities subsumed the agrarian economy in Europe, which drove colonial expansion to accumulate of new land as property for agricultural production and commodity sales from the New World. The concentration of labor in cities and concurrent dependency on fossil fuels and slave economies in
the colonies encouraged mass political movements in the cities and the inklings of representative governments in the colonies. Second, the shift from coal to oil reduced dependency on a large industrial workforce because it could be shipped, efficiently extracted from the surface, and therefore easily traded as a commodity— a property on the market. Where coal relied heavily on mass labor and finite channels of trade, oil crossed oceans and introduced a new economic vulnerability that required nation-states to intervene and regulate price and distribution on the international market. The inextricable role of oil in the development and maintenance of the global economy propagated a complex system of democracy and dependence within and amongst states that falls well outside the scope of this dissertation. Broadly speaking however, the shift from coal to oil generated a new political nomosphere, where the transportation of energy re-ordered spatial concentrations of power and set up a relationship dependency on states to guarantee that energy meets demands—as a regulatory buffer or raw producer, as a protection against the derisive forces of the free market and protector of it. “Fossil fuels helped to create both the possibility of twentieth-century democracy and its limits” (Mitchell 2009, 400).

Although oil remains a fundamental tenet of society, economy, and politics, we are arguably in the midst of a third nomospheric change in energy use and production in the United States. The first decade of the millennia marked a new moment in energy development. The Obama administration responded to the increased risks of environmental and energy insecurity from dependency on foreign oil and other non-renewable energy generation by allocating billions of dollars to promote renewable energy generation on U.S. soil (Dreveskracht 2011, 28-29). The potential renewable generation in wind and solar alone is estimated at “535 billion kWh/year of wind energy (equivalent to fourteen percent of current U.S. total annual energy generation) and 17,600 billion kWh/year of solar energy potential (equivalent to 4.5 times the total U.S. electric
generation in 2004)” (Tanana & Ruple 2012, 2). A shift towards renewable energy generation opens up new political possibilities by altering the spatial arrangements of people, finance, expertise, in relationship to the distribution and control of energy (Mitchell 2009, 401).

At least ten percent of all domestic energy resources are on Indian lands even though they only comprise five percent of the U.S. land base (Tanana & Ruple 2012, 2). Tribes don’t simply stand at the forefront of energy development. The new emphasis on renewable energy generation has prompted a full reconsideration of the value of tribal lands. Where many reservations were originally granted to tribes as the left overs that weren’t valuable to the federal government (recall the Brunot cession), now the potential for renewable generation in the United States relies on tribal lands.

The shift towards renewable energy generation in the United States has presented the Ute Mountain Ute Tribe with unprecedented opportunity for solar development on the reservation. In my time working with the Tribe on the IRMP/CRMP, this opportunity was taking shape through two projects. The first was a small-scale solar project with the Department of Energy (DOE). In 2012 the Tribe secured a $72,176 grant from the DOE to conduct a small-scale solar feasibility study on the reservation as part of a new federal program funding solar energy development on reservations, discussed infra. The grant paid for the tribe to assess loads, connectivity, slope and exposure, environmental considerations, economic and benefit sharing and other considerations to potentially construct a 1 to 2 MW maximum photovoltaic installation to offset the energy needs of the community of Towaoc only.

The second was a large commercial scale solar farm with potential corporate investors for commercial sale. Although this project has been in the works for some time now, the urgency and scope of the project abruptly changed in 2012 after a change in air quality regulations forced
the agreed partial shutdown of two major coal-fired power plants in the four-corners region. In 2012 the Four Corners Power Plant near Fruitland, New Mexico shut down three of its five units, and the San Juan Generating Station near Farmington, New Mexico agreed to shut down two of its four units by 2017 (Thompson 2013). This has not only created a new demand for power no longer being generated in the region, but also opened up transmission space in existing Shiprock substation for easy connectivity to the grid. The Shiprock substation is less than five miles from the Ute Mountain Ute reservation boundary, and new space in the substation introduced the potential for energy produced on the reservation to be exported to markets in Arizona and California.

B. A Legal Geography of Solar Energy

Tribes and developers interested in renewable energy development however, must navigate a complex patchwork of jurisdictional laws and utility regulations that vary among federal, state, and local governments and largely lag behind the technological advances in energy generation and distribution (see e.g. Ferrey 2012; Royster 2012). This legal framework is further complicated by the unique characteristics of ‘solar energy’ as a largely an invisible commodity. “Power, in its intangible embodiment, is cloaked in legal protocols that may not comport with the reality of the physical world” (Ferry 2012, 268). In this way, power is only construed as a resource—as property to be managed—through the legal and jurisdictional protocols that regulate it.

The legal regulatory framework surrounding solar energy generation on the Ute Mountain Ute reservation can be divided into two major phases: energy development and energy
distribution\textsuperscript{16}. Energy development refers to the actual generation of power on the reservation—the laws governing the production of power through the construction of the solar the facility. Energy distribution refers to how and where the power is marketed, sold, and distributed. This section is not meant to provide an exhaustive review of all of energy development or utilities laws, but rather to sketch the broad spatio-legal processes that both enable and constrain solar energy development on the reservation.

\section*{1. Solar Energy Development}

The wealth of energy potential on tribal lands and general lack of new projects inspired the federal government to promote energy development by funding planning opportunities and passing legislation to facilitate agreements with tribes (Deveskracht 2011, 28-31). These initial attempts only apply to tribes seeking to engage in energy development on tribal lands. As discussed in chapters two and three, the entire legal and regulatory system guiding how new solar projects can take place on reservations is based on old colonial boundaries predicated on the political spatialization of race. Thus any new legislation or existing statute regulating the development of new solar projects for tribes must read the “social (the political, historical and cultural) in terms of the spatio-legal” (Delaney et al. 2001, xviii). In other words, whether and how the legal framework works is inexorably bound to where it applies, who it applies to, and what type of social hierarchies it attempts to refute or support.


\textsuperscript{16}Tribal financing and tax regulations are a large component of practically implementing solar projects on tribal lands. This is a hugely complex body of law that falls outside the scope of this dissertation.
The EDSA sought to promote economic growth through energy production and self-determination by establishing the Office of Indian Energy Policy and Programs in the Department of Energy ("DOE") and setting up an Indian energy resource development program in the Department of the Interior. The EDSA requires that DOE make financial and technical assistance available to tribes seeking to develop energy resources through grants, loans, training, and other support (Sullivan 2010, 828-29).

The EDSA spatializes a political relationship between the tribe and the federal government replicative of the ward-trustee relationship that dominates the historical framework anchored in the reservation system. The EDSA only applies to projects on tribal lands, but the technical and financial means to complete such a project remains with the DOE. Although the EDSA is meant to (and generally does) assist tribes in solar development, that assistance as oriented and practiced through the spatial application of the law, fortifies the hierarchical relationship whereby the tribe receives one-directional technical assistance from the federal government (Mitchell 2002). This sustains the reservation as a place of dependency and reinforces old systems of boundary-based colonial control.

In addition to financial and technical assistance, the EDSA attempts to facilitate development legislatively by allowing certain tribes to “enter into a lease or business agreement for the purpose of energy resource development on tribal land” without requiring Secretarial approval otherwise required under federal law (25 U.S.C.A. § 3504(a)(1)). The purported idea behind the EDSA was to promote energy development on tribal lands by streamlining the bureaucratic process (Kronk 2012, 818). To qualify for the EDSA however, tribes must first enter into a Tribal Energy Resource Agreement, or TERA with the Secretary. TERAs require tribal energy development decisions to comport with a myriad of federal mandates, including
things such as an on reservation environmental review procedure that mirrors NEPA, while absolving the federal government of all liability regarding development leases. 25 U.S.C. § 3504(e)(6)(D)(ii) states “the United States shall not be liable to any party (including any Indian tribe) for any negotiated term of, or any loss resulting from the negotiated terms of, a lease, business agreement, or right-of-way executed pursuant to and in accordance with a tribal energy resource agreement.”

The spatial application of the EDSA reinforces the hierarchical relationship between tribes and the federal government while simultaneously attempting to mitigate any liability stemming from it. By re-writing the legal relationship through TERAs the federal government seeks to re-produce how tribes embody the reservation space through solar resource management. The EDSA functions as a spatio-legal carrot and stick. TERA agreements purport to streamline the bureaucratic difficulties set up by the reservation system enticing tribes to adopt a panoply of federal environmental laws on tribal lands, while absolving the federal government of any potential social liability resulting from that.

As a result, no tribe has entered into a TERA agreement with the Secretary and the EDSA remains unutilized (Kronk 2012, 820). Currently, the Senate Committee on Indian Affairs is attempting to revise the EDSA to make TERA agreements and funding more workable (Dreveskracht 2012, 447). However, “S. 1684 barely scratches the surface of outdated laws and regulations, bureaucratic regulatory and permitting processes, and insufficient federal staffing or expertise to implement those processes” (Dreveskracht 2012, 448, quoting testimony of Tex Hall, Chairman, Mandan, Hidastsa and Arikara Nation of the Fort Berthold Reservation, Indian Tribal Energy Development and Self-Determination Act of Amendments of 2011: Hearing on
S.1684, Before the S. Comm. On Indian Affairs, 112th Cong. (April 19, 2012). There are no other statutes that specifically address solar energy generation on reservations (Royster 2012, 95).

Despite the Tribes’ general (and rightful) unwillingness to take advantage of TERA agreements and funding opportunities, renewable energy development requires vast amounts disposable and time-free capital. This makes it difficult for tribes to develop solar projects on their own. Accordingly, non-Indian companies are inevitably involved in tribal energy development projects on the reservation. The presence of non-Indian corporations engaging in development on Indian lands triggers application of the Nonintercourse Act and necessitates federal statutory authority for such activities (Royster 2012, 95). This demonstrates how the spatio-legal framework not only reflects a landed system of how laws apply to certain places, but also whom those laws apply to. The Nonintercourse Act applies because non-Indian enterprises seek to engage in projects with tribes on Native lands—regardless as to where the energy will be going. Understanding the legal regulatory regime as an enmeshment of place and law also fundamentally relies on who (white or Native) is seeking to engage in that framework.

The reservation constrains how tribes develop solar projects on the reservation but also enables it. For solar projects, there are four major statues that tribes and non-Indian developers may be able to utilize when engaging in solar energy development on tribal lands: the 1938 Indian Mineral Leasing Act (“IMLA”) at 25 U.S.C.A. § 396, the 1982 Indian Mineral Development Act (“IMDA”) at 25 U.S.C.A §§ 2101-2108 (considered together as the primary laws regarding mineral extraction), the Indian Long-Term Leasing Act (“ILTLA”) at 25 U.S.C.A. § 415; § 81, and the Indian Reorganization Act at 25 U.S.C.A §§ 461-479.

Mineral resource extraction on Tribal lands is pervasively regulated under the IMDA and IMLA, which provide clear statutory guidelines for tribes to enter into any standard or negotiated
lease agreements with the federal government or third party developers through the Department of Interior. Because traditional energy generation is based on mineral extraction, there is an argument that these statutes could also be used to guide other types of energy generation. This is primarily because there is no uniform definition for what constitutes a “mineral” resource. Most statutes define mineral resources as physical elements or compounds that result from geological processes are extracted from the ground (Royster 2012, 97). “Whether the IMDA would apply to non-“mineral” energy resources—that is, renewables other than geothermal—is uncertain” (Royster 2012, 101).

The uncertainty as to whether or not solar energy development implicates the IMDA or IMLA fundamentally engages spatial practices as means for determining legal ones. Although solar energy development does not rely on mineral extraction from the ground, it still requires large amounts of tribal land in order to construct generating facilities. Thus how the tribe and potential developer physically interact with the landscape reflects and reproduces how the law qualifies such interactions.

Spatial practices considered as “surface development,” for example, is regulated separately under the ILTA. The ILTA regulates all surface development that falls outside of a specifically legislated purpose; such whatever surface rights are implicated in the extraction of mineral resources as the IMDA or IMLA. The ILTLA authorizes tribes to lease lands to developers under § 415 or enter into a contract encumbering tribal lands through an easement under § 81. Again, the legal means for securing the ability to develop tribal resources simultaneously reflects and reproduces the social and spatial conditions that uphold the law. Under § 415, Tribes may lease the land itself to a developer for any “business purposes, including the development or utilization of natural resources in connection with operations under
such leases” with Secretarial approval 25 U.S.C.A. § 415, which includes solar development (BIA Factsheet 2012, 103). Leasing lands to developers vis-à-vis the Department of Interior however, may restrict the role of tribes in the decisions of how the development will take place, whether the land will be open for multiple uses, and could result in unfavorable outcome for the tribe (BIA Factsheet 2012, 103).

Tribes may choose to utilize § 81 because it allows more flexibility for tribal participation in how the development takes place. § 81 allows tribes to enter into a contract with a developer for an easement on tribal lands where the generating facility is to be constructed. In other words, rather than leasing the actual parcel to the developer the Tribe contracts to how that land may be used by providing a backstop to secretarial approval for contracts that contain land encumbrances. This also grants tribes slightly more control over how the development may take place. If the easement is less than seven years long for example, the tribe is not required to secure Secretarial approval. Easements also allow for shared or simultaneous uses of the developed parcel and could better incorporate diverse tribal needs (Royster 2012, 105). At the same time, allowing non-member access to tribal lands implicates questions of civil regulatory jurisdiction on the reservation that may mitigate any flexibility the tribe achieves by getting rid of pervasive Secretarial administration after the contract has been made.

Like the ILTLA, the IRA also governs leasing authority of tribal lands. Under the IRA, a tribe may petition the Secretary to establish tribal corporations which have the authority to manage property in a manner consistent with whatever the business they incorporated for, and not in contravention of any other federal law. This allows the tribal corporation to lease tribal lands without further approval by the Secretary, provided they are not longer than twenty-five years (25 U.S.C.A. § 477). With § 17 corporate charters, it is clear that tribes can lease tribal
lands to developers for solar energy development, however it is unclear whether tribes could contract for an easement such as under the § 81 of the ILTLA (Royster 2012, 112). New regulations under 25 C.F.R. 162 further attempt to encourage solar development by facilitating the processes by which the BIA approves leases for wind and solar development specifically. The IRA presents yet another uncertain legal pathway for engaging in a solar development project on the reservation. Using a corporate charter would structure access agreements based on a limited economic purpose anchored in a semi-static lease with potentially limited flexibility to implement shared management or use over the given parcel of land.

A tribe’s decision to utilize the EDSA, the IMLA or IMDA, § 415 or § 81 of the ITLA, or § 17 of the IRA fundamentally shapes how solar development will take place on the reservation. That statutory decision is both determinative and determined by the type of social arrangement that reciprocally governs geo-physical development on the landscape. How the land is to be used, accessed, and controlled shapes the legal and therefore social structures of power allowing for solar development on reservations. Each legal pathway represents varying and overlapping ways for the Tribe to exercise tribal authority while staying within the spatio-legal confines of the reservation system. Whatever statutory provision a tribe seeks to pursue simultaneous and concomitantly produces social space that equally reflects and sustains the power of that provision as law.

That the Tribe is essentially forced to choose at least one of these incomplete legal pathways to solar development fundamentally (and purposefully) limits the types of relationships possible with federal, state, or non-member developers by mandating how these relationships can take place spatially. This creates a challenging environment for tribes seeking to develop their solar resources, while at the same time providing new opportunities for navigating these legal
pathways creatively and reproducing the reservation space according to tribal priorities. The nascent legal-regulatory framework for solar energy distribution demonstrates how tribes are navigating this potential.

2. Solar Energy Distribution

Regulating solar energy distribution, as opposed to development, challenges how we conceive of normal spatial applications of the law. Like most regulations, the laws governing distributed generation of solar energy vary depending on whether the federal, state, or municipal government maintains jurisdiction. How the law conceives of jurisdiction over that distribution however, proves distinct. Whether a given body maintains jurisdiction over distributed generation does not only depend on where the distribution takes place, but rather also on the type of distribution and where it is being distributed. The technological calculations of how much energy is produced, how it moves, where it goes, and who is purchasing it creates varying jurisdictions within the grid and implicates different legal and regulatory rules. The best way to understand how this works is to break the distribution laws down into two separate categories: large-scale commercial and small-scale distributed generation, discussed in turn. The Ute Mountain Ute Tribe is engaging in both, through the DOE grant and the commercial scale project, implicating two simultaneous jurisdictional patterns that require two very different pathways for negotiation.

The technical interstices of large-scale commercial generation are incredibly complex. But the law is good at hiding the spatial complexities that underlie it, and the way jurisdiction works practically is quite simple. Generally speaking, the Federal Energy Regulatory Commission (“FERC”) regulates wholesale electric markets and high-voltage interconnected
transmission systems, pursuant to sections I and II of the Federal Power Act (“FPA”), whereas
the states, through Public Utility Commissions (“PUCs”) regulate retail markets and the
interconnection of generators with lower-voltage transmission lines (Arfmann et. al. 2011, 34).
FERC also regulates certain “qualifying facilities,” either small-power production facilities or
cogenerating facilities, which receive special regulatory treatment as established under the Public
Utility Regulatory Policies Act of 1978 (“PURPA”) to conserve electric energy and encourage
equitable rate distribution (16 U.S.C.A. § 2601). FERC lacks blanket jurisdiction over all
utilities, but still influences PUC regulations for distributed generation by setting model
standards for states to follow. For example, FERC issued Order 2006 which encouraged states to
implement individualized interconnection agreements to encourage distributed generation by
streamlining the technical and legal requirements between utilities and de-centralized generators
(Arffmann et al 2011, 36). By December of 2010, thirty-four states had implemented standardized
interconnection procedures favoring distributed generation (Arfmann et al 2011, 37-38).

Where FERC lacks jurisdiction, state PUCs implement regulations that vary depending
on how the utility is organized. There three major types of utilities. Investor owned utilities
(“IOUs”) make up 75% of the utilities industry and operate like profit driven corporations.
Public, or municipal utility districts (“PUDs”) make up the remaining 25% and generally
function as a board of directors making decisions on behalf of the public (Arfmann et al. 2011,
36). A third and overlapping utility structure also exists as “non-jurisdictional” utilities—some of
which operate as PUDs and the majority of which are rural electric cooperatives—are owned and
operated by the consumers. PUCs tend to treat electric cooperatives differently from other
utilities, while FERC lacks authority to regulate them altogether unless they engage in interstate
transmission, or another broadly applicable jurisdictional hook applies, because they have been expressly excluded from the FPA (Greenfield 2010).

In Colorado, the PUC requires that utilities buy a certain amount of renewable energy by setting power-purchasing mandates for utilities (C.R.S. 40-2-124 (2013)). In June of 2013, Senate Bill 252 was signed into law to increase the portion of renewable energy. Utilities that serve more than 100,000 meters for example, “must generate or cause to be generated at least twenty percent of the energy it provides to its customers from eligible energy resources\textsuperscript{17} in the years 2020 and thereafter” (C.R.S. 40-2-127(V.5) (2013)). Each utility, and size of utility however, is treated differently under the statute. Electric cooperatives serving 40,000 meters or fewer are completely exempt from all purchasing mandates requiring that utilities purchase renewable energy (C.R.S. 40-2-124(1) (2013)), and are generally exempt from all other public utilities law unless otherwise legislated (C.R.S. 40-9.5-103 (2013)). FERC does not likely make up for this jurisdictional gap in Colorado because most rural electric cooperatives don’t fall under the purview of the FPA (Greenfield 2010).

Where the Tribe fits into this regulatory framework adds another layer of ambiguity. While Colorado lacks civil regulatory over tribal infrastructure or economic activities on the reservation, any solar energy projects on the Ute Mountain Ute reservation will involve the state PUC framework for distributed generation. Because the Tribe does not own its own transmission lines, substations, or billing utility, the reservation is connected to the grid and serviced by the local utility, in this case a rural electric cooperative called Empire Electric, just like any other customer would be. In fact, the Tribe is Empire Electric’s biggest customer. Thus any solar project on the reservation requires negotiating with the Empire Electric so the power generated

\textsuperscript{17} Eligible energy resources means recycled energy and renewable energy resources under C.R.S. 42-2-124(1)(a) (2013).
on the reservation can be delivered and metered by the utility. This also means that it must comport with applicable state laws regulating distributed generation. What those are and how to do that, however, remains unclear.

The legal ambiguity the Tribe faces in negotiating with the local electric cooperative emerges front and center in small-scale DOE project, where federal regulations do not generally apply. In response to the piecemeal and inconsistent jurisdictional framework supporting distributed generation itself, Colorado and other states have implemented a variety of other economic incentives encouraging distributive generation such as tax and zoning incentives (Arfmann et al. 2011). The most popular incentive is a system of distribution called “net metering,” utilized by eighty-five percent of states nation-wide (Ferrey 2012, 268).

The concept is fairly simple. “Net-metering is a process by which states encourage distributed generation by crediting customers, allowing them to offset their energy use by electricity they generate and feed back to the grid” (Arfmann et al 2011, 38). Basic net-metering programs focus on individual scale distributed generation, such as solar panels installed on a residential home. The broader system of interconnection remains the same, but the flow of power and reciprocal costs shift depending on how much power the generating consumer uses. When the generating consumer produces more power than it uses, a bi-directional meter runs backwards and sends power back to the grid, and the utility credits the generator. If the generating consumer uses more power than it produces, the utility collects for the surplus (Ferrey 2012, 273).

In Colorado the PUC requires that all utilities net-metering program is structured around retail rate and capped at 120% of the total individual load (C.R.S. 40-2-124 (2013)). In other words, if the generating consumer sends any excess power back to the grid, the utility will credit
up to 20% over what was actually used on the next bill at retail. Although that cap does not apply to electric cooperatives, they are required to offer net-metering agreements. “Each cooperative electric association shall allow a customer-generator's retail electricity consumption to be offset by the electricity generated from eligible energy resources on the customer-generator's side of the meter that are interconnected with the facilities of the cooperative electric association” to generating consumers with excesses up to 10 kilowatts for residential customers, and 25 for commercial or residential customers (C.R.S. 40-9.5-118(2); (2)(A-B) (2013)). The cooperative may deny any request exceeding 10 or 25 kilowatts however, which places the Tribe’s 1-2 MW project in legal no-mans land (C.R.S. 40-9.5-118(2)(e)(II) (2013)).

Colorado is also one of only eleven states offering a new variant on net metering that allows for “virtual” aggregation of multiple meters into one site (Ferrey 2012, 292). Virtual net metering plans vary across states, but generally follow the same basic function. “Rather than actually hard-wiring the on-site generation unite to share power among neighbors, the utility grid is used to distribute power. In essence, surplus power is sent out to the utility grid and redistributed to the neighbors in kind” (Ferrey 2012, 293). In other words the utility reads one meter for many. This is significant in Colorado for two major reasons. First, it allows for the aggregate to distribute power amongst its members without incurring distribution or metering costs from the utility (Ferrey 2012, 293), and second, in it allows the aggregate to skirt capacity caps. Colorado’s “community solar garden” has no specified capacity limit. Furthermore, the program allows a community to comprise of residential, commercial, or industrial customers provided there are at least ten participants in separate municipalities provided that they share the same utility and residential customer needs are satisfied first (C.R.S. 40-2-127 (2013)).
Possibilities in virtual net metering agreements mark the next great incentive and reciprocal regulatory hurdle for distributive generation. Massachusetts, for example, allows for net-metered credits to be monetized rather than represented as kilowatt-hours, so they can be transferred to third parties even outside the proximate community (see Ferrey 2012). Distributive generation disaggregates power use and production from the centralized grid and creates new possibilities for modeling billing, transmission, and power purchasing agreements. Creative use of virtual net metering technologies and community garden programs generally disfavor utilities. Utilities loose distribution revenue by transferring power to multiple users through an aggregated metering system (Ferrey 2012, 293). Utilities may still incur costs for distribution, maintenance of transmission lines, and occasionally billing, which are either negotiated as a separate service to the generating consumer, or, more commonly, distributed amongst other non-generating customers (Ferrey 2012).

As a result, utilities have attempted to challenge net metering regulations in the courts. The majority of challenges involve whether the state has power to enact such standards, whether FERC has jurisdiction, and whether such policies are constitutionally permissible. For example, FERC established the first precedent for net-metering in 2001 when it upheld Iowa’s net-metering laws against a challenge by MidAmerican Energy Company (MidAmerican Energy Co., 94 FERC ¶ 61,340 (2001)). FERC found that the state of Iowa had jurisdiction to create net-metering law because FERC lacks jurisdiction where “there is no sale for end use or otherwise between two different parties when one party is using its own generating resources for the purpose of self-supply of station power, and accounting for such usage through the practice of netting…” (MidAmerican Energy Co. 2001, ¶ 66,263). FERC upheld this decision in 2009, when it found that as long as the generating consumer sold less power to the utility than it bought, net-
metering did not constitute a wholesale power sale transaction and therefore did not trigger FERC jurisdiction (Sun Edison LLC. 129 FERC ¶ 66146, 61620 (2009)). However, if there were a wholesale power exchange agreement, the FERC would have jurisdiction because FERC jurisdiction extends to interstate commerce, and state regulations would be preempted under the Supremacy Clause of the Constitution as a matter of federal law (see Ferrey 2012, 215). Accordingly, although these decisions consistently uphold state net-metering policy, it is unclear whether net-metering agreements that disturb the net directional flow of power generation from the utility would render certain net-metering agreements impermissible (Ferrey 2012, 310).

The uncertain application and legal future of net and virtual-net metering agreements reflects the gray area at the intersection of space, law, and power (in a political sense). Jurisdictional authority to enact laws governing these agreements fundamentally relies on the scale and directionality of electron flows; the reversing of which challenges the traditional authority of utilities to monolithically control access and rates. At the same time, the directional flow occurs within spatially static transmission lines from large generating facilities oriented on the landscape. Where the generating facility, transmission lines, substation, utility, and customer are—which state they reside within—affects the type of agreement available.

More generally, the laws governing transmission and distribution on the reservation conceptualize jurisdictional space as something that is temporally and quantitatively bound, and require a reimagining of how we conceive of jurisdictional space as both based on place and scale. This legal framework does not produce space as something defined by physical boundaries, but rather creates boundaries in volume and movement. The interaction between state and federal regulation reinforces traditional ideas of jurisdiction based on political boundaries because the overarching authority to regulate the different types of utilities also
varies state-by-state. The ambiguous and overlapping patterns of jurisdiction simultaneously constrain how the Tribe can negotiate solar energy development on the reservation while providing new opportunities to (re)negotiate relationships with the state and federal governments, utilities, and communities by managing it as a valuable resource.

C. The Properties of Power and Power as Property

The basic concept behind solar (and all) power-generating technologies is to move electrons. Electricity, in its simplest conceptualization, can be defined as the directional flow of electrons through a conductor. Electrons already exist; power production simply transforms energy into electricity by applying sufficient force to overcome the normal attraction between the electrons and atoms, causing electrons to ‘flow’ as they jump from one positively charged atom to another, creating the electric current that powers modern life. There are two primary ways to generate electricity from the sun: photovoltaics and thermal concentration. Photovoltaic cells absorb solar energy directly and free electrons from their atoms to flow and generate electricity. Thermal concentration uses reflective services to focus and amplify the heat of the sun into a receiver that runs a traditional turbine to produce electricity (Tribal Energy Program 2013). The Tribe is looking at both types of technologies for harnessing the solar exposure on the reservation.

Electricity however, as the end product of solar energy development, is a largely invisible commodity that only exists through its use. Whereas most resources amenable to management plans are readily visible on the landscape and retain some static and inherent worth as a raw material before or production, solar energy is managed as an energetic potential. We only see power when we turn on the lights, paying for the amount of electricity that we use. So when we
buy electricity, we do not purchase electrons or solar energy per se. Instead we pay for a measured movement of electrons through a conductor.

The legal regulatory frameworks governing electricity largely hides the transient spatiality of electricity as a marketable commodity. We pay for power; we contract for power; we exchange power; we regulate power—as if electricity were something real, fungible, or alienable by virtue of its properties, without classifying it as property. In reality, for the IRMP/CRMP (or any other utility, regulator, etc.) to manage solar energy as a resource necessitates the simultaneous production of it. The IRMP/CRMP produces solar energy as a resource through the multiple pseudo-scientific techniques of the three stages of property making posited in chapter five: visualizing, classifying and separating, and valuing. Most of my work at Ute Mountain Ute involved the small-scale DOE project on the reservation and the following analysis draws primarily from that experience unless stated otherwise.

1. Visualizing

Solar energy is transformed from a ubiquitous and commonly undetectable energetic potential into a manageable resource by visualizing how it could produce electricity. This process begins discursively, through the inclusion of solar energy generation in the IRMP/CRMP itself. The IRMP/CRMP identifies ‘renewable energy’ as a resource of value, and assesses the ‘resource conditions’ as per the federal guidelines, discussed in chapter four. It summarizes renewable energy as the potential for “wind, solar, biomass, geothermal energy production” the Tribe works to visualize solar energy as a resource (IRMP 2013, 75). Broader discussions about renewable energy integrate discussions about solar generation with impacts on land, which require the physical mapping of where generating facilities could be constructed.
In 2012, the Tribe used the DOE grant monies to subcontract a company to compile all the potential physical sites for a 1-2 MW photovoltaic array on the reservation. The study consisted of a series of maps that represented areas amendable to small-scale generation by running models based on slope and aspect, as well as proximity to the substation on the reservation. The study selected eighteen community-scale sites based on plots of land with the appropriate acreage with less than a 4% slope and which were primarily south facing with no obstructions to the sun. The feasibility study visualizes largely invisible electrons (the actual source of solar energy production) by mapping the requirements to harness those electrons on the landscape. These maps drew representative lines on tribal lands to visualize the potential for solar energy generation, simultaneously producing solar energy as a resource by managing it.

2. Separating & Classifying

The process for classifying and separating solar energy as a renewable resource in the IRMP/CRMP reflects the broader divisions between renewable and conventional energy resources based on how electricity is produced. Electricity functions the same regardless of how it is generated. Electrons are electrons—ubiquitous, infinite, and un-producible—and yet power is cloaked in dichotomous connotations depending on how those electrons are set in motion. According to the EPA, renewable energy “includes resources that rely on fuel sources that restore themselves over short periods of time and do not diminish” (EPA 2013). Conventional energy on the other hand, is produced by burning fossil fuels, which “have environmental costs from mining, drilling, or extraction, and emit greenhouse gases and air pollution during combustion” (EPA 2013).
The oppositional categories are based on the environmental effects not as a result of differing forms of electricity itself, but rather the effects of how that electricity is produced. The bifurcated legal framework reifies and concomitantly creates those boundaries, such that mining coal is regulated differently than harvesting solar energy through thermal concentration. The IRMP/CRMP replicates those divisions and separates renewable energy resources in the document itself. Wind, solar, biomass, and geothermal energy are listed as renewable energy resources that are distinctly different from mineral resources, such as coal mining. The IRMP/CRMP reinforces this separation because they are managed by two distinct, yet interacting energy committees, as discussed in chapter five.

In addition to separating and classifying solar energy as a renewable resource in comparison to non-renewable mineral extraction, the vast interacting system of charges (electrons and protons) must be further distilled into categories based on where the power is generated and which direction the generated electricity is going. Regulation and jurisdiction of solar generation depends on the amount and directional flow of electrons. If more power is generated by the generating consumer in a net-metering agreement than the utility—if the directional flow of electricity going to the grid exceeds what it pulls out of it—then FERC has regulatory jurisdiction and state-metering laws would not apply (Sun Edison LLC, 129 FERC at ¶ 61620). The management of solar energy thus requires classifying flows of power as either moving towards or away from the utility. The laws regulating power distribution agreements both create and sustain the immaterial boundaries between flows of electrons based on where they are going so they can be negotiated as property.

The temporality of solar energy generation adds another layer of separation and classification to the production of it as a resource. This process begins by calculating total loads
based on differentiated users. The Tribe uses approximately fourteen MW of power per year. The feasibility study for the DOE project broke this total use up into twelve major uses on the reservation; the overwhelming winner being the tribal casino, using about 34% of the total load\textsuperscript{18} where all the residents of Towaoc together use about 32% of the total load (Renewable Energy Meeting A, October 1 2013). This is important because although total directional flow helps determine regulatory jurisdiction, the temporal nature of renewable energy generation dictates who buys what power, when. In other words, the peak of solar generation is midday, when it is the sunniest. But the peak use on the reservation is at night, when most people use the tribal casino and when the sun doesn’t shine. Separating and classifying the temporal use and generation of solar energy is necessary for managing it as a resource because it forms the basis of distribution agreements with the local utility and for assessing value.

3. Valuing

The categorization of solar energy in terms of temporal use and generation is essential for understanding how value is assessed. For the Tribe, peak use is at night when there is no potential for solar generation, making energy more valuable at night. At the same time, peak use for the broader community (where the utility will sell the surplus energy generated by the tribe) may be higher during the day at the height of business hours and industrial production. The Tribe uses these conflicting or complementary values to negotiate distribution agreements with local utilities. For example, an agreement for the DOE project may stipulate different sale prices for energy bought or sold at different times of the day. This valuation is essential for managing solar energy as a resource because it translates electron flows into fungible, alienable, and vendible properties to be negotiated, bought, and sold as a commodity on the market.

\textsuperscript{18} The notorious casino sign uses 1.6% of the total load.
Similar valuation occurs within the Tribe and is essential for managing solar energy as a resource because it guides whether, where, and what type of solar generation may take place. The internal valuation of solar energy as a resource in the IRMP/CRMP generally stems from assessing value in relation to other resources on the reservation. Like the DOE feasibility study, the commercial study contracted by the Tribe calculated the same basic factors of slope and aspect to assess where generating facilities could potentially be constructed on the reservation. The initial commercial study, however, failed to consider conflicting resource uses. As a result, the Tribe contracted a second company to overlay known resource conflicts to eliminate some of the sites initially mapped to include grazing rights, mineral extraction, and etc., but most importantly, known cultural sites. Any selected commercial site with adverse effects on known cultural resources mapped through the CRMP were essentially eliminated from the running, demonstrating how cultural resources are generally valued more highly than whatever economic benefit may come from developing a commercial solar farm on the reservation.

In addition to valuing resources hierarchically, the IRMP/CRMP produces solar energy as a resource by assigning economic value to Tribe. This multi-scalar process cyclically affects the potential of constructing solar generation facilities altogether and generally proceeds on two levels of assessments: external costs and internal benefits. For the small-scale DOE project, the Tribe first assessed the total external cost of generating the electricity itself. This primarily included the cost of constructing a generating facility and transmission lines to the substation. Because the transmission lines on the reservation are only 12kv, new 115kv transmission would need to be installed in order to connect back to the grid and sell power back to the local utility. Total costs to construct a 2-2.5 MW photovoltaic array and the transmission lines on the reservation would cost about $8.5 million (Renewable Energy Meeting A, October 1 2013). The
Tribe summarized all of these costs and assigned them per megawatt hour of electricity, effectively valuing measured amounts of continuous electron flows as a discernable resource with a definitive value comparable to other resources.

The Tribe then assessed how the valued megawatt hours of electricity potentially produced through solar generation on the reservation would benefit the Tribe, and more significantly, the tribal membership. Because it is unlikely that the Tribe would secure all of the financing needed to construct an $8.5 million dollar project on the reservation, it would have to use some of its own funds to seed the project. Projects using tribal funds are only politically viable if there are “visible benefits to the membership” (Renewable Energy Meeting A, October 1 2013). This is a discussion that the Tribe has yet to have, but must involve the “bottom line--” i.e. how much money the tribe will make from the solar development project and how the membership will share in that equity. This requires another level of valuing, where price per megawatt hour will be further divided and assigned among users according to individual use. These values are essential for managing solar energy as a resource on the reservation because it allows for economic assessments and proprietary claims to portions of electron flows otherwise un-cognizable and un-justifiable to both the broader financial structuring for the construction of the project as well as equity sharing agreements among the individual tribal membership.

Managing solar energy on the reservation as a resource within the IRMP/CRMP simultaneously produces it as tribal property. Through the visualization, classification and separation, and valuation the Tribe translates the ubiquitous and largely invisible presence of electrons into something that is manageable as a property: something that is alienable, fungible, and generative of rights and opportunities for the Tribe as owner. Beyond the ability to manage solar energy as the proprietor however, the Tribe establishes a new tool of governance that has
D. A Third Movement: Governable Spaces and the Re-Imagining Reservation Boundaries

The Tribe produces solar energy as a resource through the IRMP/CRMP to employ the governing power of property. Property functions as a tool of governance, as narrative, as technology, and through spaces of inclusion and exclusion, discussed in chapter two. Property “produces … temporal and spatial order” that simultaneously creates and reflects social networks of belonging based on peoples’ relationship to property (Keenan 2013, 465; Blomley 2003). This is a process that is constituted through material interactions with land, but as I have argued in previous chapters, not exclusively. The IRMP/CRMP produces solar energy as a manageable resource that relies on the reservation land for the purposes of production, but is also severable from the reservation and marketable across jurisdictional boundaries. Examining how the Tribe navigates the legal and regulatory framework of solar energy development to employ the governing power of property demonstrates a third movement, where the Tribe can re-appropriate resource management to negotiate its relationship with state and federal governments. Because the solar projects are still in their nascent phases at Ute Mountain Ute, consider the following as two plausible examples of how the Tribe might do this.

The Ute Mountain Ute and other tribes can use the governing power of property to assert itself as a sovereign in state and federal legislative processes. The obstacles tribes face to developing renewable energy on the reservation are real and the federal government has
recognized that as an impediment to domestic energy development. In April of 2012, the Senate Committee on Indian Affairs held a hearing on S. 1684, which was introduced to amend the ITEDSA, demonstrating the political will to make TERA agreements more workable and facilitate energy development with tribes. Similar conversations will be happening at the state level, as tribes struggle to enter into equitable power-sharing agreements with local utilities and especially unregulated electric cooperatives. Tribes have an incredible opportunity to contribute in state and federal decision-making generating new spaces of influence on a national scale that far exceeds the reservation boundaries.

The Tribe’s production of energy creates a new kind of property that, in turn, extends its sovereign authority beyond the reservation boundaries. The way the Tribe negotiates power-sharing agreements with the local cooperative in the DOE project, or develop the financing agreements and jurisdictional framework in the commercial-scale project, has the potential to reorder traditional hierarchical relationships of control as the Tribes retain real property rights to resources that surrounding state and federal government want, and the broader community needs. In addition to generating solar power, the Tribe is considering establishing its own utility, installing its own transmission lines, and essentially asserting its sovereign right to self-govern through energy independence. But beyond establishing energy independence, the Tribe, as a major producer, has the potential to shift traditional relationships of dependence.

As a major energy producer, the Tribe literally transports power with power, renegotiating its relationship with federal, state, and local authorities through the production and distribution of electricity. These new relationships are materially visible not in the form of jurisdictional boundaries, but rather through the maze of interconnected transmission lines that exponentially increase the legibility of the Tribe as a sovereign with a political influence that far
exceeds it, demonstrating a third movement of property. The Tribe will sell the solar energy generated on the reservation back to the grid- disseminating tribal resources as commodities far outside its landed boundaries and into hundreds of thousands of non-Indian homes, businesses, and industries in the local community and across state lines. When power is routed through a substation or sent back to the utility via distributed generation, it is assimilated and redistributed without credence to where the energy was generated in the first place. The Tribe can thus re-appropriate the federal framework for resource management and utilize the ambiguous legal framework to move beyond the reservation boundaries and forge new relationships with the broader nation-state itself.

E. Conclusion

This chapter aimed to demonstrate that by engaging in renewable energy generation through the IRMP/CRMP, the Tribe increases its influence as a sovereign through new governable spaces outside of the reservation boundaries and into non-Native communities. To do this, it relayed a brief history of energy development in relation to property, the nation-state, and the market to demonstrate the connection between energy and governance; told a legal geography of the regulatory framework governing the generation and distribution of solar energy on Tribal lands drawing on the theme of the double-movement; and finally discusses how solar energy is produced as a resource through the IRMP/CRMP. In doing so, this chapter sought to show how the Tribe employs, and can employ, the governing power of property to generate new governable spaces as a third movement to renegotiate traditional relationships with the broader state. In doing so, the Tribe literally disseminates power with power, suggesting a re-imaging
of traditional expressions of Native territoriality that can be un-landed and spatially diffuse-shirking the significance of the reservation boundaries as a limiting factor of tribal sovereignty.
Chapter VII:

What I Meant to Say and What I Hope it Means

Ultimately, this dissertation showed that tribes navigate the federal resource management regime as conscious and deliberate actors to employ the governing power of property and increase their power as sovereigns through new governable spaces outside of the reservation boundaries. This writes against the conventional way of understanding Native property by demonstrating how regardless as to whether the Utes traditionally had property or not, they can use resource management to continuously generate new properties all the time. By reconsidering the utility of resource management through the lens of legal geography, this dissertation suggested a third movement of property as a tool the Tribe used to re-order social relationships that is equally spatial as it legal, equally oppressive as it is emancipatory, and which can be multiply employed both within and outside of the broader nomosphere of the nation-state. In examining how the Tribe navigated the enmeshment of space, law, and power through the IRMP/CRMP as means for asserting itself as a sovereign outside of reservation boundaries, this dissertation ultimately argued towards a new understanding of Native territoriality that can be distinguished from traditional lands.

To justify the broader project, this dissertation made five major arguments. First, it argued that property functions as a tool of governance through narrative, through technology, and as spaces of inclusion and exclusion that are inexorable from a shared and inherently violent origin of the market economy and political system of nation-states. Second, it used this understanding of property to argue that the Ute Mountain Ute reservation is spatio-legal
construct created by the United States to set up a specific relationship with the Ute Mountain Ute Tribe through a series of nomospheric changes. Third, the dissertation built off of the spatio-legal framework of the Ute Mountain Ute reservation to argue that IRMP/CRMP simultaneously reified the hierarchical patterns of jurisdictional control while challenging them in order to highlight the dualisms of property set up the critical question of why, despite the limited, deleterious, and disciplining potential of federally funded resource management, does the Tribe do it anyway. Fourth, it argued that the Tribe engages in the IRMP/CRMP to produce resources as tribal property and generate new governable spaces to assert itself as a sovereign outside of the reservation boundaries as a third movement of property to renegotiate its relationship with the state, broadly construed. And finally, it employed each of the previous arguments to demonstrate how the Tribe used the IRMP/CRMP in the production of solar power to extend the scope of its sovereign power.

The implications of this research are two-fold. On an immediate and practical level, it contributes an underrepresented interdisciplinary perspective to the discussion of tribal resource management. It provides a reflective account of the benefits and drawbacks of using the IRMP/CRMP framework that may be helpful for other tribes and advocates seeking to implement similar plans in the future. By showing that regardless as to whether property-based resource management is actually useful for sustaining tribal resources or cultural traditions it is a powerful mechanism for increasing the legibility and influence of tribes as sovereigns, it also reintroduces the voice of the Tribe, as a deliberate political actor, into the discussion.

On a theoretical level, this dissertation contributes nuanced ways for understanding Native property to the literature. It in no way suggests any revolutionary definition of what property is, but rather highlights an additional perspective in terms of how property is generated
to better understand what property does—and can do for Native people. By analyzing how resources are generated as properties that are distinguishable from the reservation as a place, this dissertation submits a model of Native territoriality that exists outside of traditional lands, and in doing so pushes on the traditional role of place as necessarily generative and limiting of tribal sovereignty. This promotes a shift from an absolutist and land-based understanding of sovereignty towards an understanding of tribal sovereignty as a more diffuse mode of governance. The hope is that these contributions will inspire new questions about the enmeshment of space, law, and power with respect to Native property rights, Native territoriality, and resource management more generally. Specifically, it would be interesting to see how this line of reasoning illuminates questions about intangible properties, about sovereign practices of unrecognized tribes, other communities or indigenous groups, and about recognized tribes without land.

The major limitation of this study however, was that the voice of the tribal membership—as opposed to the tribal government—was largely left out. This was a constant struggle working with the Tribe. Like all governments, there was a palpable divide between the decision makers and the broader tribal membership. To be clear, my work with the Tribe was with the tribal government exclusively. This was partially due to the fact that I was unable to conduct any interviews outside of the tribal government offices and partially because of where my research at Ute Mountain Ute stopped. The next phase of the IRMP/CRMP at Ute Mountain Ute will be drafting tribal code to translate these plans into law that can be enforced on the reservation. How the Tribe drafts the IRMP/CRMP into tribal code and manages enforcement on the reservation will give better insight into how the IRMP/CRMP will actually affect the reservation landscape.
physically and politically, and will provide insight into how individual tribal members interpret, respect, or challenge the spatio-legal effects of the IRMP/CRMP posited here.

Hashing out the practical and theoretical contributions of this dissertation from behind my computer screen after having returned to Boulder is one thing, but believing that my work will actually make a difference in the lives of community members is quite another. The time I spent with tribal members and the relationships I will continue to cherish with them were extracurricular, for lack of a better word, and largely lacked a place in my project. Again, this was partially because I was unable to conduct interviews with the tribal membership and because my time at Ute Mountain Ute ended before these plans were enforced as laws on the reservation—but perhaps more so—it was because questions about resource planning and property were the last thing I wanted to talk about while making jokes over burgers. Much like the issue of the four-wheelers, the real concerns on the reservation—poverty, substance abuse, violence, and general cultural oppression had both everything and nothing to do with property.

This is my last week in Towaoc. I won't say the time flew by, because I am ready to move on- but I will say the time sort of came and went in waves, in circles-significant but hard to keep track of. Maybe that is life on the rez, or maybe that is just my life right now- either way as the last days appear and disperse like mirages as I am living them, it begs some reflection on what all of this was for.

The obvious answer is, good research! Right? I mean I came here to complete my dissertation “fieldwork,” and to help the tribe out with my time here and hopefully through my writing. People keep asking me whether "I have enough information," and all I can say is yes, because in all honesty I think 'enough' is a moving target. Nonetheless it makes me think about if what I did here was enough.

I have grown to discover that social science 'research' makes me pretty uncomfortable. I spoke with a lot of people, and a lot of people spoke to me- but I wasn't good at asking questions about what I needed to know for my paper because what I honestly felt I needed to do (feeling, not a suggested research technique), was listen. And what people usually wanted to tell me was some combination of tragedy and dirty jokes that always ended with a death and degenerated into laughter about something that wasn’t really funny. It was never about resource management or property, and when I probed or tried to guide the
conversation towards that it seemed as if I was trying to evoke a narrative to a story that while obvious to me, pertinent to the tribal government, and pervasive in academic writing, either didn't exist or was unimportant for the majority of what the general population wanted to talk to me about.

One problem was that I was disallowed from doing any formal interviews with the general membership. Perhaps in a formal setting the membership would have felt like what I wanted to ask was more important and I would have felt more comfortable ignoring the hardships that actually were. But I couldn't; and now I am unsure how to weave the non- or rather extra-pertinent information from casual conversation into a poignant and pithy analysis about legal geography. In fact, I am almost sure that I don't want to- like sharing those stories would be a violation of some unspoken trust that comes with a closed mouth and open heart, and of which subjecting them to the butchery of academia would be the most visceral.

Let me say that this is not my first time working with communities to produce information for projects not their own, quite the contrary. But it is my first time doing it on my own accord; my first time chasing an intellectual whim that I am hopeful will inspire progress in the broader intellectual landscape and trickle down to the people, but, I have my doubts about that too. I probably just need to have more faith in my project, more faith in academia, and mostly more faith in myself. I suppose the end of anything is when retrospect reveals itself as fear. But we can never predict the future and projecting self-doubt as precautions for things that haven't happened yet likely does more to secure that they will turn out shitty than that they won't.

Let me also say that I proposed my project to the Tribe, and they invited me here. This is not a lesson in why 'top-down' research methods or project proposals do not work. We were both cognizant actors entering into an agreement that was beneficial for everybody. However, the Tribe probably did not accept me because they liked my project but rather because they liked the idea of an intern. I had a feeling that was the case. However one research tactic I know I am good at is going with the flow and taking advantage of whatever 'in' you have.

And I was a great intern. I did everything from respond to consultation letters, to power-points, to legal memos, to getting the mail, to site visits, managing contractors and back again. I was able to maintain a unified direction in my work, and most of these experiences will go into my dissertation. However all of my data can be couched under "participant observation." I know I will write a fine paper from all of this; overanalyzes is both an academic virtue and personal vice I do not struggle with especially when it comes to writing.

I suppose all I can do is manifest that my time here will be as valuable to the Tribe as it was to me, and that my conversations with the people I met will hold a space of love and forgiveness suspended in a cyclical time and safe from any
overanalyzes and academic scrutiny altogether. I would rather be a good person than a good researcher- and although I am by no means saying those things are incompatible- I will say that those lines can get fuzzy and decisions on both how to research and write about experiences with other people can be as challenging intellectually as they are spiritually and emotionally.

Finding a way to meaningfully remedy the structural and theoretical with the spiritual and emotional likely falls outside of the scope of a doctoral dissertation, but these are the questions I am left with as I conclude this project.
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