LAND REFORM IN THE FIFTH WORLD

Jessica A. Shoemaker*

ABSTRACT

Our current property systems are strained by rapid climate change and growing inequality. If change is needed, how does it actually happen? Land reform is difficult to imagine, much less implement, within a physical landscape already so engineered and embedded with deep layers of tradition, experience, and law. In this short Essay, I argue that there are important lessons from Ezra Rosser's recent book, *A Nation Within: Navajo Land and Economic Development,* for the wider project of Indigenous and, ultimately, American land reform. Property scholars ignore these issues of Indigenous property and land governance to our collective detriment.

This Essay makes three particular contributions. First, I outline with some specificity *why* centering contemporary Indigenous land tenures within any wider study of America's already pluralistic property system is so important. Second, building on Rosser's detailed case study of Navajo land and economic development, I draw some wider lessons about the process of *how* land reform happens. Although law change is needed to implement many desired innovations, the Navajo experience underlines the critical role of local action, imagination, and persistence. Finally, the Essay takes a brief journey to review the experience of some First Nations in Canada—where Indigenous-led land reforms are also being pursued in a similar but different context—to expand on ideas about the architecture of successful land reform projects. When we widen our scholarly attention—humbly, and with respect—we find an abundance of critical, active land-reform projects that are ongoing and worthy of greater care and concern as we reimagine our future together in this world, and maybe the next.

* Andrew Carnegie Fellow; Steinhart Foundation Distinguished Professor of Law, University of Nebraska College of Law. Research funds from a McCollum Grant and the Andrew Carnegie Corporation of New York supported this project, as did a Fulbright Scholar award that facilitated a year-long visit to the University of Alberta Faculty of Law to study First Nation land reform projects in Canada from 2018 to 2019. I am also grateful to Ezra Rosser and the editors of the Southwestern Law Review who invited, inspired, and otherwise improved this Essay. The statements made and views presented are solely mine and my responsibility.

In the last days of the fourth world I wished to make a map for those who would climb through the hole in the sky . . . . Crucial to finding the way is this: there is no beginning or end. You must make your own map.

—Joy Harjo[1]

I. MAKING A MAP

Ezra Rosser's new book, *A Nation Within: Navajo Land and Economic Development*, is a rich and sensitive account of the past, present, and future of Navajo land and economic development. Early in the book, Rosser describes the Diné creation story and its application to current Diné cosmology.[2] He outlines a core understanding that the Diné people "are now in the fifth world, having emerged from four previous worlds."[3] Here, in this fifth world, Rosser describes how the Diné are anchored in a specific and sprawling landscape, surrounded by four sacred mountains that were created when "First Man brought soil from the fourth world into the fifth world."[4]

According to Rosser, this "visually magnificent landscape," which includes both sand-swept open expanses and mountainous forests and lakes, is central to Diné identity: "Diné live where they were formed as a people according to their creation story and where all their stories are set."[5] Land provides "an immense sense of freedom and of home."[6] Under current

1. JOY HARJO, *A Map to the Next World*, *in* HOW WE BECAME HUMAN: NEW AND SELECTED POEMS: 1975-2001, at 129, 132 (2002). Joy Harjo was the 23rd Poet Laureate of the United States and is a citizen of the Mvskoke Nation. *See id.* at back cover.

2. *See* EZRA ROSSER, A NATION WITHIN: NAVAJO LAND AND ECONOMIC DEVELOPMENT 7 (2021).

3. *Id.*

4. *Id.* On a personal note, I first came to learn and experience some of these same physical spaces as Hopitutskwa—including the three high, arid mesas and twelve ancient villages that have been the home of the Hopi Tribe since time immemorial. Many years ago, I worked as an attorney representing the Hopi Tribe on matters that overlapped with some topics covered (often from a different perspective) in Rosser's book, including grazing disputes in the former Navajo-Hopi Joint Use Area, mineral leases, and land and resource disputes between the two tribes and others. Rosser reveals a small slice of some of the long legacies of conflict and negotiation between the Hopi and Navajo. *See* ROSSER, *supra* note 2, at 35, 56-59, 184-85, 201-02. Because of my prior and delicate position on many of these matters as a former advocate for the Hopi Tribe, I have taken care to ensure this Essay responds more generally to Rosser's account without any specific discussion or comment on any dispute or matter that I worked on as an attorney. This Essay is entirely my opinion and neither reveals nor represents the views or stances of any former client. This also means that throughout this Essay, I attempt to engage directly with Rosser's story as it is presented, making no claim or comment about how some of these place-based understandings and relations may be understood and interpreted differently by others outside the Navajo Nation. That discussion is for another time and, likely, a different author.

5. *Id.* at 7-8.

6. *Id.* at 8.

federal Indian law, this continued connection to—and ownership of—land is also a prerequisite to most expressions of Navajo sovereignty and otherwise provides a "wealth of natural resources" in a nation where many citizens are otherwise still experiencing significant poverty.[7]

Today, the Navajo Nation occupies an area "larger than the state of West Virginia, with more than 27,000 square miles spread across significant parts of Arizona, New Mexico, and Southern Utah."[8] However, for most American property scholars, the complex property and land relations that exist within this vast space are not only mysterious but—*dare I say it?*—treated as irrelevant to our collective work. Not irrelevant to the Diné people, of course, and not even irrelevant to wider and important conversations about reparations and repair of historical harms caused by the forced imposition of colonial property regimes. But for the ongoing, important questions of what might be labeled "mainstream" property theory and property law—including, primarily, how property systems can adapt and respond to pressing modern concerns like climate change and growing inequality—most property thinkers ignore modern Indigenous land experiences within these reserved territories entirely.

In this short reflection on Rosser's work, I want to emphasize the reverse: how much we collectively must learn from both the historic resilience and the modern struggles of the Navajo and other tribal governments in the United States. Not surprisingly, the Navajo government and Navajo citizens face many of the same property- and land-related challenges as non-Indian governments and people: adapting to a changing climate, addressing persistent inequality, balancing these sometimes contradictory environmental and economic demands, and otherwise trying to adapt property rules and institutions across a landscape that has already been profoundly shaped by deeply embedded cultural and legal regimes.[9]

These and other struggles play out in intimate detail in *A Nation Within*. The Navajo peoples, like many Indigenous peoples, continue to try (and sometimes fail) to shape their territory to their collective vision—to reflect Navajo values and meet community needs, often with internal disagreements and in a changed and ever-changing environment. Part of this is specific to the unique legal realities of reservations as sovereign territories that are both within and set apart from the American federalist structure. Land governance within American Indian reservations is notoriously complex, often involving an intricate network of restrictive federal rules that can uniquely burden these

7. *Id.* at 8-10.

8. *Id.* at 7.

9. *See infra* notes 62-66 and accompanying text (outlining several concrete examples of specific Navajo property law choices that could inform current American property debates).

reservations with undue bureaucracy.[10] But Rosser also recounts—sensitively and with detail—the Navajo Nation's own role in shaping property relations within all of this complexity.[11]

A Nation Within is a real-time story of necessary and ongoing land reform.[12] For example, we see concretely in vivid detail how difficult it is to actually implement governance reforms intended to restructure and devolve power from a central, national authority to local chapters and communities.[13] And we scratch our heads over the Navajo's own inefficiencies and the many layers of internal oversight and bureaucracy that the tribe imposes voluntarily over their own land use choices, even when these administrative hoops impede and delay desirable developments like new homesite allocations, business leases, and grazing re-arrangements.[14]

It turns out that people everywhere have expectations about their existing land relationships that are sticky and hard to change, whether based on *de facto* patterns of use and management or formalized *de jure* rights.[15] People also tend to disagree about how to proceed in the face of complex problems like persistent poverty and environmental harm, especially when there are difficult tradeoffs to make and uncertain outcomes. And while the whole history of federal Indian law and policy reminds us, repeatedly, that property can be—and has been—used as a powerful tool to shape peoples' social, economic, and environmental realities, it is often difficult to imagine—much less implement—new property projects across a landscape that is already so pervasively over-written with existing systems and the legacies of old choices. How do you recenter sources of land use power and decision-making in a contested political context, especially when there are ongoing and historic questions of legitimacy and corruption? How do you really change a land-tenure system—however broken—when there are already existing layers of generational attachments, expectations, and strongly conflicting political interests?

In one important respect, Rosser's work joins a chorus of scholars calling for a response to these questions that are driven by the Navajo

10. *See generally* Jessica A. Shoemaker, *An Introduction to American Indian Land Tenure: Mapping the Legal Landscape*, 5 J.L. PROP. & SOC'Y 1 (2020).

11. *See id.* at 8.

12. *Id.* at 160 (describing the fact that land reform is needed as one thing that is "uncontroversial" in the book, with disputes more around how and what that reform should look like).

13. *See id.* at 132-38.

14. *See id.* at 146, 173-74.

15. *See* Daniel Fitzpatrick, *Fragmented Property Systems*, 38 UNIV. PA. J. INT'L L. 137, 141 (2016).

themselves.[16] He recognizes that federal law and bureaucracy can interfere with tribal self-determination in adverse ways, but the tribes have work to do, too.[17] This is a theme I have also explored in my own work, reaching many of the same conclusions that Rosser outlines: that Indigenous land-reform efforts should be tribally led, that there should be a carefully negotiated balance of authority and responsibility between federal and tribal governments, and that solutions focused on a return to more flexible, tribally administered use rights on top of a secure and permanent underlying tribal governance right may be beneficial.[18] What Rosser does so uniquely and importantly in *A Nation Within* is to illuminate these broad theories of change—space for local experimentation, a balance of federal and tribal reforms—in close, detailed study of the particular Navajo experience.[19]

We—particularly non-Indian property scholars like myself—ignore all of these and other matters not only to our own shame but also to our peril.[20] Property theory acknowledges, elsewhere, that property systems are inherently—even structurally—pluralistic.[21] And most people who think about resiliency and adaptation in complex human systems, such as property,

16. *See generally* ROSSER, *supra* note 2; Jessica A. Shoemaker, *Transforming Property: Reclaiming Indigenous Land Tenures*, 107 CAL. L. REV. 1531 (2019); Elizabeth A. Reese, *The Other American Law*, 73 STAN. L. REV. 555 (2021); Kristen A. Carpenter & Angela R. Riley, *Privatizing the Reservation?*, 71 STAN. L. REV. 791 (2019); Stacy L. Leeds, *The Burning of Blackacre: A Step Toward Reclaiming Tribal Property Law*, 10 KAN. J.L. & PUB. POL'Y 491 (2000).

17. *See* ROSSER, *supra* note 2, at 1-6, 11.

18. *See, e.g.*, Shoemaker, *supra* note 16, at 1589 ("Effective reform will require more flexible spaces for local-level experimentation and innovation."); *id.* at 1591-97 (outlining specific strategies for "creating flexible innovation space," including within specific federal trust land regimes); *id.* at 1597-98 (outlining the proposal to sanction "the creation and transfer (pursuant to tribal laws) of a range of use, possession, and other tribally defined rights on top of—or under the umbrella of—the baseline federal trust title."); Jessica A. Shoemaker, *Complexity's Shadow: American Indian Property, Sovereignty, and the Future*, 115 MICH. L. REV. 487, 495, 545 (2017) [hereinafter Shoemaker, *Complexity's Shadow*] (clarifying need for a reform focus "on creating the environment for meaningful local flexibility, with room for experimentation and ongoing adaptation at the reservation property level" and otherwise emphasizing "the fundamental importance of creating space for reservation-level flexibility, innovation, and space-by-space adaptation").

19. *See* ROSSER, *supra* note 2, at 141-42.

20. To consider a specific example, a Committee of the Uniform Law Commission is currently considering reforms to default tenancy-in-common rules to impose a majority-management rule. This rule mirrors a novel reform imposed on heavily fractionated Indian trust allotments—with great controversy and mixed results—in federal law in 2000. *See generally* Jessica A. Shoemaker, *No Sticks in My Bundle: Rethinking the Indian Land Tenure Problem*, 63 U. KAN. L. REV. 383 (2015). But this important case study and body of knowledge was not formally recognized, represented, or considered in the Committee's first rounds of discussion, missing a critical opportunity for the translation of experience and knowledge production. *See generally* Tenancy in Common Ownership Default Rules Act, Unif. L. Comm'n (2022).

21. *See* Hanoch Dagan, *Property's Structural Pluralism: On Autonomy, The Rule of Law, and the Role of Blackstonian Ownership*, 3 PROP. RTS. CONF. J. 27, 28 (2014).

recognize the imperative to preserve space for numerous and varied local experiences and experiments with land relations, allowing the things that work to be translated and adopted at greater scale, while preserving the ability to pivot and change from those that do not work.[22] All of this counsels toward greater attention and concern for the land governance and property regulation systems of tribal governments as part of the American legal space.

Certainly, it is important to be cautious—as Rosser is—about the degree to which outsiders (like both Rosser and me)[23] purport to dictate or even propose with any authority specific choices that the Navajo themselves should make. That is not an outsider's place, especially after the long history of external law being imposed unilaterally as a means of colonial violence in Indigenous communities. We should also be cautious of too-casual outsiders who peek into reservations spaces like this and tell overly simple but confident stories about what the problems and solutions are. This includes the journalists and economists who have notoriously and painfully argued that privatizing reservation lands, for example, would be the panacea for Indigenous poverty and underdevelopment. It is not.[24] And, there are undoubtedly important ways the tribal property experience is singular and cannot be translated to non-Indigenous experiences. Current tribal property law is built on generations of Indigenous land-tenure traditions that existed and functioned long before any European contact, colonialism caused a distinct set of harms, and Indigenous people today continue to express unique *inherent* sovereignty.[25]

However, to treat tribal governments' difficult property decisions and experiences as completely idiosyncratic or to tokenize them as neatly bounded historic artifacts is to miss the point entirely. Navajo property law is also, to paraphrase the framing of Yunpoví scholar Elizabeth Reese, American property law.[26] However specific Rosser's telling is to a uniquely Navajo experience and context, there are important lessons and ideas in his work for future thinking about broader property issues, particularly for necessary property system change.

Surely, this brief reflection and comment cannot illuminate all the threads that might be pulled from *A Nation Within* and connected to wider American property scholarship and law—even if I hope to add, generally, to

22. *See* Shoemaker, *Complexity's Shadow*, *supra* note 18, at 546-49 (collecting sources).

23. ROSSER, *supra* note 2, at xi ("I love the Navajo Nation, but my love is that of an outsider."); *see* Shoemaker, *supra* note 10, at 4-5 (describing my first exposures to federal Indian law as a law student and my childhood naiveite to "the losses that had occurred so that I could grow up the way I did.").

24. *See* Shoemaker, *supra* note 16, at 1534-35.

25. *See id.* at 1542-44.

26. *See* Reese, *supra* note 16, at 555.

the case that this project of connection and expansion is vital. Instead, this Essay is mainly an invitation to begin that careful and humbling practice. And, in that spirit, I want to use the rest of this Essay to help, I hope, situate this Navajo story in a wider conversation with other land reform projects both domestically and internationally. In Part II (*Situating the Navajo Experience*), I emphasize, perhaps a bit more than Rosser does, some important ways this Navajo experience is unique, especially vis-à-vis many other tribal governments' positions in the United States. It should be appreciated that, in many ways, the Navajo Nation is uniquely well-positioned to engage in the kinds of land reform projects Rosser imagines.

In Part III (*No Blank Canvases*), I add further thoughts on Rosser's primary emphasis on tribal, rather than federal, reform efforts. While I agree that the federal government should allow tribal governments to self-govern their own lands and territories, I may be less optimistic than Rosser about the degree to which the federal government has already done this, and even whether such a fresh start is truly possible. In this Part, I draw from the experience of First Nations in Canada, many of which are also pursuing new land reforms project of their own design and implementation, to help illuminate the difficulties of any land reform effort. Even when the federal government does get further out of the way, local change is still difficult. Property is dynamic and pluralistic, and these systems are capable of dramatic change. But the process is also iterative, and we are often shaped in invisible but nonetheless powerful ways by what came before and now is. Ultimately, this may be one of the most significant lessons we can draw from the Navajo experience, as told in *A Nation Within*. We live in a world built from former worlds, and the residue of those ancestral structures, however ancient, continues to shape what we see and imagine, even as we march toward new land relations and continue a collective effort to make new maps.

Finally, in Part IV (*Imagination Beyond the Reservation*), I conclude with some very brief thoughts on future directions for this work.

II. SITUATING THE NAVAJO EXPERIENCE

First, some context. Before drawing too many lessons from the Navajo experience that is described in such detail in *A Nation Within*, it is important to be clear-eyed about the important ways in which the Navajo position is unique, at least as compared to the land status and opportunities of many other Native nations in the United States. Importantly, these differences do not mean that the Navajo experiences are not translatable or important for other contexts, just that we need to understand the specifics of the Navajo context before we engage in that translation or application work. American Indian land tenure in the modern reservation context is notoriously complex

and difficult, but it is *knowable*. This brief section outlines a short primer on typical American Indian land tenure patterns outside of Navajo, followed by a short clarification for emphasis on the unique Navajo situation and why these different contexts matter for land reform and property analysis.

Of course, every Indigenous group experiences the world through its own unique history and geography, but in general, most reservations in the contiguous United States reflect three related but separate land tenure challenges.[27] First, as is the case with the Navajo, many Indian-owned lands are held in a special federal trust status, which means that lands cannot, as a default matter, be sold, transferred, or, in some cases, used without federal approval and oversight.[28] These trust restrictions are generally imposed in a top-down fashion and reflect a uniform federalized system, despite the diversity of on-the-ground Indigenous territories and realities.[29] This federal administrative oversight is also slow and cumbersome, adding still more costs to any effort to make economically beneficial use of these lands.

Second, there are two distinct types of trust land status: tribal trust and individual trust lands. Tribes have much less control over individual Indians' trust lands (often called allotments) than they do over tribal trust lands, and these individual trust allotments within reservation spaces are often severely fractionated (i.e., co-owned by many, many different co-owners).[30] Individual trust allotments present dual challenges: (1) confusion caused by overlapping governance (with a complicated mix of tribal and federal authorities), and (2) the practical complexity of managing so many co-owners. As a practical matter, both of these challenges increase the transaction costs of any land use on individual allotted land.

Finally, Indian ownership is often a prerequisite for tribal governance rights over specific properties. Many reservations in the United States, however, as a result of the historic federal allotment policy, tend to include a significant degree of non-Indian landownership in a more straightforward fee simple ownership form, creating a unique checkerboard of both trust and fee lands (including tribal, individual Indian, and non-Indian owners) within reserved territories.[31] States often assert authority over many aspects of these interspersed fee lands, including property tax assessments, recording, and

27. Many scholars have written in detail about the specifics of these land systems and challenges. What I recount here is a simplified and well-accepted summary of the state of affairs on most reservations. One modest source that attempts to describe these land tenure patterns issues in a more comprehensive, but still accessible, way is Shoemaker, *supra* note 10, at 33-34.

28. *See id.* at 36.

29. *See id.* at 34, 36-38.

30. *See id.* at 38-42, 47-48.

31. *See id.* at 33-34.

even land use planning.[32] This reality of a mix of Indian and non-Indian ownership within reservation territories has created a difficult patchwork of overlapping tribal, state, and federal jurisdictions within reservations that has been deeply problematic.[33]

As Rosser acknowledges, the Navajo reservation has largely avoided both the allotting of tribal lands to individual tribal members and the surplus land sales that often flowed with that nineteenth-century allotment policy and created that patchwork of fee lands seen elsewhere.[34] Without allotment and forced fee land sales, the Navajo have relatively avoided both the challenges of individual trust allotments and the difficult checkerboarding of their reservation territory.[35] Instead, the Navajo Nation is uniquely situated—vis-à-vis many other tribes within the United States—in that most of their land base remains in a single tribal trust status, with both tribal ownership and governance rights at their peak and in a relatively vast and cohesive space.[36] This is worth emphasis. It means that the Navajo people not only control and maintain significant material resources (the Navajo are uniquely wealthy in this regard) but also that their distinctly cohesive land base presents opportunities that would be much harder for many other tribes to implement. Under current law, a tribe whose reservation is checkerboarded would have a harder time implementing the kinds of land reforms Rosser imagines,[37] particularly because their jurisdiction is often contested over both allotments and fee lands.

---

32. *See id.* at 35, 42-43.

33. Ezra Rosser, *Protecting Non-Indians from Harm? The Property Consequences of Indians*, 87 OR. L. REV. 175, 187 (2008) ("Indian law scholars and the Supreme Court seemingly agree on at least one thing: checkerboard areas are bad. *Really* bad.").

34. Indeed, Rosser tells the remarkable history of Navajo land *acquisition* during the federal allotment period when most other tribes were *losing* land at a startling pace. *See* ROSSER, *supra* note 2, at 32, 34.

35. *See id.*; *see also* Shoemaker, *supra* note 10, at 33-34.

36. Indeed, for this and other reasons, there are numerous instances of Navajo-specific federal legislation and regulation recognizing the Navajo's unique status. For example, Navajo grazing permits get a standalone chapter in the federal register, including special authority for the Navajo courts to make choices about the reallocation of Navajo grazing permits in event of a permittee's death or divorce. *See* 25 C.F.R. § 161 (Navajo Partitioned Lands Grazing Permits); *see also* 25 C.F.R § 167.2 (Navajo Grazing Regulations); 25 C.F.R. § 167.8(d) (outlining Navajo authority "[d]etermination of rights to grazing permits involved in cases of divorce, separation, threatened family disruption, and permits of deceased permittees."). And there are similar legislative examples of unique Navajo-only leasing and land-related laws that recognize more autonomy and discretion for the Navajo than many other Native nations. *See* Omnibus Indian Advancement Act, Pub. L. No. 106-568, 114 Stat. 2868, § 1201-1203 (2000). Also, this should not suggest that the tribal trust status itself does not remain problematic. *See generally* ROBERT J. MILLER, RESERVATION "CAPITALISM": ECONOMIC DEVELOPMENT IN INDIAN COUNTRY (2012) (relating both challenges and opportunities within modern Indian communities and economies).

37. *See* ROSSER, *supra* note 2, at 141-43.

III. NO BLANK CANVASES

Perhaps because of this uniquely cohesive and centralized land base (albeit layered with pre-existing individual and family use claims), Rosser strikes a relatively optimistic note about the potential for Navajo-led land reform. He does acknowledge, however, how difficult this reform work is.[38] In this section, I suggest that some degree of this difficulty may be due to the legacies and continued construction of federal interventions in these reservation spaces more than Rosser may admit. Although the federal government has made strides to reduce its involvement in tribal land use decisions, this effort to create space for tribal self-determination in property relations remains woefully incomplete.

In part, this result is practical. Again and again, it turns out to be much easier to build a bureaucratic system than to dismantle it, especially once decision-making processes and regulatory structures are embedded across landscapes (and people's jobs depend on these oversight systems, among other factors).[39] Indeed, this is part of the same story that Rosser told, in a different context, when he explored why the Navajo failed (or at least continue to struggle) to implement their efforts to devolve power from the Navajo central government to local chapters[40] and perhaps why the Navajo themselves continue to re-create their versions of heavily regulated, multi-layered land-management regimes even over tribally managed land use rights.[41] Land use practices become sticky simply through experience and tradition. Because federal land management traditions and regulations across reservation spaces can be just as sticky, this work of undoing federal oversight and influence is also messy.

Thus, even as we explore and applaud tribal reform efforts, there are still important ways in which we must recognize that the federal system continues to constrict the choices that tribes can make. Federal law may still get in the way even on the tribally owned trust lands that the Navajo enjoy in a uniquely cohesive fashion. This means the use-based models Rosser proposes[42] may hit limits based on federal court precedent that has limited or prohibited other tribally created use rights. For example, when the Chemehuevi Indian Tribe sought to allocate transferable and descendible use rights to individual tribal members on top of their tribal trust lands, along the lines of what Rosser imagines the Navajo might do in the future, the Ninth Circuit invalidated

38. *See id.* at 141- 42.
39. *See* Shoemaker, *supra* note 16, at 1542-43.
40. *See* ROSSER, *supra* note 2, at 127, 140.
41. *See id.* at 101-02.
42. *See id.* at 112-14.

those Chemehuevi "assignments," holding that the tribally defined interests looked too much like a fee simple conveyance of tribal land and thus were void without federal approval.[43] It may be that the formalization of more use rights as suggested in *A Nation Within* are distinguishable to the extent they affirm customary uses that have been longstanding already or are part of grazing-specific regimes that are otherwise distinct, but this is an uncertainty that continues to shape and potentially limit tribal choices.[44]

Likewise, in the United States, one of the signature reforms for reservation land flexibility is the 2012 Helping Expedite and Advance Responsible Tribal Home Ownership Act (HEARTH Act).[45] This Act is intended to facilitate greater self-determination over reservation lands, and many tribes—including the Navajo—have taken advantage of it.[46] The HEARTH Act is one example of the kind of federal reform often lauded for increasing reservation land use efficiency by reducing federal oversight of land use decisions, but it does come at some expense to tribal creativity and support.[47] The HEARTH Act gives tribes the right to opt into a system in which they can execute certain qualifying surface leases—only on tribally owned trust lands—without federal approval of each individual leasing decision.[48] But, as I have written about before, this tribal "autonomy" is recognized and permitted only to the extent the tribe agrees to create their tribal land systems that are "consistent" with pre-existing federal regulations.[49] This is not truly flexible self-determination or reimagination of tribal land-tenure systems at all. Rather, in important ways, it is deputizing tribal governments to do the federal government's work with uncertain financial support.

---

43. *See* Chemehuevi Indian Tribe v. Jewell, 767 F.3d 900, 909-10 (2014); Shoemaker, *supra* note 16, at 1560-61.

44. *See, e.g.*, ROSSER, *supra* note 2, at 152 (describing the longstanding system of descent through matrilineal lines); Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559, 1597-98 (2001) (outlining how "every inch of the Navajo reservation is claimed by someone as part of their customary use area," but subject to certain continuous use and stewardship obligations).

45. 25 U.S.C. § 415(h) (2012).

46. *See Approved HEARTH Act Regulations*, U.S. DEP'T OF THE INTERIOR, https://www.bia.gov/service/HEARTH-Act/approved-regulations [https://perma.cc/SW22-GT6E]. In fact, the HEARTH Act was derived from a prior Navajo-specific leasing law that authorized the Navajo specifically (and singularly) to execute certain non-mineral leases without the Secretary's approval if pursuant to tribal leasing regulations that the Secretary had approved. *See* Navajo Nation Trust Land Leasing Act of 2000, Pub. L. No. 106-568, Title XII, § 1202, 114 Stat. 2933 (2000) (codified at 25 U.S.C. § 415(e)).

47. *See* Shoemaker, *supra* note 16, at 1553.

48. *See* 25 U.S.C. § 415.

49. Shoemaker, *supra* note 16, at 1565.

From 2018 to 2019, I conducted research in Canada, trying to learn from alternative land governance regimes there. The United States and Canada share many common aspects of their colonial histories but have more recently taken vastly different approaches to Indigenous land tenure and Indigenous-led land reforms.[50] While Indigenous land tenure in the United States has remained largely immune to significant structural reform—tinkering, instead, as it has with approval flows in developments like the HEARTH Act—Canada is engaged in a much more robust and complex process of reconciliation and renegotiation of land- and governance-based relationships.[51] Part of the momentum in Canada is driven by the relatively recent recognition of the possibility of persistent Aboriginal titles, meaning at least some First Nations in Canada continue to have valid, unresolved, and unceded claims to territory and land that linger as a question over modern landscapes.[52] This possibility of remaining Indigenous authority and even ownership under Canadian law creates leverage for First Nations with unceded land claims and has literally brought the Canadian government to the table to resolve these claims. There is no similar urgency or appetite in the United States for negotiation. The rule in the United States is that any such historic land claims would likely not be cognizable, either because the federal government could unilaterally extinguish the claim or because a court would otherwise deem them just too "inherently disruptive" and ancient to be heard.[53] In Canada, conversely, many examples of active treaties, land claims, and other modern self-government negotiations are ongoing right now.[54] This *is* self-determination—or at least a flexible, creative space to generate new relations, however hard that continues to be.

---

50. *See* Jessica A. Shoemaker, *Embracing Disruption and Other Lessons from Canada*, THE REGUL. REV. (Mar. 29, 2021), https://www.theregreview.org/2021/03/29/shoemaker-embracing-disruption-canada/ [https://perma.cc/2FBL-7EDH]. For a comparison between the United States and Canada, see generally Malcolm Lavoie, *The Implications of Property as Self-government*, 70 UNIV. TORONTO L.J. 535 (2020).

51. *See* Shoemaker, *supra* note 50. *See generally* ANGELA CAMERON ET AL., CREATING INDIGENOUS PROPERTY: POWER, RIGHTS, AND RELATIONSHIPS (2020) (identifying how contemporary Indigenous conceptions of property are rooted in and informed by societally specific norms, meanings, and ethics).

52. *See* Shoemaker, *supra* note 50.

53. *Id.*; *see also* Kathryn Fort, *Disruption and Impossibility: The New Laches and the Unfortunate Resolution of the Modern Iroquois Land Claims*, 11 WYO. L. REV. 375, 396-97 (2011); Tee-Hit-Ton Indians v. United States, 348 U.S. 272, (1955) (holding that the United States did not owe any compensation under the Fifth Amendment for the taking of land in which the tribe had original Indian title).

54. *See generally Treaties and Agreements,* GOV'T OF CAN. (Jul. 30, 2020), https://www.rcaanc-cirnac.gc.ca/eng/1100100028574/1529354437231#chp4 [https://perma.cc/5AR5-EHYY]; Sari Graben, *Lessons for Indigenous Property Reform*, 47 U.B.C

Nevertheless, even with these advantages, it remains difficult to implement real change in Canada. For Canadian First Nations, one primary pathway for greater First Nation control over land choices—of the kind Rosser seeks in *A Nation Within*—is the First Nations Land Management Act (FNLMA).[55] The FNLMA, unlike the HEARTH Act, did not originate by federal legislation but rather flows from a government-to-government negotiated framework agreement entered into between Canada and an original consortium of thirteen First Nations. It also includes significantly more flexible space for Indigenous-led land reform. First Nations who opt into this FNLMA framework can re-imagine land tenure and governance within their reserves, including broad, flexible space—and funding—for First Nations to develop and implement wholly new land governance regimes of their own design and control.[56]

On its face, the FNLMA recognizes nearly carte blanche flexibility for First Nations to imagine and implement almost any new land tenure or land relation system, at least on their retained collective reserve lands.[57] The FNLMA has nothing like the consistency requirement of the HEARTH Act in the United States. And yet, here is the kicker: even with all this *de jure* legal space and opportunity, the reality on the ground is that many of the First Nation land codes enacted under the FNLMA look nearly identical to and do not deviate much, if at all, from the pre-existing (and overly restrictive) federal land systems that they were intended to replace.[58] Why is this? Why do First Nations elect, often, mostly to re-create existing systems rather than re-invent or re-imagine new relations?

Part of this speaks to the difficulty of land reform itself. But I also think it reminds us to think more deeply and carefully about the invisible, or at least more insidious, legal, and social structures that tend to keep tribal governments, even with apparent legal flexibility, "within the lines" of pre-

L. REV. 399, 403 (2014) (discussing "pressure on government to homogenize laws" in context of Nisga'a treaty).

55. First Nations Land Management Act, S.C. 1999, c. 24 (Can.); *see also* Framework Agreement on First Nation Land Management, Can.-First Nation, 1996, https://resourcecentre.wpenginepowered.com/wp-content/uploads/2018/11/Framework-Agreement-on-First-Nation-Land-Management-Dec-2018.pdf [https://perma.cc/6F8Q-8FL9].

56. *See generally* S.C. 1999, c. 24 (Can.).

57. *Id.*

58. *See* Shoemaker, *supra* note 50; *see also* Malcolm Lavoie & Moira Lavoie, *Land Regime Choice in Close-Knit Communities: The Case of the First Nations Land Management Act*, 54 OSGOODE HALL L.J. 559, 568 (2017) (Can.). For some overarching critiques of the FNLMA in that it merely "municipalizes" First Nation governments or makes them subservient to larger federal or provincial regimes, see generally SHALENE JOBIN & EMILY RIDDLE, A SPECIAL REPORT: THE RISE OF THE FIRST NATION LAND MANAGEMENT IN CANADA: A CRITICAL ANALYSIS (2019), https://yellowheadinstitute.org/wp-content/uploads/2019/09/fnlma-report.pdf [https://perma.cc/6U3U-GHHC].

existing property traditions. In the Canadian context, this includes factors like the need for First Nation land codes to speak to a non-Indian audience (not just in possible land transactions with off-reserve interests but also in the sense that a Canadian or provincial court will likely decide many disputes even under the First Nation's own code). In addition, the process by which these land codes must be adopted limit the space for really iterative and flexible lawmaking and codification. First Nations have a relatively short timeline, enforced by a funding deadline, to vote on and implement a new land code, without really sufficient space for the long, iterative process of rebuilding local land relations. Finally, there is also the fact that, although this is a negotiated agreement structure, it is the Canadian government that decides which First Nations get "development funds" to pursue these projects and this discretionary pursuit can result in significant practical power on the part of the federal government to direct which types of laws are pursued and which initial, path-marking examples lead the way for future decisions and actions.[59]

All of this is to say—by way of a long Canadian detour and example—that pre-existing land relations matter in any land reform project. The Navajo do not start on a blank canvas. There are no blank canvases. And the difficult work of property scholars, and the land reform leaders themselves, is to illuminate these pressure points, amplify flexible space where it exists, and to do the creative and difficult work of thinking outside these existing property boxes.

IV. IMAGINATION BEYOND THE RESERVATION

So, what now? The Navajo position is unique, not only compared to other tribes in the United States but also compared to other governments and groups. The Navajo have a distinct land history and status vis-à-vis other federally recognized Indian tribes in the United States, and as a tribal government, the Navajo Nation already operates within a uniquely complex landscape of mixed federal, state, and tribal authorities. Is there really anything to translate here? The answer has to be yes because the same core challenges of land reform and changing property logics repeat everywhere.

Every land reform project must respond to growing social and economic inequality and a changing climate, often via broken political processes. All land reform requires reconciling pre-existing land uses and land claims; juggling and building power over sometimes cumbersome institutions; and—maybe most importantly—making space to imagine, together, new relations.

59. *See* JOBIN & RIDDLE, *supra* note 58, at 6-7, 10-11; *see also* Lavoie & Lavoie, *supra* note 58, at 576, 581.

The Navajo can consider lessons from First Nations in Canada, just as we can collectively learn from numerous other groups who are also actively seeking to imagine and implement more just and sustainable land relations. For example, at this very moment, local communities in Scotland are working to buy land for shared community ownership under recent land reform legislation enacted there,[60] and rural collectives are striving to rebuild farmland commons arrangements through new community land trust models in the United States.[61] These groups, too, can learn from both the Navajo and Canadian First Nations.

Meanwhile, this foray into the land-reform dimensions of *A Nation Within* only begins to scratch the surface of the many property stories and issues contained in the text. For example, when Rosser details examples of historic Navajo land acquisitions, especially vis-à-vis the Hopi villages, as acquisition simply because the Navajo "put our feet on the ground and claimed it,"[62] I think of all the numerous other instances in property law when a state—*some state*—has to adjudicate competing land claims in order to decide which claim is valid, often with competing possessory claims. When Rosser explores the persistence of Navajo grazing rights within families over generations, even when permittees hold no formal ownership right under tribal or federal law but rather "view themselves as the de facto owners,"[63] I am reminded of the parallel problem of durable private grazing rights on public lands, where federal grazing rights holders also insist—sometimes violently—in the continuation of their family "rights" to those lands, even without actual legal ownership.[64] And, when Rosser details how Navajo courts decide contests over the reallocation of existing grazing rights, including the default tribal intestacy rule that "the most logical heir should receive land use rights,"[65] I wonder how much state intestacy law could learn from this Navajo strategy to avoid the over-fragmentation and underuse we

60. *See generally* Mike Danson & Kathryn A. Burnett, *Current Scottish Land Reform and Reclaiming the Commons: Building Community Resilience*, 21 PROGRESS IN DEV. STUD., 280 (2021) (U.K.) (examining keystone Scotland examples Scotland of small island enterprise, social development and collective community actions); MALCOLM COMBE ET AL., LAND REFORM IN SCOTLAND: HISTORY, LAW AND POLICY (SCOTLAND'S LAND) (2020) (delving into property and human rights issues which have been under-studied in relation to the Land Reform (Scotland) Act of 2016).

61. *See, e.g.*, Ian McSweeney & Darby Weaver, *Using Multiple Community-Based Land Trusts to Save Farmland*, SHELTER FORCE (Sept. 20, 2019), https://shelterforce.org/2019/09/20/using-multiple-community-based-land-trusts-to-save-farmland/ [https://perma.cc/YEW8-RQRP]; *Agrarian Commons*, AGRARIAN TRUST, https://www.agrariantrust.org/initiatives/agrarian-commons/ [https://perma.cc/BJ9H-W3LC].

62. ROSSER, *supra* note 2, at 35.

63. *Id.* at 152-53.

64. *See id.* at 152.

65. *Id.*

often see in off-reservation heirs property where the default rule, instead, is to compel the sharing of property rights equally among whole generations of heirs, regardless of actual relationships.[66]

Property system choices are choices and change is hard, but not impossible. The Navajo people have what they need to address these challenges and they can and should do so according to their collective choices, guided by tradition and adapting as they see fit. We should be humble about intruding and respectful in our gaze, but we should also all strive to learn along with these shared projects.

66. *See id.*