

# REFLECTIONS ON PLACE AND PEOPLE FROM WITHIN

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M. Alexander Pearl\*

## I. INTRODUCTION

To begin by saying that Professor Rosser's book, *A Nation Within: Navajo Land and Economic Development*,<sup>1</sup> is unique would be a disservice. Even the title itself fails to capture what the book is and represents. The titular language focuses on land and economy, but the reader learns so much more than that throughout the book.

This essay reflects on two aspects of Rosser's work. First, the work is carried by the idea of the Navajo Nation community and reservation as a *place*. My reactions to this place-based work are driven by the twin pillars of the importance of land and water to all Indigenous peoples and by the inherent value inuring in the representation of Indigenous history from that community. The very recent trend of Indigenous storytelling in art, film, literature, and other media demonstrates the beauty of our stories, their complexity, and the importance of those narratives being driven from within an Indigenous community.<sup>2</sup> This book's success—and the success of recent Indigenous artists—demonstrate that the stories of reservations must be told because they provide a fuller picture of history, while giving voice to long-invisible participants in historical events. Second, this essay presents a narrower and more focused consideration of the component of Rosser's work detailing the tough position for the Diné people and the Navajo Nation in the

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\* Enrolled citizen of the Chickasaw Nation; Professor of Law at the University of Oklahoma College of Law; Nationally recognized scholar in the fields of water law, climate change law and policy, Indigenous legal/social issues, and statutory interpretation.

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

2. In the last two years, two television series have been developed, written, and acted by predominantly Indigenous teams of artists. Both of them, *RESERVATION DOGS* (FX NETWORKS 2021) and *RUTHERFORD FALLS* (Universal Television 2021), have achieved mainstream success while securing near unanimous approval from the Indian Country (which is much harder to obtain than the commercial success part, frankly).

context of water rights and resources. Emerging from the Dakota Access Protests in 2016,<sup>3</sup> the phrase “water is life” became a symbol for the importance of water to Indigenous peoples at the Standing Rock Reservation<sup>4</sup> and beyond. As Rosser points out, the Navajo Nation stood with Standing Rock—as did many Indigenous peoples and Tribal Nations across the globe.<sup>5</sup> Of course, the Diné people have their own relationship, history, and culture accompanying water—which Rosser carefully describes<sup>6</sup>—but the Navajo Nation, as a government, must make choices regarding the legal effect of rights related to water resources. This challenge in particular is a fascinating one to focus upon. Making it all the more compelling is the speed at which the sun is setting on our collective ability to avoid multi-faceted climate disasters that will change and could devastate communities like the Navajo Nation.

## II. STORIES AND PLACES

Rarely is there ever *one* story about an event. Even rarer is when all the participants and characters involved in an event agree on what happened, why, and what it meant. This fact—the variation of perspective and intention—is exactly why every Indigenous group needs their stories told. Ideally, those stories come from the community rather than from a place external to that place and people. For centuries, the stories about us came from anthropologists, federal agents, and other individuals outside the communities. To this very point, Rosser references the essential work by Vine Deloria, Jr., *Custer Died for Your Sins: An Indian Manifesto*, and particularly the chapter entitled “Anthropologists and Other Friends” to demonstrate the problem of outsiders doing work in Indian Country.<sup>7</sup> The anthropologists’ work criticized by Deloria is, in essence, exploitative of the Native community and derives benefits only for the “friend.”<sup>8</sup> Efforts and

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3. See Rebecca Hersher, *Key Moments in the Dakota Access Pipeline Fight*, NPR (Feb. 22, 2017, 4:28 PM), <https://npr.org/sections/thetwo-way/2017/02/22/514988040/key-moments-in-the-dakota-access-pipeline-fight> [<https://perma.cc/ZG73-WUVY>]; see also Daniel A. Medina, ‘*Water Is Life*’: A Look Inside the Dakota Access Pipeline Protesters’ Camp, NBC NEWS (Dec. 3, 2016), <https://www.nbcnews.com/storyline/dakota-pipeline-protests/water-life-look-inside-dakota-access-pipeline-protesters-camp-n691481> [<https://perma.cc/44P7-UV73>].

4. *Standing Rock is Everywhere*, 6397 NEWS, <https://6397news.com/blogs/stories/standing-rock> [<https://perma.cc/78B5-Q6MS>].

5. ROSSER, *supra* note 1, at 74.

6. *Id.* at 184-93.

7. ROSSER, *supra* note 1, at xi.

8. See VINE DELORIA, JR., *CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO* 78-100 (1969).

acts divorced from the people and the place commence as outsiders and end as strangers, all the while serving no purpose for the people.

In his introspective introduction, Rosser carefully and clearly characterizes his own status as a Bilagáana,<sup>9</sup> but also someone who has deep place-based connections to the Navajo Nation and Diné communities.<sup>10</sup> I can cite no source for this, but I would guess that most tribal communities in the United States have a word in their indigenous language that describes people, not from their community. One of our words in Chickasaw is *naahollo*,<sup>11</sup> and like with the Diné language, its organic meaning is likely not complimentary. However, Rosser does not try to twist himself into something he is not. Instead, he acknowledges the “challenge to figure out the roles [he] could and should play, as well as those [he] should not.”<sup>12</sup> There is both beauty and success in his honesty and approach. The work he has done, and this book, amplifies rather than speaks for the place he is from and the people to whom he is connected. Rosser is telling the story from within.

Stories are not important simply for therapeutic reasons. Beyond the emotional validation that comes from hearing *your story* told, there are cognitive benefits to the narrative as well. Narratives often make facts and data points make sense to us as human beings.<sup>13</sup> Taking a moment to think about that statement creates the realization that stories are incredibly powerful.<sup>14</sup> Given that sheer power, who tells them and what version is told becomes all the more critical. Indigenous peoples have stories about big moments like creation, culture, and ways to act. However, there are also

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9. White person, in Diné. See Definition of Bilagáana, NAVAJO WORD OF THE DAY (July 5, 2012), <https://navajowotd.com/word/bilagaana/> [<https://perma.cc/N6BH-TDAS>].

10. ROSSER, *supra* note 1, at xi-xiii.

11. White person, in Chickasaw. See Joshua Don Hinson, *Chi Ka Sha Goes to Washington: Chickasaw Narratives on the NMAI*, 29 AM. INDIAN Q. 491, 492 (2005).

12. ROSSER, *supra* note 1, at xiii.

13. See ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 110-11 (2002); see also Marshall Grossman, *The Subject of Narrative and the Rhetoric of the Self*, 18 PAPERS ON LANGUAGE AND LITERATURE 398, 398 (1982); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2412-15 (1989); Louis J. Goldberg, *Expanding the Narrative: The Grand Compulsion of a Storytelling Species*, 6 J. CONTEMP. LEGAL ISSUES 281, 281-82 (1995); Lorie M. Graham & Stephen M. McJohn, *Cognition, Law, Stories*, 10 MINN. J.L. SCI. & TECH. 255, 258 (2009); Lea B. Vaughn, *Feeling at Home: Law, Cognitive Science, and Narrative*, 43 MCGEORGE L. REV. 999, 1008-09 (2012); Samuel J. Levine, *Halacha and Aggada: Translating Robert Cover's Nomos and Narrative*, 1998 UTAH L. REV. 465, 466-69 (1998).

14. See Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2225 (1989) (citing Robert M. Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U. L. REV. 179, 180 (1985)); see also NASSIM NICHOLAS TALEB, *THE BLACK SWAN: THE IMPACT OF THE HIGHLY IMPROBABLE* xxvii (2007).

other, more banal, narratives about Navajo homesite leasing procedures and the selection of grazing lands for use.<sup>15</sup> These stories are more closely held, often not publicized at all. Moreover, the lessons and knowledge from these narratives cannot be retained and utilized if they never existed in the first place. Rosser's book tells these stories—the big and the small, the cultural and the bureaucratic—from within and for the community to ensure that they affect and impact the future.

The regular telling of stories about Indigenous people by outsiders has amounted to many misunderstandings about us. Those early stories about us, like the ones involved in the early Marshall Trilogy,<sup>16</sup> ushered in manifest harm. Once the narrative of tribal people as uncivilized and incapable of having property rights, a social order, laws, or the capacity for self-determination became accepted as true, the legal conclusion concerning our status as “that of a ward to [a] guardian”<sup>17</sup> was all but obvious. Stories are powerful. Stories have consequences. What Rosser is doing through his entire book—but particularly in the earlier chapters—is re-telling the story of the Navajo Nation from within in order to counterbalance the predominant artificial mythology. Only through this type of work grounded in the community, for their well-being, and in pursuit of an improved future can those old narratives start to fade.

On that measure, the book is certainly successful. Detailing the proper record and correcting the myriad of errors from the Navajo viewpoint is an achievement. But the book, like stories, does more than just correct the record. Rosser's later chapters provide a launchpad for writing new stories and diagrams of how the Diné people can do that for themselves, rather than hoping a particularly friendly anthropologist happens to visit.<sup>18</sup>

It is easy to read about the past (and some of the present) in Rosser's book and feel deflated or without hope. Anger might be the more immediate reaction, but where the stories may lead and the capacity for things to improve should be the next reaction. When reading about the efforts of the Navajo Nation today relating to sacred sites and water resources, I focus on the fact that the stories are still being written, with the Diné people playing a much larger role in their construction.

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15. See ROSSER, *supra* note 1, at 141-61.

16. See *Marshall Trilogy*, UNIV. OF ALASKA FAIRBANKS: DEP'T OF TRIBAL GOVERNANCE, <https://uaf.edu/tribal/academics/112/unit-1/marshalltrilogy.php> [<https://perma.cc/Q3XM-LEEV>].

17. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

18. See ROSSER, *supra* note 1, at 214.

### III. WATER IS LIFE

The later chapters of Rosser's book focus on the present and the future. In the chapter "Sovereign Assertions," Rosser examines three areas where the Navajo Nation actively applies its self-determining ability beyond the reservation's borders.<sup>19</sup> If the book had started with this chapter, it would still make analytical sense. For example, Rosser concisely works through the major doctrinal aspects of water law and Indian water rights to detail the legal position of the tribe and its options.<sup>20</sup> However, this chapter's focus on the contemporary problem of water scarcity holds new meaning in light of the earlier description of the land and water's role in Diné identity, community, culture, and belief. Framed as a chapter focusing on the extension of sovereignty beyond tribal boundaries, it is much more than that.

This attempt by the Navajo Nation is essential to the defense of tribal culture and community, and necessary because the problems facing Indigenous communities do not stop at the reservation's border. It is essential because of the land and water's close and intangible role in Diné communities, identity, and belief. Without the water or land, those core pillars of Diné existence may falter. Without those core pillars, the Diné people, or at least their sense of place in the universe, is similarly at risk. In comparison, for most Americans, the threat of drought may affect whether the lawn gets watered or where to move to avoid extreme heat. Now, I am the last person to understate the risk and disruption that the occurring Climate Crisis will have on people, but there is absolutely an asymmetrical effect on Indigenous peoples.<sup>21</sup> Losing the connection to the land is much more devastating when the stories, beliefs, and identities that define a people are embedded within the mountains and waters. Addressing the problem of water resource scarcity and the protection of sacred sites is essential and demands the assertion of sovereignty beyond their borders.

Extra-territorial sovereignty is also necessary. Inherent in the problem of water scarcity, exacerbated by the here-and-now Climate Crisis, is the commons-based nature of the problem. Water—and a habitable climate for humans—are common pool resources whose destruction asymmetrically affects Indigenous peoples. The Navajo Nation does not exist in a vacuum unaffected by the growing population of surrounding cities like Phoenix or major political players like Los Angeles or Las Vegas. The Navajo Nation

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19. *See id.* at 183-206.

20. *See id.* at 183-93.

21. *See, e.g.,* M. Alexander Pearl, *Human Rights, Indigenous Peoples, and the Global Climate Crisis*, 53 WAKE FOREST L. REV. 713, 727-31, 734 (2018) (providing concrete examples of Climate Crisis that is felt only by Indigenous peoples).

could do more than its fair share to conserve water and move to net zero energy consumption and carbon offsets, but it does little good if their neighbors near and far fail to share the burden. Thus, using its sovereignty as a sword rather than a shield to compel non-Indian conduct that slows water consumption, demands conservation, or hastens the arrival of renewable energy sources is something everyone benefits from. In this sense, the Navajo Nation, along with all the other Tribal Nations of the United States, can be the vanguard in compelling more immediate action through aggressive assertions of sovereignty beyond their borders.

However, despite the possible benefits and the essential and necessary nature of acting, it is not so easy. In the context of water resources, Rosser identifies challenges from within the Navajo Nation that make solutions difficult to develop.<sup>22</sup> Truly, these are wicked problems. After explaining the federal reserved rights doctrine established in *United States v. Winters*,<sup>23</sup> the quantification methodology outlined in *Arizona v. California*,<sup>24</sup> and the process of legislated water settlements,<sup>25</sup> Rosser identifies the typical justification for taking the route of congressional water settlements. While *Winters*-based rights *seem* like strong legal positions in court, Rosser identifies several caveats. First, litigation is expensive.<sup>26</sup> Second, the McCarren Amendment undoes the certainty of federal court jurisdiction, which is certainly more favorable than a tribe prevailing in a state court proceeding.<sup>27</sup> Third, water rights litigation takes years or decades.<sup>28</sup> Fourth, and in my view most importantly, the continuing apex strength of *Winters* should not be so casually assumed.<sup>29</sup> Rosser acknowledges this fact in detailing the history of how settled expectations of non-Indians, under the *City of Sherrill v. Oneida Indian Nation* decision, have affected otherwise bedrock principles of Federal Indian Law.<sup>30</sup> Finally, a court victory, which quantifies the amount of water a tribe is owed, does not actually give the tribe access to that water, given the likely necessity of infrastructure construction.<sup>31</sup> Therefore, while the tribe has a strong legal position on paper,

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22. See ROSSER, *supra* note 1, at 193.

23. See *id.* at 185-86 (discussing *U.S. v. Winters*, 207 U.S. 564 (1907)).

24. See *id.* at 186 (examining *Arizona v. California*, 373 U.S. 546 (1963)).

25. See *id.* at 184-85, 189-93.

26. See *id.* at 189 (quoting Robert T. Anderson, *Indigenous Rights to Water & Environmental Protection*, 53 HARV. C.R.-C.L. L. REV. 337, 379 (2018)).

27. See *id.*

28. See *id.*

29. See *id.* at 189-92.

30. *Id.* (discussing *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005)).

31. See *id.* at 188, 191-92.

what it really wants is “wet water,”<sup>32</sup> which can be more easily obtained through legislated water settlements via Congress. In a water settlement act, as Rosser points out, non-Indian communities and states get certainty in the form of tribal nations’ waiver of rights under *Winters* in exchange for a sum certain of water and the funds necessary to bring it to the reservation.<sup>33</sup> Like all settlements, compromises must be made.

However, those very compromises lay the groundwork for critiques from Navajo scholars. Rosser’s quote from Andrew Curley’s work puts it best: “Diné opponents of the settlement did not misunderstand western water law; they challenge[d] its legitimacy.”<sup>34</sup> The Navajo scholars from this chapter reflect a desire to decolonize the law,<sup>35</sup> despite *Winters* and its progeny being seen as victories for Indian Country. Even though *Winters* resulted in good law for the tribes,<sup>36</sup> the law still treats water as a commodity and an ordinary article of property to be transacted. This is itself inconsistent with fundamental principles of what it means to be Diné. That inconsistency negates the possibility of supporting the “right” legal choice—to settle via congressional legislation—even though the Navajo Nation simply must exist within the United States’ political and legal context where everything is commodified. To close this insightful chapter, Rosser states a hard truth (especially for elected Tribal officials): “[s]ecuring those [water] rights—moving beyond theoretical rights—likely will require that the Navajo Nation accept the need to compromise in ways not acceptable to all tribal members.”<sup>37</sup> That, however, is precisely what sovereignty is.

#### IV. CONCLUSION

Several years ago, I asked Professor Rosser to review an article of mine. He kindly did so and provided helpful feedback throughout. Regarding my conclusion to that paper, he suggested (correctly) that the tone and content departed from the substantive body of the paper. Candidly, the as-drafted conclusion was sharper, angry perhaps, because the article examined the problematic nature of how the law typically treats common-pool resources like water. While pointing this out, he also confessed that he sometimes did so as well, letting loose at the end of an article to really speak plainly. This conclusion continues in that tradition.

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32. *Id.* at 192-93.

33. *Id.* at 189.

34. *Id.* at 190 (quoting Andrew Curley, “Our *Winters*’ Rights”: *Challenging Colonial Water Laws*, 19 GLOB. ENV’T POL. 57, 75 (2019)).

35. *See id.* at 183, 185, 188-91.

36. *See generally* *Winters v. United States*, 207 U.S. 564 (1908).

37. ROSSER, *supra* note 1, at 193.

One of the aspects of Rosser's book that is so rare in Indian Country, and as Rosser notes among legal scholars in particular, is the honesty and even-handedness concerning the failings and successes of tribal governmental officials. Rosser writes about the anonymous Indian law professor who joked that a law scholar has never said anything bad about a tribe.<sup>38</sup> Rosser also then connects that strong hesitancy to create fodder for a public relations frenzy that may result from an acknowledgment that tribal governments are imperfect.<sup>39</sup> Of course, what is at stake in an honest assessment of the areas of improvement within tribal governments is more than just bad press. The Supreme Court and Congress will be paying attention to how tribal nations function, thereby transforming a bad look in the news to another potential act of judicial divestiture by the Court or another era of termination-focused legislation from Congress.<sup>40</sup> Law scholars are acutely aware of that possibility. After all, the memory of *Oliphant v. Suquamish Indian Tribe* is not so old, and the real-world consequences are exactly that—real.<sup>41</sup> For example, the fact that tribal nations and their court systems lack the inherent criminal jurisdictional authority over non-Indians has likely affected the number of missing and murdered Indigenous women and persons.<sup>42</sup> But, Rosser properly refers to noted Diné scholar, Raymond Orr, and the idea that “scholarship should engage in the messiness of life and politics on Indian reservations.”<sup>43</sup> To that point, I wholeheartedly agree, with the caveat that the messiness should be described from within, just as Orr and Rosser have done in their respective works.

For anyone working within the Navajo Nation, this book simply requires reading. It is careful, comprehensive, and includes traditional Diné sources and more traditional academic legal research. The retelling of historical events from the Navajo perspective is, by itself, a significant contribution. Navajo narratives about that history must make their way into the mainstream understanding of history and the only way that happens is by amplifying their existence, which this book does. Rosser's more specific focus on the issue of water is deeply relevant at this moment in the United States' history,

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38. *Id.* at 11.

39. *See id.*

40. *See* Samuel E. Ennis, *Implicit Divestiture and the Supreme Court's (Re)Construction of the Indian Canons*, 35 VT. L. REV. 623, 625-27 (2011); Matthew L.M. Fletcher, *The Supreme Court's Indian Problem*, 59 HASTINGS L.J. 579, 580, 593-94 (2008).

41. *See generally* *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

42. *See* Sarah Deer & Elizabeth Ann Kronk Warner, *Raping Indian Country*, 38 COLUM. J. OF GENDER & L. 31, 42, 54, 78-80 (2020).

43. ROSSER, *supra* note 1, at 12 (citing RAYMOND I. ORR, RESERVATION POLITICS: HISTORICAL TRAUMA, ECONOMIC DEVELOPMENT, AND INTRATRIBAL CONFLICT 40 (2017)).



Navajo history, and that of all Indigenous peoples. The book carefully lays out the challenges based on the choice between decolonizing the law and using it to protect what is left. I suspect that those challenges will exist in Native communities across the globe. Knowing that these challenges likely exist in most Native communities gives them a roadmap for resolution—or at least, a plan for advanced discussion with the hopes of resolution. Again, that in and of itself is a significant contribution. Finally, in reflecting on what a monumental accomplishment this work is, I cannot help but think that every tribal nation needs its own book or books as the one Rosser has written for the Navajo Nation.