Innovative sovereignty: California tribes use of the nonprofit corporation

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January 2026

Abstract:

Native American tribes in California are uniquely disadvantaged as a result of historical circumstances set in motion during California's statehood. Most tribes are largely landless with scant hope of federal recognition. Innovative efforts using a nonprofit organizational form—the nonprofit land trust—constitutes a new mechanism for regaining access to their traditional land. We explain the history of California Indian tribes' particular plight and the successful strategies being used in the land-back movement. We suggest that this approach to acquiring land is superior to existing strategies involving the federal government. Future research could examine how applicable this strategy is globally.

Keywords: Indigenous, Native American, Indian, land back, nonprofit organization, corporation, land trust

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I. Introduction

Indian law scholarship and legal practice tends to focus primarily on federally recognized tribes. A recent search on the Lexis Law Journals database for "unrecognized Indian tribes" returned 10 results dating back to 1983. A search for "recognized Indian tribes" returned 1,143 results. When there is attention paid to unrecognized tribes, it is usually regarding an effort to achieve recognition by the United States government (Canby, 2020). But federal recognition, however ardently desired by many tribes, has not solved problems as diverse as economic development (e.g., Akee, 2019), crime (e.g., Crepelle, 2022), environmental damage and cultural practices (Carpenter and Riley, 2019).

We therefore ask whether there are other strategies beyond federal recognition that tribes can access to achieve such organizational goals as access to traditional tribal land, autonomy, and economic opportunity? To answer this, we analyze a case study from the emerging "land back" movement in California which combines philanthropy, state funding, and land trusts to return land to tribal hands. We focus on the Big Sur Land Trust ("BSLT"), one of several similar nonprofits, because its five projects, in various stages of completion, provide a broad picture of these efforts.

We find that instead of taking on the costly, time consuming and improbable road to recognition, the readily accessible and flexible nonprofit corporate form offers a quick and cost-effective way to attain land and autonomy that even federal recognition does not confer. It is important to note that lands allocated to recognized tribes are actually held in trust by the federal government, which gives the Secretary of the Interior power and discretion over land-use decisions. By contrast, nonprofit corporations are formed at the state level and face only a light touch regulatory regime by states.

> Tribes may be able to obtain benefits when their land is held in trust or in restricted fee status, but one disadvantage of either status could be that the Secretary of the Interior's approval is required, with some exceptions, to develop those lands. For example, with respect to energy resource development, some of BIA's actions and decisions include reviewing and approving surface and subsurface leases, drilling permits, rights-of-way, cultural resources surveys, and environmental studies and surveys. Energy and natural resource projects also may require approval from other federal agencies. Tribes and individual tribal citizens that own their land in fee simple status are not subject to these statutory and regulatory requirements to the same extent (Murray, 2025).

In addition, nonprofit corporations can serve as an alternative form of "sovereignty" for Indian tribes. The flexible and well-developed governance features of nonprofits can support the collective action and decision-making of Indian communities but also allow for a wide variety of economic activities that can enhance outcomes for tribal members, Although, in California, unrecognized tribes may not conduct gaming operations, tribal members can achieve access to traditional land for plant materials and cultural practices (Carpenter and Riley, 2022), which currently is at the discretion of public and private landowners.

While land trusts have existed for decades to serve environmental goals, research on their use as a mechanism for tribes is almost nonexistent. We explain here that tribes in California are already establishing innovative forms of sovereignty using nonprofit corporations to restore ownership and control of traditional territory. An analysis of the strengths and weaknesses of this approach may help *recognized* tribes in California and elsewhere. Moreover, this approach could be considered for the global need for innovative organizational designs by indigenous communities facing dramatic cultural, environmental and economic challenges.

Below, we provide some historical and legal context for how the problem of unrecognized tribes emerged with extreme circumstances in California, and the historical uses of the *for-profit* corporation which led to devastating losses of reservation land among recognized tribes outside California. We then describe the nature of nonprofit corporations as potential instruments to

establish "innovative sovereignty" using our case study to illustrate innovative organizational efforts by unrecognized tribes in Monterey County, California. We conclude by discussing the potential pathway for future efforts by Indian tribes.

II. Background: Why California Indians are unique

From its foundation as a state, California has been a setting as hostile to Indians as can be imagined. As questions of Indian citizenship were being debated at the time of California's statehood in the mid-19th century, California Indians presented a legal test case. In the process, California Indians lost citizenship and rights, and in turn, land. Efforts to regain land have taken the form of formal recognition, but this process is extremely fraught.

A. Loss of Citizenship and Rights

When California was still a constituent part of Mexico, Indians were considered full citizens. This status did not prevent their exploitation by Spanish colonists. As Rawls (1984, p. 4-5) notes, the Spanish "crown maintained that the Indians of the New World were free men…free to move about and own property…. [Yet] throughout Spanish colonial history the Indians remained in a kind of twilight zone between freedom and slavery."

Nevertheless, under the Treaty of Guadalupe Hidalgo in 1848, by which California was ceded to the United States, all Mexican citizens were entitled to become citizens of their new land. But the new state of California, after a bitter internal debate at its constitutional convention, went in another direction, denying Indians citizenship, the right to vote, and access to the legal system, all with tragic consequences. "Now largely excluded from access to the state court system and protection under state laws, California Indians became the victims of a wide variety of crimes at the hands of non-Indians." (Madley, 2016, p. 162). This new regime was, as well, built upon the

legacy of forced labor and abuse that the Spanish Missions had imposed on Indians (Rawls, 1984; Berkey and Williams, 2019).

B. Loss of Land

With rights and citizenship denied, a series of steps engineered by politicians at the state and federal level deprived Indians of millions of acres of traditional land. "The day after Congress admitted California to the Union, John C. Frémont entered the US Senate and proposed ten bills aimed at unilaterally transferring vast tracts of California Indian land to non-Indians and to the new state government," (Madley, 2016, p. 163). This was known to politicians at the time to be a violation of Indian rights. Quoting prominent California Senator John C. Frémont, "Spanish law clearly and absolutely secured to Indians fixed rights of property in the lands they occupy, beyond what is admitted by this Government in its relations with its own domestic tribes, therefore *some particular provision will be necessary to divest them of these rights,"* (Madley, 2016, p. 163, emphasis added).

The Supreme Court has long recognized the right of Indian tribes to *occupy,* although not own outright, the lands they held prior to "discovery," i.e., when Europeans arrived. In *Johnson & Graham's Lessee v. McIntosh* (1823), Indian nations are recognized as

> the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion…. This opinion conforms precisely to the principle which has been supposed to be recognised [*sic*] by all European governments, from the first settlement of America. The absolute ultimate title has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring.

In turn, first the British Crown, and then the new federal government, claimed the absolute right to negotiate any transfer of the new lands through the negotiation of treaties. Thus, "fee title" has been recognized as vested in the United States while the right of occupancy and possession

rested with Indian tribes. It was on this basis that the reservation system was established although negotiations could hardly be said to have fair. Nevertheless, the Supreme Court reaffirmed recently in *Oneida Nation v. County of Oneida (2018)*:

> …a right of occupancy in the Indian tribes was nevertheless recognized... Indian title, recognized to be only a right of occupancy, was extinguishable only by the United States. The Federal Government took early steps to deal with the Indians through treaty, the principal purpose often being to recognize and guarantee the rights of Indians to specified areas of land.

Despite this legal status, a dramatic dispossession of California Indians from their aboriginal title into the hands of the new state and federal governments took place, with "negotiations" of "eighteen treaties with no fewer than 119 California tribes, in which Indian leaders were said to have surrendered almost all of their land in return for promises of protection, clothing, blankets, tools, food, education, and nineteen federal reservations," (Madley, 2016, p. 165). Negotiations were conducted at gunpoint and after a period of attacks by white settlers. "Heavily armed regular troops and, in some cases, state militiamen and artillery, enhanced the commissioners' negotiating power. White violence was also a major consideration in some Indian leaders' decision-making," (Madley, 2016, p. 165).

In addition to the violent nature of negotiations, California politicians also excluded the relevant tribes and their legitimate leaders. California treaties were "arranged (but not negotiated) … with individuals who were very likely not literate, not necessarily leaders, and from groups that may or may not have been collectivities…. Some of these treaties included within the scope of territorial cessions groups such as the Muwekma Ohlone and the Esselen, which were not [even] signatories," (Field, 1999, p. 193, 196-197).

In theory the treaty process was a legitimate mechanism to enable the new United States to negotiate with what it recognized were the aboriginal occupiers of the North American continent.

But the proposed outcome in California was dramatic: what was once more than 100 million acres in Indian possession would be whittled down to 7.5 million acres (Madley, 2016). Had at least this acreage been secure in the hands of the tribes, it might have formed the basis of a sustainable future for California's Indians.

But the treaties came under immediate and intense political attack from California's Anglo population whose "greed and racism" fed a hunger for access to potentially valuable Gold Rush-era Indian lands (Madley, 2016). The U.S. Senate then refused to ratify the treaties "clearing the way for a different and far more damaging Indian policy in the state," (Field, 1999, p. 197): a new federal reservation system was imposed, reducing what would have been the treaty lands to 1/60th of that originally promised. Even those lands, called rancherias, were precariously held by Indians who were then subject to a decade of genocidal violence. "Through a succession of laws, legislators slowly denied California Indians membership in the body politic until they became landless noncitizens, with few legal rights and almost no legal control over their own bodies. Indians became, for many Anglo-Americans, nonhumans. This legal exclusion of California Indians from California society was a crucial enabler of mass murder," (Laverty, 2010, p. 171).

The precarity of Indians' rights made their right to occupation of land tenuous. "The reservations were to be created not on reduced fragments of old Indian territory or lands newly titled to Indian peoples but on selected rather small areas of federal, often military, land. The federal government retained title to and full control over such terrain... [A] complete lack of funding and unrelenting hostility from white settlers forced the closing of all but one [of the seven such 'military reservations']…by the mid-1860s," (Field, 1999, p. 197). "The effect of the unratified treaties and subsequent federal legislation was that a large majority of California Indians were both landless and homeless by the late nineteenth century," (Berkey & Williams, p. 313).

C. Attempts to regain land through federal recognition

Little has happened in the 150 years since to remedy this abysmal historical record of displacement and destruction. It was perhaps ironic, but California's Indians, landless and forced to integrate into the surrounding White and increasingly urban society, were largely passed by when the General Allotment Act of 1887, commonly known as the Dawes Act, implemented the now infamous "allotment policy." The Act, promoted by some who sincerely believed it would improve conditions for Indians, turned out, instead, to be "a systematic attempt to disenfranchise reservation Indians across the western states by privatizing their communal land base…." but, "[i]n the main, California natives did not possess land to allot," (Field, 1999, p. 197).

The New Deal under Roosevelt ushered in a new effort to repair the damage done by the allotment policy. Again, the result was controversial. The Indian Reorganization Act of 1934 ("IRA") enabled some California tribes to secure federal recognition leading to ratified treaties and newly granted reservation lands. The IRA was controversial among Indians, with dozens of tribes, including the Navajo, rejecting its application outright. Popularly known as the "Indian New Deal," the statute had its roots in emerging support for "corporatist" solutions of the post-World War I era. It mandated that tribes adopt a governance structure at odds with Indian culture and traditions. According to Indian scholar Rebecca Robbins (1992, p. 87, 94-95), "[b]y 1938, 189 Indian nations (encompassing some 130,000 people) acquiesced to reorganization, while seventy-seven (representing 90,000) rejected it outright, usually as a gross violation of their treaty-guaranteed sovereignty….Worst of all, in some ways, the IRA decreed an electoral form of 'democratic majority rule' which was and still is structurally antithetical to the consensual form of decision making and selection of leadership integral to most indigenous traditions."

Tribes not recognized as of 1934, however, continued to face a steep uphill battle to gain recognition. And some California tribes which were recognized under the 1934 Act had their status altered during the "termination" phase of federal Indian policy after World War II. Forty-two reservations and rancherias were terminated over two decades starting in the early 1950s. (Goldberg and Champagne, 1996). This lack of access to land inhibits cultural practices and economic opportunity. Today's dozens of unrecognized California tribes are at the mercy of numerous government agencies when they seek access to publicly owned lands for even limited cultural purposes, including the California Department of Parks and Recreation, the U.S. Forest Service, the Bureau of Land Management, the National Park Service not to mention county and municipal agencies.

Understandably, then, California's unrecognized tribes still value highly the sovereignty that would come with federal recognition. Thus, tribes can, and do, still apply for federal recognition nearly a century after the IRA was put in place. But achieving recognition is highly unlikely and slow, according to the record for tribes in California and beyond. Today, two California tribes have "petitions in process" at the Bureau of Indian Affairs (BIA) Office of Federal Acknowledgement ("OFA"), while two more are listed as planning to supplement their petitions. Five California tribes have had their petitions denied. Only one California tribe is listed as successfully acknowledged in the last half century - the Death Valley Timbi Sha Shoshone Band – in 1983 (BIA, 2025). Outside of California there are 11 tribes that have active "petitions in process," one tribe that is requesting a re-petition, 29 tribes that have had petitions denied, and 17 that have had their petitions acknowledged (BIA, 2025).

Thus, attaining recognition today has proved to be all but impossible (Field, 2003). As one California tribe, the Muwekma Ohlone (2025), who were denied acknowledgement in 2002, describes their plight:

> Descendants of the Verona Band of Alameda County, the Muwekma Ohlone tribe has been present in the Bay Area for 10,000+ years. But for the last 45 years, The Muwekma Ohlone tribe along with [countless] other legitimate tribes who to this day are forgotten, marginalized, and still unrecognized. They are denied Federal recognition due to influential factors like corruption, greed, and systematic exclusion.

As a result, today in California, there are still "more people of Native American/Alaska Native heritage than any other state in the Country," (Judicial Branch of California). "[T]here are approximately 110 federally recognized Indian tribes" but [t]here are also about 81 groups seeking recognition," (California Tribal Court-State Forum).

III. Limitations of For-Profit Corporations: *Affiliated Ute* re-examined

Today the *Affiliated Utes* case is taught in American law schools' core securities law class on fraud. It is all but forgotten as a tragedy of the Northern Utes of the Colorado Plateau, despite a U.S. Supreme Court ruling many years later that found White bankers, among others, had engineered a fraud to steal Indian land (Affiliated Ute Citizens, 1972). But the case, which decimated Ute land holdings, continues to define the current plight of Indian tribes. Federal policy imposed a for-profit corporate structure on Indian reservations, converting collective ownership to shareholder ownership. Once this privatization was completed, parcels of reservation land could be sold, or stolen, by a federally-appointed trustee.

A. Rationale for a New Organizational Form

The backdrop is a perhaps well-intentioned but terribly misguided effort by the Eisenhower-era federal government to assimilate American Indians into White society. The pathway was what

was known as “termination” – i.e., terminating the designation of Indians as Indians and thus ending U.S. government supervision over reservation lands. The termination policy continued a longstanding effort to separate the Indian population from their ancestral lands. In the late 19th century, the Dawes Plan to “allot” reservation land into individual property. Parker M. Nielson, the attorney who argued on behalf of the Utes in the Supreme Court, notes as much, explaining termination as “an extension of the relocation policy, which attempted to force Indians off their reservations,” (Nielson, 1982, p. 53). Indeed, the allotment policy reduced some 4.4 million acres of communal Ute land “essential to the Indian way of life” to 350,000 acres (Nielson, 1982).

> The assumption of the allotment policy, that some magic in individual property ownership would prove an educational, civilizing factor, had proven an illusion. The policy destroyed the Ute economy, which was based on communal resources, as it did every other Indian group in the country subjected to the policy. The removal of the control over Indian land as trustee led to an “orgy of exploitation” never equaled in the United States. (Nielson, 1982, p. 33)

While some of these “allotted” lands were consolidated back into the collective hands of the Utes after the passage of the New Deal era Indian Reorganization Act, this was once again undone by the “termination” process that unfolded in the early 1950s.

B. The For-Profit Corporation as a Vehicle for Theft of Indian Reservation Land

The mechanism for “termination” was the for-profit corporation. Reservation lands were placed into the hands of for-profit corporations set up to manage them. In the case of the Utes, a key step was the somewhat arbitrary and certainly distasteful divide between so-called “mixed-blood” and “full-blood” Utes. The former included any member of the three bands that had made up the Ute tribe that allegedly fell below 51% Indian ancestry.

These “mixed-blood” Utes were organized under the Ute Termination Act into the Affiliated Ute Citizens of the State of Utah (AUCU) in 1956 (Nielson, 1982). The AUCU then took over responsibility for the assets (most importantly, mineral rich land) held jointly by the two Indian

groups. Three for-profit corporations were incorporated—two for grazing, and the Ute Development Corporation ("UDC") for the development of mineral rights and other valuable assets. Then, a leading Utah bank, First Security, was engaged as the corporations' transfer agent, which held UDC stock in bank vaults to transfer to terminated Utes their share of the assets. Crucially, shares in the corporations would be freely transferable once in the hands of individual AUCU mixed-blood (terminated) members.

Objections by some in the AUCU that "converting" the land "to stock in corporations… would destroy the Ute culture" were ignored (Nielson, 1982). Given that there were only a few hundred adult mixed-blood Utes at the time such genuine democratic engagement should not have been problematic. The Supreme Court opinion in *Affiliated Ute* noted there were 490 "mixed-blood" Utes (the preferred term of these Indians was "terminated Utes" as that group did not reject its membership in the Ute tribe and technically all modern-day Utes were, in fact, mixed-blood) and 1314 "full-bloods" (again, to use the Court's term). Fewer than 50 terminated Utes voted to approve the formation of the UDC. In a dissenting opinion Justice William O. Douglas made note of this fact:

> The Ute Distribution Corp. was not chartered according to the guidelines mandated by Congress. Rather than following the requirement for a majority vote of the mixed-blood members, it was created by the five board members of Affiliated Ute. Approval of its articles of incorporation was by a vote of only 42 to 5 -- far short of the majority of the 490 mixed-blood Utes required by 25 U.S.C. § 677e.

As a result, Justice Douglas explained, the original intent of retaining *collective* control over the valuable mineral rights on tribal land – what he called the "group interest in the mineral rights" - gave way in favor of freely transferable individual property. Thus, the fate of "over one million acres of land containing oil, natural gas, coal, oil shale, and exotic minerals, the extent of which

had never been determined, plus the grazing range that was the backbone of the reservation's economy" was sealed (Nielson, 1982).

C. Perpetration of the Fraud

Each terminated Ute received ten shares for a total issuance of 4900 shares. The shares were never actually physically distributed to the Indians. Instead, they were held at First Security. Thus, the Indians never got the benefit of reading the legend on the shares that indicated their value was uncertain and that they should not sell the shares but instead "should be retained and preserved for the benefit of the shareholder and his family" (*Affiliated Ute*). Many of the Utes viewed the shares as personal property, as legally they were, and ignored advice to hold on to the shares that came from AUCU leadership. While the UDC imposed a right of first refusal on share sales to other Utes (mixed and full blood), this failed to stop resales to outsiders at bargain basement prices.

The Utes' shares were traded away in illicit transactions with non-Indians, facilitated by First Security Bank, at *de minimis* values (in some cases, in exchange for run-down used cars). The shares sold by tribe members were priced between $300 and $700 per share and then were traded among non-Indians in a secondary market at prices ranging from $500 to $700 per share. At oral argument in *Affiliated Ute,* the petitioners estimated that the actual value was at least $28,000 per share based on the potential for successful oil drilling. Overall, the scheme resulted in 1387 shares of the original 4900 ending up in the hands of non-Indians (*Affiliated Ute*). While the plaintiffs in *Affiliated Ute* were entitled to money damages, they could not get their shares in the UDC back. As of 1986, "only 160 [of the original 490] had retained ownership of UDC stock," (*Hackford v. Babbitt*). This meant that former tribe members, although undoubtedly Indian, "lost

the accompanying right to participate in the joint management of the indivisible assets [i.e., the oil and gas rights] and to share in the proceeds," (*Hackford v. Babbitt*).

While elected directors of the AUCU approved the fateful 1958 plan that led to the fraudulent stock sales, the record made it clear that the board had no real understanding of the plan's effect. Further, there was no serious participation by the terminated Ute Indian membership of the AUCU. The new structure was mainly designed by non-Indians, with significant input from bankers and BIA representatives, and minimal involvement from Utes. The two associated range corporations (one for sheep- and one for cattle grazing) were incorporated by their non-Indian attorney *two weeks before* the AUCU members' approval of the plan. This same lawyer also selected First Security Bank to act as the corporations' transfer agent, a vital intermediary in UDC stock transactions. Two First Security employees perpetrated the securities fraud at issue in the case.

IV. The Nonprofit Corporation as an Alternative Organizational Form

Despite this sordid history of the manipulation of the Indian population via both the allotment and then the termination process, many Indian tribes continue to assert that the Federal government should play a role in assisting tribes to resolve their social and economic problems. Some aspects of this effort – the access to education, health care, etc. that so many non-Indians enjoy – certainly make sense. Tribes like the Oneida see a restoration of the pre-termination "trust" status over Indian land by the federal government as a solution (ICT News, 2008; Kiel, 2019). And many non-recognized tribes, such as the Muwekma Ohlone, have expended enormous time and resources to attain federal recognition (KALW, 2022; Wuwekma Ohlone Tribe, 2025). In fact, the terminated Utes recently filed a petition for a restoration of their once-

recognized status (Affiliated Ute Citizens, 2025). However, we turn now to discussion of an alternative form of what we call "innovative sovereignty" – the nonprofit corporation.

A. The Corporation in Historical Context

The dominant economic paradigm assumes that corporations exist to maximize profit. However, from a wider historical perspective, this presents a distorted picture. The "corporation" first emerged and, for a very long time, existed to serve quasi-governmental purposes. These entities were established, in essence, as arms of the sovereign which thus granted charters to carry out activities too complex or costly for a central government to undertake alone (Magnuson, 2023). This also enabled the formation of institutions that might not have been congruent with the political nature of governments, such as universities and monasteries. In some cases, in the medieval era, towns and guilds were, in essence, self-governing corporate bodies. In other cases, corporations that were certainly formed to make a profit, such as the East India Company and the Hudson's Bay Company, exercised sovereign powers, including collection of taxes, establishment of court systems and police forces, and even engaging in military activity (Erikson, 2014).

In the early United States, corporations, whether charitable or otherwise, struggled to establish their private independent status. It took a Supreme Court case in 1819 to decide that a corporation first chartered to establish Dartmouth College was what we recognize today as a "private" corporation as opposed to a public corporation (i.e., a unit of government). Well into the 19th century promoters of a corporate enterprise needed special recognition by a state legislature and were mandated to carry out a specific, often publicly valuable purpose, such as building a toll road, a canal or a bridge. What we accept today as the for-profit capitalist corporation was not widely used until the rise of the railroads in the *post bellum* era and this

clarity was a result of a century of social, political and legal conflict, much of it occurring in California (Diamond, 2012; Horwitz 1986).

Today, advocates of corporate social responsibility still attempt to bend the behavior of for-profit corporations to that older norm (Diamond, 2019). In parallel, there has been a significant rise in the formation of alternatives to the for-profit form, including nonprofit mutual benefit, public benefit, religious, hospital and cooperative corporations.

In this context, the existence of "nonprofit" corporations seems somewhat less out of place. There is a longstanding historical foundation for such alternative forms. Today, a growing literature seeks to understand the underlying logic of these firms. It aims to resolve the apparently puzzling questions that the existence of nonprofits pose: if for-profit corporations are intended to maximize profits for their shareholders, what do nonprofit firms maximize? And for whom do they engage in this activity? This literature identifies certain features of nonprofits that turn out to be advantageous for Indian tribes seeking a return of their traditional lands, including governance flexibility, tax exemption and the non-distribution constraint.

B. Nonprofit Organizations amidst a For-Profit Paradigm

Economists place profit-maximizing firms at the core of economic models. And while profit-maximization is something of an approximation, it is nevertheless a useful assumption for understanding firm behavior. The existence of nonprofits therefore seems surprising, and the dominance of nonprofits in such industries as health care and education, not to mention in the burgeoning "land back" movement, makes this phenomenon economically significant. In seeking a logic for nonprofits amidst a for-profit paradigm, scholars have identified several features of nonprofits that differ from for-profits, each of which could account for the existence of nonprofits (Steinberg, 1986).

First, nonprofits must specify a mission statement, and this mission often states the rationale for deviating from profit-maximization. For example, a nonprofit might pursue a social goal instead of profit maximization. Religious organizations operate schools, not to make a profit but to practice their religion (James, 1987). In other cases, a nonprofit might provide free services to clients who cannot afford to pay, so output maximization would be a more relevant goal than profit-maximization. However, because profit-maximization is thought to drive managerial efficiency, the profit-deviating goals of nonprofits imply that nonprofits are less efficient than for-profit firms (Weisbrod, 1988). Some scholars challenge this notion, modeling nonprofits as utility-maximizing firms in which donors are owners (Kuan, 2001) or as profit-maximizing firms in which donors are customers (Kuan and Thornton, 2022).

A second feature of nonprofits is their tax-exempt status which perhaps follows logically from a society-enhancing mission that is incompatible with profit. On the other hand, nonprofits compete with for-profits in a variety of industries, such as nursing homes and hospitals, and exemption from certain taxes, like property taxes, could confer a competitive advantage. Hence, the charge that nonprofits are for-profits in disguise (Weisbrod, 1988). In models where nonprofits are utility- or profit-maximizing, there are no profits, so tax-exemptions do not come into play. Instead, the tax deductibility of charitable donations is shown to be a tax break for the wealthy (Kuan, 2001).

The third feature that distinguishes nonprofits from for-profits is the “non-distribution of profit constraint,” which disallows the allocation of profits to residual claimants. Note that this does not preclude generating profits, another reason for the for-profit-in-disguise charge that nonprofits can be maximizing net-revenues (Lakdawalla and Philipson, 2006; Steinberg, 1986) and then consuming those as employee perks (Castaneda, Garen, & Thornton, 2007). Another

interpretation of the non-distribution constraint suggests that it serves as a signal of quality: by foregoing financial gain, a nonprofit can signal to customers that it has no incentive to erode quality (Weisbrod, 1988; Ben-Ner & Van Hoomissen, 1991). Because nonprofits often compete or co-exist with for-profits, this choice of nonprofit form is a strategy rather than a necessity. This non-distribution constraint should, arguably, be a powerful incentive motivating Indian tribes to use this corporate form. This ensures continuity of the lands and other assets that the entity might acquire and would also incentivize members or owners to engage in long term collective planning and decision-making.

C. Classifying Explanations

As scholars try to explain nonprofits using their distinguishing features, they are challenged by the bewildering diversity of nonprofit firms and industries. One example of an attempt to classify nonprofits, by legal scholar Henry Hansmann (1980), organizes firms by their revenue sources (donations versus fees) and management (members or paid staff) In this approach, then, the Audubon Society would be an example of a member nonprofit that relies on donations; art museums are run by a professional staff but rely on donations; and country clubs are member organizations supported by member fees while nursing homes are run by paid staff and are supported by client fees. In addition, the Internal Revenue Service has an extensive classification system that includes charitable organizations, religious organizations, private foundations, political organizations, and member organizations (Internal Revenue Service, 2025).

But governance is perhaps a more useful way to categorize nonprofits than revenue source because ownership, control, and incentives drive firm behavior. Nonprofits can be governed by consumers, as exemplified by performing arts organizations whose top customers also control the organization (Kuan, 2001). Other nonprofits are two-sided markets serving clients on one-side

and donors on the other (Kuan and Thornton, 2022). And member nonprofits are owned and operated by their members (Diamond and Kuan, 2018). The available legal frameworks allow for substantial flexibility in the choice of governance type. Delaware has long been the dominant locus of for-profit incorporation. Its statutes, however, also allow for nonprofits which are simply called "nonstock" corporations (Jacobson, 1995). As noted above, California has specific statutory language for several different nonprofit models.

D. Tribal Land Setting Highlights the Value of Nonprofit Features

Our empirical setting of tribal land casts the various features of nonprofit organizations and governance in a new light. Each of the three features of nonprofits addresses a problem that tribes have encountered in maintaining ownership and control of territory. The mission statement can articulate the collective purpose of the tribe in owning and stewarding land for future generations. Rather than being interpreted as an economically counter-productive approach in need of privatization, in the nonprofit sector collective action is the norm. In addition, our case studies, below, show that such nonprofits have access to finance.

Next, the tax-exempt status of nonprofits prevents the loss of land through taxation. This is significant in light of the loss of allotments due to taxation and the effect that tax obligations have in shifting tribal members into paid work (Akee, 2020). And finally, the non-distribution constraint, which the nonprofit literature has interpreted in several ways, directly addresses the problem of fraudulent distribution of assets away from tribal ownership. Under a nonprofit organizational form, any distribution of assets to outside claimants would be forbidden.

Thus, in this setting, the distinguishing features of the nonprofit organizational form come together to address the needs of tribal land ownership.

V. Case Study: Monterey County's Big Sur Land Trust (BSLT)

To illustrate the practice of returning land to tribal entities, we focus on the work of the Big Sur Land Trust (BSLT) in partnership with Indian tribes located in the same region. BSLT was formed as a California nonprofit corporation in 1978. It states that its "mission is to inspire love of land across generations, conservation of our unique Monterey County landscapes, and access to outdoor experiences for all," (Big Sur Land Trust, 2025a). The trust engages in several different transaction types, including the negotiation of conservation easements, which limit development on land that remains in private hands, as well as outright purchases of land titles.

In turn, the Trust has worked closely with several unacknowledged California tribes, including the Esselen Tribe of Monterey County, the Ohlone Costanoan Esselen Nation ("OCEN"), the Rumsen Ohlone Tribal Community, and the Confederation of Ohlone People. The Esselen and OCEN have both a tribal council and a nonprofit entity that work with the BSLT. We describe in greater detail one representative transaction between the Esselen and the BSLT as well as several follow on and ongoing projects. BSLT views the formation of a nonprofit corporation by a tribe as essential to completing land transfers or working with tribes to manage properties subject to a conservation easement (BSLT interview).

A. Case Study: The Esselen Tribe of Monterey County

The story of the Esselen people of what is present-day Monterey County is emblematic of the experience of California Indians we told above. The Esselen claim a continuous lineage stretching back more than 6,000 years, originally as far north as the San Francisco Bay Area before being limited to the central coast by the Ohlone (Esselen Tribe, 2025). Carbon dating suggests "that Esselen territory was largely occupied by about 4500 B.P., if not earlier…. there is no reason to believe that these inhabitants were anyone other than the Esselen and their

immediate ancestors," (Breschini and Haversat, 2025). Despite this long history, the Esselen barely survived the successive waves of Spanish, Mexican and American intrusion into their lands in the Big Sur region. The arrival of the Spanish explorer Vizcaino in 1602,

> was the beginning of a transformation of the Esselen culture, as the people were gathered up and taken into three missions: Mission Carmel, San Antonio Mission and the Soledad Mission…. The missionaries were here to save the souls of the heathens, as they called us. In this way they hoped to take the land for the Spanish king, Carlos III. (Esselen Tribe, 2025)

The missions were formally secularized after the Mexican War of Independence displaced the Spanish, but that did not lead to a return of the surrounding land to those Esselen who had been fortunate enough to survive the forced labor of the Mission period. In theory, secularization should have led to the return of land to the Esselen. Instead, "[v]enal public officials in charge of the distribution granted the most valuable lands to themselves and their relatives. The secularization processes, it was called, was so restrictive that few ex-mission Indians were eligible for the distributed lands," (Native American Heritage Commission, 2025). As the Esselen themselves explain:

> the Mexican Government gave all the former lands of the natives to their soldiers and they would become known as "Rancho's." These were massive land grants that encompassed all of the native villages of the Esselen and Rumsen tribes. All of the remaining natives were released by the Mexicans to fend for themselves, their culture totally disrupted. (Esselen Tribe, 2025)

The lives of the landless and homeless Esselen were now so precarious that they became, somewhat notoriously, one of the first California tribes to be declared "extinct" by the noted Berkeley anthropologist Alfred Kroeber. In fact, the Esselen survived and made nearly continuous efforts as early as 1846 to secure recognition from the new United States. Today, this effort is viewed by the Esselen as, "in part, a direct response to the history of erasure and dispossession they have experienced. Bumper stickers read: 'Esselen Nation is not Extinct,' as if in direct dialogue with Alfred Kroeber himself (Laverty, 2010).

In 2020, however, the Esselen took a different approach. Relying on a nonprofit corporation they had formed two years earlier, they took possession, in fee simple, of a 1,999-acre ranch in a transaction structured by the tribe, the Big Sur Land Trust and the Western Rivers Conservancy ("WRC"). Known since its acquisition, in 1950 by a Swedish farmer, as the Rancho Aguila, its transfer enabled the first direct ownership of land by the Esselen in over 250 years. Its prior owner, Alex Adler, had passed away in 2004. His family put it up for sale for $15 million, well beyond the means of the Esselen tribe. Eventually a sale was closed with the Western Rivers Conservancy at a price of $4.35 million and the WRC announced a plan to sell the land to the U.S. Forest Service. That led to concern that the property would not be properly maintained due to budget cuts. The Esselen Tribe then worked with the Big Sur Land Trust to negotiate a purchase. Funding was secured from the State of California's Natural Resources Agency which, in turn, was the beneficiary of funds raised in a sale of bonds by the State, approved by voters with the passage of Proposition 68 in 2012.

The transaction met the goals of all of the stakeholders involved. Prop. 68 raised more than $4 billion from bond investors to fund parks, environmental projects, water infrastructure projects and flood protection measures throughout California (Legislative Analyst's Office, 2025). The WRC had a direct interest in protecting the Little Sur River:

> In 2020, thanks to funding from the California Natural Resources Agency, we conserved the near-pristine 1,199-acre Eagle Peak Rancheria property by conveying the lands to the Esselen Tribe of Monterey County. The property sits at the edge of the Los Padres National Forest and includes roughly a mile of the Little Sur River and majestic stands of old-growth redwood trees. Our efforts preserved important upland grasslands, oak woodlands and chaparral and madrone forest and ensured permanent habitat connectivity between the ocean and the crest of the Santa Lucia Mountains, all in an area of critical importance to coastal wildlife.

A similar win motivated the BLST, whose staff explained that this transfer was a landmark, the first "land back" effort they had been able to negotiate with and on behalf of a California Indian

tribe. They emphasized the importance of the ability of the tribe to organize a nonprofit corporate entity that could take possession of property in fee simple, something that is not legally possible if the tribe is not formally organized (BLST interview).

Perhaps what is most notable is that the diverse interests of these stakeholders match the natural values and attributes of the aboriginal peoples of California, its Indian population. There is a shared concern among these organizations for the complex ecosystem where these properties sit. In the words of the President of the Esselen Tribe's nonprofit corporation, Tom Little Bear Nason:

> It is beyond words for us, the highest honor. The land is the most important thing to us. It is our homeland, the creation story of our lives. We are so elated and grateful. We're the original stewards of the land. Now we're returned. We are going to conserve it and pass it on to our children and grandchildren and beyond. Getting this land back gives privacy to do our ceremonies. It gives us space and the ability to continue our culture without further interruption. This is forever, and in perpetuity, that we can hold on to our culture and our values. (Rogers, 2020)

B. Follow on transactions

The success of the Adler ranch sale has led to other transactions – some still not yet closed, but in each case involving nonprofit corporations. We describe these briefly here.

1. Pico Blanco Boy Scout Camp

Since 1948, Pico Blanco has been owned by the Boy Scouts, who used it as a summer camp. The camp closed down in 2016 and is being sold. The Esselen Tribe of Monterey County has now taken ownership of 327 acres of its forestland, while two other nonprofits will acquire the buildings and remaining land to run camping programs (Rubin, 2022).

The Western Rivers Conservancy secured a $1.4 million grant from the Wildlife Conservation Board and then purchased the 327 acres. In turn, the WRC conveyed the land to the Esselen. As

with the earlier Adler ranch property, the Pico Blanco land held meaning to both the WRC and the tribe. In its press release the WRC (2025) noted:

> This property holds significant sacred and cultural meaning for the Tribe, as it is located at the base of a white limestone-topped mountain they call Pixchi (or Pico Blanco), which the Esselen Tribe considers the "Center of the Esselen World" and is where the Tribe's creation story began. Ecologically, the land features 1.3 miles of the Little Sur River, which provides critical habitat for numerous imperiled species, as well as one of the largest stands of old-growth redwoods on the Central Coast. The Wildlife Conservation Board (WCB) provided funding for the purchase of the property.

Esselen President Tom Little Bear Nason agreed: "The Pico Blanco area, defined by the Little Sur River, is the spiritual, cultural and geographical center for the Esselen Tribe. To have the opportunity for our tribal members to reconnect with more of the river and these ancient redwoods fulfills a deeply meaningful part of our mission," (Rogers, 2020).

The recognition that an overlapping mission helps cement these transactions is consistent with our discussion above of the relevance of what have long been understood as defining features of nonprofit corporations. The WRC's President Sue Doroff explains that they work with tribes in various settings due their shared vision for land conservation: "Tribes all have different capacities. But the fact is, the care of rivers and the critters that depend on them is central to Native American tribes. We have the same vision for the long-term management of landscape as tribes. So for us, Native American tribes are natural partners," (Simons, 2021). Simons (2021) further highlights the importance of an organizational solution for land transfers, noting that Axel Adler had long considered selling his property to the Esselen tribe, but the nonprofit had not yet formed when he died in 2004.

2. Basin Ranch

BSLT has already acquired this 5,105-acre property and has a memorandum of understanding with the Esselen Tribe to develop a co-management plan for the property (Big Sur Land Trust,

2023). Funding for the nearly $9 million purchase came from the California Department of Fish and Game, the California Wildlife Conservation Board, and philanthropic donors. The property contains vital habitat for threatened species and serves as a wildlife corridor and important watershed. Conservation and stewardship are a key factor for public support for the purchase of the land, which prevents development. The public agencies also promoted and encouraged BSLT's partnership with the Esselen tribe, who traditionally used Basin Ranch as a travel route. The tribe's traditional ecological knowledge is expected to improve the land's climate resilience. Additional funds are being raised to support the management of the property.

3. Hiss Parcel Project

An 84-acre parcel adjacent to the Monterey Regional Airport was purchased by BSLT in April 2024. The acquisition prevents development in an environmentally significant location – a wildlife corridor, habitat, and watershed. The goal is restoration as well as return of the property to the Ohlone Costanoan-Esselen Nation (OCEN). Shared mission values once again cemented the basis for the transaction. Leaders of the two organizations shared their perspectives when the deal was announced:

> BSLT CEO/President Jeannette Tuitele-Lewis added, "This land also holds cultural values of significant importance to the Ohlone/Costanoan-Esselen Nation (OCEN), and together we are committed to a shared goal of eventual ancestral land return. Big Sur Land Trust looks forward to collaborating with OCEN on a conservation management and restoration plan for the long-term stewardship of the property."
>
> Louise J. Miranda Ramirez, OCEN's Tribal Chairwoman added, "With this land my hope is for my people to learn how to protect the Earth and to reclaim what was taken from them, their homeland. I hope to provide a place for my people to spend as much time together as possible to build back their families, their culture, language, songs, and stories."

The State Coastal Conservancy provided $2.75 million and the Arthur L. and Elaine V. Johnson Foundation and the Barnet J. Segal Charitable Trust provided additional funds. In addition, the California Council of Land Trusts provided a one-year grant that can be used to pay OCEN for

their participation in meetings as well as for closing costs, escrow, and for BSLT work on developing a stewardship plan. The map below shows the location of the parcel in orange. It demonstrates how central to heavily developed and populated land are the ancestral lands of California's Indians.

4. Ferrini Ranch

The 866-acre Ferrini Ranch, located east of the Hiss Parcel near the famed Laguna Seca race track and the former Fort Ord, was initially approved for 185 luxury homes "which would threaten critical wildlife corridors and water resources, and increase wildfire risk," (Big Sur Land Trust, 2025b). A major housing development has already been established to the east of the ranch overlooking the massive agricultural acreage of the Salinas Valley. However, litigation succeeded in preserving this environmentally important parcel from development, leading to a sale well below market value. Originally listed for $35 million, the owners agreed to a $15 million price tag for the nonprofits. It was helpful that the family that had long "owned" the parcel, although home builders, were reportedly sympathetic to conservation goals (Schmalz, 2024).

The parcel "will connect and expand over 20,000 acres of protected natural areas, including Fort Ord National Monument, enhancing a critical wildlife corridor and habitat crossing, protecting iconic views at the gateway of the Monterey Peninsula, while reducing wildfire risks and safeguarding the region's natural and cultural heritage," (Trust for Public Land and Big Sur Land Trust, 2024).

The Trust for Public Land ("TPL"), a nationwide nonprofit formed in 1972, is working with the BSLT on the transaction. The TPL purchased the property, funded initially with a bridge loan from the Community Foundation of Santa Cruz County. But a $15.5 million funding gap remains, which TPL and BSLT are working to raise over the next two years. In the interim, BSLT

will manage the land including working with a multi-tribal group to engage Indians in the project. This property is of particular historical significance “as it lies along an ancient trade route for several Indigenous tribes, which was later traversed by Spanish explorers, including the de Anza Expedition. Its protection not only safeguards critical habitats but also honors the cultural heritage of the region,” (Trust for Public Land and Big Sur Land Trust, 2024).

VI. Discussion and Conclusion

The BSLT’s various efforts to transfer private land into tribal ownership illustrates an innovative mechanism, a land trust organized as a nonprofit corporation, to transfer ownership to a tribal nonprofit corporation. The tribal nonprofit can then take advantage of the range of distinctive governance and financial features of that organizational form to achieve its goals. The case study also illustrates the use of state funding and philanthropic funds that support specific transactions highlighting the impact of complimentary values of the various stakeholders.

If this model takes on greater momentum across California’s unrecognized tribes and beyond, there is a range of additional sources of capital. The National Oceanic and Atmospheric Agency (NOAA) has a National Climate Challenge Grant program to promote climate resilience, flood management, and fire mitigation. The grant program emphasizes engagement with indigenous tribes. The Esselen Tribe of Monterey County has received funding from this program.

At the state level the Strategic Growth Council provides grant funding for capacity building and organizational infrastructure and awarded the Esselen Tribe of Monterey County $200,000 to build administrative capacity. California State Parks is also working to create co-management plans and currently has a memorandum of understanding (MOU) in place with the Esselen Tribe of Monterey County. Statewide, 17 tribes have co-management agreements for land stewardship.

Also, the Department of Conservation's Wildlife Conservation Board makes funds available for Advancement Projects for restoration or acquisition of land.

A recent California bond sale, approved by voters in 2024 as Proposition 4, raised $10 billion for climate resilience, water, and natural resource management programs. It includes funding for a "Tribal Nature-Based Solutions Grant Program" that "will support tribes in reacquiring ancestral land, addressing climate change's impact on their communities, and protecting the environment's biodiversity," (Native American Heritage Commission, 2023).

Private funding sources are also recognizing the need for administrative capacity of tribal recipients of land parcels. The Wildlands Conservancy owns the 14,000-acre Rana Creek Ranch and has an agreement with the Esselen Tribe that includes office space and homes for tribal members. Similarly, the California Council of Land Trusts has a grant program for ongoing management capacity-building for tribes and project-advancement funding.

The foundational feature of the BSLT case study, of course, is the relationship with Indian tribes. There are no federally recognized tribes in Monterey County, so the BSLT explained to us that, initially, they reached out to county officials to identify local tribal partners (BSLT interview). It was critical to the "land back" process we describe here that a corporate entity was formed to negotiate the transactions and to take title. As we noted, the Esselen Tribe and the OCEN both incorporated nonprofits as well as maintaining traditional tribal councils. As a result, these tribes have now regained access to thousands of acres of traditional land from which they had once been violently evicted.

Future research could examine the complementary investments being made to support capacity-building for the Indian land back movement, including training of tribal members in the

formation and governance of nonprofit corporations, i.e., business education. More research is also needed on the nature of what we think of as “innovative sovereignty” and the degree to which tribes can replicate the consensus governance they lose through the for-profit corporate structure of the Affiliated Utes. And finally, the need for indigenous autonomy and rights is global. Additional research could study boundary conditions for other settings where this approach to indigenous sovereignty might succeed.

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