Saad eí Data: Formalizing the Indigenous Data Sovereignty Movement Within the Navajo National Legal System, A Comparison to the Māori's Data Governance Model [Note]

SAAD EÍ DATA: FORMALIZING THE INDIGENOUS DATA SOVEREIGNTY MOVEMENT WITHIN THE NAVAJO NATION LEGAL SYSTEM, A COMPARISON TO THE MĀORI'S DATA GOVERNANCE MODEL

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* *J.D. Candidate 2024, University of Arizona James E. Rogers College of Law. Ya'át'ééh (Hello), I am Táchii'nii (Red Running into Water clan) and born for Kinyaa'áanii (Towering House clan). My maternal grandparent is Ma'iideeshgiiszhnii (Coyote Pass clan). My paternal grandparent is Tótsohnii (Big Water Clan). I am from Pinon, AZ. I am Diné (Navajo).* *Special thanks to everyone who helped me throughout this process from my family, friends, Professor Rebecca Tsosie, Scott Kirker, Guy Forte, Professor Marcelo Rodríguez, Professor Robert Hershey, Professor Heather Whiteman Runs Him, Professor Stephanie Carroll, the Collaboratory for Indigenous Data Governance, and countless others for all your guidance and advice.*

ABSTRACT

This Note attempts to determine how tribal governments such as the Navajo Nation can exercise greater control over and protect their Nation's data from external entities. Tribal Nations or Indigenous Nations can exercise their political and cultural sovereignty by utilizing both Indigenous Data Sovereignty (IDSov) and Indigenous Data Governance (IDGov). This Note will examine the Māori's application of IDSov within their own culturally-specific IDGov framework. Then, there will be an overview of the existing mechanisms available within the Navajo Nation legal system that govern data and the fundamental principles embedded in the culture of the Diné (Navajo) people. Finally, this Note will discuss recommendations that the Navajo Nation can incorporate into its legal system using the Māori's example of its own data governance model and tools as a template. Overall, the goal of this Note is to demonstrate the legal mechanisms available to the Navajo Nation to implement its own set of data sovereignty principles aligning with its own traditional values, similar to the Māori in Aotearoa (New Zealand).

I. INTRODUCTION

"Data is the new land,"[1] said Peter-Lucas Jones,[2] associating the theft of Indigenous land with the rising danger of non-Indigenous entities misappropriating and profiting from Indigenous data.[3] Equating Indigenous data, which has become

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[1] ITU News, *How AI is Helping Revitalize Indigenous Languages*, UN SPECIALIZED AGENCY FOR ICTS, (Aug. 9, 2022), https://www.itu.int/hub/2022/08/ai-indigenous-languages-maori-te-reo/.

[2] Peter-Lucas Jones is the Chief Executive Officer of Te Hiku Media, a non-profit media organization. *Id.*

[3] Indigenous data, throughout this Note, will be discussed in the context of Indigenous Data Sovereignty (IDSov) and Indigenous Data Governance (IDGov), as well as the Native Nation's own definition of data. *See infra* notes 16, 18.

"a global currency, a valuable asset, and a source of power,"[4] to land illustrates the imperative need for Native Nations to create and enact laws that protect their inherent sovereignty and people. Otherwise, like land, their data will be commodified and subject to the control of external entities.

Both the Navajo[5] and the Māori[6] believe that land cannot be owned because their people belong to the land, not the other way around.[7] Each Nation's respective treaty with the country in which it is located—Naal Tsoos Saní (Treaty of 1868) for the Navajo and the Te Tiriti o Waitangi (1840 Treaty of Waitangi) for the Māori—subjected each Nation to a high degree of external control by its country's government.[8] The governments of the United States and New Zealand encroached upon and diminished the Navajo and Māori's lands through settlement.[9] The diminishment of their lands eroded their political and cultural sovereignty.[10] Despite these obstacles, the Navajo and Māori managed to retain a semblance of sovereignty over their lands and their people.[11]

Due to the increasing advancements in technology such as the internet and artificial intelligence (AI),[12] the need for Native Nations to "require governance of

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[4] STEPHANIE CARROLL RAINIE ET AL., POLICY BRIEF: INDIGENOUS DATA SOVEREIGNTY IN THE UNITED STATES, NATIVE NATIONS INST. 1 (2017), https://nnigovernance.arizona.edu/sites/nnigovernance.arizona.edu/files/resources/Policy%2520Brief%2520Indigenous%2520Data%2520Sovereignty%2520in%2520the%2520United%2520States.pdf.

[5] The Navajo or Diné (the people) are a federally-recognized tribe located on a land base that extends over northeastern Arizona, southeastern Utah, and northwestern New Mexico. The Navajo Nation consists of 110 local governmental units called chapters, governed by elected community members. RAYMOND D. AUSTIN, NAVAJO COURTS AND NAVAJO COMMON LAW: A TRADITION OF TRIBAL SELF-GOVERNANCE 2, 17 (2009) [hereinafter AUSTIN, NAVAJO COURTS].

[6] The Māori or tangata whenua (people of the land) are East Polynesians that settled in New Zealand, structuring themselves in iwis (tribes) and hapū (clans). *See* ATHOLL ANDERSON ET AL., TANGATA WHENUA: A HISTORY 49, 88–89, 91–92 (2015).

[7] DINÉ POL'Y INST., LAND REFORM IN THE NAVAJO NATION: POSSIBILITIES OF RENEWAL FOR OUR PEOPLE 8 (2018), https://www.dinecollege.edu/wp-content/uploads/2020/06/Land-Reform-In-Navajo-Nation.pdf; Mere Whaanga, *Story: Māori Land Court – Te Kōti Whenua – From Tribal to Individual Ownership, 1840–1862*, TE ARA: ENCYCLOPEDIA N.Z. (June 20, 2012), https://teara.govt.nz/en/maori-land-court-te-koti-whenua/page-1; *see also* ANDERSON ET AL., *supra* note 6, at 93, 189.

[8] DINÉ POL'Y INST., *supra* note 7, at 9; ANDERSON ET AL., *supra* note 6, at 194.

[9] *See* ANDERSON ET AL., *supra* note 6, at 194. *See generally* DINÉ POL'Y INST., *supra* note 7, at 5.

[10] *See* DINÉ POL'Y INST., *supra* note 7, at 6; Whaanga, *supra* note 7.

[11] *See* DINÉ POL'Y INST., *supra* note 7, at 6; Whaanga, *supra* note 7.

[12] See generally Ian Falefuafua Tapu & Terina Kamailelauli'i Fa'agau, *A New Age Indigenous Instrument: Artificial Intelligence & Its Potential for (De)colonialized Data*, 57 HARV. C.R.-C.L. L. REV. 715 (2022) for an overview of how IDSov principles might be used to mitigate and guide the use of AI in the court system.

data *and* data for governance,"[13] especially over data collection, storage, digitization,[14] and sharing, is even more vital than before. The Māori exercise a greater degree of control through its establishment of a regulatory framework that incorporated essential cultural principles to govern its Nation's data.[15] The Navajo Nation and other Indigenous Nations should follow suit. This idea is at the very foundation of Indigenous Data Governance (IDGov),[16] which is an "activating mechanism"[17] needed to realize Indigenous Data Sovereignty (IDSov).[18]

This Note will attempt to determine how tribal governments such as the Navajo Nation can exercise greater control over and protect their Nation's data from external entities, exercising their political and cultural sovereignty by utilizing IDSov and IDGov.[19] Part II will first examine the development of the IDSov movement and IDGov mechanisms. Part III will outline the Māori's application of IDSov within their own culturally-specific IDGov framework. Part IV will then consider the existing mechanisms available within the Navajo Nation legal system that govern data and the fundamental cultural principles embedded in the lifeway of Navajos. Part V will discuss recommendations that the Navajo Nation can incorporate into its legal system using the Māori's data governance model and tools as a template. Overall, the goal of this Note is to demonstrate the available legal mechanisms for the Navajo Nation to implement its own set of data sovereignty principles aligning with its own traditional values, like the Māori.

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[13] Maggie Walter & Stephanie Russo Carroll, *Indigenous Data Sovereignty, Governance and the Link to Indigenous Policy*, *in* INDIGENOUS DATA SOVEREIGNTY AND POLICY 1, 15 (Maggie Walter et al. eds., 2021).

[14] *See* Wend Wendland & Jessyca Van Weelde, *Digitizing Traditional Culture*, WIPO MAG. (June 2008), https://www.wipo.int/wipo_magazine/en/2008/03/article_0009.html.

[15] *See* TE MANA RARAUNGA – MĀORI DATA SOVEREIGNTY NETWORK CHARTER, TE MANA RARAUNGA MĀORI DATA SOVEREIGNTY NETWORK 1 (2016) [hereinafter MĀORI DATA CHARTER], https://www.temanararaunga.maori.nz/s/Te-Mana-Raraunga-Charter-Final-Approved.pdf.

[16] IDGov is the "act of harnessing tribal cultures, values, principles, and mechanism . . . and applying them to the management and control of an indigenous nation's data ecosystem." RAINIE ET AL., *supra* note 4, at 2.

[17] Walter & Carroll, *supra* note 13, at 3.

[18] IDSov is "the right of Indigenous peoples and tribes to govern the collection, ownership, and application of their own data." Stephanie Russo Carroll et al., *Indigenous Data Governance: Strategies from United States Native Nations*, 18 DATA SCI. J. 1, 3 (2019) [hereinafter Carroll et al., *IDGov Strategies*].

[19] Rebecca Tsosie, *Tribal Data Governance and Informational Privacy: Constructing "Indigenous Data Sovereignty"*, 80 MONT. L. REV. 229, 265 (2019) (questioning what can tribal governments do).

II. DEVELOPMENT OF IDSOV & IDGOV

At the core of IDSov and IDGov is self-determination. Both concepts affirm Indigenous peoples' rights "to control the collection, access, analysis, interpretation, management, dissemination, and reuse of Indigenous data."[20] IDSov is the *right* to replace "external, nontribal norms and priorities with tribal systems that define data, control how it is collected, and influence how it is used."[21] On the other hand, IDGov is the actual management of the data through mechanisms that harness cultural values and principles.[22] Under IDSov, the definition of Indigenous data is broad, extending to "information, knowledge, specimens, and belongings about Indigenous Peoples" at an individual and collective level, including digital data.[23]

Indigenous data then becomes any information concerning "a Native [N]ation and its tribal citizens, lands, resources, programs, and communities," such as "demographic profiles to educational attainment rates, maps of sacred lands, songs, and social media activities."[24] In fact, a further breakdown of an Indigenous Nation's data includes (1) data about resources and environments, (2) data about individuals, and (3) data about the nation.[25] Data about resources and environments is, specifically, information about "[l]and, water, geology, titles, air, soil, sacred sites, territories, plants, [and] animals."[26] Data about individuals concerns information obtained from administrative, legal, health, social, commercial, and corporate services.[27] Data about the Nation includes information about "traditional and cultural information, archives, oral histories, literature, ancestral and clan knowledge, stories, [and] belongings."[28] Taken as a "global advocacy movement,"[29] IDSov seeks to address the concerns about the misuse of Indigenous data, while ensuring that Indigenous peoples are the primary beneficiaries of their data.[30]

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20 Walter & Carroll, *supra* note 13, at 2.

21 RAINIE ET AL., *supra* note 4, at 2.

22 *See id.*

23 Walter & Carroll, *supra* note 13, at 2–3.

24 RAINIE ET AL., *supra* note 4.

25 Global Indigenous Data Alliance, PowerPoint Presentation, *Indigenous Data Sovereignty and Governance*, GIDA-GLOBAL.ORG, at slide 3 (2022), https://static1.squarespace.com/static/5d3799de845604000199cd24/t/640792a43ba5c11a1073bbc8/1678217895508/TheCAREPrinciples.pdf [hereinafter GIDA].

26 *Id.*

27 *Id.*

28 *Id.*

29 Walter & Carroll, *supra* note 13, at 3.

30 *Id.* at 11.

A. International Law

IDSov is a global advocacy movement that can be represented in an international or universal legal framework of rights known as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[31] Even as signatories to UNDRIP,[32] the United States and New Zealand are not legally bound to recognize and protect the rights within UNDRIP.[33] Yet, Professor Matthew Fletcher argues "[i]nternational customary law is federal Indian law,"[34] founded in the Supreme Court's decision in *Worcester v. Georgia* that argued tribes entered into a sovereign-to-sovereign relationship where the Federal Government has a duty to protect tribes.[35] Accordingly, within the United States[36] and New Zealand,[37] UNDRIP provides a legal mechanism for the formalization of IDSov principles through federal common law, as well as tribal law.[38] Indigenous peoples need to exercise IDGov by designing their own specific legal and regulatory approaches to data founded on their own cultural principles.[39]

UNDRIP does not explicitly reference IDSov by name, but it does express the idea behind the term in Article 31, which is that Indigenous peoples have the

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[31] *See* Walter & Carroll, *supra* note 13, at 11.; *see generally* United Nations Declaration on the Right of Indigenous Peoples, U.N DEP'T OF ECON. & SOC. AFFS., https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html (last visited Apr. 14, 2023).

[32] *Id.*

[33] *See* Sylvanus G. Barnabas, *The Legal Status of the United Nations Declaration on the Rights of Indigenous Peoples (2007) in Contemporary International Human Rights Law*, 6 INT'L HUM. RTS. L. REV. 242, 253 (2017) (stating that UNDRIP is not legally binding, but "represents a better outcome than a treaty whose value is substantially impaired by a poor number of ratifications, or by rather ambiguous or diluted provisions.").

[34] Matthew L.M. Fletcher, *The Dark Matter of Federal Indian Law: The Duty of Protection*, 75 ME. L. REV. 306, 327 (2023).

[35] *Id.* at 309.

[36] *Id.* at 327 (stating that within the United States, the Executive Branch, Department of State, and Congress approved of UNDRIP).

[37] *See generally Human Rights in Aotearoa*, TE KĀHUI TIKA TANGATA HUM. RTS. COMM'N, https://tikatangata.org.nz/human-rights-in-aotearoa/human-rights-and-te-tiriti-o-waitangi# (last visited Dec. 15, 2023).

[38] Fletcher, *supra* note 34, at 327–28 (Article 4 of UNDRIP supports tribal self-determination and autonomy for "matters relating to their internal and local affairs.").

[39] While this Note focuses on the Māori's implementation of IDSov and IDGov, other Indigenous Nations have begun to conceptualize what data sovereignty looks like for them to creating infrastructure and partnerships to realize those frameworks. *See* Michele Suina & Carnell T. Chosa, *Growing Pueblo Data Sovereignty*, *in* INDIGENOUS DATA SOVEREIGNTY AND POLICY 51 (2021); *see also About FNIGC*, FIRST NATIONS INFORMATION GOVERNANCE CENTRE, https://fnigc.ca/about-fnigc/ (last visited Dec. 15, 2023).

right to regulate and manage their own data.[40] Article 31 expands Indigenous peoples' right of self-determination to data in all its forms—it empowers Indigenous peoples with the "right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies, and cultures."[41] Article 31 through its diverse terminology of "cultural heritage," "traditional knowledge," and "traditional cultural expressions" seeks to unify and protect belief, culture, and practical knowledge (which all are forms of Indigenous data) "in the eyes of Indigenous peoples."[42] In addition, the first sentence of Article 31 where it lists the "manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literature, designs, sports and traditional games and visual and performing arts"[43] supports a similar expansive definition of Indigenous data that is within IDSov.

The mention of intellectual property in Article 31 suggests that it is a legal mechanism that Indigenous peoples can utilize to ensure that their data is protected, which was also implicitly founded within IDSov. A declaration within Article 31 states that Indigenous peoples have the "right to maintain, control, protect, and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions."[44] The right to intellectual property "can be seen as complementing the rights to cultural heritage, traditional knowledge, and traditional cultural expressions by adding an exclusionary entitlement"[45] that Indigenous peoples can utilize within national and international markets. With Article 31's reference to intellectual property, Indigenous peoples can apply, amend, and create intellectual property rules that bar third parties from "applying for, obtaining, and exercising intellectual property rights which are based on traditional knowledge or traditional cultural expressions of Indigenous peoples and obtained or used without their prior and informed consent."[46]

IDSov's broad definition of Indigenous data far exceeds that of Data Sovereignty because Indigenous data encapsulates data about Indigenous peoples' resources and environments, as individuals, and as nations.[47] Under International Intellectual Property Law, Data Sovereignty without the 'Indigenous' qualifier is the management of information "in a way that is consistent with its laws, practices,

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[40] *See* G.A. Res. 61/295, art. 31, United Nations Declaration on the Rights of Indigenous Peoples, at 9 (Oct. 2, 2007) [hereinafter UNDRIP].

[41] UNDRIP, *supra* note 40, at 9.

[42] Tobias Stoll, *Chapter 11, Intellectual Property and Technologies: Article 31*, *in* THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: A COMMENTARY 299, 299 (Jessie Hohmann & Marc Weller eds., 2018).

[43] UNDRIP, *supra* note 40, at 9.

[44] *Id.*

[45] Stoll, *supra* note 42, at 322.

[46] *Id.* at 326–27.

[47] GIDA, *supra* note 25.

and customs of the nation-state in which it is located."[48] On its surface, it seems that Data Sovereignty seeks to give nation-states control over data within their territories,[49] much like IDSov. Yet, unlike IDSov, Data Sovereignty seems to only apply to the regulation of digital data as a nation-state can "censor offensive [digital] content, monitor online activity, and bar access."[50]

Clause 2 of Article 31 states that "[i]n conjunction with [I]ndigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights."[51] When the policies, decisions, rules, and laws of a State impact cultural heritage, traditional knowledge, and traditional cultural expressions of Indigenous peoples, "the 'free, prior, and informed consent' of Indigenous peoples is required."[52] Overall, Article 31 of UNDRIP is "a necessary but insufficient foundation for the realization of Indigenous Peoples' rights and interests in relation to data."[53]

B. Applying IDGov to Tribes or specific Nations

Tribal Data Governance is applying IDGov to specific tribes or Native Nations.[54] It is the harnessing of a "Native [N]ation's ways of knowing, doing, and being to the management and control of a Native [N]ation's data ecosystem."[55] Dr. Stephanie Carroll outlined four considerations that tribes or Native Nations need to consider when creating mechanisms to govern data:

> [1] Identify mechanisms to facilitate tribal data governance, such as ways to strengthen tribal and intertribal institutions for effective data governance.
> [2] Explore the development of tribal-specific principles, laws, policies, and practices that tribes can use to govern their data.
> [3] Create common principles, processes, and practices of data governance that support tribes' efforts toward data sovereignty

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48 *See* Tsosie, *supra* note 19, at 233 (quoting C. Matthew Snipp, *What Does Data Sovereignty Imply: What Does It Look Like?*, *in* INDIGENOUS DATA SOVEREIGNTY: TOWARDS AN AGENDA 39, 39 (Tahu Kukutai & John Taylor eds., 2016).

49 *Id.*

50 Tsosie, *supra* note 19, at 233.

51 UNDRIP, *supra* note 40, at 9.

52 Stoll, *supra* note 42, at 307.

53 Walter & Carroll, *supra* note 13, at 13 (iterating one of the key findings from a 2019 international workshop called the Oñati workshop).

54 Stephanie Russo Carroll, PowerPoint Presentation for January in Tucson's Law 631Z Indigenous Data Governance course, *Indigenous Data Sovereignty, Data For Governance, and the Governance of Indigenous Data*, at slide 11 (Jan. 12-14, 2023) (on file with author).

55 *Id.*

> for use by tribes, governments, organizations, corporations, and researchers.
> [4] Develop data governance policies, processes, mechanisms, and tools that non-tribal governments, organizations, corporations, and researchers can use to support tribal data sovereignty.[56]

Some legal mechanisms that facilitate tribal data governance include, but are not limited to, legislation, codified cultural protocols, Institutional Review Boards (IRBs), Memoranda of Understanding (not legally binding), Memoranda of Agreement (legally binding), and contractual collaborations, partnerships, stewardships, data sharing agreements and image use restrictions.[57] The exploration, creation, and development of data governance policies, processes, mechanisms, and tools begins by considering how each Indigenous Nation can incorporate their own traditional cultural values into those systems.

While Dr. Carroll's four considerations focus on the general legal and political aspects of an IDGov mechanism, Dr. Michele Suina and Dr. Carnell Chosa's five questions that they developed in their enactment of Pueblo Data Sovereignty focus on the specific questions that Native Nation can ask to inform their decisions:

1. intentions—Why is Pueblo data sovereignty important? Why do we do this work?
2. planting seeds—Pueblo data sovereignty movement building: what does this look like for Pueblo People?
3. nurturing seeds—what needs to be done to support Pueblo data sovereignty?
4. harvesting fruits of labor—what does Pueblo data sovereignty look like?
5. reflections—what opportunities are there for Pueblo data sovereignty?[58]

III. THE MĀORI'S APPLICATION OF IDGOV

As mentioned above, there are four considerations to evaluate when creating mechanisms that apply the principles of IDGov to an Indigenous Nation.[59] In this part, I will apply and examine each consideration to the Māori's data

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[56] Carroll, *Indigenous Data Sovereignty*, *supra* note 54, at slide 21.

[57] Stephanie Russo Carroll, PowerPoint Presentation for January in Tucson's Law 631Z Indigenous Data Governance course, *Tools for Indigenous Data Governance*, at slide 22 (Jan. 12-14, 2023) (on file with author).

[58] Suina & Chosa, *supra* note 39, at 52–53.

[59] Carroll, *Indigenous Data Sovereignty*, *supra* note 54, at slide 21.

governance mechanisms. I will also be looking at how Dr. Suina and Dr. Chosa's questions inform those considerations.

A. The Māori people's relationship with New Zealand

The first consideration is to "[i]dentify mechanisms to facilitate tribal data governance, such as ways to strengthen tribal and intertribal institutions for effective data governance."[60] The relationship between the Māori and New Zealand created legal mechanisms such as the Treaty of Waitangi[61], the Waitangi Tribunal[62], and the New Zealand Law Commission[63], which facilitate the Māori's data governance models. Thus, it is important to understand the Māori's relationship with New Zealand to illustrate why Māori data sovereignty is important.[64]

1. Treaty of Waitangi

The 1840 Treaty of Waitangi between the British Crown[65] and the Māori people, through the chiefs of the iwis (tribes or community groups of Māori people), limited the Māori's independence by establishing New Zealand as a British colony.[66] In 1947, New Zealand acquired full political independence from the British Crown; in 1996, it became a federal government without any state or provincial level of government.[67] The Treaty was written in both English and te reo Māori (the Māori language) at its inception; more than 500 chiefs signed the treaty written in te reo Māori, with only 39 chiefs signing the English version.[68] While the Māori unintentionally ceded the rights and powers associated with their sovereignty in Article 1 of the Treaty of Waitangi,[69] the Crown in Article 2 did "confirm[] and guarantee[] [to the Māori] . . . the full exclusive and undisturbed possession of their Lands and Estates[,] Forests[,] Fisheries[,] and other properties which they may collectively or individually possess."[70] The differences between the English and te

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60 Carroll, *Indigenous Data Sovereignty*, *supra* note 54, at slide 21.

61 *See infra* Part III(A)(1).

62 *See infra* Part III(A)(2).

63 *See infra* Part III(A)(3).

64 *See supra* Part II(B) (explaining briefly why each nation must create its own unique framework tailored to their own ways of knowing).

65 Mark E. Manyin, *New Zealand—U.S. Relations*, CONG. RSCH. SERV. 1, https://crsreports.congress.gov/product/pdf/IF/IF10389 (last updated June 28, 2023).

66 ANDERSON ET AL., *supra* note 6, at 194.

67 Manyin, *supra* note 65, at 1.

68 ANDERSON ET AL., *supra* note 6, at 200.

69 Ministry for Culture and Heritage, *Read the Treaty, Page 1 – Introduction*, https://nzhistory.govt.nz/politics/treaty/read-the-treaty/english-text (last updated June 18, 2020).

70 *Id.*

reo Māori versions of the Treaty have left much up to debate and so the Waitangi Tribunal was created to decide those issues.[71]

2. Waitangi Tribunal

Under the Treaty of Waitangi Act of 1975, the Māori established the Waitangi Tribunal, which the Māori use to make recommendations within New Zealand's political and legal frameworks to deal with "Crown actions [that] breach the promises made in the Treaty of Waitangi."[72] The Tribunal's "long process of investigating, negotiating and settling historical claims"[73] provided iwis the ability to exercise its authority. Māori governance is also supported by one of the exclusive functions of the Waitangi Tribunal, which is "to determine the meaning and effect of the Treaty."[74] Since the treaty is available in both the English and Māori language,[75] the Tribunal "can decide on issues raised by the differences between the Māori and English texts of the Treaty."[76] The differences in the two language versions has caused disagreement.[77] For example, in Article 2 of the Māori language version, the use of "taonga" translates to treasures, which the Māori have made clear refers to "all dimensions of a tribal group's estate, material and non-material heirlooms and wahi tapu (sacred places), ancestral lore and whakapapa (genealogies), etc."[78] The Tribunal classifies something as taonga if it is "valued and treasured by Māori."[79] However, the Tribunal has not explicitly considered "which kinds of data are taonga in their own right," but have found that te reo Māori (Māori language) and mātauranga Māori (Māori knowledge) are taonga.[80]

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[71] ANDERSON ET AL., *supra* note 6, at 196.

[72] Waitangi Tribunal, *The Waitangi Tribunal's Strategic Goals Updated*, https://waitangitribunal.govt.nz (last updated Jan. 25, 2024); Waitangi Tribunal, *The Treaty of Waitangi/Te Tiriti O Waitangi, Meaning of the Treaty*, https://waitangitribunal.govt.nz/treaty-of-waitangi/meaning-of-the-treaty/ (last visited Mar. 5, 2024).

[73] ANDERSON ET AL., *supra* note 6, at 383.

[74] Waitangi Tribunal, *About the Waitangi Tribunal*, https://waitangitribunal.govt.nz/about-waitangi-tribunal/ (last updated Sept. 4, 2023); see also ANDERSON ET AL., *supra* note 6, at 196.

[75] Ministry for Culture and Heritage, *Read the Treaty, Page 2 – Māori Text*, https://nzhistory.govt.nz/politics/treaty/read-the-treaty/maori-text (last updated May 29, 2023).

[76] Waitangi Tribunal, *supra* note 74.

[77] *Id.*

[78] Te Tiriti O Waitangi (The Treaty of Waitangi), *Explanatory Footnotes by Professor Hugh Kawharu* 1, https://nzhistory.govt.nz/files/documents/treaty-kawharu-footnotes.pdf (last visited Apr. 14, 2023).

[79] Maui Hudson et al., *"He Matapihi Ki Te Mana Raraunga" – Conceptualising Big Data Through a Māori Lens*, *in* HE WHARE HANGARAU MAORI 64, 66 (Hēmi Whaanga et al. eds., 2017).

[80] TE KĀHUI RARAUNGA, MĀORI DATA GOVERNANCE MODEL 13 (2023), https://www.kahuiraraunga.io/_files/ugd/b8e45c_803c03ffe532414183afcd8b9ced10dc.pdf.

Therefore, Māori data that are taonga are subject to treaty principles and the New Zealand Government is obligated to protect them regardless of the disagreements over Māori and English language versions of the text.[81]

3. New Zealand Law Commission

The New Zealand Law Commission, an advisory body that reviews, reforms, and develops law in New Zealand,[82] "shall take into account te ao Māori (the Māori dimension),"[83] which is tikanga or Māori customary law.[84] The use of tikanga-based principles is to ensure that the Commission fulfills its purpose since those principles or customs are reliable and appropriate for incorporation into various protocols within the legal and political spaces of the country.[85] Some tikanga (also known as Māori values) that have been incorporated into legislation are Rangatiratanga **(**self-governance); Whakapapa (genealogy); Whanaungtanga (sense of belonging); Kotahitanga (oneness); Manakitanga, (ability to extend friendship); and Kaitiakitanga (reciprocity).[86]

B. New Zealand Privacy Act

The second consideration is to "[e]xplore the development of tribal-specific principles, laws, policies, and practices that tribes can use to govern their data."[87] Essentially, the question here is: what needs to be done to support Māori Data Sovereignty?[88] New Zealand needs to factor in Māori principles and uphold the promises within the Treaty of Waitangi in its legal and political policies.[89] New Zealand takes the Māori principles and the Treaty of Waitangi into consideration in its Law Commission.[90] The New Zealand Law Commission's express purpose is to incorporate the perspective of the Māori when reforming and developing law,

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81 TE KĀHUI RARAUNGA, *supra* note 80, at 13.

82 Law Commission Act 1985, s 3 (N.Z.).

83 *Id.* s 5(2)(a).

84 Karaitiana Taiuru, *Treaty of Waitangi/Te Tiriti and Māori Ethics Guidelines for: AI, Algorithms, Data and IOT*, TE KETE O KARAITIANA TAIURU BLOG (May 3, 2020), https://www.taiuru.maori.nz/tiritiethicalguide/#What_is_Tikanga.

85 *Id.*

86 Kokiri Hauora, *Tikanga Māori Values*, RANGATAHI TU RANGATIRA, https://www.r2r.org.nz/maori-health/tikanga-maori-values.html (last visited Apr. 14, 2023).

87 Carroll, *supra* note 54, at slide 21.

88 *See supra* Part II(B).

89 *See generally* TE KĀHUI RARAUNGA, *supra* note 80.

90 *Id.*

setting up a burgeoning co-governance structure between New Zealand and the Māori.[91] The New Zealand Privacy Act exemplifies this growing relationship.[92]

The New Zealand Law Commission considered the Māori when it completed its 2011 review of the Privacy Act.[93] The review found that the Māori have distinctive views on privacy and that there is tension between Western concepts of privacy and the collective interests of the Māori to protect the information collected on Māori people and how that data is controlled.[94] The review also concluded that amending section 14 of the Privacy Act of 1993 was necessary because then the Privacy Commissioner would have the responsibility to consider the needs and values of Māori and different cultural groups.[95] Section 21(c) of the Privacy Act of 2020 states the Privacy Commissioner must "take account of cultural perspectives of privacy."[96] While the Māori are not explicitly mentioned in the provision, the Office of the Privacy Commissioner released a report that tikanga would be considered, especially in a determination of a Māori individual's sensitive personal information.[97]

While the Privacy Act is the prevailing regulatory framework in New Zealand that focuses on the protection of a Māori individual's personal data, there is a need for addressing collective ownership and collective privacy that is founded in Māori knowledge systems and practices.[98] Within the Privacy Act, consent is not the "default basis for collecting, using and disclosing personal information," but rather whether the collection is for a lawful purpose.[99] As a result, Māori data under the Privacy Act is only partially protected, demonstrating the need to create a broader scope of protection for both individual and collective Māori data that encompasses aggregated data from individuals and de-identified data.[100]

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[91] Law Commission Act 1985, s 5(2)(a) (N.Z.); *see also* Michaela Ryan-Lentini, *Co-Governance in Aotearoa New Zealand: Controversy and Cooperation*, EQUAL JUST. PROJECT (June 30, 2022), https://www.equaljusticeproject.co.nz/articles/co-governance-in-aotearoa-new-zealand-controversy-and-cooperation2022.

[92] *See* Privacy Act 2020 (N.Z.).

[93] John Edwards, *Haere Mai Ke Te Wiki O Te Reo*, PRIVACY COMM'R (July 4, 2016), https://privacy.org.nz/blog/haere-mai-ki-te-wiki-o-te-reo/.

[94] *Id.*

[95] *Id.*

[96] Privacy Act 2020, s 21(c).

[97] *Sensitive Personal Information and the Privacy Act 2020*, PRIVACY COMM'R 5, https://privacy.org.nz/assets/New-order/Your-responsibilities/Privacy-resources-for-organisations/Sensitive-Personal-Information-and-the-Privacy-Act-2020.pdf (last visited Apr. 14, 2023).

[98] TE KĀHUI RARAUNGA, *supra* note 80, at 33–34.

[99] *Id.* at 33.

[100] *Id.* at 33–35.

C. Māori Data Sovereignty Network

The third consideration is to "[c]reate common principles, processes, and practices of data governance that support tribes' efforts toward data sovereignty for use by tribes, governments, organizations, corporations, and researchers."[101] Essentially, the question is: what does this look like for the Māori in particular; what does Māori Data Sovereignty look like?[102] The Te Mana Raraunga (Māori Data Sovereignty Network) is an example of the Māori creating common principles and envisioning what Māori Data Sovereignty looks like for the Māori people.[103] In addition to the Network, there are other mechanisms, expressions of Māori Data Governance, such as an analysis chart of questions to ask to determine the sensitivity of Māori data and a media license.[104] The importance of any expression of Māori Data Governance is the creation of "resilient and trustworthy data system[s] that can meet evolving Māori needs and aspirations."[105]

1. Te Mana Raraunga (Māori Data Sovereignty Network)

The charter of the Māori Data Sovereignty Network declares that its interest in data is due to the Māori's inherent rights as Indigenous peoples supported by the Treaty of Waitangi and UNDRIP.[106] In the charter, data is referred to as "a living taonga and is of strategic value to Māori."[107] It defines Māori data as "data produced by Māori or that is about Māori and the environments [they] have relationships with."[108] It further describes a non-exhaustive list of examples of Māori data, including data from organizations and businesses, data that describes or compares Māori collectives, and research data about te ao Māori.[109] The Charter also explicitly recognizes Māori Data Sovereignty and asserts that "Māori data should be subject to Māori governance."[110]

The specific purpose of the Māori Data Sovereignty Network is "to enable Māori Data Sovereignty" by (1) asserting Māori rights and interests, (2) ensuring that data is safeguarded and protected, (3) ensuring that quality and integrity of data,

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101 Carroll, *supra* note 54, at slide 21.

102 *See supra* Part II(B).

103 *See infra* Part III(C)(1).

104 Maui Hudson et al., PowerPoint for Māori Data Sovereignty: Opportunities for Policy Agencies, *Data for Governance: Governance of Data,* at slide 15 (July 26, 2017) [hereinafter Hudson et al., *Data Governance PowerPoint*], https://static1.squarespace.com/static/58e9b10f9de4bb8d1fb5ebbc/t/59792c14440243827c3ea4f6/1501113368343/Data+for+Governance_Governance+of+Data_260717.pdf.

105 TE KĀHUI RARAUNGA, *supra* note 80, at 4.

106 MĀORI DATA CHARTER, *supra* note 15, at 1.

107 *Id.*

108 MĀORI DATA CHARTER, *supra* note 15, at 1.

109 *Id.*

110 *Id.*

(4) advocating for involvement in data governance structures, (5) supporting the development of infrastructures and security systems, and (6) supporting the development of sustainable digital businesses and innovations.[111] The Māori Data Sovereignty Network establishes an intellectual property framework, which articulates the data rights and interests of "government collected administrative data, survey, census, and research data derived from [I]ndigenous taonga."[112] It is a network available at a national level to "Māori and [i]wi data users, ICT providers, researchers, policymakers and planners, businesses, service providers and community advocates."[113]

The Mana-Mahi Framework illustrates the following guiding principles: under Mana (Governance),[114] there are the Whanaungatanga, Rangatiratanga, and Kotahitanga; and under Mahi (Operations), there are Whakapapa, Manaakitanga and Kaitiakitanga.[115] The following six principles are at the core of the Māori's principles of data sovereignty: (1) Rangatiratanga (Authority); (2) Whakapapa (Relationships); (3) Whanaungatanga (Obligations); (4) Kotahitanga (Collective Benefit); (5) Manaakitanga (Reciprocity); and (6) Kaitiakitanga (Guardianship).[116] Looking at the guiding principles behind the Māori Data Sovereignty Network, there is the importance of relationships "between man, Te Ao Turoa (the natural world) and spiritual powers inherent therein, and Taha Wairua (spirit)."[117] In addition, it discusses the self-determination of not only the Māori as a whole, but each hapū (clan) and iwi, affecting "[their] people (nga uri whakaheke) or [their] environment (whenua/moana)."[118] The Framework also conceptualizes a "collective vision and unity of purpose while recognizing the mana" of individual hapū and iwi.[119] There is also the responsibility that the Māori have the ability "to live as Māori"[120] and "be an effective steward or guardian."[121]

The charter of the Māori Data Sovereignty Network was approved on April 5, 2016.[122] Brief #1, released in October 2018, defined the term Māori Data Governance as "principles, structures, accountability, mechanisms, legal instruments and policies through which Māori exercise control over Māori data."[123] The brief lays out and explains the six guiding principles of Māori Data

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111 MĀORI DATA CHARTER, *supra* note 15, at 2.

112 *Id.* at 1.

113 *Id.* at 4.

114 *Id.* at 3.

115 *Id.* at 3–4.

116 TE MANA RARAUNGA MĀORI DATA SOVEREIGNTY NETWORK, PRINCIPLES OF MĀORI DATA SOVEREIGNTY – BRIEF #1, 2 (2018) [hereinafter Māori Data Sovereignty Principles], https://cdn.auckland.ac.nz/assets/psych/about/our-research/documents/TMR%2BM%C4%81ori%2BData%2BSovereignty%2BPrinciples%2BOct%2B2018.pdf.

117 MĀORI DATA CHARTER, *supra* note 15, at 3.

118 *Id.*

119 *Id.* at 3.

120 *Id.* at 4.

121 *Id.*

122 *Id.*

123 Māori Data Sovereignty Principles, *supra* note 116, at 1.

Sovereignty. Under Rangatiratanga (Authority), the "Māori have an inherent right to exercise control over Māori data and Māori data ecosystems" because of self-determination and that through storage, control can be exercised.[124] "[A]ll data has a [W]hakapapa (genealogy)," meaning that metadata should include information about the data's relationships, especially where the data came from, their context, and how they were collected in ways that prioritize Māori needs and protects against future harm.[125] For Whanaungatanga (Obligations), there needs to be a balancing of an individual's rights and those of the group whilst ensuring that individuals and organization remain accountable to responsible collection, storage, analysis, and dissemination.[126] In order to demonstrate Kotahitanga (Collective Benefit), data ecosystems should be designed and function in a way that there is both individual and collective benefit.[127] The principle of Manaakitanga (Reciprocity) emphasizes that the dignity of Māori communities, groups, and individuals is of the utmost importance and that Free, Prior and Informed Consent (FPIC) is crucial.[128] Lastly, through Kaitiakitanga (Guardianship), the ethics should incorporate tikanga and that the Māori have the ability to control how data is stored and if it should be restricted or open.[129]

D. Analysis for Trusted Use of Māori Data

The fourth consideration is to "[d]evelop data governance policies, processes, mechanisms, and tools that non-tribal governments, organizations, corporations, and researchers can use to support tribal data sovereignty."[130] Essentially, the question here is: what opportunities are there for Māori Data Sovereignty?[131] There are a myriad of opportunities that the Māori have taken, but this section will focus on two mechanisms of Māori Data Governance, which are

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[124] Māori Data Sovereignty Principles, *supra* note 116, at 2.

[125] *Id.*

[126] *Id.*

[127] *Id.* The discussion of individual and collective benefit within the Māori Data Sovereignty Network constructs collective interests at different levels. For example, the term Iwi Data Sovereignty operationalizes both IDSov and Māori Data Sovereignty within tribal data boundaries. Hudson et al., *supra* note 79, at 65. Iwi Data Sovereignty seeks to empower an iwi to define its own populations for data collection, access, and storage. An individual Māori may have multiple iwi affiliations, which raises the need for the centralized Māori Data Sovereignty, but there is also a need for an iwi to exercise their own self-determination. Te Mana Raraunga, *Iwi Affiliation Data 26th October 2021: Summary of the Key Issues/*Points, https://static1.squarespace.com/static/58e9b10f9de4bb8d1fb5ebbc/t/61e76b9614893e1ca80607bf/1642556311014/TMR+one+pager+iwi+affiliation+29.11-converted.pdf (last visited Apr. 14, 2023).

[128] Māori Data Sovereignty Principles, *supra* note 116, at 2.

[129] *Id.*

[130] Carroll, *supra* note 54, at slide 21.

[131] *See supra* Part II(B).

an analysis chart of questions to ask to determine the sensitivity of Māori data and a media license created by a Māori non-profit organization.

The charter for the Māori Data Sovereignty Network establishes data as living taonga, which led to a framework that assesses whether a dataset holds Māori data and how much protection and control the Māori have over it.[132] Step 1 of the framework asks, "Are we using Māori data?"[133] The question considers whether the data definition is consistent with the Māori Data Sovereignty Network Charter and whether ethnicity or iwi affiliation information is collected.[134] If yes, Step 2 of the framework asks, "Is the data a taonga?" [135] This step looks at the following factors: the provenance of the data, the opportunity for the data, and the utility of the data.[136] If yes, Step 3 of the framework evaluates several characteristics of the data, such as the level of sensitivity, accessibility, value, trust, originality, the nature of application, the relationship, expertise, authority, and responsibility.[137] It relates those characteristics to Māori concepts and assesses the characteristics of the data on a scale of high, medium, and low.[138] After going through the assessment, Step 4 implements different levels of governance.[139] If the data is highly sensitive, active governance is required, which means that the Māori have control over the data or there needs to be a partnership arrangement in place.[140] If the data is determined to be medium sensitivity overall, then passive governance is an option, but still requires consultation with the Māori and disclosure of how the data will be used.[141] If the data's sensitivity is overall low, then an open data approach may be taken.[142]

1. Kaitiakitanga License

Te Hiku Media's Kaitiakitanga license bases its values on the principles created by the Māori Data Sovereignty Network.[143] The organization's purpose centers around language revitalization.[144] It fulfills this purpose through its apps;[145] one of the apps transcribes recordings of people speaking the Māori language and

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[132] MĀORI DATA CHARTER, *supra* note 15, at 1; *see* also Hudson et al., *Data Governance PowerPoint*, *supra* note 104, at slide 2.

[133] *Id.* at slide 13.

[134] *Id.*

[135] *Id.* at slide 14.

[136] *Id.*

[137] Hudson et al., *Data Governance PowerPoint*, *supra* note 104, at slide 15.

[138] *Id.*

[139] *Id.* at slide 16.

[140] *Id.*

[141] *Id.*

[142] Hudson et al., *Data Governance PowerPoint*, *supra* note 104, at slide 16.

[143] Shanti Mathias, *Inside the Fight for Māori Data Sovereignty*, SPINOFF (July 29, 2022), https://thespinoff.co.nz/internet/29-07-2022/indigenous-data-sovereignty-will-make-the-internet-a-better-place-for-maori.

[144] *About*, TE HIKU MEDIA (2023), https://tehiku.nz/about/.

[145] *See id.*

the other helps individuals practice their pronunciation. [146] The license applies to all the data entered into their apps, which prohibits third parties that use the apps from "doing surveillance . . . or unethical things."[147] Te Hiku's license stresses that:

> [U]nless you have kaitiaki [which loosely translates to guardian] rights to the data (for example, the data may come from your whānau, hapu, or iwi, and you have rights to keep the data for your own use), you agree: a. not to extract the data from the app; and b. only access the data through the app.[148]

The license by Te Hiku Media shows the further development of how the Māori's Data Sovereignty principles can inform the interactions with third parties, particularly on the Web and through AI.[149] The posting of the open-source license on GitHub allows others to repurpose the code for other purposes but illustrates how the Māori are able to retain "mana over data and other intellectual property in a Western construct."[150]

IV. NAVAJO NATION'S MECHANISMS TO FACILITATE IDGOV

While Part III evaluated the ways in which the Māori in New Zealand developed their own mechanisms and tools that explicitly outline the control, access, storage, and use of their data, the Navajo Nation has yet to do so. Thus, the remainder of this Note will address the four considerations addressed in Part II(B), particularly the first, along with the associated questions. The table below illustrates how I have consolidated both Dr. Carroll's four general considerations with Dr. Suina and Dr. Chosa's specific five questions regarding the creation of IDGov mechanisms specific to an Indigenous Nation.

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[146] Mathias, *supra* note 143.

[147] *Id.*

[148] Te Hiku Media, *Whare Kōrero Kaitiakitanga License*, GITHUB, https://github.com/TeHikuMedia/Kaitiakitanga-License/blob/tumu/wharekorero_app.md (last visited Apr. 14, 2023).

[149] Mathias, *supra* note 143.

[150] Te Hiku Media, *supra* note 148.

Dr. Carroll's Four General Considerations[151]	**Dr. Suina and Dr. Chosa's Specific Five Questions**[152]
[1] Identify mechanisms to facilitate tribal data governance, such as ways to strengthen tribal and intertribal institutions for effective data governance.	1. Why is [this tribe's] data sovereignty important?
[2] Explore the development of tribal-specific principles, laws, policies, and practices that tribes can use to govern their data.	3. What needs to be done to support [this tribe's] data sovereignty?
[3] Create common principles, processes, and practices of data governance that support tribes' efforts toward data sovereignty for use by tribes, governments, organizations, corporations, and researchers.	2. What does this look like for [this tribe]? 4. What does [this tribe's] data sovereignty look like?
[4] Develop data governance policies, processes, mechanisms, and tools that non-tribal governments, organizations, corporations, and researchers can use to support tribal data sovereignty.	5. What opportunities are there for [this tribe's] data sovereignty?

In this section, I will identify and discuss current mechanisms in place that facilitate tribal data governance in the Navajo Nation. I will first touch on Federal Indian Law, then the Navajo Nation Common Law,[153] and lastly, several provisions in the Navajo Nation Code (Code) such as the Navajo Nation Human Research Review Board[154] and the Navajo Nation Privacy Act.[155] In addition, I will address why the Navajo Nation needs to create explicit Navajo Data Sovereignty governance mechanisms in its legal and political spaces.

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151 *See supra* Part II(B).
152 *See supra* Part II(B).
153 *See infra* Part IV(B).
154 *See infra* Part IV(C)(1).
155 *See infra* note IV(C)(2).

A. Federal Indian Law

Unlike the Māori and New Zealand, whose political relationship functions in a more co-governance structure, the political relationship between the Navajo Nation and the United States is that of a guardian-ward relationship.[156] The United States recognized that Indigenous Nations in the United States have had inherent sovereignty since time immemorial or the "exclusive power over their members and their territory,"[157] but has since imposed limitations.[158] Since time immemorial, the Navajo Nation has been inherently sovereign, but with the ratification of the Treaty of 1868, the United States limited that sovereignty.[159] Thus, in the United States, there are three sovereign entities: the Federal Government, States, and Tribes.[160] And so, the Navajo Nation is a federally-recognized tribe, which means that the United States recognizes its status as a political body through treaties and agreements, but maintains a certain degree of authority over the Nation.[161]

While the Navajo Nation is restricted by Federal Indian Law because of its "inclusion within the territorial bounds of the United States,"[162] its own body of law is expansive due to its inherent authority derived from the Diyin Dine'é (Holy People).[163] However, any legislations and regulations by the Navajo Nation can still be preempted if those laws violate federal law according to the Supremacy Clause of the U.S. Constitution.[164] Yet, as Lance Morgan points out, tribes can create tribal laws that "largely ignore[] or simply give[] a slight nod to federal Indian Law."[165] A tribe can do so by passing a tribal law that preempts state law, which, if challenged by any state or federal entity, the tribe could invoke its tribal sovereign immunity, which comes from its inherent sovereignty recognized by the United States.[166] The expansiveness of tribal law due to inherent sovereignty plus inherent authority from the Diyin Dine'é arm the Navajo Nation with the authority to adopt

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156 *See* Cherokee Nation v. Georgia, 30 U.S. 1, 2 (1831).

157 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.01[1][b], at 211 (Nell Jessup Newton ed., 2012) [hereinafter COHEN'S HANDBOOK]. Although the Federal Government does not recognize Alaskan Native Corporations, state-recognized tribes, and Native Hawaiians politically in the same way that it recognizes federally-recognized tribes, these groups retain their inherent sovereignty and their ability to exercise that sovereignty.

158 *See* United States v. Wheeler, 435 U.S. 313, 322–23 (1978).

159 *See* AUSTIN, NAVAJO COURTS, *supra* note 5, at 6.

160 Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L. J. 1, 1 (1997).

161 COHEN'S HANDBOOK, *supra* note 157, § 4.01[1][a], at 207–08.

162 *Id.* at 207.

163 *See* Jonathan Perry, *Ha'a'aahdęę' Ntsékees: Concepts of Land From an Eastern Navajo Leader*, *in* NIHIKÉYAH: NAVAJO HOMELAND 23, 26–28 (Lloyd L. Lee ed., 2023) [hereinafter NIHIKÉYAH].

164 Tsosie, *supra* note 19, at 238.

165 Lance Morgan, *The Rise of Tribes and the Fall of Federal Indian Law*, 49 ARIZ. ST. L.J. 115, 115 (2017).

166 *Id.* at 121–22.

and codify culturally-appropriate IDGov principles and policies that are legally effective.

B. Diné (Navajo) Fundamental Law

The Navajo legal system roots itself in the Diné bi Beenahaz'áanii (Fundamental Laws), which consists of four different categories: (1) Diyin bitsąądęę beenahaz'áanii (Traditional Law), (2) Diyin Dine'é bitsąądęę beenahaz'áanii (Customary Law), (3) Nahasdzáán dóó Yádiłhił bitsąądęę beenahaz'áanii (Natural Law), and (4) Diyin Nohookáá Diné bi beenahaz'áanii (Common Law).[167] There are three foundational doctrines central to the Diné Fundamental Laws: Hózhǫ́, K'é, and K'éí. Hózhǫ́ generally means all things that are good and positive, such as beauty and harmony.[168] K'é "guides relationships [not just with people, but with nature] and interactions" to harmony, fostering love, kindness, and friendliness.[169] K'éí', while similar to K'é, is more responsible for the regulation and reciprocity of domestic life, clan relationships, and relationships with unrelated peoples and non-Navajos.[170] Title One of the Navajo Nation Code codifies these three doctrines, which the laws of the Navajo Nation embody.[171] These doctrines are interdependent because the Navajo people "value an individualism that is tempered by reciprocal duties and obligations to relatives, kinfolks, and people in general."[172]

Despite the inclusion of Navajo values and principles through the Fundamental Laws in current Navajo statutory law, the origin of Navajo statutory law began when the Tribal Council in 1958 adopted Anglo-American law, or the "then existing Bureau of Indian Affairs Law and Order Code."[173] The Bureau of Indian Affairs did not aim to incorporate "true Diné values in the government structure [it] imposed,"[174] similar to the original iteration of the Navajo government as a Business Council designed to approve leases for natural resources extraction on the reservation.[175] As a result, a significant portion of the Navajo Nation Code (Code), which now consists of twenty-six titles, still comprises largely of Anglo-

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167 AUSTIN, NAVAJO COURTS, *supra* note 5, at 42.

168 *Id.*

169 *Id.* at 84–85.

170 *Id.* at 137.

171 *See* Navajo Nation Code (N.N.C.), tit. 1, ch. 2. The code titles can be found at https://www.navajonationcouncil.org/code/, with the latest amendments being dated to December 2014. A compilation of the uncodified amendments with a description can be found at https://dinelanduse.org/nnc/. The issue of updating, codifying, and publishing tribal law illustrates the difficulty in which the Navajo Nation may be hindered in enacting stronger data governance mechanisms through legislation and codification.

172 AUSTIN, NAVAJO COURTS, *supra* note 5, at 55.

173 *Id.* at 37–38.

174 Perry, *supra* note 163, at 28.

175 *Id.*

American law.[176] Despite this largely Anglo-American composition of the Code, the Fundamental Laws ensure that the Navajo Nation develops and administers "policies and plans utilizing these laws as guiding principles," laying the foundation of Diné sovereignty.[177] The Fundamental Laws "preserve[], protect[], and enhance[] . . . inherent rights, beliefs, practices and freedoms" of an individual Diné,[178] the collective,[179] and self-governance.[180] An adherence to Fundamental Laws is critical to ensure the preservation, protection, and enhancement of "[our] life and culture, our relationship with the world beyond the sacred mountains, and the balance we maintain with the natural world."[181]

The written laws of the Navajo Nation are the foundation of Navajo statutory law and "must be developed and interpreted in harmony with Diné Common Law."[182] By harmoniously incorporating Diné Common Law in the Code, it becomes a "tool in exercising and exhibiting self-assurance and self-reliance and in enjoying the beauty of happiness and harmony."[183] Clause C of Section 206 in Title 1 states that Diné Common Law is used "to harness and utilize the unlimited interwoven Diné knowledge, with our absorbed knowledge from other peoples."[184] A balance between Anglo-American Law and the written laws governing the Navajo Nation must be struck for adherence to the Fundamental Laws.[185] Interestingly, a section under Traditional Law reads:

> The Diné and the government can incorporate those practices, principles and values of other societies that are not contrary to the values and principles of Diné Bi Beenahaz'áanii and that they deem is in their best interest and is necessary to provide for the physical and mental well-being for every individual.[186]

Read together, both sections emphasize that when incorporating Diné knowledge into the laws of the Navajo Nation with other non-Navajo societies' knowledge, it is important to implement values and principles not contrary to the Fundamental Laws.

Although Anglo-American law lends itself heavily to the Navajo legal system, the reliance on Navajo Common Law is an exercise of sovereignty.[187] Common Law offers a mechanism through which the Navajo Nation or an

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176 AUSTIN, NAVAJO COURTS, *supra* note 5, at 37.
177 1 N.N.C. § 202.
178 1 N.N.C. § 202(A).
179 § 202(B).
180 § 202(D).
181 § 202.
182 § 206(A).
183 1 N.N.C. § 206(C).
184 *Id.*
185 *Id.*
186 § 203(I).
187 AUSTIN, NAVAJO COURTS, *supra* note 5, at 38.

individual Navajo can seek relief if there is a threat to their data.[188] The Navajo Nation Supreme Court adopts Anglo-American law in its decisions only if it is first compatible with Diné Common Law and the fundamental Navajo values of Hózhǫ́, K'é, and K'éí.[189] Within the current Navajo legal system, the choice-of-law statute requires that Navajo courts first apply Navajo statutory law, interpreting it through Navajo Common Law, before applying any federal or state laws, which gives established Navajo customs and traditions the force of law[190] to restore Hózhǫ́. In fact, Navajo Common Law "can trump or alter predisposed expectations premised on Anglo-American legal outcomes."[191] Ultimately, the goal that Navajo Nation courts and their laws strive for is the restoration of Hózhǫ́.[192]

In the Māori Data Charter, there is an acknowledgment that a data governance model must ensure that there is a recognition of the collective and individual benefits of the Māori, the iwi, and the hapū.[193] For the Navajo Nation, the Fundamental Laws would guide the navigation of the tension between the interests of the tribe as a collective and the individual Diné, as well as the internal and external motivations for creating a data governance model. The importance of creating Navajo Data Sovereignty governance mechanisms through statutory law and other legal tools is to explicitly incorporate Diné Fundamental Laws and the values of Hózhǫ́, K'é, and K'éí for non-Navajo entities to recognize the Navajo Nation's inherent authority to protect and manage its own data, however it chooses to define it.

C. Code Provisions

Under IDGov, some legal mechanisms that tribes can utilize are Institutional Review Boards and Tribal Codes.[194] The Navajo Nation Human Research Code (Research Code) is an act that aggregates policies and procedures of researchers seeking to conduct research on Navajo individuals within the Navajo Nation.[195] In addition, the Navajo Nation Privacy and Access to Information Act (Privacy Act) guides the protection of an individual's data held by the tribal government.[196] While the Research Code can be used to govern the three categories of data under the IDGov model outlined in Part II, the Privacy Act is more limited to the protection of data about us as individuals.[197] This section will focus on how

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188 *See generally* AUSTIN, NAVAJO COURTS, *supra* note 5, at 38.
189 *Id.* at 98.
190 *Id.* at 45–46.
191 *Id.* at 46.
192 *Id.* at 66.
193 MĀORI DATA CHARTER, *supra* note 15, at 3.
194 Carroll, *supra* note 57, at slide 22.
195 *See* Navajo Nation Human Research Code, *infra* Part IV(C)(1).
196 *See* Navajo Nation Privacy Act, *infra* Part IV(C)(2).
197 *See generally* Navajo Nation Human Research Code, *infra* Part IV(C)(1) and Navajo Nation Privacy Act, *infra* Part IV(C)(2).

preexisting Navajo statutory laws such as the Research Code and the Privacy Act, which deal with the collection, storage, and dissemination of data, can inform future statutory laws that will incorporate IDGov principles more explicitly. Therefore, what needs to be done to support Navajo Data Sovereignty is to update preexisting statutory laws to incorporate more traditional principles in writing and in practice, as well as focus on the considerations of broadening the scope of protection regarding both individual and collective rights.

1. Navajo Nation Human Research Code (Institutional Review Board)

The Navajo Nation enacted a legal mechanism that influenced "the governance and stewardship of Indigenous data by Native Nations and non-Indigenous entities"[198] when it created the Navajo Nation Human Research Review Board (Review Board)[199] in 1996. The Research Code codifies the creation of the Review Board in Chapter 25 of Title 13 and was last revised in 2002.[200] The Review Board gives fifteen individuals[201] the ability to (1) review all the research proposals for research conducted within the Navajo Nation and concerning Navajo individuals, (2) issue permits to approved projects that meet the terms of the Research Code, and (3) approve the results and publication of the project.[202] The Research Code sets forth conditions that "investigators, physicians, researchers, and others [must follow to] perform research activities on living human subjects within the territorial jurisdiction of the Navajo Nation."[203] The jurisdiction of the Research Code extends to "[a]ll persons within the territorial jurisdiction of the Navajo Nation,"[204] which can be read as extending to whether the harm occurred on- or off-reservation, so long as that person falls under the Navajo Nation's jurisdiction. The Research Code's broad scope of the matter that it has the authority over encompasses "research information and data generated by and about Navajo individuals, communities, [and] culture."[205]

A twelve-phase approval process employed by the Board at its core ensures community engagement[206] and that the Navajo Nation controls the data:

> (I) Community Partnership, (II) Tribal Program Partnership, (III) Screening of Research Application, (IV) NNHRRB Meeting Presentation, (V) Study Implementation, (VI) Data Findings,

198 Carroll et al., *IDGov Strategies*, *supra* note 18, at 7.
199 *Id.* at 8.
200 13 N.N.C. § 3251.
201 § 3257.
202 § 3256.
203 § 3252.
204 § 3253(A).
205 13 N.N.C. § 3253(C).
206 Carroll et al., *IDGov* Strategies, *supra* note 18, at 8.

> (VII) Data Work Session, (VIII) Final Report and Dissemination Plan, (IX) Transfer of Data, (X) Manuscript Publication, (XI) Community Feedback/Presentation, and (XII) Transfer of Data to the Navajo Data Resource Center.[207]

The record retention section accentuates that the Board will need to "develop and maintain an up-to-date file on all research projects" for at least ten years after the proposal and five years after the publication of the paper.[208] The application must, at a minimum, include research goals, methodology, and anticipated results, plus a section on "addressing specific anticipated benefit to the study's subjects, Navajo individuals or groups of tribal members, the Navajo Nation and all other readily identifiable potential beneficiaries."[209] The Review Board needs to ensure that its research goals are consistent with the Navajo Nation,[210] that the individuals involved gave their informed consent,[211] and that the research done is "culturally relevant."[212]

The Research Code emphasizes the Western concept of intellectual property. The Research Code expresses that there are "inalienable intellectual properties" that come from the research.[213] The Review Board provides permits for a researcher to collect the data and research, which ultimately are the "property of the Navajo Nation."[214] In addition, the Research Code introduces other mechanisms that offer legal protection against unauthorized access and misuse of the data through "informed consent provisions, the Navajo Nation Privacy Act, and other Navajo Nation information technology requirements."[215] The informed consent provision in the Research Code ensures that the subject actively consented to the project in writing so that the subject knows the "purpose of the research, any potential risks, and alternative treatments or procedures."[216]

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[207] Navajo Nation Human Research Review Board, *Procedural Guidelines for Principal Investigators*, at 1, https://naair.arizona.edu/sites/default/files/procedural_guidelines_for_pi.pdf (last visited Apr. 14, 2023).

[208] 13 N.N.C. § 3261.

[209] § 3264.

[210] § 3259(A).

[211] § 3259(D).

[212] § 3259(E).

[213] 13 N.N.C. § 3253(C).

[214] § 3255(C).

[215] § 3265. This section mentions "and other Navajo Nation information technology requirements," which implies that the protection extends to data and information shared through technology such as websites, online scholarly databases, or even social media. This Note focuses on laying a foundation from which the Navajo Nation can create general principles to protect its data, which can hopefully then be used to look more closely at how the Navajo Nation's data is shared on the internet. *Id.*

[216] § 3266.

2. Navajo Nation Privacy Act

The Research Code protects data generated by "any person, organization, business, or other entity [who] conducts research within the territorial jurisdiction of the Navajo Nation."[217] On the other hand, the Navajo Nation Privacy Act,[218] which is codified in Title Two of the Code, protects the "privacy interests of individuals and entities" against the Navajo Nation Government.[219] More specifically, the policy behind the Navajo Nation Privacy Act is that records, information, or data concerning government operations shall be accessible to the public, while also recognizing that individuals have a right to privacy.[220] President Kelsey A. Begaye made the Navajo Nation Privacy Act actionable on May 4, 1999.[221]

Under this statute, there are several important definitions such as "person," "protected record," "record," and "right to privacy."[222] A person is "any individual, nonprofit or profit corporation, partnership, sole proprietorship, or other type of business organization."[223] A protected record is "any record containing data on persons, or governmental entities that is private."[224] Yet, a record is described as "all books, letters, documents, papers, maps, plans, photographs, films, cards, tapes, recordings, electronic data, or other documentary materials regardless of physical form or characteristics which are prepared, owned, received, or retained by a governmental entity."[225] The right to privacy is the "right of a person to be free from unwarranted intrusion by a governmental entity."[226]

The definitions of these key terms in the Act highlight what information is protected and the reason why. Section 84 expressly details the records that are public, such as laws, job information, final opinions, and data on individuals who gave their permission to make records available.[227] If the records contain protected information such as eligibility for assistance,[228] medical history,[229] financial information that is not public,[230] and contracts and court documents that are "otherwise protected[,] . . . [then] the privacy interest of the person outweighs the

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217 13 N.N.C. § 3255(E).
218 2 N.N.C. § 81.
219 § 82.
220 *Id.*
221 *See* Resolution of the Navajo Nation Council, Adopting the Navajo Nation Privacy and Access to Information Act, CAP-48-99 (1999).
222 2 N.N.C. § 83.
223 § 83(B).
224 § 83(C).
225 § 83(E).
226 § 83(F).
227 2 N.N.C. § 84.
228 § 85(A)(1).
229 § 85(A)(2).
230 § 85(A)(5).

public interest in the information."[231] There is a provision in Section 85 that states that protected records also include "[o]ther records containing data on individuals the disclosure of which constitutes a clearly unwarranted invasion of privacy."[232]

The Privacy Act offers another mechanism that allows for the segregation of data about individuals, which may pertain to health or government information, and highlights the importance of consent to facilitate what information is shared. Concerning third parties,[233] the Privacy Act only stipulates that individual records can be released to third parties if there is notarized written permission by the individual who is the subject of the record.[234] Other individual records may be available for statistical purposes if it is de-identified or made non-identifying.[235] In addition, the Navajo Nation government can segregate records and only share the information that is public with a requestor,[236] even if it is another Navajo Nation governmental entity.[237] Section 88 outlines a procedure of how a person can request public records and how to file an appeal with the courts should the record be determined protected or the request is ignored[238] or denied.[239]

3. Legal Remedies

Each code provision outlines criminal and civil penalties, offering a legal mechanism for seeking legal remedies in the case of data misuse. The Review Board has a great degree of control because it can limit or rescind research permits.[240] In addition, the research application includes a provision that the "[r]esearcher agrees [with a signature] to the civil jurisdiction of the Navajo Nation with respect to the research to be undertaken and any publications arising from such research."[241] Thus, the Review Board can, of "its own initiative[,]" petition the Navajo Nation courts for an injunction or other relief, and should the court find the Research Code to be violated, it can impose civil penalties of up to five thousand dollars.[242]

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231 2 N.N.C. § 85(A)(12), (14).

232 § 85(A)(20).

233 While this Note will not go into too much depth about the protection of data and third parties, it is an aspect the Navajo Nation would need to consider further, especially since the government uses social media sites, such as Facebook and Instagram, to disseminate government memoranda. The government's use of those social media sites implicates Meta as a third party in the dissemination of data about us as individuals. It further demonstrates the need for an overarching set of principles to navigate that relationship to ensure the Navajo Nation retains control and access over our data.

234 2 N.N.C. § 86(C).

235 § 86(D).

236 § 87.

237 § 86(E).

238 § 88.

239 2 N.N.C. § 89.

240 *See* 13 N.N.C. § 3268.

241 § 3264.

242 § 3271.

The Navajo Nation Privacy Act outlines criminal penalties[243] for public employees of the governmental entity that violates the act by imposing fines of a minimum of $1,000 and a maximum of $5,000.[244] The fines also apply to any person who gains access to protected information through false pretenses, bribery, or theft.[245] However, the civil penalties[246] only target non-Indians or non-Navajos through the imposition of fines of a minimum of $1,000 and a maximum of $5,000.[247]

V. RECOMMENDATIONS

The Navajo Nation has many options to develop legal mechanisms specific to its cultural values that would protect our data and that incorporate IDGov principles. IDGov is a mechanism that creates a pathway for the Navajo Nation to create a legal framework that protects our data by allowing us to define what data means to us, what concepts to use, and what tools to implement. Essentially, through IDGov and existing legal mechanisms, we can envision Navajo Data Sovereignty by utilizing the IRB, a permit scheme, legal remedies offered under the Privacy Act, and much more against both natives and non-natives within the Navajo Nation. Although Federal Indian Law makes it difficult to impose tribal laws outside the tribe's boundaries, codification and statutory law add legitimacy that external entities, such as corporations, the Federal Government, and other Indigenous nations, should recognize and acknowledge.

This next section will explore how the Navajo Nation can develop culturally-specific principles, laws, policies, and practices to govern its data and what Navajo Data Sovereignty looks like for the Navajo people. In an exercise of its inherent sovereignty, the Navajo Nation can (1) develop a General Navajo Data Sovereignty Act that integrates language from UNDRIP and (2) develop a data-sharing agreement that incorporates language that centers the relationship between data and traditional values. Once the Navajo Nation has outlined Navajo Data Sovereignty principles, it must (3) consider reforming and strengthening the Research Code and the Privacy Act by incorporating those values more explicitly within those codes, as well as including more Diné Fundamental values and language. Lastly, while the Navajo Nation's inherent sovereignty gives it the ability to create tribal laws that are internally recognized, the external recognition of their laws by the United States and other nations remains tenuous.[248]

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243 2 N.N.C. § 91.
244 § 91(A), (C), (D).
245 § 91(C).
246 § 92.
247 § 92(A), (C), (D).
248 *See generally* O'Connor, *supra* note 160.

A. "Inherent sovereignty, you're our only hope."[249]

Before discussing recommendations that the Navajo Nation may take, it is important to reiterate that the core of our existence and identity as Diné is inextricably tied to our land (Níhi Kéyah).[250] Land to us is "more than property or a commodity"[251] because of K'é. The land is our relative, since "[w]e don't own the land; the land owns us."[252] The inherent sovereignty that the Navajo Nation retains from time immemorial shields our traditions and lifeways, but it is important for the future of our Nation, especially our data, to "formulate our own Diné sovereignty doctrine, a doctrine that is grounded in our own traditional knowledge and ways."[253]

The philosophy that grounds our traditional knowledge and ways already exists in Sa'ah Naagháí Bik'eh Hózhóón (SNBH).[254] SNBH is a process essential to Nitsáhákees (Thinking), Nahat'á (Planning), Iiná (Living), and Siihasin (Reflecting).[255] Through these processes, one can achieve Hózhǫ and ensure "wellness, prosperity, and continuance."[256] Sa'ah Naagháí (Long Life) represents thought, whereas Bik'eh Hózhóón (Happiness) represents speech.[257] Sa'ah Naagháí Bik'eh Hózhóón encapsulates everything and is represented internally through thought and externally through speech.[258]

Comparing the Māori's description of data as a living taonga, or living treasure, it is important to assert the significance of words and oral tradition in Navajo culture. Oral tradition serves as a mechanism of preservation and protection of our history, language, and culture, passing it down to the next generations.[259] In practice, "oral tradition makes a bond between the land and the people."[260] In addition, we have these sayings: Saad éi Diyin (Words are Holy or Sacred) and Nitsáhákees bidzíílgo 'inlééh (Make Your Thinking Strong).[261] Since I was young, those phrases have been iterated to me many times. I was told that the universe was created by utilizing light, wind, and sound for the foundations of our world. Thus, from sound and thoughts come words, and from words come our understanding

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[249] *See* Star Wars: Episode IV A New Hope (Lucasfilm 1977, 35:39). This title is a nod to an utterance by Princess Leia as she seeks Obi-Wan's help in delivering vital information to the Rebellion that would disrupt the Empire's ongoing colonization of space.

[250] LLOYD L. LEE, DINÉ IDENTITY IN A 21ST-CENTURY WORLD 76, 77 (2020).

[251] *Id.* at 92.

[252] KLARA KELLEY & HARRIS FRANCIS, A DINE HISTORY OF NAVAJOLAND 3, 3 (2019).

[253] Raymond D. Austin, *Diné Sovereignty, A Legal and Traditional Analysis*, *in* NAVAJO SOVEREIGNTY: UNDERSTANDINGS & VISIONS OF THE DINÉ PEOPLE 19, 37 (2017) [hereinafter NAVAJO SOVEREIGNTY].

[254] LEE, *supra* note 250, at 35.

[255] *Id.* at 36.

[256] *Id.* at 37.

[257] *Id.* at 48 (quoting Leland Wyman).

[258] *Id.*

[259] KELLEY & FRANCIS, *supra* note 252, at 3.

[260] *Id.*

[261] *See also* Shawn Attakai, *Challenges to Diné Bikéyah in 2023*: Nihikéyah Bich'ą́ąh Yéiilti' Doo, *in* NIHIKÉYAH, *supra* note 163, at 81, 99.

about the observations of the world. Words, oral and now written, are foundational to our culture because they are embodiments of SNBH. Our thinking is strengthened by words because words provide us access to our knowledge and our language and solidify our connection to the land. Saad gives us the ability to describe who we are, what we are, and why we are. Through saad, we can have knowledge and information of what surrounds us. It is through saad that we have data. All in all, data is everything tied to our identities as Diné people forever;[262] it is our words, thoughts, language, history, resources, and land.

1. Develop a General Navajo Data Sovereignty Act

The U.S. Constitution, which is the United States's fundamental law,[263] was written by settlers for settlers, which means that its principles will always conflict with the traditional values and principles of Indigenous Nations. At the core of Indigenous Nations, such as the Navajo Nation, there are responsibilities that individuals owe to their communities, relatives, and lands; because nothing is owned, we are merely stewards and not owners.[264] On the other hand, the foundational values and principles of the U.S. Constitution center around property rights and the idea that for one to "control" and seek redress for something, ownership needs to be established.[265]

While under Federal Indian Law, the Navajo Nation's relationship with the United States is that of dependency, the United States still recognizes that we have had inherent sovereignty since time immemorial.[266] Our full inherent sovereignty encapsulates political and cultural aspects, giving rise to "self-determination in its widest sense."[267] IDSov and IDGov suggest a version of cultural sovereignty as both concepts encourage "Indian nations and Indian people to exercise their own norms and values in structuring their collective futures,"[268] concerning data. While I agree that the "fullness of IDS[ov] cannot be realized within the architecture of the colonial settler state,"[269] tribal law allows us a greater exercise of our full inherent sovereignty. Thus, it is through tribal law that the

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[262] *See* 1 N.N.C. § 201.

[263] United States Courts, *Overview – Rule of Law*, https://www.uscourts.gov/educational-resources/educational-activities/overview-rule-law (last visited Apr. 14, 2023).

[264] *See* Perry, *supra* note 163, at 27.

[265] *See generally* Roger Pilon, *Property Rights and the Constitution*, CATO HANDBOOK FOR POLICYMAKERS (2022), https://www.cato.org/cato-handbook-policymakers/cato-handbook-policymakers-9th-edition-2022/property-rights-constitution.

[266] Worcester v. Georgia, 31 U.S. 515, 519 (1832).

[267] KELLEY & FRANCIS, *supra* note 252, at 9.

[268] Wallace Coffey & Rebecca Tsosie, *Rethinking Tribal Sovereignty: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STANFORD L. & POL. R. 191, 196 (2001).

[269] Tahu Kukutai & Donna Cormack, *"Pushing the Space" Data Sovereignty and Self-Determination in Aotearoa NZ*, *in* INDIGENOUS DATA SOVEREIGNTY & POLICY 21, 22 (2021).

Navajo Nation must design and create policies, statutes, and processes to govern our data.

Accordingly, the Navajo Nation is well within its means to pass a resolution or statute that adopts provisions of UNDRIP, specifically Article 31, due to its inherent sovereignty and authority from the Diné Fundamental Laws, so long as it is not contrary to Diné values. The Navajo Nation has existing legal mechanisms that protect data, such as the Navajo Privacy Act and the Navajo Nation Human Research Code.[270] However, these various acts perpetuate a sectoral approach that diminishes the relationality that is apparent within the traditional values of the Diné culture. The creation and codification of a General Data Sovereignty Act will ground the existing laws in a doctrine that governs the panoply of Navajo or Diné data (saad) that has been generated, is being generated, and will be generated.

In addition, it will give the Navajo Nation the ability to assert its rights over the governance of its data by defining what Navajo data is. One possible definition could be similar to the Māori, defining Navajo data as data produced by the Navajo Nation or its people or that is about Navajos and the environments we have relationships with. Another definition could be Navajo data is saad produced by the Navajo Nation or its people or that is about Navajos and the relatives we have relationships with. The uniqueness to the Navajo would be the ability to create language in English and in Diné Bizaad (Navajo language) that definitively asserts how data collection, access, and storage can be tempered by SNBH as a good governance model[271] and cultural values such as K'é, K'éí, and Hózhǫ.

Title 1 of the Navajo Nation is for general provisions, which would be a good section to include the General Navajo Data Sovereignty Act.[272] Thus, an example of the Act's possible statutory language may look like the following:

> The Navajo Nation Council finds and declares that:
>
> > 1. Navajo Data is saad produced by the Navajo Nation or its people or that is about Navajos and the relatives we have relationships with.
> >
> > 2. Data is everything tied to our identities as Diné people forever; it is our words, thoughts, language, history, resources, and land.
> >
> > 3. Saad exemplifies this concept because it is both an internal and external manifestation of our knowledge and information of what surrounds us.

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[270] See generally Navajo Nation Human Research Code, *supra* Part IV(C)(1) and Navajo Nation Privacy Act, *supra* Part IV(C)(2).

[271] Avery Denny & Michael Lerma, *Diné Principles of Good Governance*, *in* NAVAJO SOVEREIGNTY, *supra* note 253, at 103, 117.

[272] This is what I would name the Act if I were to propose it.

> 4. Navajo Data Sovereignty is the Navajo Nation's right to subject the collection, ownership, and application of its data or saad to Navajo governance. It is also the opportunity for the right to maintain, control, protect, and develop its cultural heritage, traditional knowledge, traditional cultural expressions, and any other manifestations of its culture, which is all saad.[273]
>
> 5. Intellectual property is a mechanism that is available to the Navajo Nation, but the Navajo Nation shall have the opportunity to first weigh the collective and individual benefit of maintaining the privacy of the data and ensuring its protection from any entity, native or non-native, as an exercise of its inherent sovereignty.
>
> 6. This Act shall be an overarching piece of legislation that can inform and expand on various statutes such as the Navajo Privacy Act, Navajo Nation Human Research Code, Navajo Nation Cultural Resources Protection Act,[274] Diné Natural Resources Protection Act of 2005,[275] and other relevant Acts to fully realize the relationality of our laws and recognition of our relatives, human and non-human.

2. Develop a Data Sharing Agreement

The statutory framework that the Navajo Nation currently has in place through the Research Code and the Privacy Act demonstrates a gap. There are no explicit statutes that regulate third-party individuals that are non-Indian or non-Navajo or any business organization, such as a nonprofit or for-profit corporation, partnership, or sole proprietorship, providing services to individuals that fall under the Navajo Nation's jurisdiction, on- or off-reservation, that collect data about those individuals.[276] In fact, other than customizing a cookie-cutter service contract between the Navajo Nation and the consultant, there is not much in the way of regulation of individuals whom the Navajo Nation hires as a consultant or even another third-party corporation.[277] Contract law governs the contract and

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[273] UNDRIP, *supra* note 40, at 9.

[274] *See* 19 N.N.C. §§ 1001–61.

[275] *See* 18 N.N.C. § 1301.

[276] *See supra* Part IV(C)(2).

[277] Form 1 (administrative purposes only) Services Contact (available at https://nnooc.org/wp-content/uploads/documents/purchasing-forms/02/Service%20Contract%20Form.pdf.).

emphasizes the fact that there is no waiver of sovereign immunity in light of a dispute.[278] While the contract lends the Navajo Nation a great deal of power by accentuating that the Navajo Nation is able to terminate upon written notice ten days before and that the consultant agrees to be subjected to the jurisdiction of the Navajo Nation courts and tribunals,[279] it is still a contract that emphasizes monetary gain and does not include more language recognizing the Navajo Nation's right to govern the collection, ownership, and application of the data generated within the agreement. Possible language may look like the following:

> THIS DATA SHARING AGREEMENT ("Agreement") is made by and between [entity here] and the Navajo Nation.
>
> WHEREAS, the Navajo Nation, through its inherent sovereignty which it has held since time immemorial, is authorized pursuant to the Navajo General Data Sovereignty Act to govern the collection, ownership, and application of Navajo Data (saad).

3. Updating the Research Code & Privacy Act

The Navajo Nation's statutory framework of emerging data governance, that is the Research Code, is at least twenty years old.[280] In addition, while the Privacy Act allows the Navajo Nation great discretion in protecting the privacy interest of individuals and governmental entities against third parties, there is still much to be done. The frameworks within the Research Code and the Privacy Act could explicitly incorporate the fundamental doctrines of Hózhǫ́, K'é, and K'éí within the statute itself rather than waiting until the Navajo Nation courts interpret it in tandem with Navajo Common Law.

VI. CONCLUSION

In conclusion, IDSov and IDGov empower Indigenous peoples to assert their rights over their data and create governance systems that incorporate their distinct cultural principles and language. Thus, the Navajo Nation could create a stronger data governance system by incorporating SNBH and the principles of K'é, K'éí, and Hózhǫ into a framework similar to the Māori Data Sovereignty Network. The Navajo Nation can use its inherent sovereignty and tribal laws to "rediscover our own agenda for today and tomorrow."[281] It has the unique ability to define Navajo data in general and create stronger legal mechanisms to protect data by

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278 Form 1, *supra* note 277, at 4.
279 Form 1, *supra* note 277.
280 *See supra* Part IV(C)(1).
281 Denny & Lerma, *supra* note 271, at 124.

interweaving the distinctive sectors of existing *data law* in the Navajo Nation into a cohesive and overarching law that can expand those protections to apply more explicitly to areas such social media, AI, etc. The Māori and other groups of Indigenous peoples have made extensive headway in the realm of data protection, privacy, and security, which the Navajo Nation and other tribes can look to for guidance.