Settler Colonial Studies
Publication details, including instructions for authors and subscription information:
http://www.tandfonline.com/loi/rset20

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To cite this article: Lindsay Moira Weiss (2013): Intellectual property rights and sovereign claims; water, diamonds and rights in the Central Kalahari Game Reserve, Settler Colonial Studies, 3:2, 157-171
To link to this article: http://dx.doi.org/10.1080/2201473X.2013.781928

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Intellectual property rights and sovereign claims; water, diamonds and rights in the Central Kalahari Game Reserve

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This article explores the history of claims to intellectual cultural property as they relate to claims to sovereignty in settler societies by Indigenous groups. The recent Southern African legal victory for San communities to return to their traditional settlements in the Central Kalahari Game Reserve marks an important precedent in which human rights claims constrain and direct the impact of corporate social responsibility (CSR) discourse. In the context of CSR, and the growth of public–private partnerships, the legal assertion of cultural property and cultural rights marks an important and substantive mode for asserting political autonomy and sovereignty in settler states.

Introduction

The Central Kalahari Game Reserve (CKGR), one of the largest natural preserves in Africa, was established by what was then the Bechaunaland Protectorate in 1961. Situated in the centre of Botswana (Figure 1), this area is unique in that it marks a twinned conservation project—it was established both as a natural preserve as well as site that would facilitate the mobile hunter-gatherer lifestyle of the resident San populations. The decision to carve out this territory in this way took on a special significance, when, in 1978, a litigation consultant commissioned by the Botswana Attorney General to investigate the land rights claims of the San stated that the local San community ‘have always been true nomads’ and thus ‘can have no right of any kind except rights to hunting’. The results of a 1985 commission into the status of inhabitants inside the CKGR (part of a longer development project on the part of the Botswana government) concluded that residents should be ‘encouraged’ to move from the reserve, implementing a policy of what was overtly termed ‘freezing development’, essentially amounting to an intentional form of government neglect which was eventually coupled with governmental delays and suspensions of traditionally issued hunting licenses to inhabitants and, ultimately, relocations spaced over a series of five years between 1997 and 2002.

Relocation camps such as new Xade are generally understood as non-viable alternatives for former residents of the reserve, having been alternately referred to as ‘concentration camps’, refugee settlements and wildlife management areas. Court transcripts record vivid witness descriptions of life in the resettlement camps, with stark statements such as ‘we have nothing to do but sit and drink, get AIDS and die’. An interesting recent turn of legal events has come to produce a very different outcome from this all-too-familiar settler scenario. In 2006, the High Court of Botswana ruled on a legal claim that had been lodged initially in 2002, granting

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the San of the CKGR an important victory and ruling that the removals from the reserve had been unlawful, granting the right of return based upon their Indigenous ties to the Kalahari. In a cruel twist to this decision, however, the right to access water from the local borehole was excluded. Thus, the single most important borehole for potable water in this region of the Central Kalahari, Mothomelo (Figure 2), became a charged site of contested power as drilling new boreholes is

Figure 1. Map of the Central Kalahari Game Reserve, Botswana, Courtesy of Jaco van Rensburg, Vox United.
illegal within park territory and therefore returning residents would have to rely on water delivered by Department of Wildlife, sharing with tourists, diamond prospecting companies and park employees⁵ – establishing a very conditional sort of autonomous existence at best. The result of this situation was that the claimants from the CKGR returned to court in 2010, seeking to recommission the borehole at their own expense, the claim being based upon their fundamental human right to water – a right formally recognized by the UN General Assembly in that same year, as well as by the African Commission on Human and Peoples’ Rights, thus not only making access to water a legal entitlement, but also, interestingly, a moral claim. In September of 2011, the Mothomelo borehole was reopened, the San claimants having finally recovered full right of return to their homes in the CKGR.

To understand the full complexity of this scenario, however, it is important to bring into play the established presence of diamonds in the reserve, along with the serious interest of several mining corporations. In fact, the Mothomelo borehole was initially created as an exploratory prospecting hole by the De Beers Company, diamond exploration at Gope and surrounding locations being widely known to have been on-going since the 1980s, though only formally acknowledged by the Botswana government in 2000. Many of the dispossessed San (as well as the NGO Survival International) claim that the real reason for their relocation was anxiety on the part of these stakeholders about how the presence of such communities would potentially interfere with the anticipated emergence of a major mining concession (rather than the inconvenience of such a population to the state as ‘remote area dwellers’ (RADs), or their impact upon local wildlife as claimed in previous government issuances).⁶ The prospective mining site of Gope alone is estimated at providing a profit of 3.3 billion dollars with a projected output span of up to 30 years. The complexly intertwined relationship between De Beers and the Botswana government is represented by Debswana – a public–private partnership jointly owned by Anglo American corporation and the Botswana government, its board of directors populated with senior government officials⁷ and its diamond output responsible for one-fourth of global output of diamonds. In this context, questions regarding citizenship and government delivery inevitably entail considering luxury market conditions, and all the problematics entailed by a ‘resource curse’, particularly as diamonds constitute 64% of Botswana’s GDP and 50% of government revenue generally.⁸
Critical anthropological accounts of the events surrounding the CKGR water rights case abound, thoughtful opinions have varied as to whether the pre-eminent source for concern is the patronizing development strategy of the Botswana government, the undue corporate influence as a result of Debswana, or the essentializing discourse of well-intentioned NGOs (further alienating the members of Botswana’s high judiciary and government). The broader reconfiguration of the boundaries of cultural property, sovereignty and corporate responsibility at work in this story arguably derive from a complex re-working of what it means to lodge a claim to cultural rights and how cultural property itself is working to reconfigure modes of existence within a sovereign territory. As Coombe has recently suggested, traditional appeal either to a privatized form of culture within neoliberal citizenship or to cosmopolitan rights on a global level is increasingly giving way to complex tropes of responsibility and stewardship of cultural landscapes.

The significance of this is illustrated by the fact that the initial tactic of the state to mediate the existence of these so-called RADs within the logic of biopolitical governance (in attempting to remove them from the reserve) ultimately failed to override juridical and cosmopolitan tenets of Indigenous rights to cultural property and traditional use of cultural landscapes. Yet, the specific mode of granting rights did not so much override the Botswana government by cosmopolitical fiat, rather, it marked a domestic juridical decision that brokered an unlikely coalescing of the corporate-governmental extractive project and traditional San lifeways in the CKGR. These two agendas do not coexist unproblematically, of course, yet they represent an ever-growing discursive convergence between corporate social responsibility (CSR) on the one hand, and Indigenous rights claims on the other. The restoration of the Mothomelo water supply was facilitated by the same company that currently prepares to mine in Gope, and while it is easy to construe this as an opportunistic exploitation of CSR discourse on the part of mining interests, I would like to explore the possibility that, in fact, legal modes of recognition provide the possibility for ever-increasingly complex modes of understanding what cultural property and cultural landscapes entails. The interplay of materiality and rights, particularly in the instance of the complex representational force of the remote CKGR boreholes, illustrate how claims to sovereignty are an ever-shifting field, always historically contingent upon the particular regimes of recognition. This precedent in Southern Africa introduces the complex question of whether the relationship between claims to sovereignty and claims to cultural property has ever been a stable one, or whether, historically, it has always represented a site of cultural and even moral contestation. Below I will examine some traditions of land claims, copyright and cultural property claims, in order to illustrate the turbulent history of these concepts, shedding light on the contemporary relationship between Indigenous claims in settler states as they are increasingly echoed and even capacitated through the aegis of CSR initiatives rather than the state.

**Historical context for cultural property claims**

To examine the historical category of cultural property claims prior to the post-colonial era, it is important to examine the precedents of intellectual property (IP) and copyright claims. The modern American tradition of copyright derives from the English context of absolute monarchy, when publishing monopolies on printing rights were only granted by charter of Queen Mary Tudor in 1557. This statutorily conceived notion of copyright as deriving from the decree of the sovereign continued under the Statute of Anne, which established a two-tiered system of copyright in which both the authors as well as the publishers were offered varying levels of protection. Initially, then, the source of this right derived from the sovereign monarch, yet what came to occur at a broader political level in England during the late sixteenth and seventeenth centuries (and this has relevance for the new world colonies as well) is a shift in the concept
of sovereignty itself – from a Hobbesian monarchical notion of power to an anti-monarchical drive to widen the capabilities of the Parliament.\textsuperscript{14}

How this came to unfold through the concept of copyright is quite interesting, and the question ultimately comes down to that of the derivation of rights to IP – and the question of whether such claims ought to continue to stem from the crown or the right of the author’s labour. Naturally, the latter option echoed a new and more popular notion of sovereignty that challenged the monarchy and established natural rights as the \textit{grund norm} for delineating laws protecting the rights of the citizen. However, in the early republic of America, federalists were inclined to orient IP policy towards its role as an incentive encouraging the public good – which ultimately took precedence over what was certainly the more popular conception of the author’s natural copyright. In fact, examples of this conceptualization of the rights of the author can be witnessed in public attempts to protect copyright which preceded even the writing of the Constitution as well as in much later moves to reform copyright legislation though the collective efforts of the British romantics and American authors.\textsuperscript{15} Copyright legislation in the Anglo-American tradition and the national mandate for legislating the greater rights of the public in terms of copyright – while not co-terminus with the desires of the authors solely – was ultimately reshaped or clarified through litigation brought against the state by authors.\textsuperscript{16} This historical example illustrates that, outside of the context of royal prerogative, there were always complex norms and agendas driving various claims to IP rights.

In the post-colonial context, IP assertions made by Indigenous peoples have been primarily in the fields of patents and trademarks, and ‘[n]one of these domains of intellectual property provide absolute rights of exclusion’.\textsuperscript{17} However, there is something temporally ill-fitting when comparing the limited time-frame invoked by the notion of the author’s copyright and the ancestral claims to cultural property invoked by Indigenous claimants. Hence, it may be instructive to think more generally about property rights notions as they have been translated from the context of the English monarchy to settler colonies in the new world.

Again, sovereignty figures largely as a conceptual touchstone from which the political and legal framework for property rights was formulated in the new world. The Spanish humanist scholar Franciscus de Victoria was the first to offer new world colonizers the notion that ‘the Indians were bound by the Europeans’ normative conception of natural law’.\textsuperscript{18} Those who subscribed to natural law importantly viewed Indians as subsisting in a ‘state of nature’ – which, for Locke, justified the proprietary transfer of their ‘vacant land’ to settlers. By establishing productivity, work and commodities as the basis for property rights, Locke (foreshadowing Adam Smith) suggested that such peoples will invariable be improved by the introduction of a market system of private property. So the new world came to be forcibly assimilated into ‘the more advanced European state of constitutionally protected private property in land and commercial agriculture’,\textsuperscript{19} with the expectations of improvements for all.

But what occurred in most settler scenarios – and precisely what underlies the debates surrounding cultural property rights – was that ‘Aboriginal peoples have interacted with and adapted to commercial trade with Europeans for hundreds of years without desiring to abandon their cultural ways or to identify with the European’s uniform institutions of private property and commodity production’.\textsuperscript{20} Tully uses this point to highlight the colonial inability to recognize Aboriginal ancient forms of constitutional ‘direct democracy’ and consequently their failed attempts to integrate Aborigines within a modern constitutional framework. But more specifically, to what extent did this misrecognition play out in the realm of new world property rights? That is, to what extent were the English settlers truly capable of recognizing claims to property by the Aborigines even without the legitimating framework of ‘state of nature’?

In Maine’s discussion of ancient property rights, he notes that English property law derives from ancient Roman law, which recognized two primary classes of property: Res Mancipi
(RM) and Res Nec Mancipi (RNM). The former category, roughly speaking, consists of immovable and more valuable things and land – which require for their changing of ownership a formal public ceremony whose symbolism encapsulates the incorporeal web of social relationships that are involved in such a transaction (a Mancipation). The latter category, RNM, are those (typically less valuable and moveable) objects which do not require such a ceremony and therefore are more freely circulating – and thus, it is important to note, more desirable to the needs of an expanding Empire. These two forms of property represent the poles on a scale of forms of legal recognition of objects that extends from possessions that more resemble gifts to those that more resemble commodities – i.e. from those that are practically inalienable and those that are more easily fungible. What is interesting is that during the vast expansion of the Roman Empire under Justinian, these two categories came to be fused – all property acquiring the more easily transferable properties of RNM – in the pragmatic goal of more easily acquiring vast amounts of goods and lands from foreign societies.

Maine’s argument is that this has come to be the general case for modern European property law as well – and especially in the supersession of the feudal law of land by the Romanized law of moveables (RNM). Maine further intimates that this may ultimately come to be the case for England as well. However, he notes that England still maintains the ancient Roman distinction between RNM and RM (specifically in terms of the English law of chattel personal and that of chattel real, respectively). He cites an example: ‘a certain class of goods have gone as heirlooms with the land, and a certain description of interests in land have from historical causes been ranked with personality. This is not the only instance in which English jurisprudence, standing apart from the main current of legal modification, has reproduced phenomena of archaic law’.

This historical example highlights how very specific, and indeed political, is Locke’s choice of his description of property rights amongst the new world Aborigines, and ultimately his goal of freeing up Aboriginal lands for appropriation echoes that of Justinian in ignoring the less alienable aspects of cultural property in order to facilitate the expansion of Empire. The result is that, finally, his adoption of the tenets of natural law (and doing so in a country with a seemingly unlimited supply of land) allowed Locke to step outside of the precedents of England’s own juridical common law in order to construct a theory of liberty – through property rights – whose Homo sacer was the traditional Aborigine.

The politics of (Aboriginal) IP with relation to sovereignty

Today, property and liberty are popularly conceived of as being quite separable things – arguably the result of growing scarcity and abuses of private property throughout industrialization and especially with the rise of giant corporations (‘private governments’). In the modern era, ‘[p]roperty rights were considered more the enemy than the friend of liberty’. So the contemporary political charge surrounding IP claims made by Indigenous peoples accrues concern for the health of the cultural and intellectual commons as well as the current inadequacy of Western notions of property rights to deal with the needs of Indigenous communities. Michael Brown’s ‘Who Owns Native Culture’ is perhaps the most clearly articulated form of the former worry, suggesting Indigenous claims to IP threaten to create ‘impermeable [cultural] boundaries’. What Brown really seems to have a problem with are claims for absolute protection (e.g. the Daes report) which represent a challenge to Brown’s own liberal categorical – the ‘cultural and intellectual commons’. Yet do litigious or sovereignty-based claims ‘push aside other ways of crafting solutions to social conflicts’? To what extent should they be seen as a continued rejection of the violent appropriations facilitated by the categorical imperatives of the colonizers – e.g. the ‘greatest common good’ of Locke? Claims to cultural property, particularly as increasingly realized through cultural rights offer a pragmatic realization of the necessity of pushing ‘radically new legal forms
of intellectual property through the courts, more about seeking to refigure the shape of the intercultural dialogue than about seeking to eliminate it. As Marilyn Strathern states, ‘[I]f we shift into the world of already existing inequities, where – to use a romantic metaphor – it is hard to make one’s voice heard, then intellectual property rights is a forceful sound bite’. So it is precisely within the debates around Indigenous and minority claims that challenges to Enlightenment-derived assumptions about the ‘common good’ are being reconfigured. As one commentator has put it: ‘[I]ndigenous claims have attracted attention because they strike at the heart of liberal conceptions of political community and justice. In particular … they present a considerable challenge to the justificatory ambitions of egalitarian liberalism’. What is especially important in Brown’s account, however, is how he envisages that the debate around Indigenous claims to intellectual and cultural property should be enacted. In following Gray, Brown argues that political settlements should occur locally and constantly, rather than putting faith in ‘the majestic certainties of law’. In this view, negotiations ideally occur at the level of professional associations, educational institutions, advocacy groups, service organizations and labour unions – this is the idea of ‘soft law’ which seeks to obviate the stark and often insoluble form these debates take at the level of hard law.

Yet, when this more pragmatic approach to cultural property claims is endorsed, an important level of recognition is relinquished (particularly regarding claims to sovereignty). William Connolly, for example, suggests that minority groups must always struggle to ‘break through’ liberal conceptions of justice (which are often static conceptions of pluralism) – in order to work towards the dynamic he calls ‘pluralization’ in which

Postcolonial property and CSR

As we can understand through the appeal of the San community to traditional water usage in the CKGR, the assertion of ‘rights’ to cultural property means asserting the capability to force non-Indigenous people to perform some level of historical recognition through granting preferential access (or no access) to materials – thus, far from being the ‘disappearing’ of cultural property, this is its bigger and bolder politicized presence in the public sphere.

Research among legal scholars of cultural and IP has shown precisely how seriously such claims can benefit the somewhat limited notions of authorship and IP in Western law. Celia Lury, in fact, suggested that legal attribution of authorship be regarded in itself as a form of cultural production (based on exclusion) long before the entrance of the cultural property debate. What Coombe finds interesting about Lury’s research of historical European copyright law is how fundamentally the evolution of this copyright law came to elevate particular forms of authorship while concomitantly de-legitimating others. Coombe’s project examines the contemporary blurring of boundaries between author and consumer – which subverts the fundamental logic of copyright law and has become perhaps one of the more important practices of contemporary cultural citizenship. Coombe emphasizes the agentive practice of the ‘counterpublic’ in appropriating widely recognized and publicly meaningful cultural forms and in the process ‘stretching’ traditional Western notions of authorship. She points out, however, that Native claims operates from a very different socio-political context, and hence ‘a truly dialogic democracy might be one in which we respect a prohibition on the commodification of some signifiers as commodities, to the extent that recognizing authorial possession of the signs of alterity may well suppress the
ability of others to articulate social identity’. Moreover, Coombe recognizes the potentially revolutionary aspect of Native claims to cultural property. It is thus precisely when these claims are made in ‘the language that power understands’ (law) that they begin to force a ‘legality attentive to an ethics of contingency’ by ‘simultaneously engaging and subverting [the] claims they make in the voice of an authorial other’.

As an example, legal scholar Margaret Radin’s notion of personhood as the basis of property rights may illustrate an example of how legal categories can be creatively used to respond to Native claims. Unusually, Radin chooses to draw from a rather unconventional reading of Hegel rather than Locke for her concept of property rights and personal relationship with objects. She is fundamentally construing property as constituting a different form of liberty for the owner than the one suggested by Locke’s theory. Locke’s more negative concept of liberty (in which one’s relationship with property provides freedom through a space where public laws do not reach) is fundamentally different from Radin’s conception of a positive liberty deriving from a person’s relationship with property – arguably echoing Berlin’s second freedom. Radin argues that a person’s ‘occupancy’ of the object must be protected by the law in order to facilitate a person achieving her true and highest self – as it is wrapped up in ‘things’. Where Radin’s theory becomes most relevant to Indigenous cultural property claims is when she proposes that juridical moderation of conflicting claims to property be judged on a scale from fungible property rights to personal property rights. Possession of property in this framework amounts to something more complex than merely ‘having’ property. Rather, Radin proposes a system of overlapping claims in which the extent to which one’s personhood is wrapped up in the object might take precedence over more fungible forms of occupancy. By shifting consideration to where the object or commodity has ended up and examining that object’s relationship to the self-constitution of the claimants, the court can more eloquently address the kinds of cultural property claims that so often seem to devolve into ‘performance’ of one’s culture or displays of authenticity. In a sense, this form of propertyhood takes seriously the notion suggested by Carol Rose that possession as the basis of property ownership is as much about physical possession as it is about which claimant’s narrative resonates most successfully with the norms of the community involved. For this reason, it is important to introduce novel ‘texts’ into IP claims, so that there can be a wider recognition of alternative narratives surrounding the concept of property itself.

Understood this way, creative juridical compromise can be made between two competing narratives and even two sovereign claims. For example, in the Australian case of Milpurruru et al. v. IndoFarm Pty Ltd. et al., Judge Von Doussa’s copyright ruling for Aboriginal plaintiffs (whose traditional paintings had been used for carpet designs) incorporated tenets of Aboriginal law into its opinion, e.g. ‘If unauthorized reproduction of a story or imagery occurs, under Aboriginal law it is the responsibility of the traditional owners to take action to preserve the dreaming, and to punish those considered responsible for the breach’ (Milpurruru et al. v. IndoFarm Pty Ltd. et al.). Though not directly applying Aboriginal law, the ruling acknowledged something quite important for considerations of copyright. Van Doussa states,

Whilst the Copyright Act only recognizes the rights of the copyright owner, in a practical way it appears that there may be scope, even in the case of the estates administered by the Public Trustee, for the distribution of the proceeds of the action to those traditional owners who have legitimate entitlements according to Aboriginal law to share compensation paid by someone who has without permission reproduced the artwork of an Aboriginal artist. (Milpurruru et al. v. IndoFarm Pty Ltd. et al. 1994, 129)

Such precedents do succeed in effectively widening the legal category of copyright itself, in turn legitimating broader Aboriginal claims to culture property. While Ziff rightly notes that the court’s recognition of Aboriginal custom was a far cry from letting Aboriginal law ‘govern the action’ – it
is possible that the ‘transformative accommodation’ of the two legal systems offers a promising solution, as it is not always clear that Indigenous courts offer a utopian alternative. In North America, for example, tribal courts were instituted as an assimilative mechanism of social control by the Bureau of Indian Affairs, and even today, they still continue (post-Indian Reorganization Act) to struggle to exert themselves as more autonomous from Western doxa in adjudicating civil and political law. Thus, in bringing the case over Crazy Horse malt liquor before a tribal court, Crow explicitly sought to ‘meld American and tribal law in ways that respected each [while remaining] part of the effort to contest the representations of tribes and tribal people by the dominant culture’. Specifically, they appealed to the legal fact that the use of the name ‘Crazy Horse’ for malt liquor was tortious defamation of the spirit of Crazy Horse, thus incorporating Lakota emphasis on well-being of the deceased within Anglo tort law.

Thus, while sovereignty itself can only problematically be established through recognition by another sovereign’s courts, there remains the transformative potential in consideration of radically different conceptions of proprietary rights—in this instance concerning the use of a name. This ushers in a political form of discourse between settler state and Indigenous communities and offers perhaps substantive recognition to Indigenous assertions of its sovereign relation to its culture.

Indigenous sovereignty and materiality

Marilyn Strathern rightly cautions that IP, when applied to Indigenous knowledge, reifies divisions between persons (through things) and between things (through persons) and between (so-called) ‘first’ and ‘third’ worlds. This issue has become especially salient in the context of the ascendant discourse of CSR. Trans-national corporations (TNCs) and MNCs and their affiliate NGOs would seem to increasingly adopt the traditional role of the state in mediating Indigenous stakeholders and human rights when in conflict with projects of mineral extraction. Yet at the same time, there is a distinctly disconcerting sense that there currently lacks adequate infrastructure to ensure that such CSR discourse amounts to much more than what some have termed ‘an honest duplicity’ and others have called ‘corporate social technologies’. Whereas the case of Mothomelo might have amounted to just one such scenario, the same boreholes, literally artefacts of colonial prospecting, were legally harnessed to a heritage of materially based cultural rights to water. Ironically, in the contemporary climate of the retreating service delivery and shrinking government, it is through cultural property claims, appeals to cultural rights and the actual materiality of the cultural landscape that settler judiciaries can be made to incorporate Indigenous title.

This form of sovereignty is precisely what the object promises— if the legal system can construe that object to be inalienable from a larger political project. Cultural property as a ‘parliament of things’, leading a ‘parliament of brothers’ as Latour puts it, may have a political purchase that traditional territorial claims of sovereignty have historically lacked. One of the major American legal precedents for the denial of territorial sovereignty for American Indians is the 1823 case Johnson v. McIntosh in which Chief Justice John Marshall upheld the mediaeval ‘doctrine of discovery’, according to which ‘superior title’ was instantly granted to Europeans who discovered ‘infidel-held’ lands. Robert Williams describes Marshall’s decision as the ‘textual source of the basic principles of modern federal Indian law’ and re-examines it in the intellectual context of the historical moments leading up to the American revolution. At that time, a popular anti-Crown notion amongst the radical colonists was the idea of throwing off the ‘Norman Yoke’. The idea was that the colonist’s ancestral links to the (pre-Norman) tribes of the Saxons granted their new world holdings proprietary claim superior to any claim of the British Crown based on the Norman tenets of conquest. Thomas Jefferson nostalgically referenced a pre-Norman state of property rights in which ‘[o]ur Saxon ancestors held their lands,
as they did their personal property, in absolute dominion, disencumbered with any superior, answering nearly to the nature of those possessions which the feudalists term allodial.\(^{54}\) In throwing off the ‘Norman Yoke’, the colonies were basing their property rights on the ancient tribal Saxon law – the basis for ‘the venerated English common law of property’.\(^{55}\) For Williams, this renders the modern use of the ‘discovery doctrine’ somewhat less applicable for the post-independence claims to Indian country and casts doubt on the assumptions either that culturally based claims to property rights are a recent phenomenon or that sovereignty is a negligible consideration when examining the basis for cultural property claims. It is apparent that assertions of property rights – both of objects and of territory – go hand in hand with sovereignty claims.

Wallace Coffey and Rebecca Tsosie have drawn from the philosophical works of Warrior and Deloria in order to rethink tribal sovereignty as emerging from a participatory tradition, which they have termed ‘Cultural Sovereignty’. This is a very post-Hobbesian notion of sovereignty focusing on ‘constructive group action’ which redefines their sovereignty as shaped by cultural traditions and existing as an instrument for maximizing their well-being – thus jettisoning the Kantian tradition of natural rights universally available behind a ‘veil of ignorance’. ‘Cultural sovereignty may well become a tool to protect our rights to language, religion, art, tradition and the distinctive norms and customs that guide our societies’\(^{56}\). Coffey and Tsosie explicitly recognize how crucially Anglo-American IP law has oriented its protective scope to commercial harm, whereas cultural harm has often taken second place to free speech – e.g. Hornell Brewing Co. v. Brady 1993, upholding the commercial use of the name ‘Crazy Horse’ as protected under commercial free speech.\(^{57}\) In the same way, legal recognition of Aboriginal Native title has opened the door for larger claims to sovereignty,\(^{58}\) similar claims can be seen to derive from cultural property claims in North America.

In Locke’s assignation of property rights in his Two Treatises, it is interesting to consider how differently the property rights of the Saxon and Briton tribes are affected by the Norman Conquest compared to the fate of the new world tribes. According to the anti-Hobbesian conventions of English common law, laws derive their authority from ‘usage and custom’ and are resultanty not extinguished by the mere fact of a conquest. Hence, says Locke of England, ‘when William conquered England and imposed the Norman yoke of feudal law, he could not continue the pre-existing ancient constitution of Anglo-Saxon local government, trial by jury, independent property and individual liberties’.\(^{59}\) Indeed, Locke takes this logic even further, asserting that conquest gives no right of dominion, the Inhabitants of any Countrey, who are descended, and derive a Title to their Estates from those, who are subdued, and had a Government forced upon them against their free consents, retain a Right to the Possession of their Ancestors … For the first Conqueror never having had a Title to the Land of that Country, the People who are the Descendants of, or claim under those, who were forced to submit to the Yoke of a Government by constraint, have always a Right to shake it off.\(^{60}\)

Conquest, therefore, had to be legitimated in the language of ‘discovery’ not conquest. This adoption of the mediaeval Christian ‘right of discovery’, by Chief Justice Marshall in 1823, simultaneously rendered federal recognition of the ancient constitutionalism of the Native Indian tribes as irrelevant as well as limiting land rights to ‘occupancy’. It is in such a way that the recognition of sovereignty by the USA came to be instrumentalized for political purpose – and in the instance of the Native Indians, it has been as much a tool of domination as of pluralism. And yet, with jurisdiction limited to federally recognized lands, how might these claims to cultural property outside Indian country amount to a challenge to federal limitations? The absolutist claim to cultural property imagines itself as an unwillingness to give up one’s traditional sovereignty in areas not territorially delimited – it is the very attempt to politicize networks of cultural property flow that has, in fact, redefined what cultural sovereignty can mean. The problematic ways in which cultural property participates in the public
sphere constitutes a diminishment of Brown’s cultural commons – if the good of the cultural commons is only construed insofar as it remains a non-dialogical resource organized along the tenets of Western governmentality. In a sense, the claims made to moveable property strike more deeply at the ways in which Western governmentality has come to accrete around cultural property – and by extension around notions of cultural sovereignty.

Conclusion

It is possible to regard cultural property and landscapes as part of a larger political imaginary that ferments at the edges of juridical precedent and legislative record. Within the particular context of the settler state, the same landscapes and things awkwardly bridge the enduring structures of extractive neoliberal citizenship and Indigenous appeals to rights. Cultural property is not seen as inert but rather as dynamically charged by its relationship to the collective, and, in turn, it serves to highlight the perpetual and active transgression of Native sovereignty that the federal courts simultaneously grant and transgress (through the potential of the plenary power to intervene). If – within the legal imaginary – cultural property acts as a ‘parliament of things’ leading its human actants towards a relationship of sovereignty, then cultural property may be seen a sort of political leaven that stretches the inert boundaries of territorial sovereignty and leads courts to a reconsideration of the very texture of Indigenous dominion. Reclamation of the property of one’s ancestors, based on one’s cultural sovereignty and one’s ancient constitutions, hearkens to the revolutionary claim made by settlers themselves. As Powers elaborates, ‘[t]here is no reason that Native groups should not argue these issues in the same courts and in the same manner as all the other parties to this dialogue’.

The materiality of the CKGR boreholes evinces the complex representational force of such twinned projects, one which is arguably illustrative of a deeper problematic of the contemporary articulation of universal rights and neoliberal citizenship. In this instance, at one moment the borehole represents a socio-historical artefact, created by De Beers as a diamond-prospecting shaft in the 1980s, denoting the colonial project at its most explicitly extractive and profitable. At another (present) moment, however, it functions as a remote water pump in the CKGR, both mediating a set of normative beliefs about the biopolitics of liberal governance and the recognition of the traditional lifeways of the CKGR residents. San residents of the CKGR have been alternately represented by the Botswana judiciary as ‘RADs’, indulging in superfluous usage of government resources, ‘bad’ biopolitical subjects, and at other moments, they have been held up as Indigenous claimants accessing their fundamental right to dignity and a traditional lifestyle.

The complex relationship between these two forms of recognition within the state of Botswana warrants further investigation, and to what extent international rights discourse (underlying the latter scenario) simply facilitates an on-going biopolitical framework in which the liberal state provisions rights ‘assets’ within ‘morally efficient’ levels in efforts to promote profitable development. Ultimately, I question the extent to which this state of affairs ought to make us pessimistic with regard to our political categories, modes of recognition and the conditions created by late liberal markets, or whether we might interpret this state of affairs as simply one more historical iteration of the constant push–pull of speculative and cultural forces at work at any one historical conjuncture – with materiality and the landscape playing an under-examined role.

Rights discourse, particularly as it fosters intervention, is ordinary clustered around the catastrophic, the eventful and the worst cases of rights violations. Yet what is interesting about this case, and the prioritization of water access more generally, is that it highlights a more ‘ordinary’ and chronic form of killing, what Elizabeth Povinelli refers to as ‘the lethal conditions of late liberal societies’. Temporally speaking, this prioritization of some issue like access to water shifts the orientation of rights concerns from its more traditionally abstract perch of some
future anterior’ and rather stakes a more immanent claim in daily well-being. In the context of the San accessing water in the Kalahari, this case emblemizes the muddied waters of third generation rights, in which economic rights and environmental rights mingle with cultural heritage. Yet, ultimately it is the materiality of the Mothomelo borehole which allows these claims to sovereign cultural existence to refashion the rhetorical excess of Corporate Responsibility Discourse, constructively constraining the biopolitical excess of the public–private partnership of Botswana (attempting to simply ‘remove’ inconvenient populations). Ultimately, the case of the CKGR boreholes reminds us that rights can only ever have teeth in the context of some form of answerable juridical forum and sovereign space (even as rights discourse marks a fundamentally cosmopolitan discourse).

The uneasy coexistence of the Indigenous claim and the TNC is highlighted by the events of the CKGR case, the fundamental human right to water manifests in the infrastructure of extractive mining. Pheng Cheah calls this the ‘contaminated’ quality of rights discourse – a state of affairs in which our best attempts to humanize our existence within global capital, and to create a space for recognition, remains inevitably ‘mired within the imperatives and techniques of [capitalist] globalization’. Yet, in practice, rights discourse can only ever be implemented at a particular historical conjuncture, and is therefore always-already ‘constrained’ in its humanizing agenda by the particular infrastructures and material conditions in which it is invoked, a fact difficult to ignore when considering the materiality of these cases.

Ultimately, my point in illustrating the positive and negative material constraints of rights and claims to recognition, is because what initially strikes one as a seemingly uneasy and even paradoxical state of affairs, actually requires increased attentiveness to the materialities and histories that explicate the full meaning of our present predicament. If, much as with rights, sovereignty has always amounted to an ‘ontologically empty category that needs to be performed’, then the question arises, how might we understand certain materialities, and sites to have traditionally represented these elusive political categories? Continuing to approach the historical genealogies of speculative endeavours, sovereign claims or cultural tradition as discrete entities (absent consideration of their immanent, material) misses their complexly entangled state. Water in Southern Africa, in fact, has a long history of being caught up in the twinned project of profit and political sovereignty. During the eighteenth and nineteenth centuries, an important role performed by shamanic San practitioners was travelling to the spirit world in order to capture a rain bull and bring rain to parched areas and needy agropastoralist populations. Increased competition between itinerant shamans created an aspect of celebrity for those pre-eminent shamans who were believed to have a greater ability in the spirit-world and such pre-eminent shamans came to be depicted in larger and a more detailed manner than other shamans in rock paintings.

I briefly cite this historical instance in closing to illustrate how water has long participated in anticipatory economies in which the conditions of life on the edges of what was environmentally inhabitable was profoundly predicated on the powers to control the water and, by association, power itself (in its true sovereign form – establishing the right to life and death). Tracing a historical genealogy of water sourcing coalesces, a set of different historical events in which we begin to discern the complexly intertwined relationship between speculation, sovereignty, citizenship and rights, in a manner in which there is no necessity to consider citizenship on the one hand and cultural tradition on the other, as the Botswana government would insist.

It is through historical genealogy and attention to materiality that we might begin to understand some effects of rights discourse as enabling certain forms of sovereign continuities. Long before Bodin and Hobbes, we can imagine that there were social constructs, sites and practices from which the essence of the sovereign concept emerged. It is very interesting to understand whether rights, even as they always-already emerge from within the constraints of global capital (and as such, might be broadly conceived of as ‘contaminated’ according to their own
deontological logics) may become a new vehicle for imagining sites of sovereignty and better understanding our material world.

Notes

2. Decision, cited in, ibid., 71.
13. Ibid., 40.
22. Ibid., 167.
26. Ibid., 243.

32. Ibid., 242.
33. Precisely because ‘contemporary liberal orthodoxy is a species of legalism’ (ibid., 116), the debate over cultural rights should be opened up to include claims made according to deeply different regimes of value. In fact, the postcolonial concept of a pluralistic society based on modus vivendi would necessarily entail such considerations. Thus, for example, while Duncan Ivison’s post-colonial liberalism is also loosely based on Gray’s modus vivendi framework, it has the important addition that liberal understandings of justice should be open to debate and challenges brought forth from Indigenous claims (Ivison, Postcolonial Liberalism, 137); W.E. Connolly, The Ethos of Pluralisation (Minneapolis: University of Minnesota Press, 1995), 184.

36. Ibid., 298.
37. Ibid., 242.
40. Radin, Reinterpreting Property, 53.
46. Ibid., 197.
52. Williams, American Indian in Western Legal Thought, 231.
53. Ibid., 231.
55. Williams, American Indian in Western Legal Thought, 268–9.
57. Coffey and Tsosie, ‘Rethinking the Tribal Sovereignty Doctrine’, 204.
59. Ibid., 149.
60. J. Locke, *Two Treatises of Government*, 394.
61. B. Latour, *We Have Never Been Modern*.