

**TAKING BACK SOVEREIGNTY: THE IMPORTANCE OF  
NATIVE VOICES IN ADDRESSING ENVIRONMENTAL HARMS  
TO NATIVE LAND**

TABLE OF CONTENTS

INTRODUCTION .....	616
I. HISTORY OF TRIBAL SOVEREIGNTY .....	619
II. TRIBAL SOVEREIGNTY AND ENVIRONMENTAL RIGHTS.....	620
III. DESCRIPTION OF CONTROVERSY .....	623
A. <i>The Enbridge Pipeline</i> .....	624
B. <i>Department of Natural Resources v. White Earth Band             of Ojibwe</i> .....	625
IV. REPERCUSSIONS OF DEPARTMENT OF NATURAL RESOURCES V. WHITE EARTH BAND OF OJIBWE .....	628
A. <i>Environmental Racism</i> .....	629
B. <i>Loss of Cultural Resources and Land</i> .....	631
V. CASE STUDY: MĀORI TRIBAL SOVEREIGNTY .....	632
A. <i>Treaty of Waitangi</i> .....	632
B. <i>Māori Land Court</i> .....	634
VI. PROPOSAL .....	635
A. <i>Tribal Sovereignty</i> .....	636
B. <i>Importance of Native Voices</i> .....	638
C. <i>Fulfill Commitment to the United Nations Declaration             on the Rights of Indigenous People</i> .....	638
CONCLUSION .....	641

## INTRODUCTION

Indigenous people have been granted Tribal sovereignty<sup>1</sup> yet have not had the power to protect their land and resources. One type of environmental harm plaguing Native land is using such land as a vessel for oil pipelines.<sup>2</sup> Such placement not only exposes the land to environmental degradation, but also perpetuates a history and pattern of colonization<sup>3</sup> while putting Native land at risk.<sup>4</sup> Pipelines, placed through

---

1. *Government, Tribal Sovereignty*, PAUMA TRIBE, <https://www.pauma-tribe.com/government/tribal-sovereignty/> (last visited Nov. 5, 2021); see also John E. Echohawk, *Understanding Tribal Sovereignty: The Native American Rights Fund*, EXPEDITION, Winter 2013, at 18 (explaining that treaties are made with sovereign nations, such as tribal nations, and that the Supreme Court of the United States recognizes tribes as sovereign).

2. See Sheila Regan, *'It's Cultural Genocide': Inside the Fight to Stop a Pipeline on Tribal Lands*, THE GUARDIAN (Feb. 19, 2021, 05:00 EST), <https://www.theguardian.com/us-news/2021/feb/19/line-3-pipeline-objibwe-tribal-lands>; but see Richard Epstein, *The Indigenous Peoples War Against Pipelines*, FORBES (Apr. 8, 2019, 5:51 PM EDT), <https://www.forbes.com/sites/richardepstein/2019/04/08/the-indigenous-peoples-war-against-pipelines/?sh=63706c673781> (arguing that the Dakota Access Pipeline does not pose an “immediate threat” of danger or pollution to Indigenous land and that all parties need to work together in good faith. The author also suggests that the “war against pipelines” on Indigenous land is merely a ruse to abolish fossil fuels).

3. See Rachel Treisman, *How Loss of Historical Lands Makes Native Americans More Vulnerable to Climate Change*, NPR (Nov. 2, 2021, 7:00 AM ET), <https://www.npr.org/2021/11/02/1051146572/forced-relocation-native-american-tribes-vulnerable-climate-change-risks>; see also Kyle Whyte, *Settler Colonialism, Ecology, and Environmental Injustice*, 9 ENV'T & SOC'Y 1, 137-140 (2018) (adding that racist practices of the settlers are perpetuated today because the effects of global warming continue to disproportionately impact Native land and their livelihood. Additionally, the settler practices are continued today and are displayed by the lack of “inclination for consensual decision making”).

4. See Kelly Duquette, *Environmental Colonialism*, SCHOLAR BLOGS (Jan. 2020), <https://scholarblogs.emory.edu/postcolonialstudies/2020/01/21/environmental-colonialism/>.

Native land, such as the Dakota Access pipeline, have been controversial for years.<sup>5</sup> For example, individuals have been protesting the Dakota Access Pipeline since 2016.<sup>6</sup> While the Supreme Court recently denied Dakota Access' petition for writ of certiorari,<sup>7</sup> the battle is not over. The expansion and reconstruction of Enbridge's Line 3 could be just as disastrous.<sup>8</sup> In order for Indigenous communities to have the power to protect themselves, it is crucial that the United States acknowledge the environmental harms inflicted on Native land, and fully recognize Tribal sovereignty.

Throughout history, the United States has violated Indigenous people's Tribal sovereignty<sup>9</sup> by damaging their land and environment. While it is too late to change history, it is not too late to change the future. The United States can effectuate change partly by affirming Tribal sovereignty and partly by implementing established systems other countries have adopted to mitigate similar harms. More specifically, this comment will discuss systems that New Zealand has adopted to right some of its historic wrongs against its Indigenous people, the Māori.<sup>10</sup> For example, New Zealand created infrastructure such as the Waitangi Tribunal and Māori Land Court to help protect the interest of Indigenous people and their land.<sup>11</sup> This comment suggests the United

---

5. See Nadia B. Ahmad, *Trust or Bust: Complications with Tribal Trust Obligations and Environmental Sovereignty*, 41 VT. L. REV. 799, 803 (2017); see also Rebecca Hersher, *Key Moments in the Dakota Access Pipeline Fight*, NPR (Feb. 22, 2017, 4:28 PM ET), <https://www.npr.org/sections/thetwo-way/2017/02/22/514988040/key-moments-in-the-dakota-access-pipeline-fight> (providing a timeline of the Dakota Access Pipeline controversy).

6. Rebecca Hersher, *Key Moments in the Dakota Access Pipeline Fight*, NPR (Feb. 22, 2017, 4:28 PM), <https://www.npr.org/sections/thetwo-way/2017/02/22/514988040/key-moments-in-the-dakota-access-pipeline-fight>.

7. *Dakota Access, LLC v. Standing Rock Sioux Tribe*, No. 21-560, 2022 U.S. LEXIS 1225, at \*1 (2022).

8. Enbridge is "Canada's largest pipeline company." See *Line 3 and Treaty Rights*, SIERRA CLUB (Apr. 2017), <https://www.sierraclub.org/sites/www.sierraclub.org/files/sce/north-star-chapter/pdf/TreatRightsFactSheet.pdf>.

9. See Joseph William Singer, *The Role of Jurisdiction in the Quest for Sovereignty: Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641, 658-59 (2003).

10. See *infra* Parts V-VI.

11. See Claudia Orange, *Aboriginal Rights and Land Claims in New Zealand*, CANADIAN ARCTIC RES. COMM. (N. Persp., Canada), Summer 1995; see also *History*

States can adopt similar systems to mitigate environmental harm against its Indigenous peoples.

The United States needs to take a new approach when addressing environmental harms to Native land. Indigenous people are currently forced to rely on the federal government to protect their interests, but such protection has been inconsistent and ineffective, resulting in environmental degradation.<sup>12</sup> While it is a complex problem, there are numerous solutions. Foremost, re-establishing Tribal sovereignty can mitigate and prevent more damage from occurring on Native land by including Native voices in decisions that impact their land. The United States can take affirmative steps to re-establish Tribal sovereignty by providing Tribal representation, both politically and judicially in legal proceedings involving Native land; amplifying native voices; and re-committing to the United Nations Declaration of Indigenous Rights.<sup>13</sup> If the United States implements these measures, it will provide for a more equitable process and give Indigenous people autonomy over their land.

Part I of this comment describes the history of Tribal sovereignty and how it has diminished over time, weakening Tribal Nations' ability to protect their land, resources, and culture. Part II will provide a brief overview of the application of Tribal sovereignty to environmental rights and land use claims. Part III illustrates the importance of re-establishing Tribal sovereignty by examining the issuance of a controversial water permit through an analysis of *Department of Natural Resources v. White Earth Band of Ojibwe*. Part IV discusses the repercussions of the White Earth Band case study and explains the importance of protecting Native land. Part V provides a comparative analysis of how New Zealand has addressed a similar controversy involving the Māori people. It will introduce the Treaty of Waitangi and the systems New Zealand implemented to preserve the land and resources of the

---

*of the Māori Land Court*, MĀORI LAND CT. (June 28, 2016), <https://maori-landcourt.govt.nz/about-mlc/our-history/> (writing that the purpose of the Māori Land Court is to “promote the retention of Māori land in the hands of its owners, whānau and hapū; facilitate the occupation, retention and use of Māori land; and to ensure decisions about Māori land are fair and balanced”).

12. See Mot. for a Prelim. Inj. and Expedited Br. and Review at 13-17, *Minn. Dep't of Nat. Res. v. White Earth Band of Ojibwe* (D. Minn. Sept. 4, 2021) (No. 0:21-cv-03050), 2021 U.S. Dist. LEXIS 167790.

13. See *infra* Part VI.

Māori, such as the creation of the Waitangi Tribunal and the Māori Land Court. Part VI considers what the United States can learn from New Zealand to better protect Native land and resources.

### I. HISTORY OF TRIBAL SOVEREIGNTY

To understand the need to protect Native land, it is important to become familiar with Tribal sovereignty, which has been controversial throughout the United States' history. The United States “recognizes Indian [T]ribes as distinct governments” and grants Tribes “with few exceptions, the same powers as federal and state governments to regulate their internal affairs.”<sup>14</sup> Sovereignty is defined as, “the highest legal authority” or “the authority to employ the power of the state, including the authorities of law, above which there is no higher authority.”<sup>15</sup> This “includes the right to establish their own form of government, determine membership requirements, enact legislation, and establish law enforcement and court systems.”<sup>16</sup>

When the Europeans colonized the United States, they “asserted sovereignty over [I]ndigenous peoples, based on a theological legal theory built on ‘divine right.’”<sup>17</sup> This ideology was reflected in the Supreme Court case, *Johnson v. M’Intosh*, where the Court held the United States can “extinguish the Indian title of occupancy, either by purchase or by conquest; and also gave a right to such a degree of sovereignty.”<sup>18</sup> Later, in *Worcester v. Georgia*, the Court held “Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power.”<sup>19</sup> While the Supreme Court has

14. *An Issue of Sovereignty*, NCSL (Jan. 2013), <https://www.ncsl.org/legislators-staff/legislators/quad-caucus/an-issue-of-sovereignty.aspx>.

15. *Sovereignty*, BOUVIER LAW DICTIONARY (Desk ed. 2012).

16. *An Issue of Sovereignty*, *supra* note 14.

17. Peter d’Errico, *Sovereignty: A Brief History in the Context of U.S. “Indian law,”* in THE ENCYCLOPEDIA OF MINORITIES IN AM. POLS. 691-93 (Oryx Press) (2000), <https://www.umass.edu/legal/derrico/sovereignty.html>.

18. *Johnson v. M’Intosh*, 21 U.S. 543, 587 (1823).

19. *Worcester v. Georgia*, 31 U.S. 515, 559 (1832) *superseded by statute* McCarran Amendment, Pub. L. No. 117-80, 66 Stat. 560, *as recognized in Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983).

stated Tribal Nations have sovereignty, in practice, federal courts have been inconsistent with affirming or enforcing those rights.

More recently, the Court addressed the issue of Tribal sovereignty in *Montana v. United States*, where it held that “Indian [T]ribes are ‘unique aggregations possessing attributes of sovereignty over both their members and their territory.’”<sup>20</sup> However, the Court also noted “through [the Native Americans] original incorporation into the United States as well as through specific treaties and statutes, the Indian [T]ribes have lost many of the attributes of sovereignty.”<sup>21</sup> For instance, a sovereign nation should act as the highest authority to govern issues affecting its land. Yet, in the United States, Native Tribes are stripped of their decision making when their interests over Native Land clash with those of the United States.

## II. TRIBAL SOVEREIGNTY AND ENVIRONMENTAL RIGHTS

Other United States courts have addressed the idea of Tribal sovereignty with respect to the environment in limited contexts. While there does not seem to be a clear pattern, it appears that courts have affirmed Tribal sovereignty when a state or governmental agency has prescribed it in a law. However, courts have largely ignored Tribal sovereignty in the absence of a state law. Additionally, courts have denied Tribal sovereignty even where it is affirmed by a treaty. The following cases summarize situations where governmental agencies have granted or denied Indigenous people Tribal sovereignty for specific scenarios rather than enforcing full Tribal sovereignty.

In *City of Albuquerque v. Browner*, the court discussed the “water quality standards adopted by an Indian [T]ribe under the Clean Water Act amendment.”<sup>22</sup> It indicated that “Congress amended the Clean Water Act to authorize the Defendant EPA to treat Indian [T]ribes as states under certain circumstances for purposes of the Clean Water Act.”<sup>23</sup> This “grant[ed] [T]ribes jurisdiction to regulate their water resources in the same manner as states.”<sup>24</sup> The Isleta Pueblo Tribe adopted a “water

---

20. *Montana v. United States*, 450 U.S. 544, 563 (1981) (quoting *United States v. Wheeler*, 435 U.S. 313, 323 (1978)).

21. *Id.* at 563 (citing *Wheeler*, 435 U.S. at 326).

22. *City of Albuquerque v. Browner*, 97 F.3d 415, 418 (10th Cir. 1996).

23. *Id.* at 418.

24. *Id.*

quality standard [that] [was] more stringent than the State of New Mexico's Standard."<sup>25</sup> The City of Albuquerque filed this claim "challeng[ing] the EPA's approval of Isleta Pueblo's water quality standards on numerous grounds."<sup>26</sup> The court acknowledged the Isleta Pueblo Tribes Tribal sovereignty and held that "the EPA can treat Indian [T]ribes as states under the act," thereby denying the City of Albuquerque's motion for summary judgement.<sup>27</sup>

In *Gros Ventre Tribe v. United States*, the court held "none of the treaties cited by the Tribes impose a specific duty on the United States to regulate third parties or non-[T]ribal resources for the benefit of the Tribes."<sup>28</sup> There, the government "authoriz[ed] and plann[ed] to expand two cyanide heap-leach gold mines located upriver from the Tribe's reservation."<sup>29</sup> The Gros Ventre Tribe cited to the "Treaty of Fort Laramie" and the "1856 Treaty with the Blackfeet" which both provided in part that the government would protect Indigenous people against depredations.<sup>30</sup> The Tribe alleged "the government breached its trust responsibility . . . by failing to reclaim the Zortman and Landusky mines . . . which had diminished and continues to diminish the quality and quantity of water resources available to the Tribes."<sup>31</sup> The district court held "in the absence of a specific duty, or specific control over [T]ribal property, the government fulfills its obligations as a trustee for the Tribes if it complies with applicable statutes."<sup>32</sup> However, the court later held the Tribe lacked standing because the Bureau of Land Management closed its mines, thereby making the claims moot.<sup>33</sup> The court's ruling undermined Tribal sovereignty because it not only allowed the mines to be located on Native land without the Gros Ventre Tribe's consent, but it permitted the government to breach its responsibilities under treaties with the Gros Ventre Tribe.

---

25. *Id.* at 419.

26. *Id.*

27. *Id.* at 421-22.

28. *Gros Ventre Tribe v. United States*, 469 F.3d 801, 803 (9th Cir. 2006).

29. *Id.*

30. *Id.* at 804.

31. *Id.* at 806.

32. *Id.* at 807 (quoting *Gros Ventre Tribe v. United States*, 344 F. Supp. 2d 1221 (D. Mont. 2004)).

33. *Gros Ventre Tribe*, 469 F.3d at 807-08.

In *In re Enbridge Energy*, the court permitted Enbridge's final environmental impact statement to "issue a certificate of need and routing permit for the Line 3 replacement."<sup>34</sup> Enbridge is a Canadian energy corporation<sup>35</sup> that is replacing and expanding Line 3.<sup>36</sup> There, the court acknowledged Leech Lake Band of Ojibwe's argument that building Line 3 through Native land was "an attack on tribal sovereignty;"<sup>37</sup> however, the court ultimately held that "there was no option without impacts on the rights of [I]ndigenous people."<sup>38</sup>

These cases illustrate that courts understand or acknowledge Tribal sovereignty but refuse to consistently or fully uphold Tribal Sovereignty, sometimes elevating states' sovereign interests above that of Tribes'. If courts do not consistently affirm Tribal sovereignty, Indigenous people will continue to be subjected to the same abuses they have suffered throughout history. Thus, it is more important than ever for courts to uphold and enforce Tribal sovereignty when hearing claims regarding environmental harms to Native land. Tribal sovereignty purportedly gives Tribes' domain over their nations and land. However, it is clear the sovereignty Indigenous Tribes possess today is far from true sovereignty. This diminution of Tribal sovereignty makes it more difficult to hold United States actors accountable for the environmental harms they inflict on Native land.

Nonrecognition of Tribal sovereignty also implicates jurisdictional questions. While *Montana v. United States* provides that Tribal Courts have jurisdiction "over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, economic security, or the health or welfare of the [T]ribe,"<sup>39</sup> no case addresses the scope of jurisdiction for environmental harms committed by non-Indigenous individuals within Native land.

---

34. *In re Enbridge Energy*, 964 N.W. 2d 173, 210 (Minn. Ct. App. 2021).

35. *About Us*, ENBRIDGE, <https://www.enbridge.com/about-us> (last visited Mar. 3, 2022).

36. Nia Williams, *Enbridge's Long Delayed Line 3 Oil Pipeline Project to Start up Oct. 1*, REUTERS, <https://www.reuters.com/business/energy/enbridge-completes-line-3-oil-pipeline-replacement-project-starts-linefill-2021-09-29/> (Sept. 29, 2021, 2:49 PM PDT).

37. *In re Enbridge Energy*, 964 N.W. 2d 173 at 209.

38. *Id.* at 210.

39. *Montana v. United States*, 450 U.S. 544, 566 (1981) (citing *Fisher v. District Court*, 424 U.S. 382, 386 (1976)).

Arguably, environmental harms encompass the health, welfare, and economic security of the Tribes because environmental harms can restrict access to necessary resources such as clean water and sustainable agriculture. This uncertainty surrounding Tribal courts' scope of jurisdiction for environmental land and water use claims brought against non-Indigenous persons or entities creates the current controversy.

### III. DESCRIPTION OF CONTROVERSY

The ambiguity surrounding Tribal courts' jurisdiction for claims that damage Native land undermines Tribal sovereignty and harms Indigenous people. Pipelines and other hazardous projects on Native land not only pose environmental risks, but also denigrate Native land, culture, and resources.<sup>40</sup> The Supreme Court's failure to acknowledge the Tribal courts' jurisdictional right to environmental claims arising on or affecting Native land forced Indigenous people to place their faith in the federal court system.<sup>41</sup> Historically, federal courts have allowed pipelines and similar projects to proceed without thoughtfully considering the long-term effects on Native land and Indigenous rights.<sup>42</sup>

---

40. Epstein, *supra* note 2.

41. DNR's Mot. for a Prelim. Inj. and Expedited Br. and Review, 13-14, Sept. 13, 2021 (citing *Idaho v. Coeur D'Alene Tribe*, 521 U.S. 261, 287-88 (1997)). In *Idaho v. Coeur D'Alene Tribe*, the court held "if the Tribe were to prevail, Idaho's sovereign interest in its lands and waters would be affected in degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury." *Coeur D'Alene Tribe*, 521 U.S. at 287. The court then noted "the dignity and status of its statehood allows Idaho to rely on its Eleventh Amendment immunity and to insist upon responding to these claims in its own courts, which are open to hear and determine the case." *Id.* at 287-88.

42. See Daniel Brook, *Environmental Genocide: Native Americans and Toxic Waste*, 57 AM. J. ECON. & SOCIO. 1, 108-11 (1998).

*A. The Enbridge Pipeline*

Enbridge, a Canadian oil company has proposed expanding one of its largest pipelines throughout the United States.<sup>43</sup> Part of the pipeline is set to pass through “untouched wetlands and the treaty territory of Anishinaabe peoples, through the Mississippi River headwaters to the shore of Lake Superior.”<sup>44</sup> This not only poses environmental threats, but also affects the wild rice that grows in Anishinaabe territories.<sup>45</sup>

A portion of the controversy surrounding the Enbridge Pipeline (Line 3) involves water rights. Minnesota’s Department of Natural Resources (DNR) issued Enbridge a permit to extract five billion gallons of groundwater which will no longer be available to Tribal land.<sup>46</sup> Enbridge claims the extracted water is “temporarily being moved so that it doesn’t drain into the pipeline’s trench during construction.”<sup>47</sup> However, the loss of water access is especially dire given that Minnesota is in “a severe drought.”<sup>48</sup> Moreover, some “critics say the sheer volume of water transferred could endanger the ecosystem near the pipeline.”<sup>49</sup> The White Earth Band argues the diversion of water would cut off their water supply thereby threatening the sustainability of “ma-noomin” or wild rice.<sup>50</sup> This prompted the White Earth Band to bring a

---

43. *Line 3 and Treaty Rights*, *supra* note 8; see also *Stop the Line 3 Pipeline*, STOP LINE 3 (Nov. 19, 2021), <https://www.stoline3.org/#intro> (explaining that Line 3 is an expansion of a previous pipeline built by Enbridge).

44. *Stop the Line 3 Pipeline*, *supra* note 43.

45. *Line 3 and Treaty Rights*, *supra* note 8.

46. Kirsti Marohn, *White Earth Argues DNR Water Permit for Line 3 Violates Wild Rice Rights*, BRAINERD DISPATCH (Aug. 6, 2021, 5:20 PM), <https://www.brainerddispatch.com/business/energy-and-mining/7143774-White-Earth-argues-DNR-water-permit-for-Line-3-violates-wild-rice-rights>.

47. Mike Hughlett, *Minnesota’s OK for Enbridge to Temporarily Move 5B Gallons of Water Sows Tension*, STAR TRIB. (June 29, 2021, 5:34 PM), <https://www.startribune.com/minnesotas-ok-for-enbridge-to-temporarily-move-5b-gallons-of-water-sows-tension-line-3-pipeline/600073288/>.

48. Martin Keller, *Winona Laduke Among Seven Women Arrested Today at the Shell River; Enbridge to Drill Line 3 Under the Shell River in Anishabe Treaty Lands*, HONOR THE EARTH (July 19, 2021), <https://www.honorearth.org/shelllak-arrests-line3>.

49. Hughlett, *supra* note 47.

50. Marohn, *supra* note 46.

claim on behalf of manoomin in Tribal court<sup>51</sup> arguing, “by granting water-use permits to a company in conjunction with that company’s operation of an oil pipeline in northern Minnesota, the DNR violated their Band Parties’ rights.”<sup>52</sup> At the start of the reconstruction of Line 3, Anishinaabe land was cleared of “vegetation, including mature trees, and [Enbridge dug] trenches through wetlands and waterways, damaging land, water, and ecosystems that are part of the Anishinaabe heritage and key to their survival.”<sup>53</sup>

In response to the White Earth Band’s lawsuit in Tribal court, the Minnesota DNR brought its own suit in the United States Court of Appeals for the Eighth Circuit, arguing that a Tribal court does not have jurisdiction over a claim of this nature.<sup>54</sup>

### *B. Department of Natural Resources v. White Earth Band of Ojibwe*

In *Department of Natural Resources v. White Earth Band of Ojibwe*, the Minnesota DNR<sup>55</sup> argues that Tribal courts do not have jurisdiction “due to the nonmember status of the DNR and its officers, the

---

51. See Victoria McKenzie, *Ojibwe Tribe Fights for Jurisdiction Over Pipeline Case*, LAW360 (Sept. 9, 2021, 4:11 PM EDT), <https://www.law360.com/articles/1419824/ojibwe-tribe-fights-for-jurisdiction-over-pipeline-case>; see also Marohn, *supra* note 46 (explaining the importance of protecting manoomin as a means of protecting the White Earth Band’s culture, wetlands, and ground water in addition to protecting the Tribe’s right to “hunt, fish, and gather wild rice”).

52. *Minn. Dep’t of Nat. Res. v. White Earth Band of Ojibwe*, No. 0:21-cv-03050, 2021 U.S. Dist. LEXIS 167790, at \*2 (D. Minn. Sept. 4, 2021). While not the main point of this Comment, this case is also significant because it is “the first case brought in a United States Tribal Court on behalf of the rights of nature.” Marohn, *supra* note 46; see also Sequoia L. Butler, “*I am the River, the River is me: How Environmental Personhood Can Protect Tribal Food Systems*,” 38 WIS. INT’L L. J. 79, 80-82 (2020) (discussing the importance of environmental personhood in preserving Native land).

53. Emilie Karrick Surrusco, *Tribes Defend Minnesota Waterways from Dangerous Line 3 Pipeline*, EARTHJUSTICE (Oct. 1, 2021), <https://earthjustice.org/blog/2021-march/tribes-defend-minnesota-waterways-from-dangerous-line-3-pipeline>.

54. McKenzie, *supra* note 51.

55. The Department of Natural Resources is a Minnesota state agency that seeks “to work with Minnesotans to conserve and manage the state’s natural resources, to provide outdoor recreation opportunities, and to provide for commercial uses of natural resources in a way that creates a sustainable quality of life.” *Our Mission*, DEP’T

DNR's sovereign immunity, and the fact that the contested actions do not take place on reservation land."<sup>56</sup> The trial court held it did not have subject matter jurisdiction over the case due to the White Earth Band's sovereign immunity.<sup>57</sup>

In response to the trial court's decision, the DNR filed an appeal arguing that the Eighth Circuit should enjoin the White Earth Band from bringing its claim in Tribal court.<sup>58</sup> The DNR argued that Tribal courts do not have subject matter jurisdiction over the DNR because it has sovereign immunity.<sup>59</sup> The DNA further argued that the doctrine of *Ex Parte Young* allows it to bring "suits in federal court against [T]ribal judges to challenge [T]ribal court jurisdiction."<sup>60</sup> *Ex Parte Young* allows federal courts to "grant[] injunctive relief against state officials to prevent continuing violation of federal law . . . even if the conduct complained of is the implementation of official state policy."<sup>61</sup>

The doctrine of *Ex Parte Young* is significant because the Eleventh Amendment of the United States Constitution provides that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or in equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."<sup>62</sup> In using the doctrine of *Ex Parte Young*, the DNR argued that it is "likely to succeed in reversing the district court's *sua sponte* dismissal of Judge DeGroat on sovereign immunity grounds."<sup>63</sup> However, some experts argue the *Ex Parte Young* doctrine is unlikely

---

OF NAT. RES., <https://www.dnr.state.mn.us/aboutdnr/mission.html> (last visited Nov. 25, 2021).

56. White Earth Band of Ojibwe, 2021 U.S. Dist. LEXIS 167790, at \*2-3; *see also* McKenzie, *supra* note 51 (providing a summary of Minn. Dept. of Nat. Res. v. White Earth Band of Ojibwe, et al., No: 0:21-cv-01869, 2021 U.S. Dist. LEXIS 167790 (D. Minn. Sept. 4, 2021)).

57. *Id.* at \*5-6.

58. DNR's Mot. for a Prelim. Inj. and Expedited Br. and Review at 1, Minn. Dep't of Nat. Res. v. White Earth Band of Ojibwe (D. Minn. Sept. 4, 2021) (No. 0:21-cv-03050), 2021 U.S. Dist. LEXIS 167790.

59. *Id.* at \*13.

60. *Id.* at \*12.

61. 17A MOORE'S FEDERAL PRACTICE, CIVIL §123.40 (Matthew Bender & Co. 2021).

62. U.S. CONST. amend. XI.

63. DNR's Mot. for a Prelim. Inj. and Expedited Br. and Review, *supra* note 58, at 12-13.

to succeed because the DNR must wait until after the Tribal court case has been ruled on to appeal.<sup>64</sup> Finally, the DNR argued Tribal courts do not have jurisdiction over nonmembers, and that the harms the White Earth Band of Ojibwe faces are “temporary and capable of remedy.”<sup>65</sup>

While there may be some merit to the DNR’s arguments, the Tribal court should have jurisdiction over environmental harms committed against Indigenous individuals and Native land for the following reasons. First, environmental racism is inherent in the construction of Line 3 and most other pipelines.<sup>66</sup> Second, the harms the White Earth Band are exposed to are not temporary. Oil pipelines “have caused many environmental concerns for the [N]atives that live on the reserves because inevitable oil spills have caused water pollution, contamination of agricultural land and natural ecosystems.”<sup>67</sup> The Enbridge pipeline has already spilled once before in 2010, which became known as one of the largest oil spills in American history,<sup>68</sup> and there are no guarantees it will not happen again. While Enbridge made efforts to clean the oil spill, “many areas could not be preserved.”<sup>69</sup> Additionally, “the riverbed will never be fully cleansed of bitumen.”<sup>70</sup> Even if Enbridge had not previously built a faulty pipeline, “an oil spill during the operational lifetime is almost inevitable, considering the track record of pipelines and tankers.”<sup>71</sup> Therefore, it is clear this type of harm cannot be adequately remedied, nor is it temporary. Third, the DNR’s arguments

64. Interview with Ann Tweedy, Univ. of S.D., in San Diego, Cal. (Oct. 27, 2021).

65. DNR’s Mot. for a Prelim. Inj. and Expedited Br. and Review, *supra* note 58, at 15, 19.

66. Environmental racism discusses “the relationship between BIPOC communities and harmful environmental issues outlined under environmental injustice.” Sarah Pedigo Kulzer et. al., *Critical Criminology: State Facilitated Corporate Crime, Environmental Racism, and the Atlantic Coast Pipeline*, 60 *HOW. J.* 323, 325 (2021).

67. Mirjana Masha, *The Dangers of Oil Pipelines in Indigenous Territories*, STORY MAPS (Aug. 17, 2020), <https://storymaps.arcgis.com/stories/a19da5375bb24b7bb1bcbf29d2d0bb0d>.

68. Joseph Riesterer, *The Enduring Legacy of the 2010 Kalamazoo River Oil Spill*, BELT (July 12, 2019), <https://beltmag.com/kalamazoo-river-line-6b-oil-spill/>.

69. *Id.*

70. *Id.*

71. See Masha, *supra* note 67 (quoting Zoey Walden & John Rozhon, *Oil Spills and First Nations: Exploring Environment and Land Issues Surrounding the Northern Gateway Pipeline*, CANADIAN ENERGY RSCH. INST. (2012)).

628 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 52]

failed to recognize the importance of maintaining both the culture and resources of Native American Tribes and their environmental resources. The DNR's argument that the White Earth Band of Ojibwe lacks jurisdiction fails to provide an avenue or remedy for Indigenous peoples to protect their cultural resources, such as the cultural rice of the Anishinaabe.

#### IV. REPERCUSSIONS OF DEPARTMENT OF NATURAL RESOURCES V. WHITE EARTH BAND OF OJIBWE

This case is significant for several reasons. First, it will impact the jurisdiction of Tribal courts and the sovereignty of Indigenous people by ensuring they can enforce their rights and interests. Second, it is one of the first cases in a United States Tribal court to use environmental personhood.<sup>72</sup> Third, it raises concerns of environmental racism and the continued degradation of Indigenous culture. Fourth, it provides an opportunity for the United States to take accountability for its wrongdoings and implement measures to ensure the sustainability and livelihood of Native land. This is especially important given the effort by the United States to diminish and erase Native American culture.<sup>73</sup>

---

72. Environmental personhood is a theory that would give “standing for nature,” thereby allowing “such entities to litigate on their own behalf.” This theory “would recognize natural entities as legal persons, endowing them with corresponding rights and duties under the law.” Matthew Miller, Note, *Environmental Personhood and Standing for Nature*, 17 U.N.H.L. REV. 355, 355 (2019).

73. See “*Cultural Genocide*” and *Native American Children*, EQUAL JUST. INITIATIVE (Sept. 9, 2014), <https://eji.org/news/history-racial-injustice-cultural-genocide/>; see also *US Indian Boarding School History*, NAT'L AM. BOARDING SCH. HEALING COAL., <https://boardingschoolhealing.org/education/us-indian-boarding-school-history/> (last visited Jan. 9, 2022) (residential schools “punished [Native children] for speaking their native language, banned [them] from acting in any way that might be seen to represent traditional or cultural practices, stripped [them] of traditional clothing, hair and personal belongings and behaviors reflective of their native culture).

*A. Environmental Racism*

Construction of pipelines on Native land raises environmental racism flags.<sup>74</sup> Environmental racism has been described as “the disproportionate impact of environmental hazards on people of color.”<sup>75</sup> The idea of “environmental racism refers to the institutional rules, regulations, policies or government and/or corporate decisions that deliberately target certain communities for locally undesirable land uses and lax enforcement of zoning and environmental laws, resulting in communities being disproportionately exposed to toxic and hazardous waste based upon race.”<sup>76</sup> Underlying environmental racism is “a lack of institutional power and low land values of people of color.”<sup>77</sup>

Indigenous people have been the victim of environmental racism for centuries.<sup>78</sup> For example, one scholar wrote about the environmental injustices produced by colonialism.<sup>79</sup> The scholar discussed five themes associated with colonialism: “dispossession, displacement, entrapment [and control], invisibility [arising from settler environmental nationalism], and globalization [along the patterns set by colonialism.]”<sup>80</sup> This deprived Indigenous Peoples “of their land, for their cultural, social, and economic needs.”<sup>81</sup> Thereby making “self-sufficiency virtually impossible.”<sup>82</sup>

Line 3 endangers Native land in two ways: (1) the project required an extraction of five billion gallons of water which threatened the sustainability of manoomin and removed general access to water otherwise

---

74. *Environmental Justice & Environmental Racism*, GREEN ACTION, <https://greenaction.org/what-is-environmental-justice/> (last visited Oct. 15, 2022).

75. *Id.*

76. *Id.*

77. *Id.*

78. Sezin Koehler, *How Environmental Racism Affects Indigenous Communities in the USA*, HUFFPOST (Sept. 27, 2017, 6:39 PM EDT), <https://www.wearyourvoicemag.com/environmental-racism-affects-indigenous-communities-usa/>.

79. Heather Goodall, *Indigenous Peoples, Colonialism, and Memories of Environmental Injustice*, in *ECHOES FROM THE POISONED WELL: GLOBAL MEMORIES OF ENVIRONMENTAL JUSTICE*, at 73, 75 (Sylvia Hood Washington et al. eds., 2006).

80. *Id.*

81. *Id.*

82. Koehler, *supra* note 78.

630 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 52

available to the Tribe; and (2) it has the potential to “spill and ruin the land [Native Americans and Minnesotans] use to farm.”<sup>83</sup> While water rights’ claims are more tenuously connected to environmental racism, the harm from pipeline spills falls squarely within the definition of environmental racism.

Additionally, Daniel Brook wrote environmental racism and degradation are akin to genocide:<sup>84</sup>

[T]oxic pollution—coupled with the facts of environmental racism, pervasive poverty, and the unique status of Native Americans in the United States—“really is a matter of GENOCIDE. The Indigenous people were colonized and forced onto reservations . . . poisoned on the job. Or poisoned in the home . . . or forced to relocate so that the land rip-offs can proceed without hitch. Water is life but the corporations are killing it. It’s a genocide of all the environment and of all species of creatures.”<sup>85</sup>

Line 3’s potentially hazardous outcomes exemplify environmental racism and may be akin to environmental genocide. The Enbridge pipeline that Line 3 will replace has spilled once before,<sup>86</sup> making it too risky on any land. Line 3 poses a serious threat to Native land, people, and livelihoods. If the manoomin is no longer available, the White Earth Band of Ojibwe will be cut off from a resource that has sustained their Band for centuries. Furthermore, if Line 3 were to spill it could ruin the environment, leaving Indigenous people without resources or means to provide for their economic, cultural, and physical sustainability on their land.

Line 3 clearly carries disastrous consequences. In a similar sense, the outcome of this case may have some serious ramifications. It reveals

---

83. Misty Severi, ‘Respect Us or Expect Us’: Andrew Jackson Statue Vandalized in Front of the White House, YAHOO (Oct. 11, 2021, 10:51 AM), <https://www.yahoo.com> (search “respect us or expect us” in the Yahoo news search bar at the top the website; then scroll down and click on the first article).

84. Brook, *supra* note 42, at 111.

85. *Id.*

86. *The Largest Inland Oil Spill in U.S. History Happened in Minnesota*, STOP LINE 3 (Mar. 3, 2017), <https://www.stopline3.org/news/2017/3/6/appy-anniversary-the-largest-inland-oil-spill-in-us-history-happened-today-in-minnesota> (the previous pipeline created one of the “largest inland oil spill[s] in U.S. history” on March 3, 1991).

the severity of this situation and the need for adequate systems to protect and sustain Native American land and resources. The United States first stripped Native Americans of their land, culture, and resources.<sup>87</sup> Then it made a meager attempt to provide reparations for Indigenous people. Because Indigenous peoples still suffer from the harms inflicted centuries ago, the need to implement policies that protect Native land and autonomy is urgent.

### *B. Loss of Cultural Resources and Land*

This case also impacts Indigenous people by reinforcing generations of trauma linked with forced assimilation by the United States. Given the erosion of Tribal sovereignty and the peril of environmental hazards, clarifying, and re-establishing Tribal sovereignty is vital in order for Indigenous peoples to preserve their land, resources, cultural traditions, and to have the power and autonomy to decide these same matters. Such a move will preserve Indigenous culture and customs and enhance the economic power of Indigenous Tribes.<sup>88</sup> More importantly, preserving Indigenous culture and land is essential to preserving the identity of Indigenous people,<sup>89</sup> while mitigating climate change.<sup>90</sup>

---

87. Sam Levin, *'This is all stolen land': Native Americans Want More than California's Apology*, THE GUARDIAN (June 21, 2019, 1:00 EDT), <https://www.theguardian.com/us-news/2019/jun/20/california-native-americans-governor-apology-reparations>.

88. Press Release, Stefan Schweinfest, Director, Statistics Division, Department of Economic and Social Affairs, Indigenous People's Traditional Knowledge Must be Preserved, Valued Globally, Speakers Stress as Permanent Forum Opens Annual Session, U.N. Press Release HR/5431 (Apr. 22, 2019) (Schweinfest, reported that "teaching children in their languages and traditional ways maintains community culture, reduces school drop-out rates and leads to economic growth) [hereinafter Press Release].

89. *Keeping Culture Alive*, NATIVE HOPE, <https://blog.nativehope.org/keeping-culture-alive-0> (last visited Nov. 5, 2021).

90. Press Release, Maria Fernanda Espinosa, General Assembly President, Indigenous People's Traditional Knowledge Must be Preserved Globally, Speaker Stress Permanent Forum Opens Annual Session, U.N. Press Release HR/5431 (Apr. 22, 2019) (General Assembly President Espinosa "stressed that traditional knowledge occupies a pivotal place in the range of actions needed to mitigate climate change . . . she pointed out that knowledge accumulated over thousands of years on medicine, meteorology, agriculture and other areas is at risk of forever disappearing").

## V. CASE STUDY: MĀORI TRIBAL SOVEREIGNTY

Tribal sovereignty and jurisdictional issues in the United States are complex. However, an inquiry into the experiences of Indigenous people in other countries may help determine the best approach in balancing Tribal sovereignty with global energy needs and environmental issues. New Zealand is a country that considers the rights, sovereignty, and environmental concerns of its Indigenous people.

The Māori are the Indigenous people of New Zealand.<sup>91</sup> They migrated from what is now referred to as Tahiti, or Hawaiki<sup>92</sup> “between 800 and 1300 C.E.”<sup>93</sup> In New Zealand, the Māori have “full legal rights.”<sup>94</sup> The Māori people’s history is similar to that of Indigenous people in the United States. For example, the Māori were colonized by the British.<sup>95</sup> Later, disputes arose regarding land sales which led to conflict between the British and the Māori.<sup>96</sup> The Māori people also experienced forced assimilations to “western society and culture.”<sup>97</sup> However, unlike the United States, New Zealand has taken steps to ameliorate prior state action which subjugated the Māori.

*A. Treaty of Waitangi*

In 1840, the British and Māori signed the Treaty of Waitangi.<sup>98</sup> Controversies arose due to the different interpretations of the text between the British and the Māori.<sup>99</sup> For example, the English version of the Treaty indicates that the Māori were seceding their sovereignty to

---

91. *Māori Culture*, 100% PURE N.Z., <https://www.newzealand.com/us/maori-culture/> (last visited Jan. 4, 2021); see also *Māori*, NEW WORLD ENCYCLOPEDIA, <https://www.newworldencyclopedia.org/entry/maori> (last visited Jan. 4, 2021) (giving additional information on Māori history).

92. *Māori*, BRITANNICA, <https://www.britannica.com/topic/Maori> (last visited Nov. 25, 2021).

93. *Māori*, *supra* note 91.

94. *Id.*

95. Orange, *supra* note 11.

96. *Māori Culture*, *supra* note 91.

97. *Id.*

98. Orange, *supra* note 11.

99. *Id.* at 3.

the British.<sup>100</sup> However, in the Māori version of the text the First Article only permitted “the right to govern and to make laws.”<sup>101</sup>

While the Treaty of Waitangi maintained peace for a period of time, disputes eventually arose regarding land claims that developed into a period known as “the New Zealand Land Wars.”<sup>102</sup> During this period, the British and other settlers took ownership of “a vast majority of the land” through “questionable land sales” and “confiscation.”<sup>103</sup> These disputes eventually led to the creation of the Waitangi Tribunal.

Later, in 1975, the New Zealand Government enacted the “Treaty of Waitangi Act, which established the Waitangi Tribunal.”<sup>104</sup> The purpose of the Waitangi Tribunal was to “investigate Māori claims against the crown respecting infringements of treaty rights through crown action or lack of action.”<sup>105</sup> In carrying out its purpose, the Waitangi Tribunal “makes recommendations to the crown on an appropriate course of redress, if needed” and must “take into account the meanings of both English and Māori texts.”<sup>106</sup>

To illustrate, the Waitangi Tribunal provided redress for many issues related to Māori land, including environmental issues.<sup>107</sup> The “Report of the Waitangi Tribunal on the Kaituna River”<sup>108</sup> is relevant to the present case because it shows the impact of the Tribunal in protecting Māori land. There, New Zealand had sewage pipelines that were polluting the Kaituna River.<sup>109</sup> The “Ngati Pikiao people” asked the Waitangi Tribunal to stop the sewage line “because it would transfer the pollution

---

100. *Id.*

101. *Id.*

102. *Māori*, *supra* note 91.

103. Orange, *supra* note 11.

104. Kelly Buchanan, *Indigenous Rights in New Zealand: Legislation, Litigation, and Protest*, LIBR. OF CONG. (Nov. 18, 2016), <https://blogs.loc.gov/law/2016/11/indigenous-rights-in-new-zealand-legislation-litigation-and-protest/>.

105. Orange, *supra* note 11.

106. *Id.*

107. *See About the Waitangi Tribunal*, MINISTRY OF JUST., <https://waitangitribunal.govt.nz/about-waitangi-tribunal/> (last visited Nov. 11, 2021).

108. *Report of the Waitangi Tribunal on the Kaituna River Claim*, MINISTRY OF JUST. (Nov. 1984), [https://forms.justice.govt.nz/search/WT/reports/reportSummary.html?reportId=wt\\_DOC\\_68496990](https://forms.justice.govt.nz/search/WT/reports/reportSummary.html?reportId=wt_DOC_68496990).

109. *Id.*

634 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 52

process into their territory and was objectionable on medical, social, cultural and spiritual grounds.”<sup>110</sup> An elder of the Ngati Pikiao people explained “the need to protect the Kaituna River from harm and likened the river to his own people, whom he had a duty to protect from harm.”<sup>111</sup> The Waitangi Tribunal stopped government funding of this sewage line and “announced its support for a combined treatment plant and land disposal option.”<sup>112</sup>

The Waitangi Tribunal displays New Zealand’s commitment to remedying the colonization of Māori people and their land. The United States could create a similar legal body to revisit the various treaties between the United States and Indigenous people, while considering the need for redress. New Zealand also implemented additional systems to ensure the protection of Māori lands and resources, such as the Māori Land Court. Likewise, the United States could establish a jurisdiction for matters partially within or directly affecting Tribal boundaries.

### *B. Māori Land Court*

New Zealand created a court system specifically for land title and succession issues. While this Court was not created to protect Māori land from environmental harms, it serves as an example of a court made solely for Native land issues. The United States could mirror this system and include claims of environmental harm as within the court’s jurisdiction or boundaries.

The New Zealand government created the Māori Land Court on October 30, 1865, through the Native Lands Act,<sup>113</sup> in response to “a political debate about Māori land issues in the late 1850s, a time when politicians and officials were seeking alternatives to the existing system of Māori land acquisition.”<sup>114</sup> The Native Lands Act provided that:

The Native Land court of New Zealand (hereinafter called the Court) shall be a court of Record for the investigation of the titles of persons

---

110. *Id.*

111. *Id.*

112. *Id.*

113. *History of the Māori Land Court*, *supra* note 11.

114. R P BOAST QC, *150 years of the Māori Land Court*, MINISTRY OF JUST. 11 (Oct. 30, 2015), <https://maorilandcourt.govt.nz/assets/Documents/Publications/MLC-150-years-of-the-Maori-Land-Court.pdf>.

to Native Land for the determination of the succession of Natives on Native Lands and to hereditaments of which the Native owner shall have died intestate and for the other purposes hereinafter set forth.<sup>115</sup>

The goal of the Māori Land Court “is to provide a court service for owners of Māori land, their whānau<sup>116</sup> and their hapū<sup>117</sup> which: “promotes the retention and use of Māori land, [and] facilitates the occupation, development and use of that land.”<sup>118</sup> While Māori land “comprises less than five percent of the land in New Zealand,” the Māori Land Court seeks to maintain and preserve the land given “the special bond that Māori people have with this land.”<sup>119</sup> While the Māori Land Court addresses “matters relat[ed] to Māori land including successions, title improvements, Māori land sales, and administration of Māori land trusts and incorporations,” the Court is still a space provided for Māori individuals by Māori individuals.<sup>120</sup>

The Māori Land Court provides a template for the United States to give Tribal Courts the power and jurisdiction to determine matters relating to Native land. In addition, the United States can create a land court within the Tribal Court system to determine matters that affect and/or occur on Native land.

## VI. PROPOSAL

In addition to a Tribal court system, the United States may implement other policies to ensure the protection of Indigenous interests and land. This comment offers the following solutions: (a) re-establishing Tribal sovereignty; (b) amplifying and creating space for Native voices;

115. Native Lands Act 1865, pt 1, s V, at 264 (N.Z.).

116. Whānau is defined as “extended family” or “a familiar term of address to a number of people.” It has also been said “to include friends who may not have any kinship ties to other members.” *Whānau*, MĀORI DICTIONARY, <https://maoridictionary.co.nz/search?&keywords=whanau> (last visited Mar. 3, 2022).

117. Hapū is defined as a “tribe” or “a large kinship group or political unit in traditional Māori society.” *Hapū*, MĀORI DICTIONARY, <https://maoridictionary.co.nz/search?keywords=hapu> (last visited Mar. 3, 2022).

118. *About the Māori Land Court*, MĀORI LAND CT., <https://maori-landcourt.govt.nz/about-mlc/> (Mar. 9, 2022).

119. *The Māori Land Court*, RENNIE COX LAW., <https://renniecox.co.nz/litigation/maori-land-court/> (last visited Nov. 25, 2021).

120. *Id.*

and (c) committing to the United Nations Declaration on the Rights of Indigenous People.

### *A. Tribal Sovereignty*

Re-establishing Tribal sovereignty will help ensure that Indigenous people possess the power and authority to protect their land from environmental harm created by non-Tribal members. To re-establish Tribal sovereignty the United States must first recognize Indigenous Tribes as sovereign entities similar to States. Then, the United States ought to allow Tribes to elect representatives to Congress. States elect two senators and an allotted number of representatives to voice their concerns and enact legislation on their behalf.<sup>121</sup> By allowing Tribes to elect their own representatives, it would effectively give Tribes the same governmental voice to act in their best interest.

While implementing Congressional delegates for each Tribe is a radical approach, it stands for the idea that the United States should treat Indigenous Tribes as they treat each state. Because there are approximately “574 federally recognized [T]ribes”<sup>122</sup> in the United States, and approximately “326 Federal Indian reservations,”<sup>123</sup> it may not be feasible to provide two senators and various representatives for each Tribe. However, the United States in conjunction with Indigenous decision makers should determine an equitable way to treat Indigenous Tribes as the sovereigns they have been classified as. For example, Article I, section II of the Constitution provides that the number of delegates apportioned to each state should be proportional to the state’s population, “the

---

121. See *The Legislative Branch*, THE WHITE HOUSE, <https://www.whitehouse.gov/about-the-white-house/our-government/the-legislative-branch/#:~:text=Established%20by%20Article%20I%20of,form%20the%20United%20States%20Congress> (last visited Jan. 4, 2021).

122. Martha Saenz, *Federal and State Recognized Tribes*, NCSL (Mar. 2020), <https://www.ncsl.org/legislators-staff/legislators/quad-caucus/list-of-federal-and-state-recognized-tribes.aspx#:~:text=NCSL%20Contact&text=The%20following%20state%2Dby%2Dstate,currentlly%20574%20federally%20recognized%20tribes>.

123. *Frequently Asked Questions: What is a Federal Indian Reservation*, U.S. DEP’T OF THE INTERIOR INDIAN AFFS., <https://www.bia.gov/frequently-asked-questions#:~:text=There%20are%20approximately%20326%20Indian,%2C%20communities%2C%20etc> (last visited Nov. 5, 2021).

number of representatives shall not exceed one for every thirty thousand, but each state should have at least one representative.”<sup>124</sup> The United States census indicated that there are approximately “6.79 million Native Americans” in the United States.<sup>125</sup> Perhaps one solution would be to apportion a number of delegates for the House of Representatives and the Senate according to the population of Indigenous peoples in each state.

The idea of implementing Native representation is not foreign to the United States,<sup>126</sup> which has already implemented a Cherokee delegate to the House of Representatives.<sup>127</sup> The Cherokee were empowered to elect a delegate through the 1785 Treaty of Hopewell, the 1835 Treaty of New Echota, and the Treaty of 1866.<sup>128</sup> The 1835 Treaty of New Echota<sup>129</sup> states:

The Cherokee Nation having already made great progress in civilization and deeming it important that every proper and laudable inducement should be offered to their people to improve their condition . . . it is stipulated that they shall be entitled to a delegate in the House of Representatives of the United States whenever Congress shall make provision for the same<sup>130</sup>

Although it is significant the Cherokee have their own delegate, it is not enough. The United States should expand or enforce a system that allows for Indigenous people to have representatives to advocate for their interests.

If Tribal sovereignty is analogous to State sovereignty, then Indigenous peoples ought to be afforded the same rights as States. This would

---

124. U.S. CONST. art. I, §2, cl. 3.

125. *Native American Population 2021*, WORLD POPULATION REV., <https://worldpopulationreview.com/state-rankings/native-american-population> (last visited Nov. 25, 2021).

126. Interview with Ann Tweedy, *supra* note 64.

127. *Id.*

128. *Delegate to Congress*, CHEROKEE NATION, <https://www.cherokee.org/our-government/delegate-to-congress/> (last visited Nov. 4, 2021).

129. *Id.*

130. *Id.*

638 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 52

allow more opportunities for Indigenous people to protect their interests. Moreover, it would strengthen Tribal sovereignty and give a greater voice to Tribal Nations.

### *B. Importance of Native Voices*

Another way to move towards autonomy is to amplify voices of Indigenous peoples with respect to environmental claims on or impacting Tribal land. If the United States is going to settle claims of environmental harms on Native land in federal courts,<sup>131</sup> then it must include Indigenous peoples or Tribal judges in the decision-making process. Creating a land court similar to that of the Waitangi Tribunal or Maori Land Court would be an effective way to amplify Indigenous voices. Such a court could hear the White Earth Band's claim that the United States is violating the Treaty of 1855 by allowing Enbridge to not only continue constructing Line 3, but also allowing Enbridge to extract five billion gallons of water from Native land. Therefore, including Indigenous voices within the decision-making process provides Indigenous peoples the rights afforded to all other individuals, and also gives autonomy and sovereignty back to the Tribes.

### *C. Fulfill Commitment to the United Nations Declaration on the Rights of Indigenous People*

Additionally, the United States should uphold its commitment to the United Nations Declaration on the Rights of Indigenous People ("The Declaration").<sup>132</sup> On September 13, 2007, the General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples.<sup>133</sup> While the United States and New Zealand initially voted against adopting The Declaration, the two countries later supported

---

131. DNR's Mot. for a Prelim. Inj. and Expedited Br. and Review, *supra* note 58, at 5.

132. See d'Errico, *supra* note 17; see also U.N., Department of Economic and Social Affairs, *United Nations Declaration on the Rights of Indigenous People*, U.N. A/Res/61/295 (Sept. 13, 2007), <https://www.un.org/development/desa/indigenous-peoples/declaration-on-the-rights-of-indigenous-peoples.html> [hereinafter UNDRIP] (stating that the United States had originally voted against the UN Declaration, but now supports it.).

133. *Id.*

it.<sup>134</sup> The Declaration provides protection of Tribal sovereignty;<sup>135</sup> “social, cultural, and economic development;”<sup>136</sup> and “lands, territories, and resources which they traditionally have owned.”<sup>137</sup>

The United States has already committed to The Declaration, yet has failed to effectuate its commitment. The Declaration indicates that “States should give legal recognition and protection to [Indigenous] lands, territories, and resources.”<sup>138</sup> Moreover, The Declaration added:

States shall establish and implement, in conjunction with [I]ndigenous peoples concerned, a fair independent, impartial, open and transparent process, giving due recognition to [I]ndigenous people’s laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of [I]ndigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.<sup>139</sup>

It also provides remedies “for the lands, territories, and resources which [Indigenous people] have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.”<sup>140</sup> If the United States took concrete steps to manifest its commitment to The Declaration, it would provide a more equitable process for Native American and Indigenous peoples through a system that not only recognizes their “laws, traditions, customs, and land tenure,” but is also inclusive of Native Americans and Indigenous peoples.<sup>141</sup>

Several of the countries that have adopted The Declaration have implemented change to reflect this commitment. For example, in New Zealand, the Te Puni Kōkiri is “lead[ing] the development plan, to guide the Government’s progress towards The Declaration’s aspirations and

---

134. *Id.*

135. G.A. Res. 61/295, United Nations Declaration on Indigenous Rights, art. 3, at 8 (Sept. 13, 2007) [hereinafter The Declaration].

136. *Id.*

137. *Id.* art. 26(1), at 19.

138. *Id.* art. 26(3), at 19.

139. *Id.* art. 27, at 20.

140. *Id.* art. 28(1), at 20.

141. *Id.* art. 27, at 20.

is working closely with the National Iwi Chairs Forum and the Human Rights Commission on the current targeted engagement process.”<sup>142</sup> In addition to the Te Puni Kōkiri development plan, some commentators have even suggested that “the Declarations 46 articles . . . parallels New Zealand’s Treaty of Waitangi by affirming Indigenous people’s authority over their own affairs and their right to make meaningful influence as citizens of the state.”<sup>143</sup> The Te Puni Kōkiri development plan is not yet finalized, but New Zealand created this plan “to monitor [their] progress with the Declaration . . . provide a clearer narrative about New Zealand’s commitment to the declaration,” and “to establish greater coherence across Government in delivering beneficial outcomes for Māori.”<sup>144</sup>

While there are no similar steps being taken in the United States, it is important to note the lead of other countries in taking steps to work with Indigenous peoples to protect Indigenous rights, land, and culture. As it stands today, the United States has not created a plan of action to implement The Declaration. In fact, the United States has indicated that “[t]he UNDRIP is not legally binding on states and does not impose legal obligations on governments.”<sup>145</sup> While the support of The Declaration<sup>146</sup> is important, the implementation of The Declaration sparks the change. Treating The Declaration as a binding instrument and making a plan to ensure the sentiments of The Declaration are protected would help ensure that Indigenous peoples are protected and are not subjected to the same harms they endured during colonization.<sup>147</sup>

142. *UN Declaration on the Rights of Indigenous Peoples*, TE PUNI KŌKIRI, <https://www.tpk.govt.nz/en/whakamahia/un-declaration-on-the-rights-of-indigenous-peoples> (last visited Nov. 11, 2021).

143. Dominic O’Sullivan, *Can Colonialism be Reversed? The UN’s Declaration on the Rights of Indigenous Peoples Provides Some Answers*, THE CONVERSATION (Oct. 1, 2020, 3:59 PM EDT), <https://theconversation.com/can-colonialism-be-reversed-the-uns-declaration-on-the-rights-of-indigenous-peoples-provides-some-answers-147017>.

144. *UN Declaration on the Rights of Indigenous Peoples*, *supra* note 142.

145. *Indigenous Peoples*, USAID, <https://www.usaid.gov/environmental-policy-roadmap/indigenous-peoples> (last visited Nov. 11, 2021).

146. *Id.*

147. See Erin Hanson, *UN Declaration on the Rights of Indigenous Peoples*, INDIGENOUS FOUNDS., [https://indigenousfoundations.arts.ubc.ca/un\\_declaration\\_on\\_the\\_rights\\_of\\_indigenous\\_peoples/](https://indigenousfoundations.arts.ubc.ca/un_declaration_on_the_rights_of_indigenous_peoples/) (last visited Nov. 11, 2021).

In sum, a commitment to The Declaration is a crucial step in re-establishing Tribal sovereignty and restoring Indigenous nations. One of the major issues in how the United States addresses claims of wrongdoing and harm against Indigenous people is its failure to recognize the importance of Indigenous voices, cultures, and customs. Therefore, the commitment and active implementation of The Declaration would be a step in the right direction of empowering Native voices within the process of environmental claims on Native Land.

#### CONCLUSION

Line 3 is only the most recent pipeline afflicting Native land.<sup>148</sup> When courts continuously allow states and corporations to infringe on Native land, they are perpetuating the suffrage and detrimental effects of colonization that have been inflicted on Indigenous peoples since 1565.<sup>149</sup> Tribal courts were established to help Indigenous people “exercise their inherent sovereignty,”<sup>150</sup> and courts have repeatedly recognized that Indigenous Tribes are sovereign,<sup>151</sup> yet they consistently undermine that sovereignty. If Indigenous Tribes do not have the authority to litigate and resolve issues that affect their culture, land, and resources, then their sovereign status is simply a façade.

---

148. See Regan, *supra* note 2 (noting that “opposition to the pipeline is considerable, and is supported by environmental organizations and activists resisting pipelines such as the Dakota Access pipeline, and Keystone XL”).

149. See generally *European Colonization of North America*, NAT’L GEOGRAPHIC, <https://www.nationalgeographic.org/topics/european-colonization-north-america/#:~:text=The%20invasion%20of%20the%20North,Roanoke%20in%20present%20day%20Virginia> (last visited Nov. 25, 2021) (stating “the invasion of the North American continent and its peoples began with the Spanish in 1565, then the British in 1587”); see also *Native Americans in Colonial America*, NAT’L GEOGRAPHIC, [https://www.nationalgeographic.org/encyclopedia/native-americans-colonial-america/?utm\\_source=BiblioRCM\\_Row](https://www.nationalgeographic.org/encyclopedia/native-americans-colonial-america/?utm_source=BiblioRCM_Row) (last visited Mar. 12, 2022) (describing that as European settlers gained more land and control Natives suffered new diseases, slavery, confinement, and extermination).

150. *Tribal Courts*, TRIBAL CT. CLEARINGHOUSE, <https://www.tribal-institute.org/lists/justice.htm> (last visited Nov. 5, 2021).

151. See, e.g., *Worcester v. Georgia*, 31 U.S. 515, 538 (1832); see also *Montana v. United States*, 450 U.S. 544, 563 (1981).

While the Supreme Court has established the jurisdiction of Tribal courts for criminal acts on Native land,<sup>152</sup> it needs to similarly establish the authority of Tribal courts to hear all claims affecting their land, culture, resources, and livelihood. The acknowledgement of Tribal sovereignty with respect to environmental claims needs to be wholly inclusive, meaning it must be enforced beyond the limited circumstances where states have “granted” sovereignty to [T]ribes in years past.<sup>153</sup> In addition, the United States needs to take multiple steps to ensure the protection of Native land. It should allow Indigenous Tribes to elect members of the Senate and House of Representatives to represent their Tribal interests. Moreover, if the United States wishes to settle disputes regarding land use and environmental harms on Native land, it should create a court comprised of both Indigenous individuals and representatives to the United States. This will help ensure justice, equity, and fairness in the process. Finally, the United States should reaffirm and follow through with its commitment to The Declaration.

The United States has consistently affirmed the rights of Indigenous people but has failed to act upon its promises. Therefore, the United States needs to be held accountable and provide greater reassurances to uphold its promises in the future by implementing the solutions set forth above. Such actions will confirm its commitment to Tribal sovereignty and Indigenous people.

*Emily Reeves\**

---

152. *See* United States v. Cooley, 141 S. Ct. 1638, 1645-46 (2021); *see also* Madeleine Carlisle, *In Unanimous Ruling, SCOTUS Affirms Authority of Native American Tribal Governments and Police Forces*, TIME (June 1, 2021, 5:03 PM EDT), <https://time.com/6053156/supreme-court-native-american-tribal-sovereignty-cooley/>.

153. *See* City of Albuquerque v. Browner, 97 F.3d 415, 418 (10th Cir. 1996).

\* Emily Momoko Reeves is a J.D. candidate at California Western School of Law, 2023. She attended San Diego State University where she received her Bachelor of Arts in Political Science with minors in Philosophy and History in 2018. Special thanks to Professor Padilla and the CWSL ILJ editing staff for their continued support, dedication, and guidance on this project. She would also like to thank Professor Ann Tweedy for her encouragement and bountiful knowledge. Lastly, she would like to acknowledge that we are on the ancestral land of the Kumeyaay Nation. This land continues to be of great importance to the Kumeyaay Nation and its descendants.