INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE NO. 13.082

***AMICUS CURIAE* BRIEF**

Presented by

PRACTITIONERS AND SCHOLARS OF FEDERAL INDIAN LAW, INDIGENOUS LAW, AND NATURAL RESOURCE LAW

in the case of the

COMUNIDAD INDÍGENA MAYA Q'EQCHI' AGUA CALIENTE

versus

REPÚBLICA DE GUATEMALA

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INTRODUCTION

WHO WE ARE. We**,** Scholars and Practitioners, hereby submit this brief as *amicus curiae* in the case of the Comunidad Indígena Maya Q'eqchi'Agua Caliente, versus República de Guatemala. This case concerns an Indigenous community's claim to rights over lands and natural resources, and the State's obligation to ensure protection of those rights through appropriate and effective means. These rights and obligations are particularly salient when the state and private entities are pursuing large-scale natural resource extraction and development initiatives that may adversely affect Indigenous peoples' rights. This case also concerns an Indigenous community's rights to prompt effective judicial recourse where the state has allegedly infringed the community's rights to lands and natural resources.

The Scholars and Practitioners urge the Inter-American Court of Human Rights ("the Court") to accept their intervention as *amicus curiae* in this case and that the Court consider the points made herein. Petitioners submit that reference to domestic legal practices in other Organization of American States ("OAS") member states provides context for the state's interactions with Indigenous communities as holders of land rights, parties with equities in natural resources, government entities, co-managers of shared resources, and critical stewards of vulnerable ecosystems globally.

Further, as scholars and practitioners who work directly with Indigenous communities, we are aware of the critical role of Indigenous peoples with regard to protecting biodiversity and complex ecosystems on a global scale. Although Indigenous peoples constitute less than five percent of the world's population, the lands and waters managed by Indigenous communities

contain over 80 percent of the earth's biodiversity.[1] As we continue to grapple with the interconnected impacts of climate change and degradation of natural resources worldwide, the critical role of Indigenous communities as protectors of traditional ecological knowledge and stewards of biodiversity becomes increasingly evident.[2]

In this case, the Agua Caliente Community asserts rights to lands and natural resources based on the Community's traditional patterns of use and occupancy. As this brief will demonstrate, such traditional land tenure and resource use by an Indigenous community constitute forms of property that are protected by United States law and policy. In the United States, Indigenous tribal nations hold the right to self-government and exercise their rights to self-govern their lands and resources. This has not always been the case, and current gains are the product of American Indian tribes' sustained practices of sovereignty and inherent authority in the face of efforts to dismantle their distinct political status.[3] To be sure, the United States' policies are flawed and imperfect. And yet, they provide an example of a State system that has recognized Indigenous peoples as distinct political entities that hold collective property rights, the capacity to self-govern, and the knowledge and authority to make decisions about natural resources. Indeed, in recent years, federal and state agencies in the United States have increasingly come to rely on tribes as essential partners in supporting and sustaining vulnerable natural resources and protecting communities in Indian country and beyond.

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[1] *See* Stephen T. Garnett et al., *A Spatial Overview of the Global Importance of Indigenous Lands for Conservation*, 1 NATURE SUSTAINABILITY 369, 369 (2018); *Indigenous Peoples*, WORLD BANK, https://www.worldbank.org/en/topic/indigenouspeoples#1 (last visited Jan. 26, 2022).

[2] Garnett et al., *supra* note 1.

[3] *See* DAVID E. WILKINS & K. TSIANINA LOMAWAIMA, UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW (2001); CHARLES F. WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS (2005); ROBERT WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA (2005).

International treaties, domestic treaties, and customary practice are all sources of authority as the Court assesses this case. Although customary practice in OAS member states is not binding, this amicus demonstrates that OAS member states do engage with Indigenous communities as governments with the authority and capacity to manage resources in their traditional territories, and as co-regulators and co-managers of shared resources. This approach to Indigenous land rights and resource stewardship is not only well-supported by international and customary law, it produces better environmental outcomes and protects the essential ecosystems and resources upon which we all depend.

THE PRACTITIONERS AND SCHOLARS' INTEREST IN THE CASE

We are Scholars and Practitioners of Federal Indian Law, Human Rights Law, Political Science, and Natural Resource Law. As Scholars and Practitioners, we work directly with Indigenous communities and thus have a collective interest in securing the rights and benefits of Indigenous peoples of the United States and the world, preserving tribal rights under treaties and other agreements with the United States, and promoting the common welfare of Indigenous peoples.

Our interests in this case concern threats to the cultural survival, integrity and identity of an entire Indigenous community. We are particularly concerned with the protection of property rights to lands and natural resources belonging to Indigenous peoples and communities. In this case, State action gravely threatens the integrity of internationally recognized principles of human rights. The Court's decision in this matter will send an important message to States within the Inter-American system about their responsibilities to protect and fully guarantee the human rights and survival of Indigenous peoples. We offer this brief to provide additional information with regard to the role of Indigenous communities as self-governing entities with authority to regulate and co-manage natural resources under United States' law. This brief will provide an overview of

the history of American Indian self-governance; explain Tribal jurisdiction and the Tribal Court system in the United States; address tribal land and property rights; and discuss Indigenous rights to natural resources and authority to cooperatively manage shared resources. We hope that this context will be useful to the Court as it analyzes the Agua Caliente case and considers the implications of its decision for Indigenous communities in Guatemala and beyond.

ARGUMENT

I. AMERICAN INDIAN SELF-GOVERNANCE AND POLITICAL INDEPENDENCE

In the United States, American Indian tribes possess the right to self-determination.[4] The rights which Indians have under U.S. federal law derive from their membership and eligibility for membership in a tribe, rather than their ancestry.[5] Though the United States Supreme Court has characterized Indian tribes as "domestic dependent nations,"[6] it has also recognized that tribal rights of self-government pre-existed the United States and its federal Constitution.[7] Tribes thus occupy a unique position, both within and external to the federalist structure of the United States.[8]

While Indigenous peoples in the United States "constitute vibrant communities that have contributed greatly to the life of the country" they still "face significant challenges that are related to widespread historical wrongs . . . that today manifest themselves in various indicators of

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[4] FRANCIS JENNINGS, THE INVASION OF AMERICA: INDIANS, COLONIALISM, AND THE CANT OF CONQUEST 15, 32 (1975).

[5] *Id.*

[6] *Cherokee Nation v. Georgia*, 30 U.S. 1, 12-13 (1831).

[7] *Talton v. Mayes*, 163 U.S. 376, 384 (1896).

[8] *See, e.g.*, DAVID WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT 320 n.10 (1997) ("Tribes, I argue, have an extraconstitutional status because of their preexisting, original sovereignty; because they were existing sovereigns, they were not parties to the U.S. Constitution or state constitutions.").

disadvantage and impediments to the exercise of their individual and collective rights."[9] Despite these systemic hurdles to the full realization of Indigenous peoples' rights in the United States, there is a substantial body of federal law that supports the exercise of Indigenous rights to self-determination. The United States legal framework recognizes both federal Indian law—comprised of federal court decisions, laws, and treaties and agreements with tribes—and tribal law, which is the body of laws and customs by which tribes have chosen to govern themselves and their lands.[10]

A. Treaty Making Era

Treaties were the cornerstone of the legal relationship between American Indian sovereign tribes and the emerging United States government. Approximately 400 treaties were ratified before the federal government formally discontinued treaty making in 1871.[11] Within this model, each tribe "ha[d] control over its territory, its citizens, and its destiny."[12] In continuing to uphold these treaties in court decisions today, the United States Supreme Court recognizes tribal powers of "self-government… with original rights over their ancestral lands."[13] Many of the treaties also established reservations, or specific demarcated territories reserved as homelands for tribal communities.[14]

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[9] James Anaya (Special Rapporteur on the Rights of Indigenous Peoples), *The Situation of Indigenous Peoples in the United States of America* 20, U.N. Doc. A/HRC/21/47/Add.1 (Aug. 31, 2012).

[10] *See id.* at 6-9.

[11] CAROLE E. GOLDBERG ET AL., AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM CASES AND MATERIALS 4 (Paul Caron et al. eds., 7th ed. 2015).

[12] *Id.*

[13] Anaya, *supra* note 9, at 7.

[14] Tribal Land and Ownership Statuses: Overview and Selected Issues for Congress, CONGRESSIONAL RESEARCH SERVICE, https://sgp.fas.org/crs/misc/R46647.pdf.

Even after the federal government ceased treaty making with tribes, the previously ratified treaties continued to affirm tribes' rights to tribal self-determination and control of their demarcated land bases.[15] These federal guarantees of tribal rights were extensive. For example, the Treaty of Fort Pitt with the Delaware Nation included an agreement by the United States to "guarantee to the aforesaid nation of Delawares, and their heirs, all their [territorial] rights in the fullest and most ample manner."[16] The Treaty of Hopewell with the Cherokee Nation promised that any citizen of the United States attempting to settle on Indian land who refused to leave "shall forfeit the protection of the United States of America, and the Indians may punish him or not as they please."[17]

These same treaties made similarly broad affirmations of tribal rights to self-determination. In the Treaty of Hopewell, the Cherokee acknowledged all Cherokees "to be under the protection of the United States of America, and of no other sovereign whatsoever"[18] and the federal government reserved "the sole and exclusive right of regulating the trade with the Indians."[19] The United States supplemented this agreement with all tribes through the general Trade and Intercourse Act of 1790, which expanded the federal government's right to regulate commerce with Indian tribes to the exclusion of state governments, and by subsequent amendments that concluded in 1834.[20]

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[15] *See, e.g.*, Treaty of Fort Pitt with the Delaware Nation, 7 Stat. 13 (Sept. 17, 1778); Treaty of Hopewell with the Cherokee Nation, 7 Stat. 18 (Nov. 28, 1785); Treaty of New Echota with the Cherokee Nation, 7 Stat. 478, art. 5 (Dec. 29, 1835).

[16] Treaty of Fort Pitt with the Delaware Nation, 7 Stat. 13, art. 6 (Sept. 17, 1778).

[17] Treaty of Hopewell with the Cherokee Nation, 7 Stat. 18, art. 5 (Nov. 28, 1785).

[18] *Id.* at art. 3.

[19] *Id.* at art. 9.

[20] Trade and Intercourse Act of 1790, Pub. L. No. 1-33, 1 Stat. 137, ch. 33 (as amended in 1802 and 1834). "Regional state governments" as used here refers to the 50 states which compose the

As a whole, these laws:

> established definite geographically described boundaries that tried to replicate the then prevailing treaty boundaries, prohibited private or state negotiated cessions of Indian lands without [federal] congressional approval, regulated and licensed non-Indians who entered into Indian trade or sought entry into Indian country… [and] provided for federal punishment of offenders who committed crimes against Indians in Indian country.[21]

A subsequent treaty with the Cherokee Nation, the Treaty of New Echota, continued to guarantee that the United States would:

> secure to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them: provided that they shall not be inconsistent with the constitution of the United States and such acts of Congress.[22]

Even as the establishment of state territories extended the United States government westward, treaties still guaranteed Indians self-determination over their land bases. The Enabling Act for the Kansas Territory, which authorized the formation of the state of Kansas, made clear that the establishment of Kansas would not be construed to extend non-federal jurisdiction over Indians or impair the rights of Indians on their property within the territory.[23] This was a broadly upheld policy, and the enabling acts of many subsequent states contained the same disclaimer.[24]

United States and which send delegates to the U.S. Senate. This term is used to distinguish the regional states of the United States from internationally recognized nation-states.

[21] GOLDBERG ET AL., *supra* note 11, at 19.

[22] Treaty of New Echota with the Cherokee Nation, 7 Stat. 478, art. 5 (Dec. 29, 1835).

[23] Act of Jan. 29, 1861, 12 Stat. 127, ch. 20 § 1 (1861).

[24] *See, e.g.*, Act of July 7, 1958, Pub. L. No. 85-508, § 4, 72 Stat. 339 (1958) (enabling act of Alaska); Act of June 20, 1910, 36 Stat. 558-59, 569-70, ch. 310, §§ 2, 20 (1910) (enabling act of Arizona and New Mexico); Act of Feb. 22, 1889, 25 Stat. 677, ch. 180, § 4 (1889) (enabling act of North Dakota, South Dakota, Montana, and Washington).

Since the enactment of these early treaties and laws, it has been the practice of the United States government to affirm and advance tribal rights to self-determination over their protected and demarcated land bases. Subsequent violations of some of these treaties by the United States "constitute some of the principal wrongdoings committed by the United States towards Indigenous peoples."[25] However, the federal government has repeatedly repudiated these historical violations as illegal and immoral. In a recent decision, the U.S. Supreme Court rejected the concept that "[u]nlawful acts, performed long enough and with sufficient vigor" could ever "[be] enough to amend the law."[26] In 1999, the Supreme Court similarly found that an 1850 Presidential Executive Order, which sought to remove a group of tribes from their reservations, was insufficient to terminate Chippewa treaty rights.[27] Despite Indian land loss and resource deprivation, often as a result of treaties broken by the federal government,[28] the United States continues to acknowledge its legal obligation to protect Indian self-determination and demarcated land bases.

B. Assimilation Era

During the late 19th century and early 20th century, the federal government temporarily abandoned its prior policy of recognizing tribal self-determination and land rights in favor of policies designed to assimilate Indians into the general United States population.[29] This was accomplished by transferring Indian lands to non-Indian ownership, dividing remaining collective tribal reservation land to create individual parcels for tribal members, governing Indian affairs

[25] Anaya, *supra* note 9, at 7.

[26] *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2482 (2020) (affirming Muscogee (Creek) Nation's jurisdiction over their historic reservation in Eastern Oklahoma).

[27] *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1998).

[28] Anaya, *supra* note 9, at 11-12.

[29] Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 IDAHO L. REV. 1, 114 (2005).

directly, asserting jurisdiction over crimes in Indian Country, and forcing tribal youth into re-education camps that prohibited the use of Indigenous languages and traditional cultural practices.[30] In 1924, the Indian Citizenship Act granted U.S. citizenship to all Native Americans, although many could not vote in democratic elections until the 1950's.[31]

In 1928, the federal Secretary of the Interior commissioned the research and release of what became known as the Meriam Report, which declared the failure of United States laws and policy of individual land allotment and forced assimilation[32] and the failure of the federal Indian Service to form necessary cooperative relationships with Indian tribes.[33] The Meriam Report called for many of the reforms to reaffirm tribal rights that were subsequently enacted in the Indian Reorganization Act of 1934.[34]

C. Self Determination Era

In acknowledgement of the failure of past assimilative federal laws and policies, the Indian Reorganization Act of 1934 implemented many reforms which supported the practice of tribal self-determination and the protection of tribes' demarcated land bases. Sections 1 and 2 of the Act prohibited allotment, which was the division of communal tribal land to individual tribal members, and indefinitely extended federal protection of Indian land bases.[35] Sections 4 and 5 of the Act

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[30] GOLDBERG ET AL., *supra* note 11, at 24-30.

[31] Indian Citizenship Act of 1924, Pub. L. No. 58-175, 43 Stat. 253, ch. 233 (codified as amended at 8 U.S.C. § 1401(b)); *see also Indian Citizenship Act*, U.S. LIBR. CONGRESS, https://www.loc.gov/item/today-in-history/june-02/ (last visited Jan. 11, 2022).

[32] INST. GOV'T RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION 16, 41 (1928) [hereinafter the "Meriam Report"].

[33] *Id.* at 19.

[34] GOLDBERG ET AL., *supra* note 11, at 30; Indian Reorganization Act of 1934 (Wheeler-Howard Act), 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-79).

[35] Indian Reorganization Act, Pub. L. No. 73-383, 48 Stat. 984, ch. 576 (codified as amended at 25 U.S.C. § 461).

authorized the Secretary of the Interior to exchange lands of equal value and acquire lands by gift or purchase at a cost of two million dollars per year to reconstitute tribal land bases.[36] Section 7 of the Act permitted the Secretary of the Interior to declare any land so acquired to be an addition to tribes' demarcated land bases.[37] This shift in policy was a clear repudiation and correction of the lapse in protecting tribal land bases in previous eras.

In addition to reconstituting tribal land bases, the Indian Reorganization Act of 1934 broadly recognized tribal self-determination powers, both through federal endorsement of tribal actions and substantial financial support. The Act authorized grants for the creation of Indian business corporations, created a revolving federal loan fund, established an Indian preference in federal Indian Service employment, and included a provision empowering the Secretary of the Interior to authorize the constitutions of tribes that petitioned for federal recognition of their tribal governments.[38] Additionally, in order to define those eligible for these benefits, Section 19 of the Act comprehensively defined the term "Indian tribe" based on tribal membership requirements established by the tribes themselves.[39]

During the 1950s, however, in tandem with the downsizing of the federal government following World War II, Congress changed course and again sought to limit the federal relationship with tribes. House Concurrent Resolution 108, passed in 1953, announced the policy of Congress to, "at the earliest time possible," make all Indians "freed from Federal supervision and control and from all disabilities and limitations specially applicable to Indians."[40] Congress

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[36] *Id.* (codified as amended at 25 U.S.C. §§ 464-465).

[37] *Id.* (codified as amended at 25 U.S.C. § 467).

[38] *Id.* (codified as amended at 25 U.S.C. §§ 469-472, 476-478).

[39] *Id.* (codified as amended at 25 U.S.C. § 479); *see also* GOLDBERG ET AL., *supra* note 11, at 32.

[40] H.R. Con. Res. 108, 83d Cong. (1953) (enacted).

passed statutes designating tribes for termination from federal supervision, eligibility for federal benefits, and from coverage of federal Indian laws.[41] Scholars estimate that "3% of all federally managed Indians and 3.2% of the total [Indian land base] were involved in these termination statutes."[42] During this period, Congress also passed Public Law 280, which transferred federal jurisdiction to certain state governments over tribes that objected to a full termination of their legal status, and essentially created "a halfway measure short of termination."[43] Five years after the passage of Public Law 280 and House Concurrent Resolution 108, the International Labour Organization passed Convention 107 with a similar intent to consider "Indigenous and other tribal and semi-tribal populations which are not yet integrated into the national community."[44] This series of actions sparked the beginning of the contemporary Indigenous rights movement and influenced the development of international protections for Indigenous peoples.

By the early 1960s, public and political support for termination had receded.[45] In response to concerns about the program, President John F. Kennedy promised Indians:

> [t]here would be no change in treaty or contractual relationships without the consent of the tribes concerned. No steps would be taken by the Federal Government to impair the cultural heritage of any group. There would be protection of the Indian land base, credit

[41] *See, e.g.*, Act of Aug. 13, 1954, 68 Stat. 718, ch. 732 (The Klamath Tribes) (codified at 25 U.S.C. § 564 et seq.).

[42] GOLDBERG ET AL., *supra* note 11, at 34.

[43] Act of August 15, 1953, Pub. L. No. 280, 67 Stat. 588, ch. 505 (codified in part at 18 U.S.C. § 1162 and 28 U.S.C. § 1360).

[44] International Labour Organization (No. 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, Preamble, June 26, 1957, 328 U.N.T.S 247 (entered into force June 2, 1959).

[45] GOLDBERG ET AL., *supra* note 11, at 35.

> assistance, and encouragement of tribal planning for economic development.[46]

President Kennedy's Secretary of the Interior, Stewart Udall, also repudiated House Concurrent Resolution 108 declaring that it had "died with the 83rd Congress and is of no legal effect at the present time."[47]

Additionally, Congress passed several important pieces of legislation relevant to Indians in the 1960s. In response to the dispossession of Alaskan tribal land, the federal government ordered a halt to state selections of public domain and all other dispositions of federal land until Congress could resolve the Alaska Native claims to the affected property.[48] This Congressional deliberation led to the Alaska Native Claims Settlement Act of 1971, which awarded Alaska Natives title to over forty million acres of land, provided federal payments of $462.5 million over an 11-year period, and guaranteed tribes a royalty of up to $500 million for mineral development in the state of Alaska in exchange for the tribes extinguishing their other land claims.[49]

To support tribes seeking compensation for deprivations or restoration of lands and rights, Congress authorized any Indian tribe or band recognized by the federal government to file suit in federal district court without reference to financial standing for any case arising under the Constitution, laws, and treaties of the United States.[50] Congress also passed the Indian Civil Rights

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[46] Letter from John F. Kennedy, U.S. President, to Oliver La Farge, President, Ass'n Am. Indian Affairs (Oct. 28, 1960).

[47] ANGIE DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES 405 (1970); *see generally* THOMAS CLARKIN, FEDERAL INDIAN POLICY IN THE KENNEDY AND JOHNSON ADMINISTRATIONS 1961-1969 (2001).

[48] DEBO, *supra* note 47, at 383-404.

[49] Alaska Native Claims Settlement Act of 1971, Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified at 43 U.S.C. § 1601 et seq.).

[50] Act of Oct. 10, 1966, Pub. L. No. 89-635, § 1, 80 Stat. 880 (1966) (codified at 28 U.S.C. § 1362).

Act of 1968, which among other things, (1) supported tribal self-governance and extended most of the guarantees of the Bill of Rights, Fourteenth Amendment, and U.S. Constitution to tribal governments as extensions of the federal government; (2) authorized federal courts to review tribal court decisions through *habeas corpus* petitions, integrating tribal courts into the federal judiciary; (3) amended Public Law 280 to require tribal consent for all future state acquisitions of jurisdiction over an Indian land base; and (4) provided for state-initiated return of jurisdiction previously acquired under Public Law 280.[51] These reforms restored the federal government's relationship with tribes and again recognized tribal governments as distinct political entities within the federal legal system.

In 1970, President Richard M. Nixon served notice to Congress that he intended to pursue policies designed to further strengthen tribal governments, transfer control of Indian programs from federal to tribal governments, restore and protect Indian land bases, and forever declare an end to involuntary tribal termination.[52] The Nixon message "ushered in one of the most productive periods for the enactment of statutes affecting Indian tribes."[53]

In addition to restoring the tribal status of many terminated tribes during this period,[54] the federal government passed significant legislation to enhance tribal authority over education, family law, and other areas of governance. The Indian Self-Determination and Education Assistance Act

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[51] Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 77 (1968) (codified in part at 25 U.S.C. § 1301 et seq.).

[52] MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, RECOMMENDATIONS FOR INDIAN POLICY, H.R. DOC. NO. 363 (91st Sess. 1970).

[53] GOLDBERG ET AL., *supra* note 11, at 37.

[54] *See, e.g.,* An Act to Reinstate the Modoc, Wayandotte, Peoria, and Ottawa Indian Tribes of Oklahoma as Federally Supervised and Recognized Indian Tribes, Pub. L. No. 95-281, 92 Stat. 246 (1977) (codified at 25 U.S.C. § 861 et seq.); Siletz Indian Tribe Restoration Act, Pub. L. No. 95-195, 91 Stat. 1415 (1977) (codified at 25 U.S.C. § 711).

of 1975 strengthened tribal government control over federally funded programs for Indians, including programs for education assistance to local school districts.[55] The heart of the act authorized the Secretary of the Interior and the Secretary of Health, Education, and Welfare to contract with tribes for the formation, implementation, and administration of federally funded programs.[56] Other provisions of the Act, together with the Indian Education Act of 1972,[57] sought to increase Indian political control over federal programs for Indian education.

The authority granted to tribes under these laws extended far beyond education: the laws also permitted tribes to assume control over federal regulation of Indian natural resources in a tribe's demarcated land base.[58] A 1970 study showed that 49 of the 75 tribes studied used these programs to take some degree of management control of their timber operations.[59] The study concluded that "tribal control of forestry under [The Indian Self-Determination and Education Assistance Act of 1975] results in significantly better timber management" including increased output and higher timber prices.[60]

Similarly, the Indian Child Welfare Act of 1978 maximized tribal jurisdiction and reduced regional state authority in child custody or adoption proceedings where the Indian children were

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[55] Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C.A § 450a and elsewhere in titles 25, 42, and 50, U.S.C. app.).

[56] *Id.* at 25 U.S.C.A §§ 450f and 450g.

[57] Indian Education Act of 1972, Pub. L. No. 92-318, tit. IV, 86 Stat. 339 (codified as amended at 20 U.S.C. § 7401 et seq.).

[58] JUDITH ROYSTER ET AL., NATIVE AMERICAN NATURAL RESOURCES LAW CASES AND MATERIALS 349-50 (4th ed. 2018).

[59] *See* Matthew B. Krepps, *Can Tribes Manage Their Own Resources? The 638 Program and American Indian Forestry*, *in* WHAT CAN TRIBES DO? STRATEGIES AND INSTITUTIONS IN AMERICAN INDIAN ECONOMIC DEVELOPMENT (Stephen Cornell & Joseph P. Kalt eds., 1993).

[60] *Id.*

members of, or were eligible for membership in, a tribe.[61] This strengthened the ability of tribal government to determine the futures of their own peoples.

Reflecting on these developments, the American Indian Policy Review Commission established by Congress in 1975[62] strongly affirmed federal protection of Indian self-determination in its final report delivered to Congress in 1977.[63] The report:

> generally recommended a continuation of the federal policy of protecting and strengthening tribal governments as permanent governmental units in the federal system. It disparaged assimilationist policies and proposals and called for a reevaluation of federal commitment to… terminated and nonrecognized Indian tribes. The report called for increased financial support for tribal economic development and social and economic programs from tribal members.[64]

In the 1980s, federal support for Indian self-determination continued to expand. In 1983, President Ronald Reagan issued a "Statement on Indian Policy" that reaffirmed federal protection of Indian tribal self-government and called on tribes to further expand their exercise of taxation powers within their demarcated land bases.[65] The Indian Tribal Government Tax Status Act of 1982 extended to tribes the tax advantages enjoyed by the states of the United States.[66] The Act declared that as a "General Rule . . . An Indian tribal government shall be treated as a State."[67] In

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[61] *See* Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92, Stat. 2069 (1978) (codified at 25 U.S.C. § 1901 et seq.); *see also* GOLDBERG ET AL., *supra* note 11, at 38.

[62] 25 U.S.C. § 174 (1975).

[63] AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT (1977).

[64] GOLDBERG ET AL., *supra* note 11, at 39 (summarizing the American Indian Policy Review Commission's Final Report).

[65] Ronald Reagan, U.S. President, Statement on Indian Policy (Jan. 24 1983).

[66] Indian Tribal Government Tax Status Act of 1982, Pub. L. No. 97-473 (codified as amended at 26 U.S.C. § 7871 (2018)).

[67] *Id.* at § 7871(a); the use of "State" here by the U.S. Congress refers to the 50 regional states which send delegates to the U.S. Senate.

the field of environmental regulation, amendments to the Clean Water Act, the Clean Air Act, the Comprehensive Environmental Response, Compensation, and Liability Act, and the Safe Drinking Water Act authorized the U.S. Environmental Protection Agency ("EPA") to designate tribes as governments with program authority within demarcated Indian lands.[68] The EPA also issued its first statement of Indian policy in 1984 declaring that tribes, not states, should implement federal environmental statutes on Indian lands and receive federal funding to do so.[69]

In addition to expanding the role of tribal governments to tax and spend in their demarcated land bases, Congress further supported tribes seeking to expand their revenue stream to effectively self-govern. The Indian Mineral Development Act of 1982 authorized the approval of mineral development agreements made with tribal consent and shared tribal control over resource extraction.[70] The Indian Land Consolidation Act of 1982 sought to remedy some of the lingering effects of allotment by authorizing tribes to establish their own plans for land consolidation.[71] In an effort to further create revenue streams for tribal governments, Congress also passed the Indian

[68] *See* Clean Water Act, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1377); Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392 (codified as amended at 42 U.S.C. § 7601(D)(2)); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. § 9626); Safe Drinking Water Act, Pub. L. No. 93-523, 88 Stat. 1660 (1974) (codified as amended at 42 U.S.C. § 300h-le).

[69] EPA Policy for the Administration of Environmental Programs on Indian Reservations, U.S. Envtl. Prot. Agency (1984).

[70] Indian Mineral Development Act of 1982, Pub. L. No. 97-382, 96 Stat. 1938 (1982) (codified at 25 U.S.C. §§ 2101-2108).

[71] Indian Land Consolidation Act of 1982, Pub. L. No. 97-459, 96 Stat. 2515 (1983) (codified at 25 U.S.C. §§ 2201-2211) (2008)).

Gaming Regulatory Act of 1988, which facilitated and regulated Indian casino gaming operations.[72]

In the 1990s, several enacted laws further supported tribal control over cultural resources, tribal judicial systems, and tribal higher education. The Native American Graves and Repatriation Act of 1990 provided federal criminal protections for American Indian human remains, funerary objects, sacred objects, and established procedures to transfer possession of these items to the culturally affiliated tribal groups.[73] President William J. Clinton's administration convened the first ever meeting between the White House and the heads of various tribal governments before issuing numerous Executive Orders that afforded protection to Indian sacred sites and directed federal agencies to uphold their responsibilities to Indian peoples.[74] Additionally, Congress passed laws that created the Office of Tribal Justice to liaise between federal law enforcement and tribes, permitted tribes to administer federal law enforcement programs under the authority of the Indian Self-Determination Act, and supported tribes in establishing their own universities of higher education.[75]

During the administrations of Presidents George W. Bush, Barack H. Obama, Donald J. Trump, and Joseph R. Biden, support for tribal self-determination has continued. Under President Obama, Congress allocated $3.4 billion for the repurchase of allotted Indian land and distribution

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[72] Indian Gaming Regulatory Act of 1988, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701-2721).

[73] Native American Graves Protection and Repatriation Act of 1990, Pub. L. No. 101-601, 104 Stat. 3048 (1990) (codified at 25 U.S.C. § 3001 et seq. (2006) and 18 U.S.C. § 1170 (2006)).

[74] GOLDBERG ET AL., *supra* note 11, at 41.

[75] Indian Tribal Justice Act of 1993, Pub. L. No. 103-176, 107 Stat. 2004 (1993); Tribally Controlled College or University Assistance Act of 1998, Pub. L. No. 95-471, 92 Stat. 1325 (1998) (codified at 25 U.S.C. § 1802 et seq. (1998)); Indian Law Enforcement Reform Act of 1990, Pub. L. No. 101-379, 104 Stat. 473 (1990) (codified at 25 U.S.C. § 2801 et seq.).

to affected Indians and returned hundreds of thousands of acres to demarcated Indian land bases.[76] President Obama also signed into law the Tribal Law and Order Act of 2010 and established a joint legislative and executive commission to investigate and recommend improvements in Indian Country criminal justice.[77] The commission recognized the far-reaching expansion of the exclusive jurisdiction of tribes within their territory subject only to review by a newly established federal appellate court.[78] Even before publication of the commission's report, Congress had already begun to expand federal recognition of tribal criminal authority over violence against women committed by non-Indians on Indian land through the Violence Against Women Reauthorization Act of 2013.[79]

In 2020, President Trump announced a policy to "Promote Tribal economic self-determination . . . Increase Federal investment in Tribal Colleges and Universities . . . [and] Respect Native American culture."[80] In 2021, President Biden released an executive memorandum that focused on "Strengthening Nation-to-Nation Relationships" with tribes, and ordered all federal agencies to undergo consultation with Tribal Nations and officials and submit plans demonstrating continued implementation of President Clinton's Executive Order mandating

[76] Claims Resolution Act of 2010, Pub. L. No. 111-291, § 101, 124 Stat. 3064 (2010); GOLDBERG ET AL., *supra* note 11, at 43.

[77] Tribal Law and Order Act of 2010, Pub. L. No. 111-211, tit. II, § 235, 124 Stat. 2261 (codified at 25 U.S.C. § 2801 et seq.).

[78] *See* Troy A. Eid et al., *A Roadmap for Making Native America Safer: Report to the President & Congress of the United States*, INDIAN LAW & ORDER COMM'N (2013), https://www.aisc.ucla.edu/iloc/report/.

[79] Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013).

[80] U.S. White House, *Putting America's First Peoples First: Forgotten No More!*, at 1 (Oct. 20, 2020), https://oneida-nsn.gov/wp-content/uploads/2020/10/Putting-Americas-First-People-First_240PM.pdf.

consultation and coordination with Indian governments (2000).[81] Although the United States falters in the fulfillment of its obligations to Indigenous peoples, the federal government has long recognized the principle of tribal self-determination and has supported the protection of demarcated Indian land bases.

II. TRIBAL JURISDICTION AND TRIBAL COURTS.

A. Tribal Government, Law, and Courts

Tribal courts are distinct legal institutions that further tribal self-determination by handling a variety of matters, including both internal governance and the protection of tribal members. According to the seminal Handbook of Federal Indian Law, written by former Department of Interior Assistant Solicitor Felix S. Cohen and originally published by the federal government, "[t]he present right of tribes to govern their members and territories flows from a preexisting sovereignty limited, but not abolished, by their inclusion within the territorial bounds of the United States. . . . Neither the passage of time nor the apparent assimilation of native peoples can be interpreted as diminishing or abandoning a tribe's status as a self-governing entity."[82] The U.S. Supreme Court also echoed established federal law in declaring that "Indian governance is a matter properly entrusted to each particular tribe and, to the extent that they may exist, the tribal courts."[83]

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[81] Pres. Biden Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships (Jan. 26, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-tribal-consultation-and-strengthening-nation-to-nation-relationships/.

[82] FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 4.01 [1][a] (1945, updated through present).

[83] *Tarbell v. Dep't. Interior*, 307 F. Supp. 2d 409, 428 (N.D.N.Y. 2004).

The ancient history of tribal jurisprudence predates European conquest.[84] In 1941, the famous American jurist Karl Llewellyn expressed great respect for Indigenous jurisprudence by noting that the "classical" Cheyenne people were possessed of:

> utterly clean juristic intuition . . . indeed, the phase of Roman law itself, with whose effective spirit we find the Cheyenne comparable, is not the early form-bound Roman law, nor the archaic semi-certainty of the late Republic, but the sweet flowering of the classical jurisconsult.[85]

In the United States, the history of tribal self-government forms the basis for modern tribal courts and jurisprudence, which involves the retrieving of ancient values, customs, and norms for the solution of contemporary legal problems.[86] For example, the Navajo Nation has codified traditional law, customary law, common law, and natural law in their own tribal code which is then cited within their justice system.[87] Many other tribes, like the Muscogee Nation of Oklahoma, have similarly adopted American-style three-branch constitutional governments and three-tiered trial, appeals, and supreme courts while still integrating their customs and traditions into their

[84] *See, e.g.*, Steven M. Karr, *Now We Have Forgotten the Old Indian Law: Choctaw Culture and the Evolution of Corporeal Punishment*, 23 AM. INDIAN L. REV. 409, 409-410 (1999) (describing common elements of pre-colonial tribal law); Katherine Hermes, *The Law of Native Americans, to 1815*, *in* 1 THE CAMBRIDGE HISTORY OF LAW IN AMERICA: EARLY AMERICA (1580-1815) 32, 33 (Michael Grossberg & Christopher Tomlins, eds., 2008) (discussing the "jurispractice" of American Indians before European colonization).

[85] E. ADAMSON HOEBEL & KARL LLEWELLYN, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE 313 (1941).

[86] RAYMOND D. AUSTIN, NAVAJO COURTS AND NAVAJO COMMON LAW: A TRADITION OF TRIBAL SELF-GOVERNANCE, at xvii (2009).

[87] *See* Navajo Nation Code Annotated § 201 *et seq*.

constitution and code.[88] Although troubling limits to tribal jurisdiction persist,[89] tribes in the United States exercise self-governing powers and maintain and strengthen their distinct political, legal, economic, social, and cultural institutions.[90]

B. Recognition of Tribal Law by Federal Courts

U.S. federal courts recognize tribal law both independently of and integrated within the legal system of the United States. Federal courts have taken two complementary approaches to recognize the decisions of tribal courts within the federal system: (1) full faith and credit[91] and (2) comity.[92]

The full faith and credit model is a federalist approach that adopts tribal decisions as conclusively determining the parties' rights in the adopting jurisdiction even if those judgments violate the public policy of the enforcing government.[93] This constitutional federalist approach is

[88] *See generally* Sarah Deer & Cecilia Knapp, *Muscogee Constitutional Jurisprudence: Vhakv Em Pvtakv (The Carpet Under the Law)*, 49 TULSA L. REV. 125 (2013). Notably the Muscogee (Creek) Nation has also adopted its own translation of the UN Declaration on the Rights of Indigenous Peoples into its tribal code. *See* TR 16-149 (2016), https://creekdistrictcourt.com/wp-content/uploads/2019/08/TR16-149.pdf.

[89] *See, e.g.*, Eugene Sommers, Matthew Fletcher, & Tadd Johnson, *It's Time to End Public Law 280* (Aug. 9, 2021), https://nativegov.org/news/its-time-to-end-public-law-280/ (explaining how Public Law 280 granted certain states jurisdiction over "crimes committed by or against Native people in Indian country" and highlighting the example of the Mille Lacs Band's challenges establishing concurrent jurisdiction with the neighboring county).

[90] *See generally* MATTHEW L.M. FLETCHER, AMERICAN INDIAN TRIBAL LAW (2d ed. 2020).

[91] *See, e.g.*, Violence Against Women Act (VAWA), Pub. L. No. 103-322, tit. IV, 108 Stat. 1930 (codified as amended at 18 U.S.C. § 2265(a) (2000)) ("Full faith and credit given to protection orders."); Indian Child Welfare Act (ICWA), Pub. L. No. 95-608, tit. I, § 101, 92 Stat. 3071 (codified at 25 U.S.C. § 1911(d) (2000)) ("Full faith and credit to public acts, records, and judicial proceedings of Indian tribes.").

[92] *See, e.g.*, *FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916, 930 (9th Cir. 2019) (quoting *AT&T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899, 903 (9th Cir. 2002) ("As a general rule, federal courts must recognize and enforce tribal court judgments under principles of comity.").

[93] GOLDBERG ET AL., *supra* note 11, at 436-37.

also taken by states that adopt with full faith and credit the decisions made by other states.[94] In addition, many federal statutes require that states and the federal government give full faith and credit to tribal court decisions.[95]

The comity model is comparable to the model of international deference the United States gives to the legal judgments of foreign nations.[96] Under this model, federal courts provide deference to tribal government actions and tribal court decisions and further recognize tribal sovereignty and self-governance.[97] And, just as in the context of foreign relations, comity extends sovereign immunity to tribal government actors.[98]

Although tribal courts are generally insulated from federal oversight, federal courts do retain some limited oversight over decisions made by the tribal government. Federal courts can review tribal court decisions only where federal jurisdiction exists and only after all tribal court

[94] *Fauntleroy v. Lum*, 210 U.S. 230, 237-38 (1908).

[95] *See, e.g.*, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-66 n.21 (1978) (full faith and credit in practice); Indian Child Welfare Act, 25 U.S.C. § 1911(d) (a statute requiring full faith and credit); Federal Violence Against Women Act, 18 U.S.C. § 2265 (requiring full faith and credit); Violence Against Women Act (VAWA), Pub. L. No. 103-322, tit. IV, 108 Stat. 1930 (codified as amended at 18 U.S.C. § 2265(a) (2000)) ("Full faith and credit given to protection orders."); Indian Child Welfare Act (ICWA), Pub. L. No. 95-608, tit. I, § 101, 92 Stat. 3071 (codified at 25 U.S.C. § 1911(d) (2000)) ("Full faith and credit to public acts, records, and judicial proceedings of Indian tribes.").

[96] William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2078 (2015).

[97] *See, e.g.*, *Mexican v. Circle Bear*, 370 N.W.2d 737 (S.D. 1985) (South Dakota [regional state] Supreme Court granted comity to and enforced tribal judgement of the Cheyenne River Sioux courts based on customary Indigenous law).

[98] *See, e.g.*, *Minn. Dep't Nat. Res. v. White Earth Band of Ojibwe*, 2021 WL 4034582, at *1 n.1 (D. Minn. Sept. 3, 2021) (denying the state of Minnesota's motion for a preliminary injunction of the tribal court decision and dismissing Minnesota's complaint because the federal court lacked authority to enjoin the tribe from proceeding with their lawsuit due to sovereign immunity of the tribal court).

remedies have been exhausted.[99] To avoid issues caused by overlapping or opaque jurisdictional boundaries, tribes, the federal government, and states and their departments will often enter into intergovernmental agreements. These agreements may provide for the advanced resolution of tax disputes, the cross deputization of tribal and state law enforcement officers within specific boundaries, or the resolution of similar legal questions.[100] Where there is a jurisdictional dispute, a variety of factors are taken into account, as detailed in the following two sections.

C. Tribal Civil Jurisdiction

In the case of tribal civil jurisdiction, tribes have extensive jurisdiction over disputes between their own members. Tribes may also "regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."[101] Furthermore, tribes "retain inherent power to exercise civil authority over the conduct of non-Indians [in the demarcated Indian land bases] when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[102] In addition, tribes may

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[99] *See, e.g.*, *Nat'l Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 856 (1985).

[100] *See, e.g.*, Interlocal Agreement for Deputization and Mutual Law Enforcement Assistance Between the Little Traverse Band of Odawa Indians and the County of Emmet, Michigan (2003), http://walkingoncommonground.org/files/Michigan%20Little%20Traverse%20Bay%20Bands%20of%20Odawa%20Indians%20and%20County%20of%20Emmet%20Deputization%20Agreement.pdf; Cigarette Tax Compact Between the Squaxin Island Tribe and the State of Washington (2004), https://www.squaxinisland.org/wp/wp-content/uploads/2010/04/cigarette_compact.pdf; *see also* GOLDBERG ET AL., supra note 11, at 446.

[101] *Montana v. U.S.*, 450 U.S. 544, 565-66 (1981) (listing relevant cases).

[102] *Id*. at 566; *see also Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (tribes treated like a regional state and considered to have inherent powers to tax both members of the tribe and nonmembers benefitting from tribally provided services and infrastructure, especially when revenues are derived on tribal lands); *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114 (1993) (absent explicit federal Congressional direction to the contrary, it must be presumed that a state does not have jurisdiction to tax tribal members who live and work in Indian Country); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 52 (9th Cir. 1981) (ruling that regulation of

have federally delegated authority to assert jurisdiction over the regulation of air, water, waste disposal, and other matters provided for by federal statute.[103] This constellation of powers permits tribes to govern the people and natural resources on their demarcated land base, settle disputes with connected nonmembers within tribal courts, and extend police powers to regulate external threats in order to safeguard the health and welfare of their community.

D. Tribal Criminal Jurisdiction

Tribal courts have broad criminal jurisdiction on Indian land, especially where a tribal member or Indian from another tribe is involved. The scope of criminal jurisdiction over non-Indians is defined by a variety of federal statutes, including the Major Crimes Act, General Crimes Act, Violence Against Women Act, and Tribal Law and Order Act.[104] Jurisdiction varies based on a number of factors. In most cases where there is an Indian victim or offender, the tribe or federal government acting as a trustee of the tribe (or both) has jurisdiction. In other cases, a regional state may have jurisdiction if a non-Indian commits a crime against another non-Indian or commits a victimless crime within a tribe located within the regional state's borders, or when the federal government has amended jurisdictional boundaries.[105]

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water on the tribe's demarcated land base is critical to tribal self-government and regional state regulation is preempted).

[103] *See generally* JANE M. SMITH, CONG. RESEARCH SERV., R43324, TRIBAL JURISDICTION OVER NONMEMBERS: A LEGAL OVERVIEW 1, 11-12 (2013).

[104] *See generally* General Crimes Act, Pub. L. No. 117-80, 52 Stat. 757 (codified at 18 U.S.C. § 1152); Major Crimes Act, Pub. L. No. 117-80, 62 Stat. 757 (codified at 18 U.S.C. § 1153); Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 56 (2013) (codified at 42 U.S.C. § 13924 et seq); Tribal Law and Order Act, Pub. L. No. 111-211, 124 Stat. 2258.

[105] U.S. Department of Justice, Criminal Resource Manual § 689 (Jurisdictional Summary) (updated Jan. 22, 2020), https://www.justice.gov/archives/jm/criminal-resource-manual-689-jurisdictional-summary.

Even though tribes do have extensive powers over their own members, there remain jurisdictional issues that have impeded justice.[106] In 2021, President Trump noted that, "[c]riminal jurisdiction complexities and resource constraints have left many injustices unaddressed," and called for increased collaboration with tribal leadership and community members after noting that tribal communities were not yet receiving sufficient aid.[107] Nonetheless, the recent trend has leaned toward an expanded federal conception of tribal jurisdiction through delegation by the federal government and federal recognition of inherent tribal jurisdiction.[108]

Despite jurisdictional challenges, tribal courts build on a long and respected history of tribal jurisprudence to further self-determination in the modern era. Tribal courts remain an integral institution by which tribes are empowered to develop priorities and strategies for their land and resources, maintain and strengthen their distinct political, legal, economic, social, and cultural institutions, and exercise their autonomy and self-government.

III. AMERICAN INDIAN TRIBES HOLD LEGALLY ENFORCEABLE LAND AND PROPERTY RIGHTS.

Prior to European contact, Indian tribes typically held the view that their traditional lands belonged to members of the tribe and generally held in common, with rights and duties in specific

[106] *See, e.g.*, Matthew L.M. Fletcher, *Politics, Indian Law, and the Constitution*, 108 CAL. L. REV. 495, 527 n.218 (2020) ("[T]he Court has justified the extension of federal criminal jurisdiction into Indian country on the grounds that federal prosecutions are for the benefit of Indians and Indian tribes . . . even though Indians are convicted at higher rates than non-Indians to federal prison, sentenced to disproportionately longer sentences than non-Indians for the same crimes, and Indian children constitute a disproportionately high percentage of children in the federal prison system.") (internal citations omitted).

[107] Exec. Order No. 14053, 86 Fed. Reg. 64337 (Nov. 15, 2021).

[108] *See, e.g.*, Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 56 (2013) (codified at 42 U.S.C. § 13924 *et seq.*; *McGirt*, 140 S. Ct. at 2482.

"family" or clan plots recognized in tribal law and custom.[109] While each tribe had its own history regarding land tenure,[110] the concept of communal ownership was essential to the way of life for many tribes. However, during the allotment and termination eras, Congress broke up much of the tribal landholdings on reservations.[111] As a result of these transfers, approximately two-thirds of Indian land passed from tribal ownership.[112] Even so, many reservations today retain the concept of communal property, particularly in the southwest United States where large tracts of reservation lands are held under some form of communal tribal ownership.[113]

When an Indian tribe communally holds land, individual tribal members may share the entire property without having claim to any particular part of the land.[114] However in practice, as the following examples show, most tribes have developed systems where a license or assignment is given to an individual tribal member or a group of individual tribal members for a specific area so that tribal members know where they build or develop the land or conduct activities. The terms and the duration of these assignments vary depending on the tribe. The assignment may expire

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[109] *See, e.g.*, Adam Crepelle & Walter E. Block, *Property Rights and Freedom: The Keys to Improving Life in Indian Country*, 23 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 315, 335-38 (2017); Kristen A. Carpenter and Angela R. Riley, Privatizing the Reservation? 71 Stanford Law Review 791, 850-55 (2019).

[110] *See, e.g.*, Navajo Fundamental Law (NAVAJO NATION CODE tit. I, § 205) and Yurok Constitution (YUROK TRIBE CONST. pmbl., available at https://yurok.tribal.codes/Constitution/Preamble).

[111] *See supra* Pt. I.B.

[112] Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559, 1562 (2001).

[113] *See, e.g.*, *Begay v. Keedah*, 19 Indian L. Rptr. 6021, 6022 (Navajo 1991) ("Families and subsistence residential units . . . hold land in a form of communal ownership.").

[114] *See, e.g.*, *id.* (discussing how grazing rights on communal land "are not a form of land title, but the right of a named permittee to graze a certain number of animals in a large common grazing area").

after a term of years without a right to renew, though many tribes allow renewal and permit descendants to acquire the assignment of a deceased assignee.

Each Indian tribe's customs and laws regarding personal and communal property derive from its unique cultural traditions and land tenure. For example, in the Navajo Nation in the southwestern United States, land is held by family units in a form of communal ownership.[115] Under this system, the family group holds the land, but certain members may have rights to specific areas, such as the right to grow crops or graze cattle.[116] The Navajo Nation has explained its practices as follows: "Traditional Navajo land tenure is not the same as English common law tenure, as used in the United States. Navajos have always occupied land in family units, using the land for subsistence."[117]

As with other Indian tribes, the ownership of land according to Navajo customary law is vested in the tribal community as a whole.[118] While each tribe has its own laws and customs regarding property, a common theme among tribes is that the land is essential to survival and cultural preservation. The Navajo courts have stressed this point:

> The most valuable tangible asset of the Navajo Nation is its land, without which the Navajo Nation would [not] exist and without which the Navajo People would be caused to disperse . . . Land is basic to the survival of the Navajo People.
>
> While it is said that land belongs to the clans, more accurately it may be said that the land belongs to those who live on it and depend upon it for their survival. When we speak of the Navajo Nation as a whole, its land and assets belong to those who use it and who depend upon it for survival—the Navajo People.[119]

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[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *See Yazzie v. Jumbo*, 5 Navajo Rptr. 75, 77 (Navajo 1986).

[119] *Tome v. Navajo Nation*, 4 Navajo Rptr. 159, 161 (Window Rock D. Ct. 1983).

These concepts have analogues in other tribes. For instance, many tribes have customary laws describing the areas where families can gather, hunt, or fish on the land. The Hoopa Valley tribe in California, for example, use their own traditional private property rules to determine who can cut timber near areas of sacred significance.[120] While each tribe has its own history and customs, both tribal courts and the federal government have recognized that the lands and property rights are entitled to protection and are essential to the tribe's cultural preservation.

A. Trust Land and Non-Trust Land

In the United States, Indian land falls under one of two broad categories: trust land and non-trust land.[121] Trust land is land owned by the federal government but set aside for the exclusive use of American Indians.[122] Non-trust or "fee land" is privately owned.[123] Fee lands may be subject to restrictions against sale or transfer or encumbrance (liens, leases, etc), or may be freely sold or transferred without federal approval.[124]

Indian tribes can own the same kinds of property, personal and real, that non-Indians can own, including land and items attached to or found within the land such as buildings, timber, and minerals. There are many ways in which Indian tribes have obtained their interests in land, including by treaty, federal statute, purchase by the tribe, purchase by the federal government, or

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[120] *Bugenig v. Hoopa Valley Tribe*, 25 Indian L. Rptr. 6139, 6143-44 (N.W. Regional Tribal Ct. App. 1998).

[121] *See Native American Ownership and Governance of Natural Resources*, NAT. RESOURCES REVENUE DATA, https://revenuedata.doi.gov/how-revenue-works/native-american-ownership-governance/ (last visited Jan. 28, 2022).

[122] *See id.*

[123] *See id.*

[124] *See* Tribal Land and Ownership Statuses: Overview and Selected Issues for Congress, CONGRESSIONAL RESEARCH SERVICE, https://sgp.fas.org/crs/misc/R46647.pdf (describing differences between "restricted fee lands" and "fee simple lands").

donation. Tribes may also have Indian title, or aboriginal title, which is land that has always been a part of a tribe's ancestral homelands.[125]

An Indian reservation includes all the land within the boundaries of the reservation, including trust land and fee land owned by the tribe or by a tribal member.[126] The reservation also includes fee land owned by nonmembers; however, tribes have more authority to regulate Indian land than land owned by nonmembers.[127]

In the United States, Indian tribes have inherent recognized rights in lands held in trust. These Indian trust lands are inalienable[128] and not subject to taxation by the federal or state governments.[129] For instance, Indians who farm or ranch on their trust allotments do not pay federal taxes on the income they earn.[130] Likewise, Indians who sell timber, oil, or minerals from trust land do not pay federal taxes on the income they earn.[131] In general, state governments do not have criminal and civil jurisdiction over Indian activities occurring on trust land.[132] Because trust land is owned by the federal government, trust land is immune from state tax and zoning laws.

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[125] Ralph Erickson, *Aboriginal Land Rights in the United States and Canada*, 60 N.D.L. REV. 107, 107 (1984).

[126] *See Definition of Indian Country*, U.S. ENV'T PROTECTION AGENCY, https://www.epa.gov/pesticide-applicator-certification-indian-country/definition-indian-country (last visited Jan. 28, 2022).

[127] *See generally* SMITH, *supra* note 103.

[128] *See Johnson v. M'Intosh*, 21 U.S. 543 (1823) (deeming tribal lands as inalienable except to the federal government).

[129] Joseph P. Kalt & Joseph W. Singer, *Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule* 36 fig.1, HARV. U. JOHN F. KENNEDY SCH. GOV'T (March 2004), https://scholar.harvard.edu/files/jsinger/files/myths_realities.pdf.

[130] *Stevens v. Comm'r Internal Revenue*, 452 F.2d 741, 748-49 (9th Cir. 1971).

[131] *Squire v. Capoeman*, 351 U.S. 1, 10 (1956).

[132] *Worcester v. Georgia*, 31 U.S. 515, 559, 560 (1832).

For example, a state cannot tax the income that a tribe receives when it leases land for mineral development.[133]

The property interest of Indian tribes in trust land is unique in the United States legal system. It is a form of "ownership in common" that is not analogous to other collective forms of ownership in U.S. property law.[134] Under the trust system, Indigenous land and resource interests are held in common for the benefit of community members.[135] The tribe chooses to use the land pursuant to the laws of the tribal government, with some limitations from the federal government.[136] Tribes may lease and develop their trust land for mining,[137] for oil and gas,[138] for grazing,[139] and for farming[140]—and those lessees pay rent or royalties to the tribe. There are some restrictions placed on the tribe's ability to sell, use, or lease trust land without federal consent. However, in most instances the "[d]etermination of the use of its own land is peculiarly the province of the tribe involved."[141]

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[133] *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985).

[134] *See Amicus Curiae* Brief Presented by the National Congress of American Indians in the *Case of the Mayagna (Sumo) Community of Awas Tingni*, at 62, Case No. 11.577, Inter-Am. Ct. H.R. (2000) (citing *United States v. Jim*, 409 U.S. 80 (1972); *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73 (1977)).

[135] *See Native American Ownership and Governance of Natural Resources*, *supra* note 121.

[136] Mary Mullen, *American Indians, Indian Tribes, and State Government*, MINN. HOUSE RES. (Feb. 2020), https://www.house.leg.state.mn.us/hrd/pubs/indiangb.pdf.

[137] *See* Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396 (2020).

[138] *See* 25 U.S.C. § 398 (2020).

[139] *See* 25 U.S.C. § 397 (2020).

[140] *See* 25 U.S.C. §§ 402-402a (2020).

[141] *Hawley Lake Homeowners' Ass'n v. Deputy Assistant Sec'y*, 13 IBIA 276, 288 (1985).

There are advantages[142] and disadvantages[143] to keeping land in trust status. However, given the immunity from state taxes, most tribes in the United States opt to keep land in trust status or to convert fee land into trust land.[144] Tribes can put lands into trust through the "fee-to-trust" or "land-into-trust" process.[145] This can also be done through a mandatory acquisition, whereby Congress directs the Secretary of the Interior to bring land into trust.[146] For instance, in December 2019, Congress recognized the Little Shell Band of Chippewa Indians as a federally recognized tribe and directed the Secretary of the Interior to acquire 200 acres of land in trust for the benefit of the tribe.[147] Alternatively, federal law also authorizes the Secretary to purchase fee land with federal funds, convert that land into trust status, and assign it to an Indian or tribe.[148] Tribes or

[142] *See* SMITH, *supra* note 103, at 10-11.

[143] *See* Evelyn Iritani, *Ownership Structure of Tribal Land Exacts a Multibillion-Dollar Penalty*, UCLA ANDERSON REV. (Aug. 26, 2020), https://anderson-review.ucla.edu/native-american-land/ (discussing how owners of trust land cannot "borrow against, sell, or develop" their land without the approval of the Bureau of Indian Affairs).

[144] *See Native American Ownership and Governance of Natural Resources*, *supra* note 121 ("In general, most Native American lands are trust land.").

[145] *See Fee to Trust Land Acquisitions*, U.S. DEP'T INTERIOR: INDIAN AFFS., https://www.bia.gov/bia/ots/fee-to-trust (last visited Jan. 28, 2022). Note that there are some restrictions to this process. *See, e.g.*, *Carcieri v. Salazar*, 555 U.S. 379, 395-96 (2009) (ruling that that a 1934 statute provides no authority for the Secretary of the Interior to take land into trust for the Narragansett Indian Tribe because the statute applies only to tribes under federal jurisdiction when that law was enacted).

[146] Department of the Interior et al., *Acquisition of Title to Land Held in Fee or Restricted Fee Status (Fee-to-Trust Handbook)*, at 5 (June 28, 2016), https://www.bia.gov/sites/bia.gov/files/assets/public/raca/handbook/pdf/Acquisition_of_Title_to_Land_Held_in_Fee_or_Restricted_Fee_Status_50_OIMT.pdf#:~:text=Mandatory%20Trust%20Acquisition%3A%20A%20trust,an%20individual%20Indian%20or%20Tribe.

[147] *See* National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 2870(a)(11), 133 Stat. 1198, 1908 (2019) (codified as amended at 10 U.S.C. § 2870).

[148] 25 U.S.C. § 465 (2012).

individual tribal members can also purchase fee land and request that these lands be converted into trust status.[149]

B. An Indian Tribe Has the Right to Regulate Its Property

Today tribes occupy or control approximately 56 million acres of land in the United States.[150] Indian tribes have the right to regulate tribal land as "a fundamental attribute of [their] sovereignty . . . unless divested of [that power] by federal law or necessary implication of their dependent status."[151] As an example, tribes have the right to tax the value of oil and gas removed from tribal trust lands by a non-Indian company operating under a contract with the tribe.[152] This power to tax activities occurring on tribal land comes from the tribe's right "to tribal self-government and territorial management."[153]

Tribes in the United States also have the inherent rights over Indian land "to manage the use of [their] territory and resources," including the right to regulate or prohibit certain activities if the tribe so chooses.[154] These inherent rights include the rights to:

- Regulate hunting and fishing on tribal land.[155]
- Regulate the use and quality of water on tribal land.[156]

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[149] 25 C.F.R. § 151.4 (2016).

[150] *See Native American Ownership and Governance of Natural Resources*, *supra* note 121.

[151] *Merrion*, 455 U.S. at 137.

[152] *Id.* at 144.

[153] *Id.* at 141.

[154] *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983).

[155] *Parravano v. Babbitt*, 70 F.3d 539, 545-46 (9th Cir. 1995), *cert. denied*, 518 U.S. 1016 (1996)

[156] *Pyramid Lake Paiute Tribe v. Morton*, 354 F.Supp. 252, 255-56 (D.D.C. 1972), *rev'd on other grounds*, 499 F.2d 1095 (D.C. Cir. 1974).

- Eject trespassers from tribal land.[157]
- Tax Indians and non-Indians who use tribal land for farming, grazing, or other purposes under contracts with the tribe or tribal members.[158]
- Regulate commercial activities on tribal land.[159]

Federal laws also protect trust lands. For example, the National Historic Preservation Act (NHPA) requires federal agencies to take into account any adverse effects a proposed project may have on federal lands that have cultural or historic significance.[160] Federal agencies have used the NHPA to prohibit projects such as mining, oiling and gas exploration on sites that have historic and cultural significance to Indian tribes.[161]

C. A Tribe Is Entitled to Just Compensation When Its Rights Are Violated

Nearly 400 treaties recognize Indigenous lands and resource rights.[162] These treaty lands cannot be taken from tribes without payment of just compensation by the federal government.[163] Tribes are also entitled to fair compensation when their rights are violated. For instance, tribes are

[157] *Merrion*, 455 U.S. at 141.

[158] *Morris v. Hitchcock*, 194 U.S. 384, 393 (1904).

[159] *Merrion*, 455 U.S. at 137; *S. Pac. Transp. Co v. Watt*, 700 F.2d 550, 556 (9th Cir.), *cert. denied*, 464 U.S. 960 (1983).

[160] National Historic Preservation Act of 1966, Pub. L. No. 113-287, 128 Stat. 3227 (codified at 54 U.S.C. § 306108 (2018)).

[161] *Comanche Nation v. U.S.*, 2008 WL 4426621, at *18 (W.D. Okla. Sept. 23, 2008) (discussing NHPA).

[162] *American Indians and Alaska Natives – Treaties*, U.S. DEP'T HEALTH & HUM. SERVS.: ADMIN. NATIVE AMS., https://www.acf.hhs.gov/ana/fact-sheet/american-indians-and-alaska-natives-treaties (last visited January 28, 2022).

[163] *See Sioux Tribe v. U.S.*, 316 U.S. 317, 326 (1942) (citing *Shoshone Tribe v. U.S.*, 299 U.S. 476 (1937)).

entitled to compensation for the loss of hunting and fishing rights,[164] or for the taking of land, minerals, or standing timber.[165]

Though not required under the Constitution, [166] tribes have received compensation for the taking of land or resources even on lands with *unrecognized* Indian title or aboriginal title, including lands traditionally held by Indigenous peoples without formal recognition by the United States. As explained above, in the Alaska Native Claims Settlement Act, the federal government transferred forty-four million acres and money payments totaling $962.5 million to Alaska Native regional and village corporations in return for voluntarily relinquishing their claims to aboriginal title in Alaska.[167] Similar land settlement acts include the Maine Indian Claims Settlement Act,[168] Florida Indian Land Claims Settlement Act,[169] and the Connecticut Indian Land Claims Settlement Act.[170]

[164] *Menominee Tribe v. U.S.*, 391 U.S. 404, 413 (1968).

[165] *United States v. Shoshone Tribe*, 304 U.S. 111, 118 (1938).

[166] *See Tee-Hit-Ton Indians v. U.S.*, 348 U.S. 272, 279 (1955) (holding aboriginal title is not a vested property interest but rather is a "mere passion not specifically recognized as ownership by Congress" and therefore the Tee-Hit-Tons do not legally need to be compensated for the taking of timber).

[167] Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688 (codified at 43 U.S.C. §§ 1601-1629 (2000)).

[168] Maine Indian Claims Settlement Act of 1980, Pub. L. No. 96-240, § 6(a), 94 Stat. 1785 (codified as amended at 25 U.S.C. §§ 1721-35).

[169] Florida Indian Land Claims Settlement Act of 1982, Pub. L. No. 97-399, 96 Stat. 2012 (1982) (25 U.S.C. §§ 1741-49).

[170] Connecticut Indian Land Claims Settlement, Pub. L. No. 98-134, 97 Stat. 851 (1983) (codified at 25 U.S.C. §§ 1751-60).

IV. INDIGENOUS RIGHTS TO NATURAL RESOURCES AND COOPERATIVE MANAGEMENT

In addition to possessing land rights, American Indian tribes have the rights to own, manage, lease, and steward natural resources.[171] Additionally, tribes have the right to the soil, natural gas, oil, and mineral interests under the land, as "[m]inerals and standing timber are constituent elements of the land itself."[172] Natural resources on American Indian land can be held in trust for a tribe or individuals,[173] or can be privately owned as attributes of "fee land."[174]

American Indian tribes' authority to manage and regulate natural resources on Indian lands predates the establishment of the United States; indeed, maintaining ongoing tribal access to resources was central to many treaty negotiations between American Indians and the federal government.[175] Despite this fact, tribes were largely denied the rights to control and manage

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[171] SMITH, *supra* note 103, at 8 ("[The Indian Self-Determination and Education Assistance Act] gave tribes the opportunity to assume responsibility in several areas, including . . . natural resources management.").

[172] *Shoshone Tribe*, 304 U.S. at 116; *see also* SMITH, *supra* note 103, at 22 ("Once a tribe enters into a [tribal energy resource agreement] with the Secretary, it is able to enter into energy-related mineral leases and associated transactions without additional approval by the Secretary.").

[173] *See, e.g.*, *id.* at 9 tbl.1 ("The United States holds in trust approximately . . . 59 million acres of subsurface mineral estates for tribes and individual tribal members.").

[174] *See, e.g.*, *id.* ("*Fee lands* . . . are freely alienable or can be encumbered without federal approval.") (emphasis in original).

[175] *See, e.g.*, 1837 Treaty with the Chippewa (7 Stat. 537); 1842 Treaty with the (Wisconsin) Chippewa (7 Stat. 591); 1854 Treaty with the Nisqualli, Puyallup (10 Stat. 1132); 1855 Treaty with the Dwamish, Suquamish (12 Stat. 927); 1855 Treaty of Point No Point (12 Stat. 933); 1859 Treaty with the Yakima Nation (12 Stat. 951); Bethany Berger, *Natural Resources and the Making of Modern Indian Law*, 51 CONN. L. REV. 927 (2019).

Tribal constitutions are also a source of law through which tribes assert their authority over on-reservation natural resources. *See, e.g.*, Const. of the Ho-Chunk Nation, Art. I, Sec. 1 (Wisc.); Const. of the Tohono O'Odham Nation, Art. VI, Sec. 1(i)(2), Arts. XVI–XVIII (Ariz.); Const. of the White Mountain Apache Tribe of the Fort Apache Indian Reservation, Art. I, Sec. 1, Art. IV, Sec. 1(f) (Ariz.); Const. of the Lower Brule Sioux Tribe, Preamble (S. Dak.); Const. of the Puyallup Tribe, Art. I. (Wash.).

reservation resources for over a century as a result of federal policies and agreements between government agencies and private actors that routinely failed to include tribes and tribal interests.[176] However, in the past 50 years, Indian tribes have steadily expanded their authority and jurisdiction over natural resource regulation.[177] These efforts by Indian tribes have also been supported by a range of federal policies that recognize and encourage tribal self-determination.[178]

Indian tribes also manage environmental resources in the treaty-ceded territories.[179] This authority is rooted in tribal sovereignty, the treaties, and the trust relationship between the federal government and tribal nations.[180] A series of federal court cases have further recognized states' obligations to uphold tribal treaty rights and co-manage shared resources with tribal governments.[181] Thus, analyses of jurisdiction, environmental protection, and resource

[176] *See* National Congress of American Indians, *Natural Resource Conservation Policy: Incorporating Tribal Perspectives* 1, (2011), https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1045669.pdf.

[177] *Id.* at 2.

[178] *See, e.g.*, Press Release, WHITE HOUSE, Fact Sheet: Building a New Era of Nation-to-Nation Engagement (Nov. 15, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/15/fact-sheet-building-a-new-era-of-nation-to-nation-engagement/ (detailing the Biden-Harris Administration's efforts to "strengthen Tribal sovereignty and advance Tribal self-determination").

[179] *See, e.g.*, *Ceded Territory*, WIS. DEP'T NAT. RESOURCES, https://dnr.wisconsin.gov/topic/Fishing/ceded (last visited Feb. 1, 2022) ("Each year, a portion of [the Ceded Territory is] subject to special fisheries regulations as a result of Chippewa off-reservation treaty rights that are mandated by Federal Court rulings.").

[180] *See* Martin Nie, *The Use of Co-Management and Protected Land-Use Designations to Protect Tribal Cultural Resources and Reserved Treaty Rights on Federal Lands*, 48 NAT. RESOURCES J. 1, 10-13 (2008).

[181] *See* John Eligon, *'This Ruling Gives Us Hope': Supreme Court Sides with Tribe in Salmon Case*, N.Y. TIMES (June 11, 2018), https://www.nytimes.com/2018/06/11/us/washington-salmon-culverts-supreme-court.html (describing the "Fish Wars" and the subsequent federal court rulings that affirmed tribal rights to "co-manage fishing resources with the state").

management in the United States cannot be complete without considering American Indian tribes as political actors, regulators, and co-stewards of natural resources.

A. Tribal Resource Management On-Reservation

American Indian lands hold vast amounts of natural resources. American Indians and Alaska Natives occupy over 56.2 million acres of lands in the United States.[182] These lands cover 46 million acres of agricultural and rangeland, 19 million acres of timber forests and woodlands, nearly 30 percent of the nation's coal reserves in the western United States, 20 percent of known oil and gas reserves in the United States, and over one-half of the country's uranium deposits.[183] Although Indian land comprises only about 2 percent of land in the United States, as of 2013, Indian lands contained an estimated 5 percent of all renewable energy resources in the country, and had the technical potential to deliver a combined 11.4 percent of the United States' solar, wind, and hydropower energy generation capacity.[184]

Many tribes have natural resource departments that manage on-reservation resources, oversee infrastructure projects, rehabilitate native landscapes, issue permits for hunting and fishing

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[182] *FAQs: What is a Federal Indian Reservation?*, BUREAU INDIAN AFFS., https://www.bia.gov/frequently-asked-questions#:~:text=Approximately%2056.2%20million%20acres%20are,%2C%20communities%2C%20etc (last visited Feb. 2, 2022).

[183] *See* Debra L. Donahue, *A Call for Native American Natural Resources in the Law School Curriculum*, 24 J. LAND, RESOURCES, & ENVTL. L. 211, 211-12 (2004); *Natural Resources*, BUREAU INDIAN AFFS.: BRANCH AG. & RANGELAND DEV'T, https://www.bia.gov/bia/ots/division-natural-resources/branch-agriculture-and-rangeland-development (last visited Jan. 24, 2022); Cynthia R. Harris, *Reasserting Tribal Forest Management Under Good Neighbor Authority*, REG. REV. (Dec. 7, 2020), https://www.theregreview.org/2020/12/07/harris-reasserting-tribal-forest-management-good-neighbor-authority/; Maura Grogan et al., *Native American Lands and Natural Resource Development*, REVENUE WATCH INST. 3 (2011), https://resourcegovernance.org/sites/default/files/RWI_Native_American_Lands_2011.pdf.

[184] U.S. Department of Energy: Office of Indian Energy, *Developing Clean Energy Projects on Tribal Lands: Data and Resources for Tribes* 3, (Apr. 2013), https://www.nrel.gov/docs/fy13osti/57748.pdf.

by tribal members, and develop integrated plans for managing reservation forests, agricultural and rangelands, water, and other resources, and conservation plans tied to specific tribally-issued permits and leases.[185] Tribes have the right to sufficient water appropriations to fulfill the purposes of the reservation and generally have priority water rights over other users of shared water resources.[186] Accordingly, tribes coordinate with state and federal agencies to develop water infrastructure on-reservation and certain tribes administer their own public water systems.[187]

Tribes also integrate resource protection within broader tribal governance agendas and priorities. For instance, in 2015, the Navajo Nation developed a complex Integrated Resource Management Plan to protect and extend programmatic protections for natural resources in an area that required significant development of housing and other infrastructure.[188] This effort coordinated plans for managing water, air quality, climate change mitigation, agriculture, invasive species, rangeland, forestland, fish and wildlife, cultural resources, and other environmental preservation while fulfilling the tribes' need to develop housing, infrastructure, economic opportunities, and other land uses.[189] Many other tribes have instituted similar plans that account

[185] *See Native Resources*, NAT'L CONGRESS AM. INDIANS, https://www.ncai.org/policy-issues/land-natural-resources/native-resources (accessed Jan. 24, 2022); *Programs & Services*, U.S. DEP'T. INTERIOR, BUREAU INDIAN AFFS. DIVISION NAT. RESOURCES, https://www.bia.gov/regional-offices/great-plains/division-of-natural-resources (last visited Jan. 24, 2022); American Indian Agricultural Resource Management Act, 25 U.S.C. § 3703(11) (2020).

[186] *Winters v. U.S.*, 207 U.S. 564, 575-78 (1908); *Hawkins v. Haaland*, 991 F.3d 216, 225-28 (D.D.C. 2021); *Navajo Nation v. U.S. Dep't. Interior*, 996 F.3d 623, 631 (9th Cir. 2021).

[187] See Safe Drinking Water Act, Pub. L. No. 114-322, 130 Stat. 1729 (codified at 42 U.S.C. § 300f (2020)).

[188] *See* Navajo Nation et al., *Former Bennett Freeze Area Draft Integrated Resource Management Plan*, (2020), bia.gov/sites/bia.gov/files/assets/bia/navreg/Draft_FBFA_IRMP_05.15.2020.pdf.

[189] *Id.* at 5.

for tribes' specific developmental needs balanced with their commitments to resource stewardship.[190]

1. Consultation

Although tribes have authority over resource management on reservations, federal government agencies also make decisions that have implications for tribal lands, resources, and communities. Pursuant to the trust relationship between tribes and the federal government, federal government agencies are required to consult with tribal governments prior to making decisions on proposed federal agency actions.[191] Tribal consultation is a formal, reciprocal government-to-government dialogue between the tribes' representatives and high-level agency staff designed to establish meaningful collaboration between federal and tribal officials.[192] As discussed in Section

[190] *See, e.g.*, Confederated Tribes Colville Reservation, *Integrated Resource Management Plan* (2015), https://static1.squarespace.com/static/56a24f7f841aba12ab7ecfa9/t/5b982d76352f53b1ab915b93/1536699802464/CTCR+2015+IRMP+online+2018-08-14.pdf; Red Cliff Band Lake Superior Chippewa, *Integrated Resource Management Plan 2006–2016* (2006), https://cms9files.revize.com/redcliffband/Document%20Center/Government/Planning/RC_IRMP.pdf; Keweenaw Bay Indian Bay Community, *Integrated Resource Management Plan* (2002), https://nrd.kbic-nsn.gov/sites/default/files/KBIC-IRMP-2002-2012.pdf; Menominee Nation, *Integrated Forest Management Plan 2012–2027* (2012), https://www.mtewood.com/Content/files/ForestManagementPlan.pdf; Iowa Tribe of Oklahoma. Integrated Resource Management Plan (2016), https://www.energy.gov/sites/prod/files/2016/01/f28/0911review_bigsoldier.pdf.

[191] Lauren Goschke, Note, *Tribes, Treaties, and the Trust Responsibility: A Call for Co-Management of Huckleberries in the Northwest*, 27 COLO. NAT. RESOURCES, ENERGY, & ENVTL. L. REV. 315, 323 (2016) ("Under the trust relationship, the federal government has a duty to . . . engage in government-to-government consultation.").

[192] *See, e.g.*, *Department of the Interior Policy on Consultation with Indian Tribes*, DEP'T INTERIOR, https://www.doi.gov/sites/doi.gov/files/migrated/cobell/upload/FINAL-Departmental-tribal-consultation-policy.pdf (last visited Feb. 2, 2022) ("Consultation is a deliberative process that aims to create effective collaboration and informed Federal decision-making. Consultation is built upon government-to-government exchange of information."); *Tribal Consultations*, U.S. DEP'T TREASURY, https://home.treasury.gov/policy-issues/tribal-affairs/tribal-consultations (last visited Feb. 2, 2022) ("The principle of consultation has its roots in the unique relationship between the federal government and the governments of Indian Tribes. This government-to-government

I, the modern federal consultation duty was established by an Executive Order of President Clinton in 2000.[193] It has since been reaffirmed in numerous executive orders and presidential memoranda[194] and enshrined in the internal policies of federal agencies and departments.[195] Less than a week after President Biden took office, he issued a memorandum reasserting the executive office's commitment to strengthening relationships with tribal nations and prioritizing government-to-government consultation.[196] Some states also have developed tribal consultation policies.[197] In 2021, seventeen federal agencies signed a Memorandum of Understanding ("MOU") committing to interagency coordination and collaboration for the protection of tribal treaty rights and reserved rights.[198]

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relationship has a more than 200-year history and is built on the foundation of the U.S. Constitution, treaties, legislation, executive action, and judicial rulings.").

[193] Exec. Order No. 13175, 65 Fed. Reg. 67249 (Nov. 6, 2000).

[194] *See* Pres. Clinton Government-to-Government Relations with Native American Tribal Governments, 94 Fed. Reg. 10877 (May 4, 1994); Exec. Order No. 13007, Indian Sacred Sites, 61 Fed. Reg. 26771 (May 24, 1996); Pres. G.W. Bush Memorandum on Government-to-Government Relationship with Tribal Governments, 40 Weekly Comp. Pres. Doc. 39 (Sept. 23, 2004); Pres. Obama Memorandum on Tribal Consultation, Daily Comp. Pres. Doc. 200900887 (Nov. 5, 2009).

[195] *See, e.g.*, U.S. Dep't of Interior, Policy on Consultation with Indian Tribes and Alaska Native Corporations, 512 DM 4 (2015); U.S. Army Corps of Engineers, Tribal Consultation Policy (2013); U.S. Bureau of Land Mgmt., Tribal Relations Manual, MS-1780 (2016); U.S. Dept. of Housing & Urban Devt., Government-to-Government Tribal Consultation Policy (2016); U.S. Ctrs. for Disease Control & Prevention, Tribal Consultation Policy, CDC-GA-2005-16 (2020).

[196] Pres. Biden Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, Daily Comp. Pres. Doc 202100091 (Jan. 26. 2021).

[197] *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 41-2051–2054; MINN. STAT. § 10.65; OR. REV. STAT. § 182.164; WASH. REV. CODE §§ 43.376.010–060; Wisconsin Executive Order #39 (Wisc. 2004); Wisconsin Executive Order #18 (Wisc. 2019).

[198] Memorandum of Understanding Re: Interagency Coord. & Collab. For the Protection of Tribal Treaty Rights and Reserved Rights (2021), https://www.doi.gov/sites/doi.gov/files/interagency-mou-protecting-tribal-treaty-and-reserved-rights-11-15-2021.pdf.

Establishing a consultation framework is an important step to ensuring that Indigenous knowledge, perspectives, and interests are accounted for in major environmental and public health decisions. However, despite comparatively robust federal consultation policies in the United States, consultation alone is insufficient to ensure that tribal governments are adequately involved and treated as full partners in environmental decision-making.[199] Recognition of tribal sovereignty and jurisdiction over natural resources must be integrated into decisions about resource management and policy.

a) *Implementing Federal Environmental Regulations*

Federally recognized tribes that meet certain requirements also serve as regulatory authorities for the purposes of implementing key pieces of federal environmental regulation on-reservation. Pursuant to the federal Clean Water Act, tribes may develop and implement water quality standards, issue permits, manage pollution, and conduct regulatory enforcement of environmental standards on-reservation.[200] As regulatory authorities, tribes may also set standards that exceed federal and state regulations for waters that enter the reservation and for water bodies

[199] *See, e.g.*, United States Government Accountability Office, *Federal Land Management: Key Differences and Stakeholder Views of the Federal Systems Used to Manage Hardrock Mining* (July 2021), https://www.gao.gov/assets/gao-21-299.pdf; United States Government Accountability Office, *Native American Issues: Examples of Certain Fed. Requirements That Apply to Cultural Resources and Factors That Impact Tribal Consultation* (Feb. 2020), https://www.gao.gov/assets/gao-20-466t.pdf; United States Government Accountability Office, *Resource Constraints and Management Weaknesses Can Limit Federal Program Delivery to Tribes* 5-7 (Nov. 2019), https://naturalresources.house.gov/imo/media/doc/Ortiz_GAO-Testimony.pdf; United States Government Accountability Office, *EPA Should Improve the Reliability of Data on National Priorities List Sites Affecting Indian Tribes* 87–110 (Jan. 2019), https://www.gao.gov/assets/gao-19-123.pdf.

[200] Clean Water Act, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§§ 1251-1377); *see also Tribal Assumption of Federal Laws – Treatment as a State (TAS)*, U.S. ENVTL. PROTECTION AGENCY, https://www.epa.gov/tribal/tribal-assumption-federal-laws-treatment-state-tas (last visited Feb. 2, 2022) ("The Clean Air Act (CAA), Clean Water Act (CWA), and Safe Drinking Water Act (SDWA) expressly provide the authority for Indian tribes to play essentially the same role in Indian country that states do within state lands.").

that do not fall completely within reservation borders,[201] and develop cooperative agreements for regulating and monitoring shared water resources with states.[202] Under the Safe Drinking Water Act, tribes implement and manage public water system supervision programs and enforce drinking water regulations on reservations.[203] Designated tribes also have authority over air resources within the exterior boundaries of a reservation (including lands owned by non-Indians), and may develop, implement, monitor, and issue permits for air quality standards under the federal Clean Air Act.[204] The United States' EPA further relies on tribes as partners for the purposes of implementing and enforcing other environmental regulations, including the Toxic Substances Control Act, Comprehensive Environmental Response, Compensation and Liability Act, and others.[205]

b) *Mineral Development and Resource Extraction on Indian Lands*

Energy development and mineral resources are the largest source of revenue generated from natural resources on Indian trust land. In 2019, federally recognized Indian tribes and individual Indian mineral owners received $1.1 billion in energy and mineral revenue.[206] Tribes

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[201] *See City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996); *Wisconsin v. Enviro. Protection Agency*, 266 F.3d 741 (7th Cir. 2001); Jessica Owley, *Tribal Sovereignty Over Water Quality*, 20 J. LAND USE 61, 77 (2004).

[202] 33 U.S.C. § 1337(e).

[203] Safe Drinking Water Act, Pub. L. No. 104-182, 110 Stat. 1692 (codified at 42 U.S.C.A. § 300j-11).

[204] Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392 (codified as amended at 42 U.S.C. §§ 7401–7642, 42 U.S.C. § 9626); *see* Indian Country: Air Quality Planning and Management, 40 C.F.R. § 49.3 (Feb. 12, 1998).

[205] *See Tribal Assumption of Federal Laws*, *supra* note 200 ("EPA has interpreted [the Toxic Substances Control Act, and Emergency Planning and Community Right to Know Act] to authorize tribal participation. . . . EPA has interpreted [CERCLA] to allow tribes to enter cooperative agreements and receive financial assistance.").

[206] TANA FITZPATRICK, CONG. RESEARCH SERV., R46446, TRIBAL ENERGY RESOURCE AGREEMENTS (TERAS): APPROVAL PROCESS AND SELECTED ISSUES FOR CONGRESS 1 (2020).

or individual allotment holders must consent to leases for mineral, oil, gas, geothermal, or other extraction on tribal lands and tribes may negotiate their own mineral development agreements with leasing companies.[207] Tribes may also enter into Tribal Energy Resource Agreements with the federal government, through which tribes have increased administrative and regulatory authority over energy development projects on Indian lands.[208]

Pursuant to the Indian Mineral Leasing Act, states are prohibited from taxing tribes' royalty interests under oil and gas leases issued to non-Indian lessees.[209] Tribes with significant mineral and sub-surface resources have developed different methods of managing leasing, taxation, and extraction activities. For instance, the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation in the state of Montana formed a corporate partnership, Fort Peck Energy Co., LLC, which leases allottee, tribal and other lands for oil and natural gas exploration and drilling.[210] The Crow Tribe of Montana, whose reservation overlaps with a vast coal deposit, manages its own leasing, with some assistance from the Department of the Interior, while other tribes rely heavily on federal agencies including the Bureau of Land Management and the Office of Surface Mining to oversee extraction operations on-reservation.[211] The Navajo Nation, which has the largest land base of any tribe in the United States as well as significant coal, oil, and gas deposits, manages its

[207] Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396 (2020); Indian Mineral Development Act of 1982, 25 U.S.C. § 2102 *et seq.* (1982); 25 C.F.R. §§ 211–12, 225.

[208] Indian Tribal Energy Development & Self-Determination Act, Pub. L. No. 109-58, tit. V (2005), *amended* Pub. L. No. 115-325 (2018).

[209] *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 767–68 (1985). States may, however, tax non-Indians that extract resources on Indian lands. *Cotton Petrol. Corp. v. New Mexico*, 490 U.S. 163, 191–93 (1989).

[210] Grogan et al., *supra* note 183, at 30.

[211] *Id.* at 32–34.

own mineral audits, royalty payments, taxes, regulation and enforcement activities, and environmental assessments.[212]

B. Cooperative Management in the Ceded Territories

Tribes also have the authority to co-manage resources off-reservation. Many of the treaties signed between American Indian tribes and the federal government include specific language recognizing Indigenous peoples' rights to continue to hunt, fish, gather, access water, and otherwise use resources in the ceded territories.[213] Pursuant to these treaties, the U.S. Supreme Court has held that "Indian treaty rights can coexist with state management of natural resources,"[214] and federal courts have affirmed that states, federal agencies, and tribes have an obligation to co-manage shared resources in the ceded territories in the interest of conservation.[215]

Tribal resource managers are also essential partners for state and federal agencies. For instance, in 1998, the United States Forest Service signed a MOU with 10 tribes in the states of Minnesota, Wisconsin, and Michigan, recognizing the tribes' retained treaty rights, tribal, sovereignty, and tribal regulatory authority and articulating the signatories' shared goal of

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[212] *Id.* at 36.

[213] *Supra* note 175; *see also*, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1998); *Washington v. Washington State Comm. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 679 (1979); *Herrera v. Wyo.*, 139 S. Ct. 1686, 170-03 (2019). Even where treaties do not include specific language recognizing tribes' continued equities in natural resources, tribes may retain any prior rights that have not been specifically limited through treaty making or subsequent Congressional action. *U.S. v. Winans*, 198 U.S. 371, 381 (1905) ("[T]he treaty was not a grant of rights to the Indians, but a grant of right from them—a reservation of those not granted.").

[214] *Mille Lacs*, 526 U.S. at 204.

[215] *Id.* at 204–05; *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341 (1983); *Lac Courte Oreilles Band v. Wisconsin*, 488 F. Supp. 1233 (W.D. Wis. 1987); *Lac Courte Oreilles Band v. Wisconsin*, 707 F. Supp. 1034 (W.D. Wis. 1989); *Pyramid Lake Paiute Tribe of Indians*, 354 F. Supp. at 262–65; *Washington*, 443 U.S. at 686–88.

protecting, co-managing, and enhancing the ecosystems in co-managed federal forests.[216] The reauthorized MOU has facilitated integration of tribal knowledge into federal forest management, educational initiatives, joint harvesting, permitting, and monitoring of pipelines and other infrastructure that traverses the MOU's geographic scope.[217] As climate change intensifies the occurrence and damage of wildfires, tribal foresters and Indigenous knowledge of sustainable fire management practices are increasingly critical resources for protecting co-managed forest resources.[218] Similarly, when an oil pipeline ruptured in 2010, spilling into the Kalamazoo River in the state of Michigan, the Nottawaseppi Huron Band of the Potawatomi Tribe and the Match-E-Be-Nash-She-Wish Band of the Pottawatomi Tribe were appointed Natural Resources Trustees for the federally-mandated Natural Resource Damage Assessment reporting process; the bands were vital to the cleanup process, reporting, and development of multi-agency emergency response plans.[219]

Tribes also play a critical role in sustaining and strengthening essential food resources and aquatic ecosystems. In the Pacific Northwest region of the United States, tribes co-manage

[216] U.S. Forest Service and 10 federally recognized Tribes of the Great Lakes Indian Fish and Wildlife Commission, MOU-One Year Implementation Summary (March 2000), https://www.fs.usda.gov/detail/cnnf/workingtogether/tribalrelations/?cid=stelprdb5117663.

[217] Memorandum of Understanding Regarding Tribal-USDA-Forest Service Relations on Nat'l Forest Lands Within the Territories Ceded in Treaties of 1836, 1837, and 1842 (2012); Celebrating 20th Anniversary of Tribal Memorandum of Understanding (2018), https://www.fs.usda.gov/detail/r9/home/?cid=FSEPRD602188.

[218] Timothy Brown, For Native Foresters, *Land Management About More than Economics and Timber*, YALE SCH. ENV'T (May 20, 2016), https://environment.yale.edu/news/article/for-native-american-foresters-managing-the-land-transcends-economics-and-timber; Christopher I. Roos, et al., *Native American Fire Management at an Ancient Wildland-Urban Interface in the Southwest United States*, 118 PNAS 1 (2021).

[219] *See* U.S. Fish & Wildlife Service et al., *Final Damage Assessment and Restoration Plan* (2015), https://www.fws.gov/midwest/es/ec/nrda/michiganenbridge/pdf/finaldarp_ea_enbridgeOct2015.pdf (last visited Jan. 24, 2022).

commercial fisheries with state and federal agencies, collaboratively developing policies, standards, and facility management protocols.[220] Since 1992, tribes have partnered with the state of Washington to produce inventories of salmon, and more recently steelhead, to guide wild fish recovery in shared waters.[221]

C. Tribal Legal Systems as Venues for Resource Protection

Disputes over natural resource protection are also increasingly litigated in tribal courts. In 2019, a federal Court of Appeals affirmed the Shoshone-Bannock Tribal Court's judgment ordering use permit fees for hazardous waste storage on reservation. The Court of Appeals concluded that the Shoshone-Bannock tribes had regulatory jurisdiction to impose fees over the plaintiff, a non-Indian operator of an elemental phosphorous plant, because the plaintiff entered into a consensual relationship with the tribes and its storage of millions of tons of hazardous waste on reservation threatened the tribes' health and resources.[222] The Court of Appeals also found that the tribal court had jurisdiction to adjudicate the claims and enforce the fees, and that the plaintiff's rights to due process were not violated by proceeding in tribal court.[223]

Similarly, in 2021, the White Earth Band of Ojibwe filed an action in White Earth Tribal Court against the state of Minnesota, related to the state's permitting for an oil pipeline that crossed the treaty-ceded territories.[224] The tribal court denied Minnesota's motion to dismiss the

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[220] Section 9409: Managing Impacts to Commercial, Recreational, and Tribal Fisheries (2020), https://www.rrt10nwac.com/Files/NWACP/2020/Section%209409%20v21.pdf.

[221] Washington Dept. of Fish & Wildlife, Salmon and Steelhead Co-Management, https://wdfw.wa.gov/fishing/tribal/co-management (last visited Feb. 2, 2022).

[222] *FMC Corp.*, 942 F.3d at 934–35.

[223] *Id.* at 941–44.

[224] *See* Principal Brief of Appellants, Minn. Dept. of Natural Res. v. Manoomin (White Earth Tribal Ct. Sept. 13, 2021), https://whiteearth.com/assets/files/programs/judicial/cases/2%20-%20DNR%20-%20Principal%20Brief%20(Appellants).pdf; Dan Gunderson, *Appeals Court to Decide if Minnesota DNR Can Be Sued in Tribal Court*, MPR NEWS (Dec. 16, 2021),

complaint. The state filed a separate action in federal district court challenging the tribal court's jurisdiction; the federal court dismissed Minnesota's claims, determining that it lacked jurisdiction over the tribal court.[225] The state of Minnesota has appealed both decisions to the tribal and federal Courts of Appeals, respectively.[226] This case is notable because one of the named plaintiffs in the action is *Manoomin*, or wild rice, which the complaint alleges is threatened by the pipeline. By naming a natural resource as a plaintiff, this case has become a bellwether for asserting the legal rights of natural resources in tribal courts and beyond.[227] Further, the case demonstrates the expanding role of tribal courts as active arbiters of environmental disputes and the deference that federal courts increasingly show to sovereign tribal judiciaries.

V. CONCLUSION

As this brief demonstrates, the United States, an OAS member state, has established a multi-faceted framework that obligates the federal government and state governments to engage with Indigenous communities as governments with the authority and capacity to manage resources in their traditional territories, and as co-regulators and co-managers of shared resources. Indigenous communities' right to self-government—and to exercise their rights to self-govern their lands and resources—is foundational to international, domestic, and customary legal systems.

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https://www.mprnews.org/story/2021/12/16/appeals-court-to-decide-if-minnesota-dnr-can-be-sued-in-tribal-court.

[225] *See White Earth Band of Ojibwe*, 2021 WL 4034582 at *2.

[226] *Minn. Dep't Nat. Res. v. White Earth Band of Ojibwe*, 2021 WL 4034582 (D. Minn. Sept. 3, 2021), *appeal docketed*, No. 21-3050 (8th Cir. Sept. 13, 2021).

[227] *See* Mary Annette Pember, *'Rights of Nature' Lawsuits Hit a Sweet Spot*, INDIAN COUNTRY TODAY (Aug. 15, 2021), https://indiancountrytoday.com/news/rights-of-nature-lawsuits-hit-a-sweet-spot; White Earth Reservation, Press Release, First 'Rights of Nature' Enforcement Case Filed in Tribal Court to Enforce Treaty Guarantees (Aug. 4, 2021), https://static1.squarespace.com/static/5ceea3dff402670001e6ca05/t/610c22c71c825e2412994bd4/1628185287579/Manoomin+v+DNR+Press+Release+8-4-2021.pdf.

Indigenous peoples' property rights must be regarded as basic human rights, and must be protected as essential to the cultural survival of Indigenous peoples.

Dated: February 23, 2022

Respectfully submitted,

DocuSigned by:
36E758235C98483...

Arielle S. Wagner
Attorney
LOCKRIDGE GRINDAL NAUEN P.L.L.P.

DocuSigned by:
0984B88A10EF464...

Dr. Laura M. Matson
Attorney
LOCKRIDGE GRINDAL NAUEN P.L.L.P.

DocuSigned by:
A09D30E9381D434...

Edward Randall Ornstein
JD Candidate, 2022
Editor-in-Chief, Arizona Journal of Environmental Law and Policy
Co-Vice-Chair of Membership, ABA Native American Resources Committee
The University of Arizona Rogers College of Law

DocuSigned by:
18D2624A90E348E...

Robert A. Williams, Jr.
Regents Professor,
E. Thomas Sullivan Professor of Law and Faculty Co-Chair, Indigenous Peoples Law and Policy Program
The University of Arizona Rogers College of Law

DocuSigned by:
F26CDEF0A7C642B...

Eura Chang
JD Candidate, 2022
University of Minnesota
Law Clerk
LOCKRIDGE GRINDAL NAUEN P.L.L.P.

DocuSigned by:
A85B80D29C4041D...

Kailey C. Mrosak
Attorney
LOCKRIDGE GRINDAL NAUEN P.L.L.P.

DocuSigned by:
68230BB9CB5D4AA...

Dr. David E. Wilkins
Professor, E. Claiborne Robins Distinguished Professor in Leadership Studies
Jepson School of Leadership Studies
University of Richmond

DocuSigned by:
43E3D6861EF045C...

Lindsay G. Robertson
Chickasaw Nation Endowed Chair in Native American Law
Sam K. Viersen Family Foundation Presidential Professor
Faculty Director, Center for the Study of American Indian Law and Policy
University of Oklahoma College of Law

DocuSigned by:
Professor Angelique EagleWoman
38586283FA0B403...

Professor Angelique EagleWoman
Director, Native American Law and Sovereignty Institute
Mitchell Hamline School of Law

DocuSigned by:
Kekek Jason Stark
921AC7045DFF44E...

Kekek Jason Stark
Assistant Professor of Law
Co-Director, Indian Law Program
Co-Director, Margery Hunter Brown Indian Law Clinic
Co-Director, American Indian Governance and Policy Institute
Alexander Blewett III School of Law
University of Montana

DocuSigned by:
John Borrows
A2EC6C5E485B4AF...

John Borrows
Canada Research Chair in Indigenous Law,
University of Victoria Law School
B.A., M.A., J.D., LL.M., Ph.D., LL.D. (Hons.), D.H.L. (Hons.), F.R.S.C., O.C.

DocuSigned by:
Kristen A. Carpenter
99045FD6FD704A8...

Kristen A. Carpenter
Council Tree Professor of Law
Director, American Indian Law Program
University of Colorado Law School