

WATER IS LIFE: THE NATIVE AMERICAN TRIBAL ROLE IN PROTECTING NATURAL RESOURCES

WATER, POLICY, AND NATIVE AMERICAN SOVEREIGNTY

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Introduction

“So, the monarch [butterfly] is also part of the protest, part of the movement, with its drumbeat reverberating across the planet. The tribal peoples of Earth are making their voices heard in so many ways. Their mission is to reconnect the modern world with the circle of life — a circle that much of humanity left behind maybe ten millennia ago, in pursuit of the Agricultural Revolution and dominion over nature. In the process, we’ve succeeded in changing the climate and, perhaps, establishing a troubling new geological epoch. Now it’s time to rethink ‘progress.’”

Robert C. Koehler¹

Water is key to the circle of life.² Water is a rare, non-renewable natural resource.³ It moves through the Earth’s closed atmosphere in continuous motion.⁴ Amazingly, the portion that is life-sustaining

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¹Robert C. Koehler, *The Future Cries Out: Water is Life*, COMMON DREAMS (Sept. 15, 2016), <https://www.commondreams.org/views/2016/09/15/future-cries-out-water-life>.

² Sybille Hildebrandt, *The Earth has Lost a Quarter of its Water*, SCIENCE NORDIC (March 13, 2012), <http://sciencenordic.com/earth-has-lost-quarter-its-water>.

³ Howard Perlman, *The USGS Water Science School*, U.S. DEPT. OF THE INTERIOR (Dec. 15, 2016), <http://water.usgs.gov/edu/watercyclesummary.html>.

⁴ *Id.*

fresh water makes up less than three percent of all water within the Earth's atmosphere.⁵ Even more interesting is the reality that the world's growing population exists on the same recycled water that sustained life billions of years ago.⁶ Civilizations flourished where water was plentiful.⁷ Those who live in the United States enjoy more clean water than most of the world.⁸ When the U.S. news screams that there is a water crisis in America,⁹ it is long past the time to take notice and implement serious water protection with a vision for sustaining future generations. Deteriorating infrastructure, climate change, pollution, and population growth directly impact this water cycle upon which all life is dependent.¹⁰ Climate change is rapidly exacerbating the water crisis in the United States by changing the amount, timing, form, and intensity of precipitation.¹¹ As a result of these significant changes there is a water scarcity, and scarcity breeds conflict.¹²

The path of conquering and abusing non-renewable natural resources is not sustainable.¹³ The indigenous people's way life has a different focus than those from the Euro-American settlers.¹⁴ This paper will trace a brief history of relations between the Native Americans to the settlers to the New World for the purposes of laying the foundation that explains the

⁵ *Id.*

⁶ *Freshwater Crisis*, NATIONAL GEOGRAPHIC, <https://www.nationalgeographic.com/environment/freshwater/freshwater-crisis/> (last visited Jan. 5, 2018).

⁷ Dave Owen, *Water and Taxes*, 50 U.C.D. L. REV. 1559, 1618 (2017).

⁸ Alison Burke, *10 Facts About Water Policy and Infrastructure in the US*, BROOKINGS NOW (March 21, 2017), <https://www.brookings.edu/blog/brookings-now/2017/03/21/10-facts-about-water-policy-and-infrastructure-in-the-us>.

⁹ Dina Gusovsky, *America's Water Crisis Goes Beyond Flint, Michigan*, CNBC (March 28, 2016), <https://www.cnbc.com/2016/03/24/americas-water-crisis-goes-beyond-flint-michigan.html>.

¹⁰ *Water and Climate Change*, UNION OF CONCERNED SCIENTISTS, https://www.ucsusa.org/global-warming/science-and-impacts/impacts/water-and-climate-change.html#_Wk_RVVQ-eT8. (last visited Feb. 15, 2018).

¹¹ KATHY JACOBS & PAUL FLEMING, *THE WATER PROBLEM: CLIMATE CHANGE AND WATER POLICY IN THE UNITED STATES* 12 (Paul Mulroy ed. 2017) <https://www.brookings.edu/book/the-water-problem>.

¹² Stephen E. Draper, *Introduction to Transboundary Water Sharing*, 133 J WATER RES PL- ASCE, no. 5, 2007, at 1 <https://ascelibrary.org/toc/jwrmd5/133/5>.

¹³ J. S. Thomson, *Federal Indian Policy: A Violation of International Treaty Law*, 4 W. ST. U. L. REV. 229, 252 (1977).

¹⁴ Glenn C. Reynolds, *A Native American Land Ethic*, 21 NAT. RESOURCES & ENV'T 16 (2007).

rights of the Native American tribes. Then there will be a discussion of the tri-part Constitutional relationships of the Federal, State, and Indian tribes. These relationships will be evaluated considering water protection as it relates to this complex and often overlooked federal, state, and Indian interconnection. There will be a discussion of the adversarial relationship that the Tribes encountered in their history with the federal and state government. Finally, it will be pointed out that environmental protections are often most effective when implemented at the local level. Native Americans have a significant role in connecting with local government to require federal and state governments to protect their water resources. To explain this position, there will be a case study of actions by the Seminole Tribe of Florida in negotiating a compact with the State of Florida and Miccosukee Tribe in Florida litigating against the state Florida to protect water and their way of life.

I. NATIVE AMERICAN SOVEREIGNTY- PROTECTING THEIR CULTURAL WAY OF LIFE

In 2016, in Cannon Ball, North Dakota, members of the Standing Rock Sioux and thousands of other Native Americans from across the country protested the building of the Dakota pipeline (DAPL) that invaded sacred lands and threatened their water supply.¹⁵ The government neglected to complete the required impact studies and issued construction permits without the consent of the tribal government.¹⁶ Native American tribes united in protest, set up camps, and held prayer circles at the spirit camp.¹⁷ They stood in opposition to the proposed pipeline that puts over a thousand miles of the Missouri river at risk for contamination in the event of a pipeline leak.¹⁸ Native Americans claim that treaties between the U.S. government and the Great Sioux Nation are being broken.¹⁹ The tribes' peaceful protestors assert violations of the Fort Laramie Treaty because permitting the pipeline through their lands ignores long standing and hard fought Tribal land and water rights.²⁰ Militarized local law enforcement shot rubber bullets, tased, arrested, and brutalized tribal

¹⁵ Sam Levine, *Dakota Access Pipeline: The Who, What and Why of the Standing Rock Protests*, THE GUARDIAN (Nov. 12, 2016), <https://www.theguardian.com/us-news/2016/nov/03/north-dakota-access-oil-pipeline-protests-explainer>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

members, journalists, and film crews.²¹ The sheriff, supported by the North Dakota national guard, claimed criminal trespass and other serious felonies and forcibly evicted the unarmed peaceful “water protectors.”²² This is one of the continuing examples of the local, state, and federal government abandoning their obligation to the indigenous people’s rights.²³

In the highly publicized controversy between the federal government and the Lakota tribe, the Donald Trump administration gave the greenlight to expedite the the Keystone Pipeline extension, designed to transfer tar sand oil from Canada over the U.S. border traversing their reservation lands.²⁴ The developer planned the pipeline to span the south end of the Cheyenne Sioux reservation.²⁵ This permit approval signaled a reversal of the Barack Obama administration’s commitment to reducing carbon emissions from fossil fuels.²⁶ Now, the federal government returned to emphasizing economic growth over positioning the U.S. as a leader in reversing climate change.²⁷ The pipeline expansion project continued forward despite opposition from private property owners, environmental groups, and the Lakota, Nakota, and Dakota tribal members.²⁸ Nebraska blocked their own public serve department, tasked with examing whether the pipeline was in the state’s public interest, from reporting on the potential impact of an oil leak from the pipeline on the extensive water resources in the area.²⁹ Misinformed members of Congress went so far as to ask the Justice Department to look into whether the pipeline protests could be considered acts of

²¹ Sam Levine, *Dakota Access Pipeline: The Who, What and Why of the Standing Rock Protests*, THE GUARDIAN (Nov. 12, 2016), <https://www.theguardian.com/us-news/2016/nov/03/north-dakota-access-oil-pipeline-protests-explainer>.

²² Aleen Brown, *The Battle of Treaty Camp, Law Enforcement Descended on Standing Rock a Year Ago and Changed the DAPL Fight Forever*, THE INTERCEPT, <https://theintercept.com/2017/10/27/law-enforcement-descended-on-standing-rock-a-year-ago-and-changed-the-dapl-fight-forever> (Last visited Feb. 15, 2018).

²³ *Id.*

²⁴ Aleen Brown, *Nebraska Approves Keystone Pipeline as Opponents Face Criminalization of Protests*, THE INTERCEPT (Nov. 20, 2017), <https://theintercept.com/2017/11/20/nebraska-approves-keystone-xl-pipeline-as-opponents-face-criminalization-of-protests/>.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

domestic terror and subsequently subjected to more serious charges.³⁰ Predictably, on November 16, 2017, hundreds of thousands of gallons of oil leaked from the Keystone pipeline, leaving South Dakota regulators looking into revoking the permit because of the recognition that oil spills get into the groundwater.³¹

These events and the response by the local, state, and federal government law instead of breaking the spirit of the tribes spawned a new generation of water protectors.³² Indian tribes and environmental groups are setting up resistance camps across the U.S. to bring attention to the eminent harm of continued reliance on fossil fuels, and the threat to water resources with the expanded use of pipelines.³³

When there is a water conflict, questioning who has the legal right to the water, and how they came to have these rights, becomes critical.³⁴ Within the boundaries of the United States, there are three Constitutionally-protected sovereignties which seek to claim authority over the allocation and use of water within their jurisdiction: the federal, the state, and the Indian tribes.³⁵ The fact that all life needs water, and that water naturally moves freely between all jurisdictions, makes creating one set of laws governing water a legal nightmare, especially when there is a water crisis.³⁶ These conflicts involve complex applications of law entangled in the tri-part relationships of the federal government and the national interest, the state governments and the local interest, and Indian Tribes protecting their culture, land rights, and their members.³⁷

³⁰ *Id.*

³¹ Phil McKenna, *Cause of Keystone Pipeline Spill Worries South Dakota Officials as Oil Flow Restarts*, INSIDE CLIMATE NEWS (Nov. 29, 2017), <https://insideclimatenews.org/news/29112017/keystone-pipeline-oil-spill-south-dakota-permit-transcanada-construction-weights>.

³² Joseph Bullington, *Standing Rock Spawned a Generation of Water Protectors. Now They're on the Move*, IN THESE TIMES (August 9, 2017), http://inthesetimes.com/features/standing_rock_dapl_tacoma_water_protectors.html.

³³ *Id.*

³⁴ Daina Dravnieks Apple, *Evolution of U.S. Water Policy: Toward a Unified Federal Policy*, US FOREST SERVICE 1, 3 (2001), https://www.fs.fed.us/research/publications/wo/wo_2001_apple_d001.pdf.

³⁵ Dylan M. DesRosier, *Tribal Water Rights Settlements and Instream Flow Protection* (2015) (unpublished M.S. thesis, University of Montana) (on file with the Maureen and Mike Mansfield Library, University of Montana).

³⁶ *Id.*

³⁷ *Id.*

American Indian tribes hold a key role in protecting water resources because of their cultural relation to nature.³⁸ To the Indian tribes, their way of life encompasses a spiritual relation to nature.³⁹ The tribes believe that water is the source of all life.⁴⁰ For the tribes, water is a sacred element that ensures physical and psychological well-being for all human beings.⁴¹ *Mini Wiconi*, meaning Water is Life, is the song and the war chant of the Lakota tribes as they join with native and non-native people who see their land and water being threatened.⁴² Under the Public Trust Doctrine, the federal government has an obligation to protect the tribes and their way of life.⁴³ The tribal duty to protect water, and the U.S. federal government's obligation to protect this way of life, necessitates a remedy for conflicts over water rights, especially when there is degradation of land and water on or near Indian lands.⁴⁴ Further, through the power of long-standing treaties entered into between the tribes and the U.S. government, the Native American's water rights are bolstered by Supreme Court decisions that hold these rights are protected by the Constitution.⁴⁵ Further, because a tribe's water rights are protected, they have the authority to protect the rights of their members.⁴⁶ Through this authority, tribes may choose to enter into negotiations with states to form water compacts as an alternative to litigation.⁴⁷ This puts the tribes in a unique position to be able to influence water protection when there are differences with a state or local government arises, because they can reach compromises that are influence by Native

³⁸ *Importance of Water in Native American Culture*, KACHINA HOUSE (Apr. 3, 2017), <http://blog.kachinahouse.com/importance-of-water-in-native-american-culture>.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Chet Brokaw, *Mni Wiconi Water Reaching Pine Ridge Reservation*, INDIAN COUNTRY (Aug. 26, 2008) <http://www.indiancountrynews.com/index.php/news/politics-business/4387-mni-wiconi-water-reaching-pine-ridge-reservation>.

⁴³ Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1475 (1994).

⁴⁴ *Id.* at 1490 (the U.S. Environmental Protection Agency (EPA) regulates most activities with significant potential to degrade the environment).

⁴⁵ *Id.* at 1497.

⁴⁶ Jennifer R. Pelphrey, *Oklahoma's State/Tribal Water Compact: Three Cheers for Compromise*, 29 AM. INDIAN L. REV. 127, 131 (2004).

⁴⁷ *Id.*

American customs and traditions surrounding the sacred nature of water.⁴⁸

To advance this argument, it is important to trace the Supreme Court's acknowledgment of tribal right of action to enforce property interests under federal common law.⁴⁹ In *Worcester v. Georgia*, Justice Marshall wrote that the paradigm of federal-Indian relations was that of the tribes seeking protection as a sovereign nation from the increasingly powerful United States.⁵⁰ Unfortunately, gradually lawmakers reframed this nation-to-nation duty to protect to a relationship of extreme dependency where the U.S. is the guardian over the Indian tribes and their lands.⁵¹ The result is a misrepresentation of *Worcester* that creates a legacy of confusion around Native American Sovereignty and subjugated the Indian tribes legal rights to settlers expanding into the west.⁵² Euro-American settlers understanding of individual rights and ownership is not the same as communal ownership to the indigenous people and the Court recognized this disadvantage.⁵³ Landmark water law cases and acts of Congress established that land rights translated into water rights.⁵⁴ The indigenous people believe that nature belongs to no one, which contrasts to the European explorers whose explorations were funded by the monarchies in their respective countries.⁵⁵ The Europeans came to conquer and expand their powers by ownership of lands and resources, and exercise dominion over the people that they conquered.⁵⁶ There was a dichotomy of ideology that undervalued the American Indian's culture.⁵⁷ Even though the Founding Fathers memorialized the interconnection between the federal, state, and Indian tribes in the Constitution, history shows millions of Indian tribes were marginalized,

⁴⁸ *Id.* at 134.

⁴⁹ Wood, *supra* note 41, at 1500.

⁵⁰ *Id.* at 1501 (citing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 555-56 (1832)).

⁵¹ *Id.*

⁵² *Id.*

⁵³ James Anaya, *Indigenous People's Participatory Rights in Relation to Decisions About Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources*, 22 ARIZ. J. INT'L & COMP. L. 7 (2005).

⁵⁴ *Winters v. U.S.*, 207 U.S. 564 (1908); *Winans v. U.S.*, 198 U.S. 371 (1905); *Arizona v. California*, 373 U.S. 546 (1963); The McCarran Amendment, 43 U.S.C. § 666 (1953); The Clean Water Act, 33 U.S.C. § 1251 et seq. (1972).

⁵⁵ Thomson, *supra* note 12, at 252.

⁵⁶ *Id.* at 232.

⁵⁷ James L. Huffman, *An Exploratory Essay on Native Americans and Environmentalism*, 63 U. COLO. L. REV. 901, 906 (1992).

murdered, and cheated out of their home lands.⁵⁸ Despite efforts to erase native heritage and convert the indigenous people to their beliefs, the Indian tribes were not a conquered people.⁵⁹ In fact, the treaties written between the two sovereigns, the newly formed U.S. government and the established tribes, still have legal force today.⁶⁰ Therefore, due to the federal government's authority to protect Indian land and reservations that exist amongst the states, it is reasonable for the tribes to assert regulatory jurisdiction as water protectors at the local level.⁶¹ In fact, the treaties written created a theoretical co-existence of the three separate sovereignties: the Tribal nations, the federal government, and the individual states.⁶² Current relations with the federal government, the state of Florida, and the Seminole and Miccosukee tribes in Florida, will be discussed as an example of the positive impact that the tribes have on protecting water not only for tribes, but also the non-native citizens.

Finally, it will be pointed out that implementing and enforcing environmental protections can be most effective when implemented at the local level.⁶³ Because Indian reservations exist amongst the states and have federal protection, the tribes have unique opportunity to be able to connect with local governments to engage federal and state governments to protect natural resources.⁶⁴ As an example, this article will look at the Seminole and the Miccosukee tribes in Florida and their efforts to protect their water rights. The claims that these tribes make on the federal and state government to safeguard water reveals a broader benefit for both native and non-native citizens.⁶⁵

⁵⁸ S. James Anaya, *Indian Givers, What Indigenous Peoples Have Contributed to Human Right Law*, 22 WASH. U. J.L. & POL'Y 107 (2006).

⁵⁹ E. P. Krauss, *The Irony of Native American Rights*, 8 OKLA. CITY U. L. REV. 409, 418 (1983).

⁶⁰ Wood, *supra* note 41, at 1501.

⁶¹ Jacqueline Phelan Hand, *Protecting the World's Largest Body of Fresh Water: The Often Overlooked Role of Indian Tribes' Co-Management of the Great Lakes*, 47 NAT. RESOURCES J. 815, 838 (2007).

⁶² Judith Resnik, *Multiple Sovereignties: Indian Tribes, States, and the Federal Government*, 79 JUDICATURE 118, 125 (1995).

⁶³ *Natural Resource Conservation Policy: Incorporating Tribal Perspectives*, USDA 1, 7 (2011) https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1045669.pdf.

⁶⁴ *Id.*

⁶⁵ Rachel Silverstein, *State of Florida Wants to Add More Toxic Chemicals to Our Water*, MIAMI HERALD (July 22, 2016), <http://www.miamiherald.com/opinion/op-ed/article91203287.html>.

The Native American way of life not only is a belief system that offers solutions to the environmental water crisis, but a Constitutionally protected right that provides safeguards of water as an invaluable resource.⁶⁶ United States water policy follows the ideology of the conqueror instead of a co-existent life force with nature that exacerbates the threat to mankind.⁶⁷ Major changes in water policy need to be solidified in consultation with the indigenous tribes who must invoke their legitimate right to protection.⁶⁸ Now is the opportunity to facilitate the ushering in of a united consciousness of the value of limited water resources.⁶⁹

II. NATIVE AMERICAN RIGHTS AND JURISDICTIONAL CONFIGURATIONS

“Tribes are treated differently from other groups due to their ties to the indigenous peoples of North America. These ties comprise a constitutional minimum requirement for federal tribal recognition. This constitutional understanding of tribes derives from the international law origins of the federal-tribal relationship and is reflected in contemporary case law and federal regulations.”⁷⁰

The Native Americans’ claim is based on the legal precedent that by living within the U.S. boundaries they are a pre-Constitutional sovereign nation.⁷¹ While the express land rights of these self-governing people are not mentioned in the Constitution, the Supreme Court clearly rules that

⁶⁶ Robert T. Anderson, *Water Rights, Water Quality, and Regulatory Jurisdiction in Indian Country*, 34 STAN. ENVTL. L. J. 195, 202 (2015).

⁶⁷ Thompson, *supra* note 53, at 252.

⁶⁸ Paula Goodman Maccabee, *Tribal Authority to Protect Water Resources and Reserved Rights Under Clean Water Act Section 401*, Vol. 41:2, 644 WM. MITCHELL L. REV. (2015).

⁶⁹ Steven Cohen, *The Growing Level of Environmental Awareness*, HUFFINGTON POST (Dec. 29, 2014), https://www.huffingtonpost.com/steven-cohen/the-growing-level-of-envi_b_6390054.html.

⁷⁰ Sarah Krakoff, *They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum*, STAN. L. REV. 491, 497 (2017).

⁷¹ Indians are mentioned twice in Art. I of the Constitution involving allocation of seats in the House of Representatives and levying of federal taxes, once in the Fourteenth Amendment under the allotment formula reducing the slave fraction, significantly in the Commerce Clause, and affirmation of pre-negotiated treaties and in the Supremacy clause in Art. VI. (see Charles F. Wilkinson, *Indian Tribes and the American Constitution*, in *Indians in American History* 119 (Harlan Davidson, Inc. (1988)).

the indigenous peoples' land title rights exist and did so prior to the arrival of the colonists.⁷²

Further, the federal government has a fiduciary obligation to protect these rights.⁷³ Of preeminent importance, inherent in Native American sovereign rights, is the Native American people's cultural identity that is indivisible from protection of the earth and resources.⁷⁴ Unfortunately, while the Supreme Court states that the U.S. must adhere to their trust responsibility, the inconsistent actions on the part of the federal government divest tribes of rights and limit sovereign powers.⁷⁵

Statutory actions by Congress further complicate and limit the relationships between the Native Americans, the federal government, and the states.⁷⁶ Some statutes try to assimilate the tribes into the "mainstream" European Judeo-Christian society, while others "bolstered the standing, independence, and capacity of tribal governments in the United States."⁷⁷ Disputes between the indigenous people and those invading their territory continue today, impacting land rights, natural resource rights, and land access.⁷⁸

When the executive or legislative branches of the federal government or individual state governments enact policies that effect Native American land rights or degrade their natural resources, the federal government has an obligation to listen and deal fairly with the Native Americans as prominent stakeholders at the decision-making table.⁷⁹ Native Americans may seek remedy for the harm connected to the mishandling of Indian assets by the government.⁸⁰ In addition, Native

⁷² J.S. Thomson, *Federal Indian Policy: A Violation of International Treaty Law*, 4 W. ST. U. L. REV. 229, 230 (1976-1977). Citing *Johnson & Graham's Lessee v. M'Intosh*, 21 U.S. 543 (1823).

⁷³ Larry B. Leventhal, *American Indians-The Trust Responsibility: An Overview*, 8 HAMLINE L. REV. 625, 627 (1985).

⁷⁴ Reynolds, *supra* note 15, at 16.

⁷⁵ Robert T. Anderson, *Indian Water Rights and the Federal Trust Responsibility*, 46 NAT. RESOURCES J. 399, 401 (2006).

⁷⁶ *Id.* at 402.

⁷⁷ *Id.*

⁷⁸ *Id.* at 404.

⁷⁹ Leventhal, *supra* at 662 (citing *Morton v. Ruiz*, 415 U.S. 199, 228 (1974) and *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942)).

⁸⁰ Anderson, *supra* note 75, at 432.

Americans' have First Amendment rights⁸¹ to protest under the Indian Civil Rights Act of 1968 (ICRA).⁸²

A. Recognition of Indigenous Title Rights

Indigenous people are native to the place that they live and they were the first on the continent.⁸³ When population expands, it places increasing demands on land, water, and other natural resources.⁸⁴ Conflicts arise over how these resources are to be used, especially in regards to overconsumption, or type of use, by one group to the disadvantage or harm of others.⁸⁵ The example at DAPL, is one of these conflicts.⁸⁶ There is increasing support and interest for legal recognition of indigenous, or aboriginal, title rights of those who live in territories that were colonized by Europeans, particularly those colonized by the British in the United States.⁸⁷ The single-minded model for economic growth and private property rights conflicts with that of the indigenous people.⁸⁸ When the Eurocentric ideology of property rights conflicts with internationally recognized rights of an indigenous people, the indigenous rights are often supplanted.⁸⁹ Just because the law is disregarded, does not make it any less the law.⁹⁰

B. International Law and Recognition of Indigenous Title Rights

Acceptance of the indigenous people's land rights is a matter of international law.⁹¹

⁸¹ Indian Citizen Act of June 2, 1924, Public Law 68-175, 43 STAT 253.

⁸² 25 U.S.C. § 1301.

⁸³ Sarah Krakoff, *They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum*, STAN. L. REV. 491, 528 (2017).

⁸⁴ Owen J. Lynch, *Mandating Recognition: International Law and Native/Aboriginal Title*, 1 PHIL. L. & SOC'Y REV. 31, 34 (2011).

⁸⁵ *Id.*

⁸⁶ Levine, *supra* note 13.

⁸⁷ *Id.*

⁸⁸ *Id.* at 33.

⁸⁹ Nadia, Ahmad, *Trust or Bust: Complications with Tribal Obligations and Environmental Sovereignty*, 41 VT. L. REV. 799 8 (2017).

⁹⁰ Sharon M. Morrison, *Comments on Indian Water Rights*, 41 MONT. L. REV. 39, 42 (1980).

⁹¹ James Anaya, *Indigenous People's Participatory Rights in Relation to Decisions About Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources*, 22 ARIZ. J. INT'L & COMP. L. 7 (2005).

These moral and legal land rights are conveniently ignored by those looking to dispossess others of their property.⁹² The truth is millions of indigenous people occupied the territories long before settlers' arrived and created their judicial system.⁹³ The indigenous ideology embraces a communal stewardship and a deeply felt spiritual and emotional nexus with the land and its fruits.⁹⁴ The non-exclusive right to land is seen not as the individual's bundle of sticks, but is the communal concerns of those who stand in a particular relationship.⁹⁵ The United Nations recognizes that there is a duty to consult indigenous people,⁹⁶ which applies directly to environmental concerns because the Native American way of life is integrally tied to the land.⁹⁷ Where American Indian law fails to properly protect the first Americans, there is a more recent push by the tribes to claim their domestic rights to "land, culture, and self-determination."⁹⁸ International human rights law provides the opportunity for revitalization of indigenous identity, and their ancestral claims to the land they inhabit and its resources.⁹⁹ Exploitation of natural resources impacts this politically vulnerable population. When the federal government refuses to consult with local Native American tribes when making energy policy, it is the federal government that is violating domestic and international law.¹⁰⁰

C. Native American Title Rights: Continuous Use and Occupancy

The establishment of sovereignty by a European colonial power conveyed actual title by "continuous use and occupancy 'for a long time' prior to the loss of the property."¹⁰¹ The Supreme Court recognized the indigenous people's title to the land in the 1835 case *Mitchel v. United States*, that articulated that the indigenous people do not have to prove possession because their use of the land for hunting or fishing was as

⁹² Anderson, *supra* note 75, at 431.

⁹³ Krakoff, at 528.

⁹⁴ Anaya, *supra* note 9, at 7.

⁹⁵ Ahmad, *supra* note 96 at 8.

⁹⁶ Anaya, *supra* note 9.

⁹⁷ Reynolds, *supra* note 75, at 16.

⁹⁸ Krakoff, *supra* note 90, at 539.

⁹⁹ *Id.* at 545.

¹⁰⁰ *Id.* at 546.

¹⁰¹ Katja Gocke, *Protection and Realization of Indigenous People' Land Rights at the National and International Level*, 5 GOETTINGEN J. INT'L L. 83, 93 (2013).

much an actual possession as fields cleared by settlers, who followed the individual private property concept of title.¹⁰² The original transfers of land, based on treaties and agreements between Native American tribes and the colonists, were often based on coercion and misunderstanding.¹⁰³ As the Native Americans were pushed west out of their territory, some were able to retain considerable amounts of land and keep their tribal structures and unity.¹⁰⁴ By the late 1800s, unfair governmental actions reduced the power of inherent traditional indigenous people's land rights and the treaties that protected those rights to nothing.¹⁰⁵ Today, although weakened by the history of battles resisting termination and assimilation, Indian tribal rights continue to prioritize reserving water for agricultural and fishing that are integral to sustaining their way of life.¹⁰⁶

1. Indian Sovereignty and the Discovery Doctrine

The newcomers to America embraced the discovery doctrine, a root theory by which people from Europe laid claim to land as successors to the indigenous tribes.¹⁰⁷ Chief Justice John Marshall authored the opinion for *Johnson v. McIntosh*, a cornerstone case on federal Indian law, recognizing Indian sovereignty because "they were here first."¹⁰⁸ Judge Marshall reasoned that because the British government had rights to the lands occupied by the Indians, these rights passed to the United States.¹⁰⁹ In a convenient shift in legal reasoning, title by discovery placed government rights above the valid rights of the Native Americans.¹¹⁰ In applying the discovery doctrine, the Supreme Court exempted themselves from ruling on lands that transferred prior to establishing of the Constitution.¹¹¹ Subsequently, the court classified this legal presumption

¹⁰² *Id.* (citing the text of the Royal Proclamation of 7 October 1763 that can be found in B. Slattery, *The Land Rights of Indigenous Canadian Peoples as Affected by the Crowns Acquisition of Their Territories* (1979), 363-369. Ref. *Mitchel v United States*, 34 US 711, 746. (1835)).

¹⁰³ *Id.* at 96.

¹⁰⁴ *Id.* at 95.

¹⁰⁵ *Id.* at 96.

¹⁰⁶ Anderson, *supra* note 65, at 210.

¹⁰⁷ Krakoff, *supra* note 90, at 530.

¹⁰⁸ *Id.* See 21 U.S. (8 Wheat.) 543, 573-88 (1823) (discussing the origins of the doctrine, its use by European nations to justify their claims to property occupied by indigenous peoples, and the United States' adoption of it).

¹⁰⁹ *Id.* at 531.

¹¹⁰ *Johnson v. McIntosh*, 21 U.S. 543, 545 (1823).

¹¹¹ *Id.* at 550.

as the “right of conquest to the case of the Indian savages,” and thus, subordinate to the absolute, ultimate title of the government.¹¹² Even though the discovery doctrine is considered good law today, it is incorrect to say that the lands were conquered when, in fact, conflicts and negotiations over land were settled by treaties and agreements and not through subrogation.¹¹³

2. The Federal Trust Responsibility

As immigration, colonization, and statehood enveloped Indian lands and the new Americans became more powerful, better fed, and better armed, federal policy had the freedom to revert to its true philosophical orientation toward Indigenous peoples: that it is the divine right and mandate of “civilized” peoples to dominate, subjugate, annihilate, and assimilate Indigenous people culturally, linguistically, technologically, ethnically, racially, and spiritually.¹¹⁴

When making the treaties with the tribes, the federal government made a promise to protect Indian ways of life, government, and economies.¹¹⁵ The federal trust responsibility created a fiduciary obligation of the federal government to a trust relationship with tribes and individual Indians.¹¹⁶ The duties include treaties, statutes, or statements that create a legal and moral obligation to benefit the trustee.¹¹⁷ The doctrine, developed from political relationships or promises, entitled the tribes not only to federal protection, but also the right to self-governance and independence.¹¹⁸ In what reads like a checklist of limitations on enforcing rightful government to government relationships, the “Marshall trilogy of cases” limited the power of inherent sovereignty and are the

¹¹² *Id.* at 562.

¹¹³ Nicholas A. Fromherz & Joseph W. Mead, *Equal Standing with States: Tribal Sovereignty and Standing After Massachusetts v. EPA*, 29 STAN. ENVTL. L.J. 130, 156 (2010).

¹¹⁴ Tonya Kowalski, *The Forgotten Sovereign*, 36 FLA. ST. U.L. REV. 765, 772 (2009).

¹¹⁵ Mary Christina Wood, *Indian Trust Responsibility: Protecting Tribal Lands and Resources Through Claims of Injunctive Relief Against Federal Agencies*, 39 TULSA L. REV. 355, 356 (2003-2004).

¹¹⁶ Larry B. Leventhal, *American Indians-The Trust Responsibility: An Overview*, 8 HAMLINE L. REV. 625 (1985).

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 628.

lasting framework that weakened, but did not terminate, Native American sovereign rights.¹¹⁹

The significance of Justice Marshall's rulings in this trilogy of cases involving disputes between states, the different Indian tribes, and the federal government is that the Supreme Court gave the federal government the fiduciary oversight of the tribes.¹²⁰ Thus, this quasi-sovereign designation requires provision and oversight by the federal government.¹²¹ While this ruling protects the Native Americans from state interference, arguably it had the effect of diminishing the power to self-determine by putting them under the guardianship of the federal government.¹²² The problem is that the federal trust responsibility is not property law.¹²³ Mary Wood reasons that in the time of the treaties that the protections were needed to protect the Native Americans from intrusion from settlers.¹²⁴ Today she suggests that tribal protection is needed as a shield from environmental threats from industry and the governmental policy, and that tribal lawyers need to modify the trust relationship for recognition of a sovereign trust.¹²⁵

3. Treaties: A Transfer of Land Rights

The federal government settled the long, often-violent, battles over settlers' intrusion into Indian country by treaties and agreements.¹²⁶ The first treaties of peace and friendship looked for allegiance to the United States, due to fears that the Indian nations might join with other foreign nations to rise up against settlers.¹²⁷ Subsequently, the treaties became a moral avenue to take land from the tribes.¹²⁸ While no one knows for sure, modern scholars believe more than 16 million indigenous people lived in the area that is now the United States prior to Columbus arriving in

¹¹⁹ *Id.* These cases included *Johnson v. McIntosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); and *Worcester v. Georgia*, 31 U.S. 515 (1832).

¹²⁰ *Id.*

¹²¹ *Id.* at 638.

¹²² *Id.* at 640.

¹²³ Wood, *supra* note 115, at 358.

¹²⁴ *Id.*

¹²⁵ *Id.* at 360.

¹²⁶ Gocke, *supra* note 101, at 95.

¹²⁷ Raymond J. DeMallie, *American Indian Treaty Making: Motives and Meaning*, 3 AM. INDIAN J. 2, 5-6 (1977).

¹²⁸ *Id.*

1492.¹²⁹ The colonists were outnumbered, and winning by conquest was an unreasonable proposition.¹³⁰ The intrinsic misunderstanding over the concept of land ownership between the indigenous people and the colonists involved not only the permanent transfer of land rights, but permission for the settlers to use the land.¹³¹ Because of the language barriers, the Indians negotiators signed treaties with the white man that provided not only peaceful access to their tribal lands, but also inadvertently conveyed the land itself.¹³² They exchanged guns, ammunition, open trade, and prestige for title to millions of acres priceless land in unfair agreements written under a property ownership concept that meant nothing to them.¹³³ Over three hundred treaties were negotiated and ratified between 1778 and 1871.¹³⁴ Subsequently, the settlers' and miners' wagon trains, protected by the federal government and its Old World view of law, roled unhindered through tribal lands pushing millions of indigenous people from their homelands separating them from their traditional way of life.¹³⁵

D. Indian Sovereignty: Cultural Identity and Legal Precedence

Indian Sovereignty is “both a wellspring of authority and control, and a shield against external interference. It connects tribal communities to their history and their ancestors because it represents an inherent self-governing authority that has been passed from generation to generation, from time immemorial to present-day tribal governments.”¹³⁶ Tribal sovereignty stirs an emotional, social, and cultural meaning that transcends legal and political definitions.¹³⁷ To the Native American, inherent sovereignty means having rights to their “language and buffalo medicine” that forms the foundation of who they are, and attempts to

¹²⁹ Lewis Lord, *How Many People Were Here Before Columbus?* U.S. NEWS & WORLD REPORT, 68-70, Aug. 18, 1997, <http://www.bxscience.edu/>

¹³⁰ DeMallie, *supra* note 127.

¹³¹ *Id.* at 9.

¹³² *Id.*

¹³³ *Id.* at 7.

¹³⁴ *Id.* at 5.

¹³⁵ *Id.* at 6.

¹³⁶ Wenona T. Singel, *Indian Tribes and Human Rights Accountability*, 49 SAN DIEGO L. REV. 567, 591 (2012).

¹³⁷ *Id.* at 591.

sustain their survival.¹³⁸ Ancient Native American traditions teach that the land and water are not commodities to be bought and sold but “legacies to be preserved for the Seventh Generation.”¹³⁹ Water’s life force, symbolized by the feminine Mother Earth, rushes from the mother at birth.¹⁴⁰ Protecting the purity of springs is still a deep spiritual responsibility.¹⁴¹ As stated previously, the American Indians communal concept of land, and the renewing of life’s force through water, is foreign to the European concept of expand and conquer.¹⁴²

III. LIMITATIONS ON NATIVE AMERICAN SOVEREIGNTY

Closely connected to the discovery doctrine were the programs of assimilation.¹⁴³ Congress’ powers to regulate trade between the states and the tribes was fully expanded under the interpretation of the Commerce Clause.¹⁴⁴ Native culture was a threat to the settler in the expanded west, and ethnic cleansing was seen as a natural progression over a conquered people.¹⁴⁵ The Indian ghost dances that symbolized unity and all that was Indian instilled a consuming fear in the hearts and minds of the surrounding non-Indian people.¹⁴⁶ It was this fear that was used as the excuse to round up and exterminate Indians such as at Wounded Knee.¹⁴⁷ The inherent right to self-determination based on the foundations of indigenous tradition such as “oral history, lifeways, spirituality , and language” of the tribes gave way to the justification of a right to dominion over conquered lands.¹⁴⁸ Ironically, this wrongful devaluing of Indian sovereignty is the argument for special solicitude, that provides standing for the Tribes to sue in court.¹⁴⁹

¹³⁸ Kachina House, *supra* note 38.

¹³⁹ Glenn C. Reynolds, *Native American Land Ethic*, 21 NAT. RESOURCES & ENV’T 16, (2006-2007).

¹⁴⁰ *Id.* at 17.

¹⁴¹ *Id.*

¹⁴² *Id.* at 16.

¹⁴³ Kowalski, *supra* note 114, at 777.

¹⁴⁴ US Const. art. I §8, cl. 3.

¹⁴⁵ Kowalski *supra* note 114.

¹⁴⁶ E.P. Krauss, *The Irony of Native American “Rights”*, 8 OKLA. CITY U. L. REV. 409, 426 (1983).

¹⁴⁷ *Id.*

¹⁴⁸ Kowalski *supra* note 114.

¹⁴⁹ *Id.*

A. Congressional Regulations of Land Use and Ownership

As the expansion westward continued, settlers, explorers, and miners laid claim to lands rich in the resources that they wanted.¹⁵⁰ Congress, at the height of the land grab, passed the General Allotment Act of 1887, commonly referred to as the Dawes Act.¹⁵¹ The Act began reducing Native American lands from 156 million acres to 48 million acres in 1934 by returning excess Indian lands to public domain lands.¹⁵² Congress reasoned that Native Americans no longer needed all this land and, over a period of years, proceeded to convert the land from trust lands to ownership in fee simple.¹⁵³ This revision of the original Indian land rights policy of “clearing the land of its indigenous populations so that it could be controlled and annexed ... resulted in genocide in the form of unthinkable numbers of massacres.”¹⁵⁴

B. Assimilation Policies and Natural Resource Exploitation

In 1868, the U.S. government and the Great Sioux Nation signed the Fort Laramie Treaty to end the war waged over the invasion of Indian territory by white settlers.¹⁵⁵ The treaty provided that the Black Hills located in what is now South Dakota belonged to the tribe, promised subsistence rations, and continued access to non-territorial hunting grounds.¹⁵⁶ Miners, however, soon discovered valuable natural resources in the hills and began invading.¹⁵⁷ In breach of the agreement, Congress passed the Act of 1877, that legitimized the white man invasion and substituted incremental payments on a total of six million dollars owed to the Tribe from the original treaty.¹⁵⁸ This debt did not get paid.¹⁵⁹ Until 1946, there was no appropriate court for litigation and redress of the

¹⁵⁰ Gocke, *supra* note 101, at 96.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ Kowalski, *supra* note 114, at 772.

¹⁵⁴ *Id.*

¹⁵⁵ *United States v. Sioux Nation of Indians*, 448 U.S. 371, at 379.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ E.P. Krauss, *The Irony of Native American “Rights”*, 8 OKLA. CITY U. L. REV. 409, 412 (1983).

¹⁵⁹ *Id.*

government's breach of a treaty.¹⁶⁰ It took eighty years for the tribes to find redress for the unlawful taking of their lands.¹⁶¹

IV. THE ROLE OF SOVEREIGNTY IN ENVIRONMENTAL PROTECTION

Located within the boundaries of the United States, the Indian tribes, each a self-governing nation finds itself engulfed in the U.S. economy, one of the largest in the world.¹⁶² The U.S. market is integrally tied to the discovery, development, and transportation of energy products for consumption in the U.S. and around the world.¹⁶³ The U.S. economy is bolstered both as a major supplier of energy resources and a voracious consumer of energy.¹⁶⁴ Native American lands hold the potential for massive amounts of energy resources.¹⁶⁵ Native American sovereign rights to land and water are emerging at the epicenter of the energy dialogue.¹⁶⁶ There is a clash between the demand for energy and the need for sustainable energy that supports the Native American way of life.¹⁶⁷ As evidenced after the 2016 U.S. presidential elections, political shifts in power can change the focus from the necessity of reducing carbon emissions from fossil fuels that science shows is causing climate change, to energy independence based on intensified exploitation and extraction

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² IER, *A Primer on Energy and the Economy: Energy's Large Share of the Economy Requires Caution in Determining Policies that Affect it*, Feb. 16, 2010, <http://www.institute for energy research.org>.

¹⁶³ *Id.*

¹⁶⁴ Annual Energy Review 2011, 35 published Sept 2012, <http://www.eia.gov>.

¹⁶⁵ Elizabeth Ann Kronk Warner, *Examining Tribal Environmental Law*, 39 COLUM. J. ENVTL. L. 42, 50 (2014).

¹⁶⁶ *Trump to Sign New Order Rolling Back Obama Energy Regs*, FOX NEWS (Mar. 28, 2017), <http://www.foxnews.com> ("Moving forward with a campaign pledge to unravel former President Obama's sweeping plan to curb global warming, President Trump on Tuesday is set to sign an executive order that will suspend, rescind, or flag review more a half-dozen measures to boost domestic energy production in the form of fossil fuels.").

¹⁶⁷ Kathryn Norton-Smith & Kathy Lynn, *Climate Change and Indigenous Peoples: A Synthesis of Current Impacts and Experiences*, USDA (2016), http://nativewaters-aridlands.com/wp-content/uploads/2017/03/NortonSmith_2016.pdf.

of coal, oil, and natural gas.¹⁶⁸ These shifts in policy directly impact the tribal nations existing within the U.S.¹⁶⁹

A. Economic Analysis

After the Organization of Arab Petroleum Exporting Countries (OAPEC) induced the oil crisis in the 1970s, the U.S. energy policy shifted to prioritizing in reducing dependence on energy imports, particularly oil.¹⁷⁰ The United States overdependence on imported oil left the U.S. economy vulnerable to countries politically antagonistic to the United States.¹⁷¹ The oil and gas companies adjusted their operations focusing on energy production in Canada and the United States.¹⁷² Untapped Native Americans lands were looked at hungrily as an extension of the emerging policy to exploit resources closer to the American consumer.¹⁷³ The economic success of this industry depends on availability of natural resources, affordability of procuring them, ability to easily transport to refineries, and reliability of being able to provide the products to end users.¹⁷⁴ Because the U.S. economy at that time was completely oil dependent, the federal government prioritized shifting policy and passing laws that promised a consistent supply of oil.¹⁷⁵ Fossil fuels are still the number one source of energy in the U.S..¹⁷⁶ Fossil fuels are also environmentally costly during every part of the process.¹⁷⁷

¹⁶⁸ Fox News, *supra* note 165, at 172.

¹⁶⁹ Norton-Smith, *supra* note 166, at 173 (noting that there are 567 federally recognized American Indian and Alaska Native tribes, as well as state-recognized tribes, Native Hawaiian peoples, unrecognized tribes, and indigenous peoples of U.S. affiliated territories living in remote, rural, and urban communities within the Nation).

¹⁷⁰ History.com Staff, *Energy Crisis (1970's)*, A+E NETWORKS (2010), <https://www.history.com/topics/energy-crisis>.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ Nancy Stauffer, *Moving Away from Fossil Fuel Energy? Not Without Aggressive Energy Policy*, MIT (Dec. 5, 2016), <http://energy.mit.edu/news/moving-away-fossil-fuel-energy-not-without-aggressive-policy-action/>.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *The Hidden Costs of Fossil Fuel*, Union of Concerned Scientists, (Mar. 10, 2018), <https://www.ucsusa.org/clean-energy/coal-and-other-fossil-fuels/hidden-cost-of-fossils#.WqSo85PwaT8>.

B. Conflicts in Policy- Non-renewable Energy Sources, The Tribes, and Climate Change

There is overwhelming evidence of the negative environmental impacts of all four traditional forms of energy: coal, oil, natural gas, and nuclear power.¹⁷⁸ Energy exploration, development, processing, and transportation involves massive tracts of land.¹⁷⁹ Open and untouched Indian lands are fair game for those looking for access to these resources.¹⁸⁰ The historic loss of Indian lands results in sustained challenges through loss of identity, marginalization, poverty, and abuse of tribal land rights.¹⁸¹ The injustice suffered by these people in proportion to their natural resource rich land holdings shows that they are disadvantaged by almost every standard compared to the U.S. society that surrounds them.¹⁸² This includes disparity in income, education, housing, standard of health, and life expectancy.¹⁸³ Native American lands are rich in coal.¹⁸⁴ Estimates of thirty percent of U.S. coal are located on native lands.¹⁸⁵ In the Pacific Northwest, the Navaho nation recognizes that toxic coal dust from transporting coal pollutes the air, poisons the waterways, and contaminates their salmon food source.¹⁸⁶ Within the individual tribes there are deep conflicts over whether to participate in the expanded use of natural resource exploration on Indian lands.¹⁸⁷ Extreme poverty within the communities makes the lure of selling or leasing mining rights in Indian country an attractive option.¹⁸⁸ Wanting to be self-sufficient, the tribes contract with the coal industry that promises money for the coal and desperately needed jobs for the unemployed living on the reservations.¹⁸⁹ Many tribal leaders believe a coal economic injection will sustain life.¹⁹⁰ In contrast, others within the tribe do not want the expansion of the coal

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Gocke, *supra* note 101, at 90.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ Warner, *supra* note 171, at 49.

¹⁸⁵ *Id.* at 51.

¹⁸⁶ Lynne Peeples, *Coal-Hungry World Brings Tough Choices for Native Americans*, HUFFINGTON POST (Dec. 6, 2017), https://www.huffingtonpost.com/2014/01/30/northwest-coal-exports_n_4611021.html.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

industry because they believe that their voices speaking Mother Earth outweighs any economic benefit.¹⁹¹ For these tribal members sacrificing clean air and water is a breach of their sacred trust duty.¹⁹²

In 2015, 197 countries from around the world came together to address the threat of climate change.¹⁹³ Other countries looked to the United States as one of the largest producers of greenhouse gas emissions to commit to reducing their carbon footprint.¹⁹⁴ Even if the U.S. government lacks the political will to provide necessary oversight to reduce emissions that disrupt the earth's climate, the Native Americans that own fifty-five million acres of land within the U.S. boundary,¹⁹⁵ as sovereign nations, can join with the other indigenous people from around the planet and speak with one voice.¹⁹⁶ Further, the tribes have the legal right to force the government to act to protect the interests of the tribes.¹⁹⁷ The tribes holistic understanding of the world, based on a special relationship with nature, and an appreciation of the sacred nature of the earth, has the power to seep into U.S. energy policy to transform from the ideology of the conqueror to embracing the role of protectors.¹⁹⁸

Evolved technologies create a glut in domestic oil and gas available for consumption, and oil and gas drilling carry significant hazards.¹⁹⁹ During the extraction process, which includes invasive drilling, wells, access roads, processing facilities, and pipelines, water is degraded and left with solids, heavy metals, hydrocarbons, and radioactive materials in concentrations that make it unsuitable for human consumption and difficult to dispose of.²⁰⁰

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ United Nations, Framework Convention on Climate Change, http://unfccc.int/paris_agreement/items/9485.php (last visited Apr. 17, 2017).

¹⁹⁴ Mary Christina Wood, *Tribal Trustees in Climate Change*, 2 AM. INDIAN L.J. 523 (2014).

¹⁹⁵ *Appendix D: Indian Nations*, THE AMERICAN INDIAN DIGEST <https://www.fs.fed.us/people/tribal/tribexd.pdf> (last visited Jan. 6, 2017).

¹⁹⁶ Jin Hyung Lee, *Improving Native American Tribes' Voice in International Climate Change Negotiations*, 5 AM. INDIAN L.J. 687 (2017).

¹⁹⁷ *Id.*

¹⁹⁸ Allison M. Dussias, *Science, Sovereignty, and the Sacred Text: Paleontogocail Resources and Native American Rights*, 55 MD. L. REV. 84, 159 (1996).

¹⁹⁹ *The Hidden Costs of Fossil Fuel*, UNION OF CONCERNED SCIENTISTS, <https://www.ucsusa.org/clean-energy/coal-and-other-fossil-fuels/hidden-cost-of-fossils#.WqSo85PwaT8> (last visited Mar. 10, 2018).

²⁰⁰ *Id.*

Global warming is impacted by emission from burning gas products by consumers.²⁰¹ A major impact of the greenhouse effects includes: polar ice caps melting, and subsequent desalination of the oceans which will kill off wild life; increased probability and intensity of droughts and heat waves; warmer waters and more hurricanes; spread of disease; and negative economic consequences as the direct result these effects.²⁰² This has a significant impact on the lives of any tribe whose sustenance revolves around hunting, fishing, or agriculture.²⁰³ “Reciprocity—respect for and responsibility to—wildlife and natural resources is embedded in indigenous cultures. Reciprocal relationships are fundamental to how tribes will respond to climate impacts.”²⁰⁴ This is how the federal government, in opposition to western thought, must respond to the Indian tribes.

In December of 2015, the United Nations Framework Convention on Climate Change included the rights of indigenous people in the adoption of a global agreement that climate change posed an urgent and potentially irreversible threat to human societies and the planet, and called for the widest possible cooperation by all countries to reduce the global greenhouse emissions.²⁰⁵ In the meantime, the U.S. Senate passed a bill that would grant the right of Indian tribes to have oil and gas extracted from their ancestral lands in a streamlined fashion.²⁰⁶ The bill amended the Energy Policy Act of 1992, which directed the Department of the Interior to provide Indian tribes with technical assistance in planning their energy resource development programs.²⁰⁷ The bill allowed the pooling of tribal resources with other energy resources, and amended the requirement for the Department of the Interior’s approval of leases.²⁰⁸ The bill further revised the process by which a third-party complaint suffering

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ Kathy Lynn et al, *The Impacts of Climate Change on Tribal Traditional Foods*, CLIMATE CHANGE 120: 445-556, 549 (2013).

²⁰⁴ *Id.* at 546.

²⁰⁵ Marie-Claire Cordonier Segger, *Advancing the Paris Agreement on Climate Change for Sustainable Development*, 5 CAMBRIDGE J. INT’L & COMP. L. 202, 230 (2016).

²⁰⁶ S.209, The Indian Tribal Energy Development and Self-Determination Act Amendments of 2015.

²⁰⁷ Steve Horn, *Senate Passed Bill Expediting Fossil Fuel Extraction on Native American Land Two Days Before Paris Agreement*, DESMOG (Dec. 19, 2015), <https://www.desmogblog.com/2015/12/19/congress-expedite-fossil-fuel-extraction-indian-land-indigenous-rights-paris-climate-deal>.

²⁰⁸ *Id.*

an adverse environmental impact due to tribe's noncompliance.²⁰⁹ The bill included expediting of oil and gas permitting, electricity generation, water planning transmission planning, and other energy uses.²¹⁰ Heavily lobbied for by oil and gas corporations, the authors of the bill received hundreds of thousands of dollars in campaign contributions, justifying passing the bill because it "would be a crucial step in furthering efforts by Congress to encourage economic development throughout Indian Country."²¹¹ This bill, or one similar, is likely to be revived because Congress and the Trump administration strongly support further fossil fuel development.²¹²

Transporting the oil and gas to refineries, businesses, and homes is a massive project.²¹³ Oil is transmitted by supertankers across the ocean and moved by land, pipeline, rail, and trucks.²¹⁴ Oil spills cause serious environmental threats that can last for decades.²¹⁵ Besides harmful effects on humans, the oil kills marine life and vegetation, can modify feeding habitats, disrupt shell life, and cause slow suffocation.²¹⁶

Controversy over siting pipelines through Native American land and within proximity of major water supplies has been in the front-page headlines for several years.²¹⁷ When President Trump took office, his executive directives reversed decisions made by the previous administration that supported the tribes position that without consent there is no access.²¹⁸ Trump expedited the approval of the Dakota Pipeline and approved the permitting of the cross-border Keystone Pipeline XL

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² Marianne Lavelle, *How Congress is Cementing Trump's Anti-Climate Orders into Law*, INSIDE CLIMATE NEWS (July 31, 2017), <https://insideclimatenews.org/news/31072017/trump-climate-change-executive-orders-congress-turning-into-law-via-budget>.

²¹³ *Oil Spill: Severity and Consequences to Our Ecosystem*, DUJS (March 11, 2012), <http://dujs.dartmouth.edu/2012/03/oil-spills-severity-and-consequences-to-our-ecosystem/#.WqgtYZPwaT9>.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Trump Moves Forward with Controversial Pipelines*, NEWSWEEK (Jan. 24, 2017), <http://www.newsweek.com/donald-trump-keystone-pipeline-keystone-xl-dakota-access-pipeline-environment-547752>.

²¹⁸ *Id.*

expansion.²¹⁹ Both land access disputes are vehemently opposed by not only the tribes that are directly impacted, but by broad support and protests, which have swelled in challenging the latest threat to tribal lands.²²⁰ Swayed by Indian lobbying efforts and President Obama's desire for success with the Paris Climate Agreement, the pipeline was temporarily halted.²²¹ The permit to build the pipeline was issued under a general permit for 250 sites across the country slated for possible locations of energy locations.²²² The Sable Pipeline running from Georgia to Florida is another pipeline that that people are protesting.²²³ Unfortunately, the permitting and construction was underway prior to public awareness of the project, and traverses the vulnerable aquifer for public consumption.²²⁴ The water protectors set up a camp in protest of the pipeline that traverses the Suwannee River.²²⁵

Native American lands are proposed locations to store and dump radioactive waste from nuclear power plants.²²⁶ The U.S. proposed that nuclear waste from power plants was to be stored on Yucca Mountain, located near Native American lands in Nevada.²²⁷ On the Navajo lands in Colorado, uranium mining causes contamination in air, groundwater, streams, and soil.²²⁸ The debate over tribal authority to protect themselves

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ Chris Mooney, *How Obama's Keystone Pipeline Rejection Adds Momentum to the Paris Climate Talks*, WASHINGTON POST (Nov. 6, 2015), https://www.washingtonpost.com/news/energy-environment/wp/2015/11/06/how-obamas-keystone-xl-rejection-gives-him-momentum-for-the-paris-climate-talks/?utm_term=.430761b63054.

²²² *Oil and Gas Stormwater Permitting*, EPA, <http://www.epa.gov/npdes/oil-and-gas-stormwater-permitting#undefined> (last visited Apr. 17, 2017).

²²³ Beth Kassab & Kevin Spear, *Gas Pipeline Across Central Florida Brings Cheap Energy and Protests*, ORLANDO SENTINEL (Apr. 2, 2017), <http://www.orlandosentinel.com/news/environment/os-sabal-trail-pipeline-impact-20170329-story.html>.

²²⁴ *Id.*

²²⁵ Erin Mundahl, *'Water Protectors' Look to Expand North Dakota Protest into Florida*, INSIDE SOURCES, Dec 1, 2016, <http://www.insidesources.com/fl-protesters-nd-recruit-sabal-pipeline/>.

²²⁶ C. Jay Ou, *Native Americans and the Monitored Retrievable Storage Plan for Nuclear Waste: Late Capitalism, Negotiation, and Control*, 92 KROEBER ANTHROPOLOGY SOC'Y 93 (1996).

²²⁷ *Id.*

²²⁸ Rebecca Tsosie, *Climate Change, Sustainability and Globalization: Charting the Future of Indigenous Environmental Self-Determination*, 4 ENVTL. & ENERGY L. & POL'Y J. 188, 216 (2009).

from the imminent threat of contamination by activity on non Indian lands is still not resolved.²²⁹

While historically disadvantaged by legal, administrative, and congressional policies that ignore the rightful status of the tribes as a sovereign people, tribal communities' are crucial participants in understanding and responding to current environmental crisis.²³⁰ Under the trust responsibility, now administered by the Bureau of Indian Affairs (BIA), the U.S. government is required to consult with the tribal governments before taking any actions that impact the resources, cultural practices, or traditionally important cultural or religious lands on federally managed lands.²³¹

Despite the current administration's heightened economic focus on using non renewable energy sources, each brings limitations and liabilities particularly in fossil fuel emissions that exacerbate climate change.²³² Coal and gas extraction poisons the air, water, and ground.²³³ Nuclear by-products leave radioactive waste, cause water pollution, forecast catastrophic effects in the case of a melt-down, and threaten national security.²³⁴ Finding, producing, moving, and using oil (petroleum products) causes air, water, and land pollution.²³⁵ There are over fifty million acres of land within the U.S. that are part of the Indian trust lands.²³⁶ Even though pipelines are an efficient mode of transport for extracted resources, existing and planned pipelines encroach on the protected land belonging to the tribes.²³⁷ Government policy developed without consultation with the tribes becomes the newest assault not only on native environmental concerns, but also additional devaluation to the tribal sovereignty.²³⁸ Threats to the environment ignore the authority of

²²⁹ Bradford D. Cooley, *The Navajo Uranium Ban: Tribal Sovereignty v. National Energy Demands*, 26 J. LAND RESOURCES & ENVTL. L. 393, 394 (2006).

²³⁰ *Id.* at 416.

²³¹ *Id.* at 421.

²³² *Non Renewable Energy*, NATIONAL GEOGRAPHIC, <https://www.nationalgeographic.org/encyclopedia/non-renewable-energy/> (last visited Mar. 10, 2018).

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *How Does Oil Impact the Environment?* ENERGY AND ECOLOGY, <http://environment-ecology.com/energy-and-environment/92-how-does-oil-impact-the-environment.html> (last visited March 10, 2018).

²³⁶ Ahmad, *supra* note 96, at 4.

²³⁷ *Id.*

²³⁸ *Id.*

the indigenous people to manage their own lands and resources.²³⁹ Already a vulnerable population, the tribes depend heavily on their natural resources for economic and sacred cultural identity.²⁴⁰ This is especially true for tribes that lack federal recognition and therefore are most at risk when climate change alters the landscape and ecosystems on treaty-protected land.²⁴¹ When hunting, fishing, and traditional gathering sites shift, and plants, animals, and aquatic species disappear, tribes would be legally unable to defend themselves from the surrounding non-indigenous population.²⁴² Native sovereignty and right to self-determine is grounded in an ancient way of life.²⁴³ Rather than increasing the use of nonrenewable resources, it makes far more sense to combine the traditional knowledge and land-management practices of the native elders with Western science and technology.²⁴⁴ The tribes demonstrate that their way of life adapts and endures through colonialism, genocide, forced relocation, and climate events.²⁴⁵

C. Sovereignty and Environmental Law

In order to fortify tribal sovereignty and to codify their environmental ethics, the tribes can write their own environmental laws.²⁴⁶ Congress, however, has plenary power to legislate over subject matter in Indian country.²⁴⁷ In the 1970s, the federal government enacted several environmental laws that expanded federal regulations over the risks from air pollution, water pollution, waste disposal, and chemical production.²⁴⁸ It is estimated that tribal lands collectively have the potential to create one trillion dollars in revenue from the traditional, natural resources of coal, gas, and oil, alternative resources like biofuels,

²³⁹ Norton-Smith, *supra* note 163, at 6.

²⁴⁰ *Id.*

²⁴¹ *Id.* at 7.

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.* at 15.

²⁴⁵ Norton-Smith, *supra* note 163.

²⁴⁶ *Id.*

²⁴⁷ Warner, *supra* note 171, at 59. Citing *United States v. Kagama*, 118 U.S. 375 (1886).

²⁴⁸ Safe Drinking Water Act, 42 U.S.C. § 300j- 11(2012); Clean Water Act, 42 U.S.C. § 1377 (2012); Clean Air Act, 42 U.S.C. § 7474 (2012); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9626 (2012).

and from the renewable resources of wind, water, and solar.²⁴⁹ Although, there is potential for development of natural resources in Indian country, there is concern that there can be a steep increase in pollution.²⁵⁰ In order to shield themselves and surrounding non-native lands, tribes can pass environmental laws governing their territory.²⁵¹ Banning fracking for natural gas, for example, can reduce the risk of polluting groundwater.²⁵² Tribes pass laws governing their community that mitigate the impact of climate change.²⁵³ Tribal jurisdiction over non-native citizens living, hunting, or fishing on their land is limited to their own citizens because the tribe's inherent sovereignty does not extend to non-citizens and non-Indian land.²⁵⁴ Government policy under the Environmental Protection Agency (EPA) gave the tribes the same right as states (tribes-as-states (TAS)) to enforce their own environmental statutes as long as they met the federal minimums.²⁵⁵ Further, Congress enacted laws such as the Tribal Energy Resource Agreement (TERA) and the Health Expedite and Advance Responsible Tribal Homeownership Act (HEARTH) that encourage development on tribal lands.²⁵⁶

Tribal action on establishing environmental laws vary, and relatively few of the federally recognized tribes currently have a full environmental code in place.²⁵⁷ This may be in part because of the historical and ongoing social inequality that tribes face in maintaining their very existence.²⁵⁸ Increasing inclusion and integration of the Indigenous perspective, providing federal government support for environmental programs, and raising public awareness would provide the opportunity for encouraging participation on the part of the tribes in protecting their own lands.²⁵⁹

²⁴⁹ Warner, *supra* note 171, at 44.

²⁵⁰ *Id.* at 51.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.* at 57. (citing *Montana v. United States*, 450 U.S. 544 (1981) and *Nevada v. Hicks*, 533 U.S. 353 (2001)).

²⁵⁵ *Id.* at 60.

²⁵⁶ *Id.* at 44.

²⁵⁷ *Id.* at 82.

²⁵⁸ Norton-Smith, *supra* note 163, at 94.

²⁵⁹ *Id.* at 95.

D. Indian Sovereignty and the Right to Sue

Given their sovereign status, the Indian tribes have crucial role in protecting the environment.²⁶⁰ In 2007, the Supreme Court lowered the burden for a state as the plaintiff to sue for damages that resulted from environmental harm in the case *Massachusetts v. EPA*.²⁶¹ The ruling in *Massachusetts* provides that states in their sovereign status have an expanded role in litigating climate change issues in federal court.²⁶² The Court reasoned that states have special solicitude to represent the interest of its citizens and, therefore, standing to sue a government regulatory agency if they do not follow the guidelines for environmental protections under federal law.²⁶³ In 1832, in *Worcester v. Georgia*, the Court had already solidified the power of the federal government over states and the tribes.²⁶⁴ In that case, the Court established that only the federal government and not the states have power to regulate Indian tribes.²⁶⁵ Hence, the states and the tribes are on the same level in terms of sovereignty.²⁶⁶ The special solicitude, therefore, can be attributed to the Indian tribes when they sue to protect their members and their sovereign lands.²⁶⁷ Under the mantle of the *Massachusetts* ruling, tribes can sue federal government agencies when they fail to enforce federal regulatory environmental protections.²⁶⁸

E. Congress Affirms the Power of the Tribes under the Clean Water Act

In 1987, Congress amended the federal EPA regulations under the Clean Water Act (CWA) to allow Indian tribes to be treated the same as states (TAS) for establishing water quality standards up to the exterior

²⁶⁰ Fromherz, *supra* note 111, at 149.

²⁶¹ *Id.* at 137 (citing *Massachusetts v. EPA*, 549 U.S. 497 (2007)) (this case “alters the standing test in four notable ways: a) the purposes served by standing predominate over the strictures of the formal test; b) harms to quasi-sovereign interests count as injuries for purposes of standing; c) generalized grievances are more likely to be tolerated when the plaintiff is a sovereign; and d) deference will be given to the sovereign’s factual assessments. Each of these alterations proves that sovereignty is critical to the standing analysis”).

²⁶² *Id.* at 149.

²⁶³ *Id.*

²⁶⁴ *Id.* at 158 (citing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)).

²⁶⁵ Fromherz, *supra* note 111.

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

boundaries of their reservations.²⁶⁹ In 2001, the state of Wisconsin sought to overturn the decision by arguing that states have the sole right to regulate water.²⁷⁰ The Seventh Circuit Court of Appeals unanimously affirmed that it is reasonable that the Indian tribes could regulate water quality under the CWA.²⁷¹ This standard is the similar to those of the states.²⁷² Without getting into the discussion of the whether or not the Indian tribes sufficiently utilize this power, for purposes of this article, it affirms that the Indian tribes have sovereign jurisdiction over water quality standards on the surface waters on their reservations.²⁷³

F. The Judiciary – Adjudication in Environmental Case Law

The judiciary is a necessary component for supporting enforcement of environmental law.²⁷⁴ Enforcing environmental laws disrupts economic norms and are very controversial.²⁷⁵ The judiciary plays a key role in protecting the environment.²⁷⁶ Once Congress enacts environmental legislation, the courts can step in to see that the purposes of the environmental protections do not get lost or misdirected.²⁷⁷ It is far too easy for the federal and state bureaucratic committees and subcommittees to get lost in an economic cost benefit analysis when it comes to regulating the protection of natural resources.²⁷⁸ The “Water is Life” chant of the Native American tribes questions the notion that material progress should be at the epicenter of the purpose for rules and regulations.²⁷⁹ Courts are inclined to make decisions in environmental lawsuits based on a cost benefit analysis.²⁸⁰ Since the 1970’s when sweeping legislation ushered in decades of new environmental protection,

²⁶⁹ Kurt R. Moser, *Water Quality Standards and Indian Tribes: Are Tribes Afraid of Clean Water*, 8 U. DENV. WATER L REV. 27, 30 (2004).

²⁷⁰ *Id.* (Citing *Wisconsin v. EPA*, 266 F.3d 741 (7th Cir. 2001)).

²⁷¹ *Id.* (this decision also affirmed the *Montana v. United States* case previously discussed).

²⁷² *Id.* at 31.

²⁷³ *Id.*

²⁷⁴ Richard J. Lazarus, *Judging Environmental Law*, 18 TUL. ENVTL. L.J. 201, 208 (2004).

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 194.

²⁷⁷ *Id.* at 205.

²⁷⁸ *Id.* at 207.

²⁷⁹ *Id.* at 208.

²⁸⁰ *Id.* at 215.

the Court still struggles with how to balance the government's role in protecting private property rights, the economic responsibility of protecting the environment, what is in the the best interests of the community including the Indian tribes.²⁸¹ In a challenge to the National Environmental Policy Act (NEPA), the Court recognized it had a duty to balance protecting the natural environment with recognizing the need for economic progress.²⁸² The cost to implement, litigate, and provide remedy are extremely high.²⁸³ Courts can provide balance by reviewing protection of the environment with heightened scrutiny and the understanding that judicial rulings impact not only injuries to the plaintiffs now also ecologically impacts to the public interest far into the future.²⁸⁴ Many judges are not persuaded by the importance of environmental protection laws, and are not apt to trigger environmental regulations in judicial decisions.²⁸⁵ Businesses are often the victor.²⁸⁶ What must be recognized is that the judiciary continues to play a key role in protecting the environment.²⁸⁷

V. PROTECTORS OF THE ENVIRONMENT

Congress amended the Clean Water Act (CWA) in 1987 to allow tribes with a governing body, and water within the boundaries of the reservation, to manage their water resources.²⁸⁸ Up until the 1970s western civilization allowed for the degradation of irreplaceable natural resources while the indigenous cultures fought to preserve what remained of their pristine lands and waters.²⁸⁹ For Native Americans, life already

²⁸¹ *Lazarus* at 209.

²⁸² *Id.* at 205 (citing *Calvert Cliffs Coordinating Committee v. United States Atomic Energy Commission*, 449 F.2d 1109 (D.C. Circ. 1971)).

²⁸³ *Id.* at 208.

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 218.

²⁸⁶ *Id.* at 217.

²⁸⁷ *Id.* at 218.

²⁸⁸ Judith V. Royster, *A Primer on Indian Water Rights: More Questions than Answers*, 30 TULSA L.J. 61, 85 (1994) (the Clean Water Act provides that tribes may seek program authorization for implementing the permit programs for dredge and fill materials and discharges from point sources; promulgating water quality standards; developing management programs for non-point source pollution; seeking certain types of grants; and granting or denying certification for federally permitted activities that may result in discharges of pollutants into the waters. 33 U.S.C. § 1377(e) (1988)).

²⁸⁹ Reynold, *supra* note 72, at 20.

equaled the earth and its resources.²⁹⁰ Before the tribes knew that the lands they inhabited were paradise, and they could not comprehend why the intruders from the east were determined to destroy all that was Indian as well as America itself.”²⁹¹ Native American people believe this life is inherent in all humans as a right.²⁹² Their legal system is a cultural sovereignty that sees a person’s self image on the same level of relevance as a legal strategy for making a claim of these rights.²⁹³ Creating policy or litigating rights that are based in a human right contrasts with the Euro-American based conqueror legal theory that continues to appear in controversies involving environmental protection.²⁹⁴

A. *Safeguarding Native Water Rights*

The Court’s earliest opinions establishing the distribution of power between the federal government and the states without providing for the status of the Indian tribes nevertheless created a fiduciary relationship with the indigenous peoples to protect their way of life.²⁹⁵ The Court included in this obligation a recognition that Indian water rights pre-date the establishment of treaties and the Indian reservations.²⁹⁶ The Court recognized that the tribes reserved water rights to and by themselves, and that these were not rights given to them.²⁹⁷ These reserved rights extended for reservation purposes, for indigenous practices, and for prevention of interference by non-Indian uses of the water.²⁹⁸ The 1908 Supreme Court case *Winters v. United State*, memorialized Indian reserved water rights in the western states of the indigenous people.²⁹⁹ Here, the Court limited the non-Indian

²⁹⁰ *Id.*

²⁹¹ Krauss, *supra* note 57, at 413.

²⁹² *Id.* at 414.

²⁹³ *Id.* at 410.

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 415 (citing *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee v. Nation*, 30 U.S. (5 Pet.) 1 (1831); and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 525 (1832)).

²⁹⁶ Judith V. Royster, *Winters in the East: Tribal Reserved Rights to Water in Riparian States*, 25 WM. & MARY ENVTL. L. & POL’Y REV. 169, 202, 173 (2000).

²⁹⁷ *Id.* at 178.

²⁹⁸ *Id.* at 174-179.

²⁹⁹ Dylan M. DesRosier, *Tribal Water Rights Settlements and Instream Flow Protection* 3 (2015) (“The case therefore set the fundamental precedent that Native American Tribes have reserved water rights, of a fundamentally different nature than

water users access to water, to the extent that it took from the agricultural needs of the tribe.³⁰⁰ The Court reasoned that to do so would be a fundamental assumption upon which the tribes would agree when making a treaty.³⁰¹ In the 1905 Supreme Court case *Winans v. United States*, the Court affirmed that not only on-reservation, but also off-reservation protections existed for fishing and hunting beyond the boundaries of the reservations established in the treaties.³⁰² It is important to distinguish that the Court recognized that reserved rights are established when the indigenous people granted the settlers use and access to the lands they already inhabited and not a right that they attained when making Treaty agreements.³⁰³ Intent to reserve rights was implicit beyond the reservations because the reservation settlements were too small to allow for protection of the nomadic hunting way of life known to the tribes.³⁰⁴ The government hoped to “civilize the tribes into an agrarian culture” and therefore further the evidence that the tribes had reserved water rights because water is a necessary element for agriculture.³⁰⁵

In 1963, the Supreme Court confirmed in *Arizona v. California*, that reserved water rights on the Indian reservations are to include agricultural and related uses and a purpose that benefits the Indians.³⁰⁶ The Court ruled that the federal government has the power to set aside water for tribal use.³⁰⁷ State courts must apply federal law when settling water disputes involving the Indian tribes.³⁰⁸ Additionally, Congress, under the Property Clause and the Commerce Clause, was authorized to act upon the waters and the Indian tribes.³⁰⁹ These rights were protected into perpetuity, and only Congress could change these water rights, if and when they terminate a reservation.³¹⁰ Even if this authority is not

state water rights, necessary to meet the purposes of each federal Indian reservation. Thus, the Court firmly cemented tribal water rights into the legal landscape of the Western U.S. Despite the case’s profound ruling, its narrow scope left a legacy of uncertainty and conflict between state water law and tribal reserved water rights”).

³⁰⁰ *Id.* at 20.

³⁰¹ *Id.*

³⁰² *Royster*, at 175.

³⁰³ *DesRosier*, *supra* note 296, at 22.

³⁰⁴ *Royster*, *supra* note 293, at 174 (see *Winans v. United States*, 198 U.S. 371,381 (1905)).

³⁰⁵ *Id.*

³⁰⁶ *Id.* at 20 (quoting *Arizona v. California*, 373 U.S. 546 (1963)).

³⁰⁷ *Id.*

³⁰⁸ *See. Arizona*, 373 U.S. 546, 597-98 (1963).

³⁰⁹ *Id.* at 179.

³¹⁰ *Royster*, *supra* note 293, at 182.

claimed or acknowledged, it is abundantly clear that the Supreme Court and the Constitution have not only the obligation, but the authority, to protect the Indian tribes. Elevating recognition of the water rights of the indigenous people is a powerful tool when water quality, water abuse, and water access are being threatened anywhere near tribal lands.

Indian tribes in the western United States rely on the *Winters* doctrine where the Court held that the tribes have a reserved right to the water within the boundaries of their reservations.³¹¹ In this case, the Court ruled that land developers could not intentionally divert water away from the Fort Belknap Indian Reservation in Montana under the treaty agreement entered into with the U.S. government in 1988.³¹² The United States, acting as trustee for the tribe, sued the defendants whose upstream town in 1905 cut off the water supply for the reservation located to the south.³¹³ The expanding non-native community redirected the water the tribe needed for feeding cattle, drinking water, fishing, and hunting.³¹⁴ If the tribe lost access to water, the court reasoned, it contradicted the purpose of creating the reservation.³¹⁵ The goal of establishing reservations was to assimilate the tribes into a white, agricultural, and Christian society.³¹⁶ The Court based its rationale on the logic that the tribe would not sign away their rights to water in the treaty.³¹⁷ The *Winters* case not only laid the foundation for Indian reservation water rights, it created precedent for determining disputes over water rights that are asserted to be perfected under state law.³¹⁸

While the federal, state, and Indian tribes interact in the final determination of water rights, water resource allocation is generally governed by state law.³¹⁹ Under state water law in the west, the rights are

³¹¹ Lee, *supra* note 197, at 682.

³¹² *Id.* (see *Winters v. U.S.*, 207 U.S. 564, 576 (1908)).

³¹³ Royster, *supra* note 326, at 64.

³¹⁴ Lee, *supra* note 197.

³¹⁵ Royster, *supra* note 326, at 65.

³¹⁶ Dan Tarlock, *Do Water Law and Policy Promote Sustainable Water Use*, 28 PACE ENVTL. L. REV. 642, 669 (2011).

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *State Water Law*, RED LODGE CLEARINGHOUSE (Apr. 6, 2010), <http://www.rlch.org/content/state-water-law>.

litigated typically under the prior appropriation doctrine.³²⁰ In those states, where there are often severe water shortages, one acquires the right to divert water from its natural source for another beneficial use.³²¹ There must be a continued, beneficial use to maintain the right, and priority of right is based on the date of the initial diversion.³²² Since there are few state appropriation rights that pre-date the Indian reservations, tribal claims for protection of surface waters on, or near, the reservations take preference and are enforceable.³²³

State water rights of the states to the east of the Great Plains are usually governed by the common law doctrine of riparian water rights.³²⁴ In those states landowners that are adjacent to a water resource have the right to reasonable use of that resource.³²⁵ The water right is subject to availability and reasonable use by others who are similarly situated.³²⁶ Therefore, the tribes in the east where water is historically more plentiful, have a different set of challenges when these rights are challenged.³²⁷ The quantity of water that is reasonable for the users to access is not part of the methodology in determining riparian rights.³²⁸ Riparian rights are determinative of the way the water is used, and not the apportionment.³²⁹ The riparian doctrine falls short in being able to provide by the current legal standard in disputes between tribes and the state government, and also in disputes involving interstate disputes.³³⁰ Another issue is water

³²⁰ *Id.* at 67 (see *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 805 (1976)).

³²¹ *Id.*

³²² *Id.*

³²³ *Id.* at 68.

³²⁴ *State Water Law*, *supra* note 316, at 348.

³²⁵ George William Sherk, *Eastern Water Law: Trends in State Legislation*, 9 VA. ENVTL. L.J. 287, 288 (1990).

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.* at 289.

³²⁹ *Id.*

³³⁰ *See*, *Florida v. Georgia*, Oyez, <https://www.oyez.org/cases/2017/142-orig> (last visited Apr. 7, 2018), where the Court will decide whether in two riparian rights states if Florida is entitled to equitable apportionment of the waters of the Apalachicola-Chattahoochee-Flint River Basin (ACF Basin) and appropriate injunctive relief against Georgia to sustain an adequate flow of fresh water into the Apalachicola Region. The legal standard used by the Special Master was clear and convincing evidence. <http://www.scotusblog.com/case-files/cases/florida-v-georgia-2/>.

quality requirements for human and wildlife needs that cannot be guaranteed under a riparian theory of water rights.³³¹

B. Energy and Natural Resources in Florida-

The state of Florida's growing population relies on electricity for its major energy source and has a large agricultural sector that requires a lot of water.³³² The EPA delegates its authority to regulate water quality under the CWA to the state, and it is then implemented at the local level.³³³ Currently, natural gas is the dominant fuel source for traditional electricity generation.³³⁴ The natural gas comes through pipelines from out of state sources.³³⁵ Pipelines are an efficient form of transport for hydrocarbons like natural gas in Florida.³³⁶ The increasing frequency of their use brings significant challenges to Indian tribes.³³⁷ Controversies over the location of a pipeline through native lands without the required consultation, disproportionately impacts the Indian tribes.³³⁸ The Indian tribes as plaintiffs are at a disadvantage to contest permitting and siting processes.³³⁹ The Florida Department of Agriculture and Consumer Services' Office of Energy (FDACS OOE) is a state agency that regulates energy policy and evaluates energy related studies, analyses, and stakeholder input.³⁴⁰ FDACS OOE uses available state and federal funds to develop and manage energy efficiency, renewable energy, and energy education programs throughout the state.³⁴¹ The underground in Florida is porous, and water seeps into the deep aquifers and is used as the state's source of fresh water.³⁴² Identifying industrial point source or non-point

³³¹ *Id.*

³³² 2015 Florida Office of Energy Annual Report, <http://www.freshfromflorida.com> (last visited Apr. 12, 2017).

³³³ 2015 Florida Office of Energy Annual Report, <http://www.freshfromflorida.com> (last visited Apr. 12, 2017)

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ Ahmad, *supra* note 87, at 802.

³³⁷ *Id.*

³³⁸ *Id.* at 804.

³³⁹ *Id.* at 806.

³⁴⁰ *Id.*

³⁴¹ 2015 Florida Office of Energy Report, *supra* note 332 at 1.

³⁴² *Florida's Aquifers*, ST. JOHN'S RIVER WATER MANAGEMENT DISTRICT, <https://www.sjrwmd.com/water-supply/aquifer/> (last visited Mar. 17, 2018).

source polluters can be difficult.³⁴³ Water use within the state is regulated through the federal, state, and local government.³⁴⁴ The water in Florida is managed at the state level by five separate water management districts.³⁴⁵ Permits for water use requires that the applicant must demonstrate the water use will be reasonable and beneficial (similar to the doctrine of prior appropriation), will not interfere with an existing use, and will be in the public interest.³⁴⁶ Most of Florida's water is concentrated in the northern part of the state, while the population lives more in the southern part.³⁴⁷ The water management districts are under the Florida Constitutional authority of the governor who must prioritize the increasing demands for water from the agricultural sector, urban development, and protecting the environment.³⁴⁸ Competing interests reflecting the politics of the administration impact how water is allowed to be used.³⁴⁹ There are two federally recognized tribes that govern 165,000 acres of reservation and trust lands in Florida.³⁵⁰ The Seminole

³⁴³ Sources of Water Pollution, *Educational Resources*, <https://www.sjrwmd.com/education/water-pollution/> (last visited Apr. 7, 2018).

³⁴⁴ See Ryan Stoa, *Florida Water Management Districts and the Florida Water Resources Act: The Challenges of Basin-Level Management*, 7 KY. J. EQUINE AGRIC. & NAT. RESOURCES L. 73, 74 (2014).

(Florida relies on a water governance structure that may be the most complex in the United States. Institutional responsibility for water management is shared among local governments, regional water management districts, state agencies (e.g., Florida Department of Environmental Protection), and federal agencies and sub agencies, including the Environmental Protection Agency and the Departments of the Interior (e.g., Fish and Wildlife Service, National Park Service), Agriculture (e.g., Forest Service), Commerce (e.g., National Oceanic and Atmospheric Administration), and Defense (e.g., Army Corps of Engineers). Co-existing with these institutions is a comprehensive landscape of environmental laws and regulations, such as the federal Clean Water Act and the Florida Water Resources Act).

³⁴⁵ See Florida Water Resources Act, FLA. STAT. §§ 373.076-200 (1972).

³⁴⁶ See Stoa at 79.

³⁴⁷ *Id.* at 82.

³⁴⁸ *Id.* at 83.

³⁴⁹ *Id.*

³⁵⁰ Allison M. Dussias, *The Seminole Tribe of Florida and the Everglades Ecosystem: Refuge and Resource*, 9 FIU L. REV. 22, 235 (2014) (the three main reservations inhabited by the Seminoles and the Miccosukee Tribes are—Big Cypress (in Broward and Hendry Counties), Brighton (in Glades County), and Hollywood (in Broward County)—along with smaller reservations at Immokalee (in Collier County), Tampa (in Hillsborough County), and Fort Pierce (in St. Lucie County). See explanation of federal tribal recognition at Indian Entities Recognized & Eligible To Receive Services From the U.S. Bureau of Indian Affairs, 80 Fed. Reg. 1942, 1942 (Jan. 14, 2015) (listing the federally recognized tribes in the United States)).

Tribe of Florida and the Miccosukee Tribe of Indians of Florida, are the remaining two tribes that survived the federal government's attempt at their extinction.³⁵¹ The small band of surviving tribes successfully adapted to life in the soggy, mosquito-infested, swamp lands living off of hunting, trapping, fishing, and trading with non-native settlers.³⁵² The tribes, acting in their sovereign capacity today, are a necessary partner with the state and federal government in regulating the quantity and quality of the water impacting their lands.³⁵³ Their position as a stakeholder continues to be questioned, but the Tribes persist in claiming their rights to water through litigation and settlement.³⁵⁴

C. The Seminole Tribe in Florida- Negotiation as a Tool for Protection

During the time of assimilation, the Seminole tribe refused to surrender their land, resisted Congressional efforts to terminate their existence, and took refuge in remote areas of south Florida.³⁵⁵ They went to war with the government and refusing to surrender, hid in the Everglades and the Big Cypress area.³⁵⁶ Despite the large tracts of land under their sovereign control, the Seminole tribes water rights were still not clearly established until 1987.³⁵⁷

The Seminoles East Big Cypress Reservation was originally established in 1935, and the tribe had their lands managed in trust by the Board of Trustees which included the Governor of Florida and Cabinet, similar to the federal government's holding of Indian lands in trust.³⁵⁸ The State, acting in consort with the federal Army Corps of Engineers, granted an easement to land through the reservation creating a massive land project named Lake Okeechobee.³⁵⁹ The state failed to compensate the

³⁵¹ *Id.* at 231.

³⁵² *Id.* at 233.

³⁵³ *Id.* at 238.

³⁵⁴ *Id.*

³⁵⁵ *Id.* at 229.

³⁵⁶ *Indian Resistance and Removal*, <http://www.semtribe.com/History/IndianRemoval> (last visited Apr. 12, 2017)

³⁵⁷ Jim Shore & Jerry C. Straus, *The Seminole Water Rights Compact and the Seminole Indian Land Claims Settlement Act of 1987*, 6 J. LAND USE & ENVTL. L. 1, 2 (1990).

³⁵⁸ *Id.* at 4.

³⁵⁹ Barbara S. Monahan, *Florida Indian Land Claims Agreement: Vehicle for an innovative water Rights Agreement*, 15 AM. INDIAN L. REV. 341, 344 (1990-1991).

Seminoles for the taking of the land.³⁶⁰ During the rainy season, the areas within the reservation subject to the easement flooded.³⁶¹ The State of Florida and the Seminole tribe found themselves in breach of contract litigation where the Seminole claimed that Florida breached its fiduciary duty and demanded damages.³⁶² Further, the Seminole claimed they still had aboriginal title to five million acres of the 1842 reservation land in south-central Florida.³⁶³ Florida and the Seminole found themselves in disputes over multiple issues.³⁶⁴ It was during this time that the state passed the Florida Waters Resource Act of 1972, deciding to divide the management of the state's water resources into districts.³⁶⁵ The tribe refused to comply, stating that Florida had no jurisdiction over them.³⁶⁶ Florida realized that the Seminole had substantive legal arguments, and became aware that negotiations needed to occur.³⁶⁷ Negotiations of land title controversies gave way to the issue of whether Florida's jurisdiction over tribal-related matters could be enforced.³⁶⁸ In reliance on the *Winters* case, the Seminole argued that federal government protection made their water rights claim superior over that of the state.³⁶⁹ In a settlement negotiation, Florida and the Seminole, with the oversight of the federal government's Department of the Interior, signed the Water Claims Compact of 1978, a water rights agreement between the Seminole Tribe of Florida, the state of Florida, and the Southwest Water Management District (SWFMD) with the effect of being enforceable under federal law.³⁷⁰ Now by state law, Florida could not restrict the water on Seminole lands.³⁷¹ In exchange, the Seminole tribe dismissed their lawsuits for monetary damages and consented to comply with terms and principles of the state system, but still be free from direct control by the state or

³⁶⁰ Shore, *supra* note 354.

³⁶¹ *Id.*

³⁶² *Id.* at 5.

³⁶³ *Id.*

³⁶⁴ *Id.*

³⁶⁵ Stoa, *supra* note 339, at 74.

³⁶⁶ *Id.*

³⁶⁷ See Shore, *supra* note 354, at 7.

³⁶⁸ *Id.*

³⁶⁹ *Id.* at 8 ("The Florida Water Resources Act of 1972 established a permitting system in lieu of the previous riparian system." This Act did not address tribal water use.).

³⁷⁰ See Fla. Stat. § 373.016 (1989); see also Seminole Indian Land Claims Settlement Act of 1987, Pub. L. No. 100-228, 101 STAT. 1556 (codified at 25 U.S.C. § 1772(a)-(g) (1988)).

³⁷¹ Monahan, *supra* note 354, at 356-360.

SWFMD.³⁷² Further, the tribe agreed not to sue in federal court over water issues without attempting first to work out issues with the state directly.³⁷³

Since that time, the Seminoles administer their own Water Quality Standard (WQS) through the Tribal Water Code.³⁷⁴ The Environmental Resource Management Department (“ERMD”) and the Seminole Water Commission (the “Water Commission”) are the formal avenues that the Seminoles use to protect reservation waters and monitor conservation of their water resources.³⁷⁵ The Water Compact as an effective tool to protect their water rights and the health and maintenance of their way of life.³⁷⁶ The tribe can monitor water quality on their reservation lands, and protect access to the water needed to sustain their way of life.³⁷⁷ The Water Commission rules prevent pollution of water that harms spiritual and cultural use of the water.³⁷⁸ The comprehensive program for water protection on their reservation lands can be a model for other tribes looking to implement water quality, and quantity, standards on their reservations.³⁷⁹ The Seminoles use their established sovereign rights to further engage with broader non-native communities in efforts to protect the entire ecosystem of South Florida, especially with the Everglades Restoration Initiative.³⁸⁰

D. The Miccosukee: Protecting the Everglades

The Miccosukee Tribe of Indians is a federally recognized tribe that also finds their home in the Everglades region in Florida.³⁸¹ The Tribe utilizes the Everglades ecosystem, including permitting privileges on federal lands beyond the borders of their reservation.³⁸² For the Tribe, this ecosystem sustains their religious, cultural, and economic way of life that includes hunting and fishing.³⁸³ Water historically flowed south through

³⁷² *Id.*

³⁷³ *See Shore, supra* note 354, at 14.

³⁷⁴ Dussias, *supra* note 347, at 243.

³⁷⁵ *Id.*

³⁷⁶ *Id.*

³⁷⁷ *Id.*

³⁷⁸ *Id.* at 245.

³⁷⁹ *Id.* at 348.

³⁸⁰ *See Dussias.*

³⁸¹ Charles Prior, *Permitting Problems: Environmental Justice and the Miccosukee Indian Tribe*, 3 ENVTL. & EARTH L.J. 163, 171 (2013).

³⁸² *Id.*

³⁸³ *Id.*

the Everglades before the construction of Lake Okeechobee.³⁸⁴ The man-made lake cuts off the natural flow of water to the Everglades and increases the phosphorous concentration of runoff from urban, agricultural, and residential areas.³⁸⁵ The Miccosukee and Friends of the Everglades filed suit as plaintiffs against SWFMD as the agency for the State of Florida when the water management district permitted contaminated phosphorous-rich pollutants to be backdumped into the ecosystem.³⁸⁶ Their claim, initiated under the CWA, argued that SWFMD violated the CWA because they failed to get the proper permitting needed when increasing adding pollutants.³⁸⁷ The plaintiffs won at the district court level, but on appeal, the Eleventh Circuit Court of Appeals stated it would not be possible to trace where all of the pollutants were coming from, and ultimately who was responsible for the pollution.³⁸⁸ The case made it to the U.S. Supreme Court where the Court overruled the defendants motion for summary judgement, and remanded the case for further consideration.³⁸⁹ Ruling in favor of the plaintiffs, the Court held that there were factual issues that needed to be resolved.³⁹⁰ Unfortunately, the Court missed the opportunity to address environmental injustice of polluting the Miccosukee Tribes, rendering them unable to live free of increased pollution negatively impacting their natural habitat.³⁹¹

Litigation, like the Miccosukee case, settles the legal question with finality, but the cost of litigation may be prohibitive and time-consuming.³⁹² It can take up to twenty years to get a decision, and then once the decision is rendered, it does not necessarily provide the federal funds to remedy the problem.³⁹³ The federal government, acting as trustee for the interests of the tribe, is not always successful.³⁹⁴ In those cases, the tribe may find itself with the burden of proving abuse of discretion

³⁸⁴ Kristin Carden, *South Florida Water Management District v. Miccosukee Tribe of Indians*, 28 HARV. ENVTL. L. REV. 549 (2004).

³⁸⁵ *Id.*

³⁸⁶ *See* Miccosukee Tribe of Indians of Florida, 706 F. Supp. 2d at 1299-300.

³⁸⁷ Carden, *supra* note 379, at 551.

³⁸⁸ *Id.* at 553.

³⁸⁹ *Id.* (Citing *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 98-100 (2004)).

³⁹⁰ *Id.*

³⁹¹ *Id.* at 555.

³⁹² Jennifer R. Pelphrey, *Oklahoma's State/Tribal Water Compact: Three Cheers for Compromise*, 29 AM. INDIAN L. REV. 127, 132 (2004).

³⁹³ *Id.* at 133.

³⁹⁴ *Id.*

against the government.³⁹⁵ The issue here may involve bias by the state court, who may not necessarily understand federal water laws that they are being asked to enforce.³⁹⁶ The state is allowed to continue dumping pollutants into the tribes waters free from federal permitting procedures while the litigation continued.³⁹⁷ Sadly, CWA protected the water vital to the survival of the tribe, but the Micosukee are powerless to do anything about it until the issue is fully litigated.³⁹⁸

VI. CONCLUSION

As a cultural society interconnected with the environment, the Indian tribes are vital to creating long lasting solutions to protecting water resources.³⁹⁹ Despite efforts to assimilate the native people and erase their indigenous way of life, public awareness of the rights of this powerful, yet marginalized people, is growing.⁴⁰⁰ This is essential because the path of conquering and abusing non-renewable natural resources is not sustainable.⁴⁰¹ Native American culture teaches oneness with all creation, and that what is taken from the earth needs to be given back.⁴⁰² The Native American tribes are standing up for the truth of their sovereign rights, and teach non-natives about caring for and protecting the earth.⁴⁰³ Indian tribes must continue to build their institutional and economic capacity to self-rule together to strengthen their voices and return towards greater independency.⁴⁰⁴ Claiming their sovereign right to self determination will reframe Indian tribes from having dependent reliance on the federal government to independent negotiators with protected rights based in enforceable Treaty agreements.⁴⁰⁵ The Native American culture and spiritual way of life offers powerful lessons that need to be incorporated into the non Native culture. Native Americans must return as the

³⁹⁵ *Id.*

³⁹⁶ *Id.*

³⁹⁷ *Id.* at 558.

³⁹⁸ *Id.*

³⁹⁹ Reynolds, *supra* note 72, at 16.

⁴⁰⁰ Joseph P. Kalt & Joseph William Singer, *Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule*, HARV. L. AND ECON 3 (2003).

⁴⁰¹ *Id.* at 8.

⁴⁰² See Reynolds, *supra* note 72, at 16.

⁴⁰³ Kalt, *supra* note 397, at 6.

⁴⁰⁴ *Id.* at 29.

⁴⁰⁵ *Id.*

caretakers of the land and water embrace and be recognized for the key role and purpose they provide in solving our looming water crisis.