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Trust or Bust: Complications with Tribal Trust Obligations and Environmental Sovereignty

Nadia B. Ahmad
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TRUST OR BUST: COMPLICATIONS WITH TRIBAL TRUST OBLIGATIONS AND ENVIRONMENTAL SOVEREIGNTY

Nadia B. Ahmad^{*†}

ABSTRACT

The Native American framework for environmental protection places a sanctity on nature, which cannot be fully realized under either existing environmental protection laws or through the tribal trust obligations. In the face of these legal deficiencies, tribes and their members can consider resorting to other legal protections to assert tribal environmental sovereignty, including tribal treaty provisions and international human rights law. This Article assesses tribal sovereignty through the lens of energy infrastructure projects on Indian lands, and concludes that updates to the federal right-of-way law chisel away at tribal rights to land, property, and self-determination. A rights-based approach to tribal trust obligations offers heightened protections for these whittled-away rights.

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* Assistant Professor, Barry University Dwayne O. Andreas School of Law; B.A., University of California, Berkeley; J.D., University of Florida Fredric G. Levin College of Law; LL.M. in Natural Resources and Environmental Law and Policy, University of Denver Sturm College of Law.

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INTRODUCTION

The National Environmental Policy Act (NEPA) and participation rights should mean more, not less, on tribal lands when respect for tribal sovereignty and federal tribal trust responsibilities exists. This Article proposes a rights-based approach to reinvigorate tribal treaty regimes based on a historico-legal analysis of the interconnected right-of-way doctrine and environmental impact statement process for pipeline projects in “Indian Country.” This legal strategy will enrich the democratic approaches to tribal consultation, and respond to environmental justice concerns arising from lax regulations and the subsequent environmental degradation. The aim of this Article is to reframe the responses to tribal environmental challenges on account of deficiencies in NEPA and prior tribal trust claims. It also offers recommendations to overcome those challenges through analyzing

the history of right-of-way regulations in Indian Country, the standards for impact statements, and treaty language. Moreover, this Article assesses tribal sovereignty through the lens of energy infrastructure projects on Indian lands, and concludes that updates to the federal right-of-way law chisel away at tribal rights to land, property, and self-determination.¹ Without a thorough reassessment of the essential rights-of-way laws that affect pipeline permitting on tribal lands, tribal environmental sovereignty will be compromised, and tribal land will be more prone to environmental degradation and pollution from increased toxins and hazards associated with oil and gas transport. This Article argues that using existing NEPA procedural remedies,² in concert with provisions from the updated rights-of-way regulations in Indian Country, provides project development and litigation outcomes more attenuated to Indian interests.³

American Indian tribes face exceptional land use, property, and environmental challenges because of hydrocarbon transport projects on their lands.⁴ Due to the tribes' various geographic locations throughout the United States, and their proximity to existing and future hydrocarbon reserves, pipelines crisscross tribal lands with increased frequency and

1. Rights-of-Way on Indian Lands, 80 Fed. Reg. 79,258 (Dec. 21, 2015) (to be codified at 25 C.F.R. pt. 169) (promulgating a rule “streamlin[ing] the process for obtaining Bureau of Indian Affairs (BIA) grants of rights-of-way on Indian land and BIA land, while supporting tribal self-determination and self-governance”). See also 25 C.F.R. pt. 169 (2016) (prescribing the procedures, terms, and conditions under which rights-of-way over tribal lands may be granted).

2. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4331–4370 (2012). The Revised Draft Guidance for Greenhouse Emissions and Climate Change Impacts of the White House Council on Environmental Quality (CEQ) provides additional support for environmental protection. The legacy of previous attempts at climate change adaptation measures is diminishing with a new White House administration. Yet, existing federal regulations and environmental protection measures—along with private-public partnerships—will minimize the assault on environmental rights by federal leadership that is attuned to the interests of the fossil fuel industry. See WHITE HOUSE COUNCIL ON ENVIRONMENTAL QUALITY, REVISED DRAFT GUIDANCE FOR GREENHOUSE EMISSIONS AND CLIMATE CHANGE IMPACTS 1–2 (Dec. 18, 2014), https://obamawhitehouse.archives.gov/sites/default/files/docs/nepa_revised_draft_ghg_guidance.pdf.

3. Rights-of-Way on Indian Lands, 80 Fed. Reg. 72,492, 72,492 (Nov. 19, 2015) (to be codified at 25 C.F.R. pt. 169) (promulgating a rule “[s]treamlining the process for obtaining a right-of-way on Indian land”). The total climate change litigation in the United States exceeds that of the rest of the world combined. By 2013, more than 420 climate cases had been resolved in the United States versus 173 for the rest of the world. Michael B. Gerrard, *Scale and Focus of Climate Litigation Outside the U.S.*, N.Y. LAW JOURNAL (Mar. 12, 2015), http://web.law.columbia.edu/sites/default/files/microsites/climate-change/nyljscaleandfocusofclimatelitigationoutsideofunitedstates_0.pdf.

4. See Bill McKibben, *Why Dakota Is the New Keystone*, N.Y. TIMES (Oct. 28, 2016), <https://www.nytimes.com/2016/10/29/opinion/why-dakota-is-the-new-keystone.html> (discussing Native Americans conducting peaceful protests against an oil pipeline seeking to address clean water, environmental justice, and climate issues).

carrying capacity.⁵ A hydrocarbon transport project in a right-of-way corridor creates an economically efficient means of passage for energy resources, but such a project also sullies tribal property, sovereignty, and environmental rights. From a legal perspective, a pipeline poses significant risks to the use and enjoyment of tribal land, and uniquely threatens sacred space.⁶

While concern for pipeline siting is ubiquitous, what is less conspicuous—but equally significant—is the property and environmental rights impact of energy projects on tribal lands and on former tribal lands ceded to the United States.⁷ More than 50 million acres of Indian trust lands exist in the United States.⁸ Thousands of miles of easements traverse tribal lands for various purposes as crucial fragments of the national infrastructure.⁹ Significant swaths of tribal lands lay within the path of major energy infrastructure projects.¹⁰ American Indian communities experience an imbalanced proportion of environmental degradation on account of the mineral development in North America.¹¹

Without improved tribal consultations and more robust treaty claims, the updated rights-of-way regulations in Indian Country will lead to a steady and blatant encroachment of tribal lands. Moreover, this will also affect all future development of energy easements, including lands of the White Earth Band of Ojibwe in northwestern Minnesota, Navajo Nation in Texas and New Mexico, and the Seminole Tribe of Florida's Big Cypress Reservation.¹² Under these regulations, native environmental protection

5. See Jack Healy, *North Dakota Oil Pipeline Battle: Whose Fighting and Why?*, N.Y. TIMES (Dec. 2, 2016), <https://www.nytimes.com/2016/11/02/us/north-dakota-oil-pipeline-battle-whos-fighting-and-why.html> (stating that there are 2.5 million miles of pipelines crossing the United States).

6. See *id.* (discussing the Standing Rock Sioux Tribe's opposition to the Dakota access pipeline for crossing over sacred tribal land).

7. Andrew S. Montgomery, *Tribal Sovereignty and Congressional Dominion: Rights-of-Way for Gas Pipelines on Indian Reservations*, 38 STAN. L. REV. 195, 199 (1985).

8. C.E. Willoughby, *Native American Sovereignty Takes a Back Seat to the "Pig in the Parlor": The Redefining of Tribal Sovereignty in Traditional Property Law Terms*, 19 S. ILL. L.J. 593, 601 (1995).

9. Todd Miller, Comment, *Easements on Tribal Sovereignty*, 26 AM. INDIAN L. REV. 105, 105 (2001). Rights-of-way easements encompass "highways, railroads, electric transmission lines, oil and gas pipelines, and various communication facilities." *Id.*

10. See Daniel W. Hester, *Protection of Sacred Sites and Cultural Resources: An Obstacle to Development in Indian Country?*, 23A ROCKY MTN. MIN. L. INST. 11 (1989) (noting that development of the Powder River region would impact the Northern Cheyenne Tribe).

11. James M. Grijalva, *Control and Accountability: The Twin Dimensions of Tribal Sovereignty Necessary to Achieve Environmental Justice for Native America*, in TRIBES, LAND, AND THE ENVIRONMENT 30 (Sarah Krakoff & Ezra Rosser eds., 2012).

12. See Miller, *supra* note 9, at 130 (identifying the need for more energy easements across tribal land to satisfy the demand for more transmission capacity).

concerns are devalued and underappreciated, particularly in negotiating and/or contesting pipeline siting and permitting.¹³ Based on the unique nature of the pipeline industry and asset specificity, long distance pipelines create distinct financing and contracting matters.¹⁴ “[A] century of dealing with oil and gas pipelines shows just how hard it is to keep them from being used as John D. Rockefeller first discovered they could be—as levers to frustrate competition in commodity markets and as profitable tollgates lying athwart commodity trade routes.”¹⁵ The economics of the pipeline industry also make the business climate adverse to environmental and tribal land concerns.

Part I provides the jurisdictional overlay of rights and duties involved with projects on tribal lands. Part II examines the legal nuances in the development of right-of-way regulations in what constitutes Indian lands. Parts II.C and II.D posit that NEPA sufficiently allows for stronger claims against pipeline projects. Analyzing tribal challenges to pipelines in the cases of *Sisseton-Wahpeton Oyate v. U.S. Department of State and TransCanada Pipeline*¹⁶ and *White Earth Nation v. U.S. Department of State*¹⁷ showcases distinct methodological opportunities to take advantage of legal remedies implicit in NEPA.¹⁸ To counter threats to tribal environmental sovereignty by an ever-expanding consortium of oil and gas operations, Part III offers an ancillary proposal of normative guidelines. These guidelines heighten transparency, incorporate a richer understanding of the NEPA process in energy permitting, and enhance measures for a better participatory process to avoid legal showdowns, such as the Dakota Access Pipeline Project.

13. See Rights-of-Way on Indian Lands, 80 Fed. Reg. 72,492, 72,492 (Nov. 19, 2015) (to be codified at 25 C.F.R. pt. 169) (noting the absence of environmental considerations, despite the streamlined process). See also 25 C.F.R. § 169.3 (2016) (giving the Secretary authority to grant right-of-way permits).

14. JEFF D. MAKHOLM, *THE POLITICAL ECONOMY OF PIPELINES: A CENTURY OF COMPARATIVE INSTITUTIONAL DEVELOPMENT* 175 (2012).

15. *Id.* at 176.

16. *Sisseton-Wahpeton Oyate v. U.S. Dep’t of State*, 659 F. Supp. 2d 1071, 1079 (D.S.D. 2009).

17. *White Earth Nation v. Kerry*, No. 14-4726 (MJD/LIB), 2015 WL 8483278, at *1 (D. Minn. Dec. 9, 2015).

18. The rights-of-way revisions include: (1) “Eliminating the need to obtain BIA consent for surveying in preparation for applying for a right-of-way”; (2) “Establishing timelines for BIA review of rights-of-way requests”; “Clarifying processes for BIA review of right-of-way documents”; (4) “[A]llowing BIA disapproval only where there is a stated compelling reason”; (5) “[P]roviding greater deference to Tribes on decisions affecting lands”; (6) Clarifying the authority by which BIA approves rights-of-way; and (7) “[E]liminating outdated requirements that apply to specific different types of rights-of-way.” Rights-of-Way on Indian Lands, 80 Fed. Reg. 72,492, 72,492 (Nov. 19, 2015) (to be codified at 25 C.F.R. pt. 169).

I. THE JURISDICTIONAL LANDSCAPE

Tribal members suffer from natural resource exploitation in a more adverse manner than non-Indians because of the indigenous connection to native lands. Tribal leaders share a central concern that developers will desire isolated Indian lands for energy projects.¹⁹ The importance of indigenous land, title, and property exploitation weigh into the determination of what constitutes an indigenous group.²⁰ Indigenous property provides “the source of indigenous worship and the object of indigenous return.”²¹ Both the public and private spheres use indigenous land and resources. In the public sphere, the state takes advantage of its authority over native peoples.²² Even though individual acts of Congress require coordination with the Bureau of Indian Affairs, Bureau of Land Management, Bureau of Reclamation, National Park Service, U.S. Fish and Wildlife Service, and U.S. Forest Service, these agencies often neglect or fail to fully account for indigenous land concerns by favoring the commercial economic interests of project developers.²³ Since indigenous peoples are underrepresented in government, they have limited leverage with governing authorities.²⁴ On account of these inequities, indigenous peoples continue to suffer environmental harm disproportionately on a global scale.²⁵ In the United States, which values human rights, property rights, and environmental stewardship, tribes do not achieve adequate

19. See WARNER K. REESER, COUNCIL OF ENERGY RESOURCE TRIBES, INVENTORY OF HAZARDOUS WASTE GENERATORS AND SITES ON SELECTED INDIAN RESERVATIONS, 2, 24 (1985) (illustrating that tribal lands’ vast open spaces and proximity to industrial developments make tribal lands common sites for hazardous waste disposal). See generally Pamela D’Angelo, *Waste Management Industry Turns to Indian Reservations as States Close Landfills*, 21 ENV’T REP. 1607, 1607 (1990) (discussing how waste management companies are seeking to develop landfills on Indian lands).

20. David Fagan, *Multinational Corporations*, in INDIGENOUS PEOPLES, THE ENVIRONMENT, AND LAW 139, 141 (Lawrence Watters ed., 2004).

21. *Id.*

22. *Id.* at 142. See generally Sumudu Atapattu, *The Significance of International Environmental Law Principles in Reinforcing or Dismantling the North–South Divide*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH 97, 100–07 (Shawkat Alam et al. eds., 2015) (providing examples of sovereign states using their superior position and information to skew negotiations with indigenous peoples and violate basic human rights); Louis J. Kotze, *Human Rights, the Environment and the Global South*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH 184, 185–87 (providing further examples of coercive state negotiations).

23. See generally Robert McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians*, 19 B.Y.U. J. PUB. L. 1, 87–91, 99–101 (2004) (discussing the role of and criticism against the Bureau of Indian Affairs in managing the rights of Indian tribes. The Article also discusses the BIA’s actions pursuant to federal statutes and in coordination with the other offices in the Department of Interior).

24. Fagan, *supra* note 20, at 142.

25. *Id.*

representation to protect their interests in energy development projects from multinational enterprises.²⁶

While Native Nations managed and consumed natural resources, consumption rates increased when Europeans settled the New World.²⁷ Later under U.S. dominion and rule, Native Nations not only lost property rights, but also they lost the ability to use the land.²⁸ Congress intended federal Indian laws to disengage and mollify Native Nations.²⁹ First, because of overlapping layers of administrative regulation, the legal scheme for securing rights-of-way on Indian lands benefits the economic interests of the oil and gas industry and pipeline operators to the detriment of Native Nations.³⁰ The Secretary of the Department of the Interior (DOI) has the power to grant rights-of-way across Indian lands.³¹ The stated mission of the DOI is to protect the country's "natural resources and cultural heritage" and honor tribal communities.³² The DOI's overarching mission and goals with competing land and cultural claims intrinsically clash and favor non-Indians to the detriment of Indians.³³ A secondary issue is the prodigious

26. See, e.g., AL GEDICKS, *NATIVE AND ENVIRONMENTAL STRUGGLES AGAINST MULTINATIONAL CORPORATIONS* 42–43 (1993) (explaining that tribal lease negotiations are "among the poorest agreements ever made"); Mark Anthony Rolo, *The Indian Wars Have Never Ended*, PROGRESSIVE.ORG (Jan. 26, 2017), <http://progressive.org/magazine/the-indian-wars-have-never-ended/> (discussing how the federal government often turns a blind eye to mining and pipeline threats from multinational corporations).

27. Jason J. Czarneski, *Everyday Environmentalism: Concerning Consumption*, 41 ENVTL. L. REP. 10374, 10375 (2011).

28. *Id.*

29. 25 U.S.C. § 324 (2012). Native Nations include American Indian tribal governments as well as Native Alaskan and Native Hawaiian groups. See, e.g., Notice, Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 81 Fed. Reg. 5019, 5020 (Jan. 29, 2016) (describing the purpose of visiting Alaska natives separately, which was to reference them independently); Frances Kai-haw Wang, *Dept. of Interior Finalizes Rule to Recognize Native Hawaiian Government*, NBC NEWS (Sept. 23, 2016, 6:24 PM), <http://www.nbcnews.com/news/asian-america/departement-interior-finalizes-rule-recognize-native-hawaiian-government-n653631> (discussing the new federal administrative procedures regarding native Hawaiian tribal governments).

30. See 25 U.S.C. § 324 (noting the ability of the Secretary to overrule Indian consent).

31. 25 U.S.C. § 323 (2012).

32. *Mission Statement*, U.S. DEP'T INTERIOR, <https://www.doi.gov/whoweare/Mission-Statement> (last visited May 8, 2017).

33. See, e.g., Uma Outka, *Environmental Justice Issues in Sustainable Development: Environmental Justice in the Renewable Energy Transition*, 19 J. ENVTL. & SUSTAINABILITY L. 60, 100–01 (2012) (discussing the impact of the Energy Policy Act of 2005 on tribal communities); Paul E. Frye, *Section 1813 of the Energy Policy Act of 2005: Implications for Tribal Sovereignty and Self-Sufficiency*, 42 TULSA L. REV. 75, 87 (2006) (describing the tribal opposition to § 1813 of the Energy Policy Act of 2005); Judith V. Royster, *Tribal Energy Development: Renewables and the Problem of the Current Statutory Structures*, 31 STAN. ENVTL. L.J. 91, 136 (2012) (explaining how regulation of renewable energy is prohibitively cumbersome for tribes, and new legislation is needed); Christy McCann, *Damned If You Do, Damned If You Don't: FERC's Tribal Consultation Requirement and the*

task that plaintiffs from Native Nations face when they contest energy permits and siting processes. They must overcome systemic legal barriers for achieving environmental justice and actualizing land protection.³⁴ Because of problems with legal status and standing, such plaintiffs lack effective legal regimes to contest pipelines in their territories and on sacred native lands.³⁵ Subsections I.A and I.B explain how the jurisdictional overlay complicates property rights and environmental claims brought forward by plaintiffs from Native Nations.³⁶ The multitude of variables for litigation actions such as venue, time, financial resources, redressability, justiciability, and procedural standing are exacerbated for claims involving Indian lands.³⁷ Tribal property and environmental claims have a more burdensome threshold to meet procedurally and substantively because of the unique milieu of federal, state, and tribal laws.³⁸ This establishment of complex laws does not make claims prohibitive, but the bureaucratic steps

Hydropower Re-Licensing at Post Falls Dam, 41 GONZ. L. REV. 411, 439–42 (2006) (discussing the evolving definition of “consultation” in case law); Charles R. Zeh & Treva J. Hearne, *Development Considerations on Indian Lands*, 13 NAT. RESOURCES & ENV'T 350, 372 (1998) (discussing the interaction between corporations, non-tribal interests, and tribal interests on tribal lands); Ryan David Dreveskracht, *Native Nation Economic Development via the Implementation of Solar Projects: How to Make it Work*, 68 WASH. & LEE L. REV. 27, 49–109 (2011) (promoting implementation of solar energy projects in tribal lands as a means for sustainable economic development in Indian Country; such projects do not only provide general economic benefits, but also advance practical sovereignty, the formation of capable institutions, and an economic opportunity that matches the tribes’ cultures); Kurt Gasser, *The TransCanada Keystone XL Pipeline: The Good, the Bad, and the Ugly Debate*, 32 UTAH ENVTL. L. REV. 489, 494, 503–04, 508–09, 511 (2012) (illustrating President Obama and the Department of State’s priority on achieving economic and national security through oil pipelines at the expense of environmental security).

34. See James M. Grijalva & Daniel E. Gogal, *The Evolving Path Toward Achieving Environmental Justice for Native America*, 40 ENVTL. L. REP. NEWS & ANALYSIS 10905, 10905 (2010) (noting that indigenous peoples lack many resources to oppose energy development projects).

35. Jana L. Walker et al., *A Closer Look at Environmental Injustice in Indian Country*, 1 SEATTLE J. SOC. JUST. 379, 382–83 (2002) (explaining the unique legal status of Native Americans as sovereign nations, but still subject to the plenary power of the federal government). See also *Sisseton-Wahpeton Oyate v. U.S. Dep’t of State*, 659 F. Supp. 2d 1071, 1078 (D.S.D. 2009) (finding that the tribe lacked standing because it was unable to prove the redressability prong); *Puyallup Tribe, Inc. v. Dep’t of Game*, 433 U.S. 165, 167 (1977) (holding that tribes do not have absolute and exclusive rights to important natural resources passing through reservations); *Arrow Midstream Holdings, LLC v. 3 Bears Constr., LLC*, 873 N.W.2d 16, 23 (N.D. 2015) (noting that unless the Tribes appear, a private party has no standing).

36. See *infra* Parts I.A, I.B (discussing the status of tribal land under U.S. law and international law).

37. Geneva E.B. Thompson, *The Double-Edged Sword of Sovereignty by the Barrel: How Native Nations Can Wield Environmental Justice in the Fight Against the Harms of Fracking*, 63 UCLA L. REV. 1818, 1860 (2016).

38. Walker et al., *supra* note 35, at 382–83 (discussing the complex relationship between federal, state, and tribal laws as they apply to Native Americans).

to the courthouse do make these claims on tribal lands more cumbersome to successfully litigate.

Courts grapple with defining “Indian Country.” The term Indian Country is subject to an imprecise statutory definition.³⁹ The legal definition, nonetheless, raises problems, as evidenced by ongoing disputes over property rights, natural resource extraction, and indigenous land use. Thomas Berry argues that contemporary societies should consider indigenous practices as: “[D]ialogue with native peoples . . . throughout the world is urgently needed to provide the human community with models of a more integral human presence to the Earth.”⁴⁰ The indigenous notions of land have the simultaneous existence of obligations and rights that are place-specific to the land.⁴¹ Irene Watson argues, “Ownership is not exclusive. And it does not define the owned object as a commodity: instead it defines it as the concern of a limited group of people who stand in a particular relationship.”⁴² Indigenous conceptualizations of land are more akin to the Anglo-American governance model with property as a bundle of sticks. Watson rejects the formal native title system, arguing that it erodes and subverts native identities.⁴³ As such, she contends that “[n]ative title does nothing to help us care for country,” and she observes the law of people outside formal legal mechanisms.⁴⁴ This framework clarifies the consequence of vernacular law.⁴⁵ The official legal recognition of “both ecocentric and indigenous descriptions of private property are related and there is the potential for great benefit from a dialogue and shared learning from both perspectives.”⁴⁶ When the Anglo-American and Indian notions of property clash, the Eurocentric configuration of property supersedes.

39. 18 U.S.C. § 1151 (2012).

40. THOMAS BERRY, *THE GREAT WORK: OUR WAY INTO THE FUTURE* 180 (1999).

41. PETER D. BURDON, *EARTH JURISPRUDENCE: PRIVATE PROPERTY AND THE ENVIRONMENT* 121 (2015).

42. *Id.* (quoting Irene Watson, *Buried Alive*, 13 L. & CRITIQUE 253, 46–47 (2002)).

43. Irene Watson, *Buried Alive*, 13 L. & CRITIQUE 253, 264 (2002). Watson is an elder among the Tanganekald-Meintangk peoples, who are the custodians of an area in Southeastern Australia, known as the Coorong.

44. *Id.* at 260.

45. BURNS H. WESTON & DAVID BOLLIER, *GREEN GOVERNANCE: ECOLOGICAL SURVIVAL, HUMAN RIGHTS, AND THE LAW OF THE COMMONS* 104 (2013).

46. BURDON, *supra* note 41, at 122.

A. Status of Indian Nations Under U.S. Law

Federally-recognized tribes are “recognized by treaty, statute, administrative process, or other intercourse with the United States.”⁴⁷ “[D]espite some historical and ethnographic evidence concerning [their] existence,” non-federally-recognized tribes do not have the same rights afforded to the federally recognized counterparts.⁴⁸ The term *recognized* is “a legal term of art”⁴⁹ and signifies “a formal political act” and “permanently establishes a government-to-government relationship between the United States and the recognized tribe as a ‘domestic dependent nation,’ and [it] imposes on the government a fiduciary trust relationship to the tribe and its members.”⁵⁰ What constitutes a federally recognized tribe impacts the rights of the indigenous body in seeking redress under tribal treaty and congressional trust obligations. This classification system disadvantages indigenous native groups who are not federally recognized. Those tribes that are federally recognized can establish and maintain their own form of government,⁵¹ unless Congress has passed a statute delineating the method of choosing tribal representatives or other aspects of the tribal governance system.⁵²

Control and ownership on Indian lands depend on an intricate land use system. Judith Royster distinguishes four different types of land ownership within tribal territories: “[T]ribal trust land, Indian allotments, Indian fee land, and non-Indian fee land.”⁵³ The land ceded by the tribes through

47. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 3.02(3) (Nell Jessup Newton et al. eds., 2012) [hereinafter COHEN’S].

48. *Id.*

49. H.R. REP. NO. 103-781, at 2, (1994). *See also* COHEN’S, *supra* note 47, § 3.02(3) (describing federal tribe recognition).

50. COHEN’S, *supra* note 47, § 3.02(3) (quoting H.R. Rep. No. 103-781, at 3 (1994)).

51. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62–63 (1978). *See, e.g.*, COHEN’S, *supra* note 47, § 3.02(3).

52. *See, e.g.*, Act of Apr. 26, 1906, ch. 1876, 34 Stat. 137, 139 (“[I]f the principal chief of the Choctaw, Cherokee, Creek, or Seminole tribe . . . shall refuse or neglect to perform the duties devolving upon him, he may be removed from office by the President of the United States . . . who may fill any vacancy arising from removal, disability or death of the incumbent, by appointment of a citizen by blood of the tribe.”); COHEN’S, *supra* note 47, § 4.02(3)(a) (declaring that in the modern era, Congress has the power to “clearly and unambiguously” limit tribal sovereignty over jurisdiction).

53. Judith V. Royster, *Environmental Protection and Native American Rights: Controlling Land Use Through Environmental Regulation*, 1 KAN. J.L. & PUB. POL’Y 89, 90 (1991). *See generally* Robert T. Anderson, *Indian Water Rights and the Federal Trust Responsibility*, 46 NAT. RESOURCES J. 399, 408–09, 411, 431–32 (2006) (highlighting that, unlike policy on tribal land ownership and governance, policy on water resource development by Indians on reserve lands has never been addressed comprehensively; Congress and state courts continue to protect existing non-Indian uses over senior tribal water rights).

treaties resulted in the termination of tribal powers over those ceded areas.⁵⁴ In some instances, though, the tribes maintained hunting, fishing, agricultural, and other specific property use rights over the ceded lands.⁵⁵ Subsection II.D discusses how these provisions encumber the exploitation of natural resources over these former tribal lands that were ceded to the United States.⁵⁶

Generally, three fundamental principles of Indian tribal power govern the notion of sovereignty among Indian nations:

- (1) an Indian tribe possesses . . . all the inherent powers of any sovereign state; (2) a tribe's presence within the territorial boundaries of the United States subjects the tribe to federal legislative power and precludes the exercise of external powers

54. COHEN'S, *supra* note 47, § 4.02(2).

55. See, e.g., Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 106–07 (1993) (suggesting that after the end of the federal government's termination policy, the Indian tribes' efforts in litigation and legislation succeeded in "reassuming political control over [the tribes'] economic and cultural destinies"); Nicholas A. Fromherz & Joseph W. Mead, *Equal Standing with States: Tribal Sovereignty and Standing After Massachusetts v. EPA*, 29 STAN. ENVTL. L.J. 130, 160 (2010) (discussing tribal sovereignty and tribal authority over reservation lands); Sandra B. Zellmer, *Indian Lands as Critical Habitat for Indian Nations and Endangered Species: Tribal Survival and Sovereignty Come First*, 43 S.D. L. REV. 381, 406–07, 414, 416, 422–23 (1998) (explaining that the Secretarial Order on Tribal Rights, Trust Responsibilities and Endangered Species directs Departments, when creating critical habitats under the Endangered Species Act, to recognize tribal sovereignty, work with tribes on federal programs, and consider the impact of listing species on the tribes' use of such species. The Order also evidences a substantive policy of prioritizing tribal needs for conservation and utilization of resources, and acknowledges that traditional ecological values may adequately protect reservations.); Matthew L.M. Fletcher, *The Comparative Rights of Indispensable Sovereigns*, 40 GONZ. L. REV. 1, 15 (2004) (stating that tribes would retain hunting, fishing, and gathering rights in treaty agreements); Patrice H. Kunes, *Tribal Self-Determination in the Age of Scarcity*, 54 S.D. L. REV. 398, 402 (2009) (describing the sovereign immunity that extends to tribal commercial activities); Geoffrey D. Strommer & Stephen D. Osborne, "Indian Country" and the Nature and Scope of Tribal Self-Governance, 22 ALASKA L. REV. 1, 11 (2005) (explaining that tribal self-government authority to enforce hunting and fishing regulations apply outside Indian Country in some instances); Robert N. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979, 1020–33 (1981) (arguing that the failure of assimilation and termination policies in the past, and existing contractual obligations to Indian tribes, justify maintaining federal policy honoring tribes' property use rights over ceded lands); Dennis W. Arrow, *Oklahoma's Tribal Courts: A Prologue, the First Fifteen Years of the Modern Era, and a Glimpse at the Road Ahead*, 19 OKLA. CITY U. L. REV. 5, 8–44 (1994) (discussing the history of tribal court jurisdiction in Oklahoma); Michael E. Webster, *Native American Jurisdiction and Permitting*, 1995 ROCKY MTN. MIN. L. INST. 1, 12–25 (giving an example of a tribe that required pipeline companies seeking rights-of-way through tribal land to agree to use the pipeline to transport gas belonging to the tribe, via tribal law); Rebecca Tsosie, *The Challenge of "Differentiated Citizenship": Can State Constitutions Protect Tribal Rights?*, 64 MONT. L. REV. 199, 221 (2003) (describing the cultural status of Native Americans).

56. See *infra* Parts II.D.1–II.D.3 (describing tribal environmental challenges).

of sovereignty of the tribe . . . but does not by itself affect the internal sovereignty of the tribe; and (3) inherent tribal powers are subject to qualification by treaties and by express legislation of Congress, but except as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.⁵⁷

These principles elucidate the multiplicity and complexity of variables imposed on the tribal trust duty and the treatment of Indian tribes in American courts.⁵⁸ Issues of federalism and sovereignty surface on another plane because of concerns of states' rights.⁵⁹ This divide between federal Indian law and state environmental law provides an avenue for tribes to seek redress for property rights and environmental claims in state courts, federal courts, and even in the domain of international law.⁶⁰

The longest pending case of the Supreme Court 2015 term, *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, ended in a four-four per curiam opinion affirming the lower court ruling.⁶¹ Legal scholars are grappling with the impact of the case. Some argue that *Dollar General* reinforces existing judicial precedent regarding tribal sovereignty, while others contend that the case expands the parameters of tribal jurisdiction.⁶²

57. COHEN's, *supra* note 47, § 4.02(1).

58. *Id.*

59. See *Alyeska Pipeline v. Kluti Kaah Native Vill.*, 101 F.3d 610, 613 (9th Cir. 1996) (discussing the Alaska Native Claims Settlement Act and federally reserved rights-of-way on tribal land for the use of pipelines); *Blackfeet Indian Tribe v. Mont. Power Co.*, 838 F.2d 1055, 1058–59 (9th Cir. 1988) (holding that the federal government can grant 20-year or 50-year rights-of-way for pipelines on Indian reservations, provided that the government obtains tribal consent); *N. Border Pipeline Co. v. Montana*, 772 P.2d 829, 831 (Mont. 1989) (describing how Indian reservations are a creation of federal law, making a state's laws inapplicable to the conduct of Indians on the reservation); *South Dakota v. U.S. Dep't of Interior*, 665 F.3d 986, 990–91 (8th Cir. 2012) (holding that South Dakota had constitutional standing to challenge the Secretary of the Interior's land-into-trust acquisition because such acquisition will deprive South Dakota of additional tax revenues. The court ultimately dismissed the suit for failing to satisfy prudential standing requirements.); *Washoe Tribe of Nev. v. Sw. Gas Corp.*, No. CV-N-99-153-ECRVPC, 2000 WL 665605, at *3 (D. Nev. Jan. 12, 2000) (declining to apply the state statute of limitations on an Indian land claim).

60. See *McCarthy*, *supra* note 23, at 20, 77–91 (citing and discussing federal and state cases, laws, and regulations involving tribal property rights and environmental concerns); Michael C. Blumm & Brett M. Swift, *The Indian Treaty Piscary Profit and Habitat Protection in the Pacific Northwest: A Property Rights Approach*, 69 U. COLO. L. REV. 407, 489 (1998) (discussing tribal claims of habitat protection for treaty fishing rights in federal court).

61. *Dollar General Corp. v. Miss. Band of Choctaw Indians*, No. 13–1496 (U.S. June 23, 2016).

62. See, e.g., Ed Gehres, *Opinion Analysis: Dollar General, the Court's Longest Pending Case of the 2015 Term is a Four-Four Per Curiam Opinion*, SCOTUSBLOG (June 25, 2016, 9:28 AM), <http://www.scotusblog.com/2016/06/opinion-analysis-dollar-general-the-courts-longest-pending-case-of-the-2015-term-is-a-four-four-per-curiam-opinion/> (discussing the limited trial jurisdiction under

The case's implications to tribal sovereignty are particularly important in the environmental context.

B. Nature of Aboriginal Title Under International Law

International legal norms acknowledge aboriginal title.⁶³ This recognition of aboriginal title stems from a move to bridge human rights and environmental rights in the international context.⁶⁴ In an annual report to the UN Human Rights Council, UN Special Rapporteur John Knox highlighted transparency, public participation, accountability, and redressability on the topic of human rights and environmental protection.⁶⁵ This linking of human rights to environmental rights corresponds with the trend of bilaterally appreciating both human rights and indigenous rights.⁶⁶ At the 2015 Paris Climate negotiations, recognizing the foundation of justice was critical to the formulation of the climate treaty.⁶⁷ The only language in the Paris climate agreement referencing indigenous rights

Montana v. United States that remains a guiding principle); Rory E. Dilweg, *Dollar General Upholds Tribal Jurisdiction Status Quo*, LAW360 (July 26, 2016, 4:15 PM), <https://www.law360.com/articles/821665/dollar-general-upholds-tribal-jurisdiction-status-quo> (stating that *Dollar General* keeps tribal jurisdiction at the status quo).

63. See Statute of the International Court of Justice, art. 38, ¶ 1 (“The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply . . . international custom, as evidence of a general practice accepted as law”); U.N. Charter art. 92 (“The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which . . . forms an integral part of the present Charter.”); Vienna Convention on the Law of Treaties art. 38, May 23, 1969, 1980 U.N.T.S. 341 (providing that treaties may become binding on third parties through customary international law).

64. John H. Knox, *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy, and Sustainable Environment*, ¶ 2, U.N. Doc. A/HRC/28/61 (Feb. 3, 2015).

65. *Id.* at ¶¶ 32–71. Knox outlined the following concerns: “(a) procedural obligations to make environmental information public, to facilitate public participation in environmental decision-making, to protect rights of expression and association, [and] to provide access to legal remedies; (b) substantive obligations, including obligations relating to non-State actors; (c) obligations relating to transboundary harm; and (d) obligations relating to those in vulnerable situations.” *Id.* at 1. He maps human rights obligations relating to the environment, on the basis of an extensive review of global and regional sources. *Id.*

66. *Id.* at ¶ 2 (responding to the mandate to study the link between human rights and a healthy environment); *id.* at ¶¶ 99–100 (identifying the recognition of the legal rights of indigenous peoples in natural resources as a good practice).

67. Alice Kaswan, *The Paris Agreement and Theories of Justice*, CTR. FOR PROGRESSIVE REFORM BLOG (Dec. 21, 2015), <http://www.progressivereform.org/CPRBlog.cfm?idBlog=C0DE1418-A53E-4A33-0E11F57F187F575B>. See also Michael Liebreich, *We'll Always Have Paris*, BLOOMBERG NEW ENERGY FIN. (Dec. 16, 2015), <https://about.bnef.com/blog/liebreich-well-always-have-paris/> (attributing the success of the Paris Agreement to bottom-up pragmatism and States' understanding that the only widely acceptable framework for the treaty was voluntary pledge and review).

appears in the preamble, which is non-binding.⁶⁸ All other references to indigenous people are in other non-binding parts.⁶⁹ Despite these shortcomings, international law provides an avenue for redressability for tribal communities.⁷⁰

James Anaya explored the international platforms to boost national and subnational agreements with human rights norms.⁷¹ Owen Lynch further argued that legal recognition of aboriginal title by indigenous populations and other long-term occupants is grounded in international law.⁷² Lynch recognized how this trend showcases enduring and unequal legal arrangements, and “builds upon growing awareness that the local knowledge and practices of long-term occupants often contribute to conservation and sustainable management of forests and biodiversity.”⁷³

The idea of aboriginal title is grounded in Free Prior and Informed Consent (FPIC), which “manifests [another] trend towards the development of international law supportive of native/aboriginal title, including legal standards that protect the rights, interest[s] and well-being of local rural communities regarding the natural resources they depend on for their lives and livelihoods.”⁷⁴ It continues with the following:

Similar to community-based property rights (CBPRs), including native/aboriginal title, the right to prior informed consent of indigenous and other local communities can be viewed as a human right that derives its authority from and is recognized not

68. *What the Paris Climate Agreement Means for Indigenous Rights and Hydroelectric Dams*, ECOWATCH (Dec. 14, 2015, 8:39 PM), <http://ecowatch.com/2015/12/14/indigenous-rights-cop21/>.

The only other mention includes a recognition of indigenous ecological knowledge, although the wording provides no protection for such peoples. The decision was made in part by pressure from the UK, Norway, the EU and the U.S., who fear the legal liability that would follow a mandated recognition of indigenous groups.

Id.

69. *Id.*

For example, any request following the auxiliary (helping) verb ‘shall’ is legally binding; those following ‘should’ are not. The need to ‘respect, promote . . . obligations on human rights . . . the rights of indigenous peoples’ falls under the category of ‘should’ and is therefore not legally binding.

Id.

70. S. JAMES ANAYA, *INDIGENOUS PEOPLE IN INTERNATIONAL LAW* 290 (2d ed. 2004).

71. *Id.* at 49.

72. Owen J. Lynch, *Mandating Recognition: International Law and Aboriginal/Native Title*, 1 *PHIL. L. & SOC’Y REV.* 31, 37 (2011).

73. *Id.* at 38.

74. *Id.* (citing Anne Perrault et al., *Partnerships for Success in Protected Areas: The Public Interests and Local Community Rights to Prior Informed Consent (PIC)*, 19 *GEO. INT’L ENVTL L. REV.* 475, 517 (2007)).

only by international law, but also natural law concepts; the existence of a right to FPIC is not necessarily dependent on governments or any creation, grant or recognition by a particular nation state.⁷⁵

This analysis of international norms recognizing aboriginal title lays the foundation for understanding the complex web of land title in what is referred to as Indian lands. The interweaving definitions of aboriginal land, title, and property rights on the international level meld with Anglo-American frameworks for indigenous environmental constructs.

C. U.S. Reorganization and Regulation of Indian Lands

The term “Indian Country” traces its origins to the 1763 Royal Proclamation by King George of England to demarcate land belonging to the British settlers and existing Indian natives.⁷⁶ The Indian Intercourse Act of 1796 included the “first statutory definition of Indian country”⁷⁷ and stated Indian Country was “all lands beyond the western frontier.”⁷⁸ North American courts have accepted the political autonomy and self-governing system of the tribes.⁷⁹ The Supreme Court in *Cherokee Nation v. Georgia* classified tribes as “domestic dependent nations”; their “relation to the United States resembles that of a ward to this guardian.”⁸⁰ In *Worcester v. Georgia*, the Supreme Court explained this ward-guardian relationship in which the United States was viewed as the “protector” of the Indian tribes,⁸¹ “acknowledging and guaranteeing their security as distinct political communities in exchange for their friendliness to the United States.”⁸²

75. *Id.* at 38–39 (footnote omitted).

76. *See, e.g.*, Robert L. Lucero, Jr., *State v. Romero: The Legacy of Pueblo Land Grants and the Contours of Jurisdiction in Indian Country*, 37 N.M. L. REV. 671, 679–80 (2007) (examining the history of “Indian Country”); COHEN’S, *supra* note 47, § 3.01 (defining “Indian tribe,” “Indian nation,” “Indian,” and “Indian Country” in federal law); Joseph D. Matal, *A Revisionist History of Indian Country*, 14 ALASKA L. REV. 283, 289 (1997) (detailing the origin of the term “Indian Country”).

77. *See, e.g.*, Lucero, *supra* note 76, at 680 (examining the history of “Indian Country”); Indian Intercourse Act, ch. 30, 1 Stat. 469, 469 (1796) (establishing boundary lines between the United States and Indian tribes); COHEN’S, *supra* note 47, § 3.04(2)(b) (stating the definition of “Indian Country” in the Trade and Intercourse Act).

78. Lucero, *supra* note 76 at 680. *See also* Indian Intercourse Act, ch. 30, 1 Stat. 469, 469 (1796) (describing the Western Frontier).

79. COHEN’S, *supra* note 47, § 4.01(1)(a).

80. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). *See also* COHEN’S, *supra* note 47, § 4.01(1)(a) (discussing court recognition of tribal political independence and self-governance in early decisions).

81. *Worcester v. Georgia*, 31 U.S. 515, 555 (1832); COHEN’S, *supra* note 47, § 4.01(1)(a).

82. COHEN’S, *supra* note 47, § 4.01(1)(a).

The Trade and Intercourse Act of 1834⁸³ pushed Indian Country westward and regulated individual conduct in Indian Country.⁸⁴ As a result of forced relocations of Indians in the mid-nineteenth century, federal Indian policy shifted to transferring Indians to reservation lands and granting individual allotments of land in an effort to achieve assimilation.⁸⁵ These policies made those existing definitions of Indian Country untenable. In 1874, the Indian Country definition was deleted from the revised statutes, leaving courts to arbitrate the meaning of the term.⁸⁶ It is important to note that the land where the Indians were relocated was less desirable to the settlers, but it was also land that would lie in the path of future hydrocarbon transport projects.⁸⁷ The geological formations that give rise to hydrocarbon reserves are typically dry and arid, and were historically located in remote and previously unsettled areas.⁸⁸ These tribal lands became valued later due to their natural resources.⁸⁹

For purposes of property disputes and environmental claims, the courts rely on the definition set out in the criminal law statutes for Indian Country.⁹⁰ While this definition provides bounds for legal rules and ancillary duties, it fails to account for the complexities and nuances of environmental, regulatory, and property law regimes. Having a rigid definition of Indian land impairs the tribes' ability to protect activities on lands that would impact Indian land and ways of life. A more accurate definition of Indian land would account for the absence of property rights and the negative externalities of commercial development and hydrocarbon transport. The standard for Indian Country was developed in *United States v. McGowan*,⁹¹ and refined in *United States v. John*⁹² and *Oklahoma Tax*

83. Trade and Intercourse Act, ch. 161, 4 Stat. 729, 729 (1834) (codified as amended 25 U.S.C. § 177 (2012)).

84. See COHEN'S, *supra* note 47, § 3.04(2)(b) (summarizing the provisions of the 1834 Trade and Intercourse Act, as including, but not limited to: "substantive laws governing trade, non-Indian trespass, crimes, [and] liquor traffic").

85. COHEN'S, *supra* note 47, § 1.04.

86. See *Bates v. Clark*, 95 U.S. 204, 206–08 (1877) (analyzing the definition of Indian Country). "[A]ll the country described by the act of 1834 as Indian country remains Indian country so long as the Indians retain their original title to the soil, and ceases to be Indian country whenever they lose that title, in the absence of any different provision by treaty or by act of Congress." *Id.* at 209.

87. MAURA GROGAN ET AL., NATIVE AMERICAN LANDS AND NATURAL RESOURCE DEVELOPMENT 6 (2011).

88. *Id.*

89. *Id.*

90. Trade and Intercourse Act, ch. 161, 4 Stat. 729, 729 (1834) (codified as amended 25 U.S.C. § 177 (2012)).

91. *United States v. McGowan*, 302 U.S. 535, 538 (1938).

92. *United States v. John*, 437 U.S. 634, 648 (1978).

Commission v. Potawatomi Tribe.⁹³ The Court in *Potawatomi* held that Indian Country was land that has been “validly set apart for the use of the Indians as such, under the superintendence of the [g]overnment.”⁹⁴

In lieu of expanding the definition of what constitutes Indian Country, Congress should turn to its trust duties to tribes for preserving and protecting tribal lands and tribal peoples.⁹⁵ This protection of Indian land would also improve cultural heritage, environmental stewardship, and commerce. The next section explores development of the federal right-of-way law in Indian Country to show the imperative of tribal environmental sovereignty concerns. This historical process of obtaining a right-of-way grant in Indian Country demonstrates how the interests of the tribes were secondary to non-Indian commercial interests and state goals for land allocation.

II. ENVIRONMENTAL SOVEREIGNTY AND HYDROCARBON TRANSPORT

A. Governing Law for Right-of-Way Doctrine on Indian Lands

The right-of-way grant on non-Indian lands is treated as an easement.⁹⁶ However, in Indian Country, land encumbered by the right-of-way is treated as fee simple.⁹⁷ The difference between treatment of the land encumbered by the right-of-way in Indian lands and non-Indian lands is peculiar. Pipeline rights-of-way over private, non-Indian lands are acquired via grant or prescription.⁹⁸ A pipeline owner’s rights on non-Indian lands

93. *Okl. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 511 (1991). See also Brent Eckersley, *Narragansett Indian Tribe of Rhode Island v. Narragansett Electric Company: When Dependent Indian Communities Fall Within Indian Country*, 21 AM. INDIAN L. REV. 193, 197 (1997) (discussing the Supreme Court’s holding in *Potawatomi*); *Indian Country, U.S.A., Inc. v. Oklahoma*, 829 F.2d 967, 973 (10th Cir.1987) (holding that Indian Country includes lands owned by the tribe); *Weddell v. Meierhenry*, 636 F.2d 211, 212 (8th Cir. 1980) (citing *United States v. McGowan* as an early case defining Indian land); *United States v. Morgan*, 614 F.2d 166, 170 (8th Cir.1980) (explaining that an area was non-Indian based on the number of non-Indian inhabitants); *John*, 437 U.S. at 649 (explaining that once Congress declares land a reservation, it is Indian Country); *Narragansett Indian Tribe of R.I. v. Narragansett Elec. Co.*, 878 F. Supp. 349, 355 (D.R.I. 1995), *aff’d in part, rev’d in part*, 89 F.3d 908 (1st Cir. 1996) (discussing the court’s analysis when reviewing state authority to regulate activities within Indian Country).

94. *Okl. Tax Comm’n*, 498 U.S. at 511 (quoting *John*, 437 U.S. at 648–49).

95. Angela R. Riley, *Indian Remains, Human Rights: Reconsidering Entitlement Under the Native American Graves Protection and Repatriation Act*, 34 COLUM. HUM. RTS. L. REV. 49, 74 (2002).

96. Sean Cassidy & Robert H. Stone, Jr., *Old Right-of-Way, New Pipe: The Right to Enlarge Pipelines and Related Equipment*, 34 ENERGY & MIN. L. FOUND. 573, 576 (2013).

97. *Id.* at 578–79.

98. Cassidy & Stone, *supra* note 96, at 575–78 (2013); C.S. Patrinelis, Annotation, *Correlative Rights of Dominant and Servient Owners in Right of Way for Pipeline*, 28 A.L.R.2d 626, 629 (1953). “A

are easements on another's property.⁹⁹ One of the essential facets to full enjoyment of a pipeline easement is that it is accessible.¹⁰⁰

In contrast, rights-of-way on Indian land are similar to fee simple lands and offer the easement holder more rights compared to rights-of-way on private, non-Indian lands.¹⁰¹ Pipeline operators and utility companies have more rights and better access to the land. Until now, the process of obtaining a right-of-way in Indian Country had been extremely bureaucratic.¹⁰² However, the revised set of regulations minimized the procedural hurdles that historically slowed the processing of right-of-way requests.¹⁰³ The advent of amended federal right-of-way regulations in Indian Country, 25 C.F.R. part 169, streamlined the process and allowed projects to move forward with less delay.¹⁰⁴ Therefore, as the easement holder in Indian Country acquires more rights, the tribe's rights decrease with each grant of a right-of-way easement on tribal lands.¹⁰⁵ Tribes need

right of way for a pipeline acquired by prescription is dependent upon the character and extent of the use established." *Id.* See also *Strahm v. Buckeye Pipe Line Co.*, No. 1-10-60, 2011 WL 915575, at *7, *8 (Ohio Ct. App. Mar. 14, 2011) (denying summary judgment for a defendant claiming the right to clear the area of the easement, including rights-of-way, to maintain its pipeline. The court found that such clearing did not constitute "maintenance" because the defendant was not performing maintenance at the time of the clearing. Moreover, defendant failed to show facts on record proving that clearing the area was necessary to maintain its pipeline.); *Alban v. R.K. Co.*, 239 N.E.2d 22, 24 (Ohio 1968) (holding that a right-of-way grant is an easement of passage granted for useful, proper purposes); *Munchmeyer v. Burfield*, No. 95CA7, 1996 WL 142579, at *3 (Ohio Ct. App. Mar. 26, 1996) (restating the majority rule that in cases where the right-of-way does not describe dimensions, courts will fix dimensions "reasonable to accomplish the purposes of the easement"); *Palmer v. Newman*, 112 S.E. 194, 196-97 (W. Va. 1922) (stating that, "[t]he servient estate cannot be burdened by the occupancy of a greater width than is reasonably necessary for the purposes for which the right of way was intended").

99. Cassidy & Stone, *supra* note 96, at 575-78.

100. *Id.* at 585-86. Without such right, the easement would eventually become useless because leaks, breaks, and other defects would cause loss of the material transported. Pipeline right-of-way grants which are typically unrestricted "often contemplate the grantor's use of the surface for a particular purpose, such as farming, and contain provisions which place restrictions on the grantee's incidental use of the premises." *Id.* at 585.

101. Cassidy & Stone, *supra* note 96, at 578-79.

102. See Rights-of-Way on Indian Land, 79 Fed. Reg. 34,455, 34,455 (proposed Jun. 17, 2014) (to be codified at 25 C.F.R. pt. 169) (proposing changes to 25 USC § 169 in order to streamline and clarify the processes involved in obtaining a right-of-way over Indian land).

103. See Rights-of-Way on Indian Lands, 80 Fed. Reg. 72,492, 72,492 (Nov. 19, 2015) (to be codified at 25 C.F.R. pt. 169) (updating the process for obtaining rights-of-way on Indian land).

104. See *id.* (summarizing the changes made by the new rule).

105. See, e.g., Russel L. Barsh, *Grounded Visions: Native American Conceptions of Landscapes and Ceremony*, 13 ST. THOMAS L. REV. 127, 137-41 (2000) (arguing that existing federal laws offer only limited protection over "individual elements of Native American landscapes," such as history, shared meaning, and indigenous knowledge systems that are embedded in the landscape); Ezekiel J. Williams, *Lands and Natural Resources Survey*, 70 DENV. U. L. REV. 811, 824, 832 (1993) (discussing that the BIA can approve oil and gas leases on tribal land as long as it considers the economic, social, and environmental effects on the tribe, although the economic factors are the most important to the

greater procedural remedies to protect their lands and peoples because of this unusual legal predicament.

The unique legal status of tribes leads to variations in the way agencies administer laws applicable to easements compared to common property law.¹⁰⁶ There is a multifarious statutory and regulatory scheme that controls how an individual obtains an easement across Indian lands.¹⁰⁷ The precise legal status of these easements impacts the tribes' land rights and environmental sovereignty and affects the duties and burdens of the various entities that are easement holders. The Ninth Circuit considered the *Strate* factors in determining that a state highway, another type of easement, was the "equivalent of non-Indian fee land."¹⁰⁸ Todd Miller argues that the holding in *Big Horn* was an attack on tribes' ability to govern due to the adverse impact on tribal taxation, which is crucial to tribal sovereignty.¹⁰⁹ Jessie Owley notes that the federal courts have been hesitant to apply any of the exceptions outlined in *Montana v. United States*.¹¹⁰ In the future, courts are unlikely to extend greater property rights to Native Nations that have

court); Sandra B. Zellmer, *Sustaining Geographies of Hope: Cultural Resources on Public Lands*, 73 U. COLO. L. REV. 413, 414–18 (2002) (arguing that neither the First Amendment nor the Equal Protection Clause necessarily prevent statutory authorities from reasonably accommodating tribal cultural practices in facilitating the interests of American Indian tribes over resources and properties); Martin Nie, *The Use of Co-Management and Protected Land-Use Designations to Protect Tribal Cultural Resources and Reserved Treaty Rights on Federal Lands*, 48 NAT. RESOURCES J. 585, 585–86 (2008) (suggesting that cooperative management arrangement and protected land use designations could protect cultural resources); Sandra B. Zellmer, *The Protection of Cultural Resources on Public Lands: Federal Statutes and Regulations*, 31 ENVTL. L. REP. 10689, 10689–90, 10705 (2001) (assessing the adequacy of federal laws governing the management and protection of American Indian cultural resources in providing grounds for accommodating American Indian cultural interests in public lands).

106. Miller, *supra* note 9, at 105.

107. 25 U.S.C. §§ 323–328 (2012). 25 C.F.R. §§ 169.1–169.28 (2016) (prescribing the procedures, terms, and conditions under which rights-of-way over tribal lands may be granted).

108. *Big Horn Cty. Elec. Coop. v. Adams*, 219 F.3d 944, 950 (9th Cir. 2000) (citing *Strate v. A-1 Contractors*, 520 U.S. 438, 454–56 (1997)). The Montana line of cases includes the following: *Montana v. United States*, 450 U.S. 544, 547, 566–67 (1981) (reversing the Ninth Circuit's decision that the Tribe had authority to prohibit all hunting and fishing by non-Indians within the reservation boundaries); *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 422–23 (1989) (holding that the Yakima Nation no longer retained "exclusive use and benefit" over all the land within the reservation because the disputed land was alienated under the Indian General Allotment Act. As in *Montana*, the Court concluded that the purpose of the allotment policy was to destroy tribal government. Therefore, non-Indians purchasing allotted land do not fall within tribal jurisdiction.); *South Dakota v. Bourland*, 508 U.S. 679, 697 (1993) (holding that the Flood Control Act and the Cheyenne River Act abrogated the Tribe's "absolute and undisturbed use and occupation" of tribal land and deprived the Tribe of its ability to regulate non-Indian use of tribal land).

109. Miller, *supra* note 9, at 106.

110. Jessie Owley, *Tribes as Conservation Easement Holders: Is a Partial Property Interest Better than None?*, in *TRIBES, LAND, AND THE ENVIRONMENT* 181 (Sarah Krakoff & Ezra Rosser eds., 2012).

territory used for the purpose of pipeline infrastructure projects.¹¹¹ Therefore, the onus to protect the tribal land interests rests with Congress and the Executive Branch. Daniel Etsy notes, “how so much development proceeds with so little scrutiny from local environmental authorities or any other level of government.”¹¹² He explains that this paradox comes from conceptualizations of private property as sacred, and that land use restrictions are subject to demanding reviews.¹¹³ Access to mineral rights and preservation of sacred tribal space is an ongoing conflict because of the multiplicity of environmental rights and the amount of energy infrastructure projects.¹¹⁴

During the notice period, several commentators addressed this issue of the conversion of Indian land to fee land with the right-of-way developments.¹¹⁵ They raised these concerns to the Bureau of Indian Affairs (BIA) in the rule-making comment period for 25 C.F.R. part 169, referencing *Strate v. A-1 Contractors*.¹¹⁶ The commentators noted, “when a landowner grants a right-of-way, they reserve no right to the exclusive

111. See Rebecca Tsosie, *The Conflict Between the “Public Trust” and the “Indian Trust” Doctrines: Federal Public Land Policy and Native Nations*, 39 TULSA L. REV. 271, 279–81 (2003) (highlighting the trend in Supreme Court cases lessening the federal government’s fiduciary obligation to native tribes).

112. Daniel C. Esty, *Preface* to NEW GROUND: THE ADVENT OF LOCAL ENVIRONMENTAL LAW xvi (John Nolon ed., 2003).

113. *Id.*

114. See, e.g., Hester, *supra* note 10 (noting various degrees of protection to the environment, cultural and historical resources, and sacred sites); Colby L. Branch, *Accessing Indian Lands for Mineral Development*, 5 ROCKY MTN. MIN. L. INST. 3 (2005) (stating that mineral developers have access and use problems for projects on tribal lands because of the fragmented ownership governed by federal law); Judith V. Royster, *Mineral Development in Indian Country: The Evolution of Tribal Control Over Mineral Resources*, 29 TULSA L.J. 541, 583 (1994) (discussing the government’s curtailment of tribal participation in mineral leases); Stan N. Harris & Carla Mattix, *Sacred Sites and Cultural Resource Protection: Implications for Mineral Development On – and Off – Indian Lands*, 5 ROCKY MTN. MIN. L. INST. 7-1, 7-1 (2005) (discussing selected federal, state, and tribal laws protecting sacred tribal sites that may impact mineral development on and off tribal land); Dean B. Suagee, *Tribal Voices in Historic Preservation: Sacred Landscapes, Cross-Cultural Bridges, and Common Ground*, 21 VT. L. REV. 145, 170–74 (1996) (discussing federal treatment of Indian sacred spaces on federal lands under the National Historic Preservation Act); Lakshman Guruswamy et al., *Protecting the Cultural and Natural Heritage: Finding Common Ground*, 34 TULSA L.J. 713, 744 (1999) (discussing the importance of protecting indigenous peoples’ cultural heritage); Andrew L. Adler & Stephen K. Urice, *Resolving the Disjunction Between Cultural Property Policy and Law: A Call for Reform*, 64 RUTGERS L. REV. 117, 120 (2011) (describing the conflict between archaeologists, collectors, and dealers of cultural property at sacred tribal spaces); Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559, 670–71 (1995) (discussing the variations in legal treatment of cultural property due to conflicts between political groups and cultural groups).

115. Rights-of-Way on Indian Lands, 80 Fed. Reg. 72,492, 72,494 (Nov. 19, 2015) (to be codified at 25 C.F.R. pt. 169).

116. *Id.* (citing *Strate v. A-1 Contractors*, 520 U.S. 438, 456–57 (1997)).

dominion or control over the right-of-way, and the land underlying the right-of-way is removed from tribal jurisdiction.”¹¹⁷ The commentators further argued, “the *Strate* holding means there can be no ‘seamless consistency’ between the right-of-way regulations and leasing regulations, because this precedent treats land subject to a right-of-way differently from leased land.”¹¹⁸ The BIA responded that the ruling in *Strate* was fact-specific, because the federal government and the tribe failed to expressly reserve jurisdiction in the grant of the right-of-way.¹¹⁹ The BIA distinguished the changes in these regulations by stating that the United States, as the grantor, “[preserves] the tribes’ jurisdictions in all right-of-way grants issued under these regulations and [requires] that such grants expressly reserve tribal jurisdiction.”¹²⁰ The BIA either oversimplified the rights issues in Indian lands or overestimated U.S. ability as trustee to protect the Native American’s land rights. The complicated system of treaties between Native Nations and the federal government, and the delicate web of historical title documents, is difficult to navigate in tracing precise title to land, especially for lands in the Western United States. In theory, grants of rights-of-way under these regulations are identical to fee lands, but because of the historical environmental and land transgressions against Native Nations, these regulations undermine an already weak system of Native Nations’ title to Indian lands.

The last time a seismic legislative shift occurred involving energy easements in Indian Country was in the 1980s, when several natural gas pipeline rights-of-way on Indian reservations expired and pipeline companies sought renewals.¹²¹ This marked the first time that the Indian tribes withheld consent for encumbrances and challenged the right-of-way renewals in court.¹²² Because of the uncertainty in federal Indian law, the courts considered the enforceability of a tribe’s refusal to consent to a right-of-way.¹²³ At the time, some argued that if the courts enforced the tribes’ consent requirements, the tribes would effectively hold veto power over

117. *Id.*

118. *Id.*

119. *Id.* The BIA noted, “[t]his lack of reservation of a ‘gatekeeping right’ led the Supreme Court to consider the right-of-way as aligned, for purposes of jurisdiction, with land alienated to non-Indians.” *Id.*

120. *Id.*

121. Montgomery, *supra* note 7, at 222.

122. *Federal Protection of Indian Resources: Hearing Before the Subcomm. on Admin. Practice and Procedure of the Comm. on the Judiciary*, 92d Cong. 1716–18 (1972) (statement of Director, Office of Indian Water Rights).

123. Montgomery, *supra* note 7, at 221.

federal administrative decisions.¹²⁴ However, the Federal Energy Regulatory Commission (FERC) countered that rejecting the tribes' consent requirements would give the agency power to approve the use of Indian lands against the tribes' wishes.¹²⁵

Since the 1980s, court decisions involving the law of right-of-way in Indian Country, particularly in the case of pipeline siting and permitting, have further eroded land rights of Native Nations. This encroachment—at times gradual and other times direct—runs counter to the overarching intent of federal Indian law to protect American Indians and care for Native lands. During the same period, the majority of court decisions made in the 1980s were not in favor of Indian interests.¹²⁶

The law governing energy rights-of-way in Indian Country is unsettled, but these regulations remained the same until the recent update.¹²⁷ The revised regulations create a more streamlined process for obtaining right-of-way grants and allowed for tribal parties to be economic players.¹²⁸ However, the updated regulations also increased hydrocarbon infrastructure projects and caused adverse environmental and public health consequences. Federal law provides for pipeline rights-of-way over public and private lands, including tribal lands.¹²⁹ The rights-of-way for oil and gas pipelines, pumping stations, or tank sites shall not extend beyond a term of 20 years, and may be extended for another period not exceeding 20 years following the procedures set out in 25 C.F.R. § 169.19.¹³⁰ The next subsection

124. *Id.* at 222–23.

125. *Id.* at 223.

126. Eighty percent of cases decided against Indian interests. David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 296 n.116 (2001).

127. Rights-of-Way on Indian Land, 79 Fed. Reg. 34,455, 34,455 (proposed Jun. 17, 2014) (to be codified at 25 C.F.R. pt. 169) (stating the last update for the regulations was in 1980).

128. *See, e.g.*, Michael P. O'Connell, *Fundamentals of Contracting By and With Indian Tribes*, 3 AM. INDIAN L.J. 159, 178–79 (2014) (listing a number of statutes authorizing rights-of-way over tribal land); Lynn H. Slade, *Indian Tribes—Business Partners and Market Participants: Strategies for Effective Tribal/Industry Partnership*, 2011 ROCKY MTN. MIN. L. INST. 3B-20 (2011); (observing that the Department of Interior's regulations expanded the consent requirement to include all Indian tribes, not only those organized under the Indian Reorganization Act); Raymond Cross, *Tribes as Rich Nations*, 79 OR. L. REV. 893, 896 (2000) (stating the importance of tribal self-determination as a source for tribal economic development).

129. 25 U.S.C. § 323 (2012); 25 C.F.R. § 169.3 (2016). “Rights-of-way granted under that act shall be subject to the provisions of this section as well as other pertinent sections of this part 169. Except when otherwise determined by the Secretary, rights-of-way granted for such purposes under the Act of February 5, 1948 (62 Stat. 17; 25 U.S.C. 323–328) shall also be subject to the provisions of this section.” *Id.* § 169.25(a). *See also* Sierra Club v. U.S. Army Corps of Eng'rs, 990 F. Supp. 2d 9, 15 (D.D.C. 2013) (explaining that the BIA has promulgated regulations regarding easements over tribal land that include specific provisions that govern oil and gas pipelines).

130. 25 U.S.C. § 321 (2012).

considers what exactly is considered “Indian Country” for purposes of these right-of-way regulations.

B. Historico-Legal Analysis

Since the 1980s, the Supreme Court has formed a bias against tribal jurisdiction. Gregory Ablavsky believes this bias was “grounded not in text but in problematic readings of history.”¹³¹ This bias against tribal jurisdiction coincided with the rise of hydrocarbon projects on tribal lands in the past 40 years.¹³² In reassessing the problematic interpretations of history, the Dawes Act, or General Allotment Act of 1887, heralded a systematic “process to allow for the large-scale transfer of communally held tribal lands to individual tribal members and outright transfers of so-called ‘surplus lands’ to the federal government.”¹³³

1. The Federal Rules (1887–1980)

a. General Allotment Act of 1887

In vying for land, non-Indians contended that Indians had excess land and were eager to acquire Indian land for settlement and development purposes.¹³⁴ Through the passage of the Dawes Act, the government received 60 million acres of Indian land, either ceded to or purchased “for non-Indian homesteaders and corporations as ‘surplus lands.’”¹³⁵ “Under the [Dawes Act], Indian allottees were declared ‘incompetent’ to handle their land affairs and the United States would retain legal title to the land as trustee for the allottee; Indian allottees only had beneficial or usufruct title.”¹³⁶ An allotment held in trust remains U.S. property in trust for the

131. Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1086 (2015).

132. See Katherine Bagley, *At Standing Rock, A Battle Over Fossil Fuels and Land*, YALE ENV'T 360 (Nov. 10, 2016), http://e360.yale.edu/features/at_standing_rock_battle_over_fossil_fuels_and_land (interviewing Kyle Powys Whyte, an indigenous environmental justice expert, about the impact of energy infrastructure, such as pipelines on Native American tribes throughout history).

133. Robert T. Anderson, *Water Rights, Water Quality, and Regulatory Jurisdiction in Indian Country*, 34 STAN. ENVTL. L.J. 195, 200 (2015) (detailing the Department of Interior’s moratorium on approval of tribal water codes). See also Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 29–30 (1995) (explaining that federal authority supersedes tribal authority).

134. *History of Allotment*, INDIAN LAND TENURE FOUND., <https://www.iltf.org/resources/land-tenure-history/allotment> (last visited May 8, 2017).

135. *Id.*

136. *Id.*

allottee's use and benefit.¹³⁷ With an allotment held in trust, the allottee's rights are not absolute.¹³⁸ However, "[t]he terms of the trust must be construed in favor of the Indians."¹³⁹ The Dawes Act establishes "only a limited trust relationship,"¹⁴⁰ but it "does not constitute an undertaking by the government to manage the land resources of reservations for the optimum economic benefit of the Indians."¹⁴¹

What is critical is that the terms of the trust should be construed in the favor of the Indians. Court decisions do not reflect the intent of these allotment rules.¹⁴² Future litigation challenges to pipeline siting and permitting can emphasize the legislative intent. Even if the rights of the allottee are absolute, the United States still has a trust duty toward the tribes for their optimal economic benefit. Courts should not construe the provision for "economic benefit" to mean rapid development and exploitation of hydrocarbons with limited regard for air, water, soil, and land. Preserving environmental rights and tribal sovereignty also adds tangible economic value to tribal lands and property.

137. 42 C.J.S. *Indians* § 97 (2007). *See also* *Begay v. Albers*, 721 F.2d 1274, 1279 (10th Cir. 1983) (observing that, "[t]he United States holds legal title to the allotted-patented land in trust for the Indians"); *Ahboah v. Hous. Auth. of the Kiowa Tribe of Indians*, 660 P.2d 625, 632–33 (Okla. 1983) (finding that the United States did not intend to delegate authority over trust property to the state, nor did the Oklahoma Legislature intend to grant state agencies such authority); *United States v. S. Pac. Transp. Co.*, 543 F.2d 676, 683 (9th Cir. 1976) (observing that Indian lands are held in trust for the individual Indian to whom the allotment was made).

138. 42 C.J.S. *Indians* § 97 (2007). *See also* *Tooahnippah v. Hickel*, 397 U.S. 598, 609 (1970) (finding that allottees do not have absolute power to make testamentary dispositions).

139. 42 C.J.S. *Indians* § 97 (2007). *See also* *Cty. of Thurston v. Andrus*, 586 F.2d 1212, 1222 (8th Cir. 1978) (concluding that the special historic relationship between the federal government and the Indian tribes requires construction in favor of the Indians when interpreting rights conferred under a trust).

140. *United States v. Mitchell*, 445 U.S. 535, 542 (1980). *See also* 42 C.J.S. *Indians* § 97 (2007) (discussing the effect of the trust relationship).

141. *United States v. Anderson*, 625 F.2d 910, 915 (9th Cir. 1980). *See also* 42 C.J.S. *Indians* § 97 (2007) (discussing the effect of the trust relationship).

142. *See, e.g., DeCoteau v. Dist. Cty. Ct.*, 420 U.S. 425, 445 (1974) (construing an 1891 legislative act to find that the Lake Traverse Reservation was entirely terminated); *Indian Country, U.S.A., Inc. v. Oklahoma*, 829 F.2d 967, 979 (10th Cir. 1987) (reasoning that Congress's promise to protect the Creek from state laws via the Creek Allotment Agreement also preserved federal authority over the Tribe's land); *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997) (holding that tribes do not have jurisdiction over non-Indians unless necessary to ensure that tribal members may be governed by their own laws); *United States v. Navajo Nation*, 537 U.S. 488, 489 (2003) (holding that a tribe's right to compensation for mismanaged resources or tribal lands does not accrue from the general trust relationship between the tribe and the federal government. A tribe must prove that the statute from which the tribe is claiming compensation establishes the right to compensation.); *Oglala Sioux Tribe v. U.S. Army Corps of Eng'rs*, 537 F. Supp. 2d 161, 172 (D.D.C. 2008) (noting that the Tribe does not have a valid trust claim against the Army Corps); *Nance v. Envtl. Prot. Agency*, 645 F.2d 701, 711 (9th Cir. 1981) (holding that the EPA fulfilled its trust duties to the tribe).

b. Rights-of-Way for Pipelines: 25 U.S.C. § 321 (1904)

25 U.S.C. § 321 governs the granting of a right-of-way on tribal lands.¹⁴³ The statute in relevant part states:

The Secretary of the Interior is authorized and empowered to grant a right-of-way in the nature of an easement for the construction, operation, and maintenance of pipe lines for the conveyance of oil and gas through any Indian reservation, through any lands held by an Indian tribe or nation in the former Indian Territory, through any lands reserved for an Indian agency or Indian school, or for other purpose in connection with the Indian Service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation upon the terms and conditions herein expressed.¹⁴⁴

The language here is critical because what constitutes “tribal lands” is far broader than the statutory definition of “Indian Country.” The Department of Interior’s power to grant a right-of-way relates not only to reservation lands, but also to lands that the tribes occupy:

[1] lands held by an Indian tribe or nation in the former Indian Territory; [2] lands reserved for an Indian agency or Indian school, or for other purpose in connection with the Indian Service; or [3] through any lands which have been allotted in severalty to any individual Indian under any law or treaty.¹⁴⁵

This broad grant of power to allocate rights-of-way in 1904 did not consider the intensity of hydrocarbon exploitation and development. The law also granted the Secretary of the Interior the power to extend the right to maintain any pipeline every 20 years.¹⁴⁶ The Act remains the seminal piece of legislation on this topic. Given its scope, the practical result of this Act is the giveaway of tribal land parcels. It is important to consider the inequitable ramifications of this policy.

143. 25 U.S.C. § 321 (2012).

144. *Id.* The “former Indian Territory”, referred to in text, was in the original “Indian Territory,” and has been designated as former Indian Territory by virtue of the admission of such former Territory and the Territory of Oklahoma to the Union as the State of Oklahoma. Act of June 16, 1906, Pub. L. No. 234, 34 Stat. 267.

145. 25 U.S.C. § 321.

146. *Id.*

c. Rights-of-Way Through Public Lands, Indian, and Other Reservations for Power and Communications Facilities: 43 U.S.C. § 961 (1911)

In 1911, 43 U.S.C. § 961 expanded the jurisdiction and scope of the federal right-of-way law in Indian Country.¹⁴⁷ Here, the government is “authorized and empowered” to grant right-of-way easements for up to 50 years:

from the date of the issuance of such grant, over, across, and upon the public lands . . . and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power, and for poles and lines for communication purposes, and for radio, television, and other forms of communication transmitting, relay, and receiving structures and facilities¹⁴⁸

The statute also increased the length and width of the easements to 200 feet on either side (not to exceed 400 feet by 400 feet for transmission lines).¹⁴⁹ The increasing area available for the easement grant reflected the surge of energy and communication infrastructure projects.

d. Regulations 1928–1948

In 1928, the right-of-way regulations in Indian Country were updated to specifically state that easement holders obtain easements at their own risk.¹⁵⁰ In other words, the statute does not protect easement holders from the threat posed by Native Nation members to commercial interests of non-Indian corporations, entities, and individuals. The rules do not account for the dispossession of tribal lands from Native Nations and tribal members.¹⁵¹

The Indian Right of Way Act of 1948 specifically mentions pipelines, which subsequent regulations incorporated.¹⁵² The new “regulations promulgated under § 321 will also apply to pipeline rights-of-way under the

147. 43 U.S.C. § 961 (2012).

148. *Id.*

149. *Id.*

150. *See* DEPT. OF INTERIOR, REGULATION OF THE DEPARTMENT OF THE INTERIOR CONCERNING RIGHTS OF WAY OVER INDIAN LANDS 5 (1929) (providing that the officer in charge may use his discretion to temporarily grant a right-of-way at the applicant’s own risk).

151. *See* 25 U.S.C. § 5138 (2012) (noting that the land always goes back to the United States in trust for the tribe).

152. *See* 25 U.S.C. § 321 (2012) (mentioning pipelines specifically); 25 C.F.R. § 169.25 (2016) (mentioning pipelines specifically).

1948 Act.”¹⁵³ If the tribe consents, individual Indian landholders within a reservation may not interfere with laying pipelines.¹⁵⁴

In 1948, the Ninth Circuit reconciled the 1948 and 1904 Acts.¹⁵⁵ The court read that the two statutes as giving “the Tribe a choice between either the 20-year term under the earlier statute or up to a 50-year term under the latter statute.”¹⁵⁶ The court found it unnecessary to determine under which statute the Department of Interior granted the rights-of-way at issue, even though the 1904 Act specifies a maximum 20-year term.¹⁵⁷

2. Energy Policy Act of 2005

The Energy Policy Act addressed energy production in the United States, including energy efficiency, renewable energy, oil and gas, coal, tribal energy, nuclear matters and security, vehicle fuels (including ethanol, hydrogen, and electricity), energy tax incentives, hydropower and geothermal energy, and climate change technology.¹⁵⁸ Pursuant to the Energy Policy Act of 2005, the DOI and U.S. Department of Energy (DOE) prepared a joint report to Congress on issues associated with grants, expansions, and renewals of energy rights-of-way on tribal lands.¹⁵⁹ The Act defines tribal land as “any land or interests in land owned by any Indian tribe, title to which is held in trust by the United States, or is subject to a restriction against alienation under laws of the United States.”¹⁶⁰ Section 1813(b) required a report to Congress with an analysis of compensation to Indian tribes for grants, expansions, and renewals of energy rights-of-way on tribal land; an analysis of tribal self-determination and sovereignty interests relating to expansion, or renewal of energy rights-of-way on tribal land; and information on national energy transportation policies about these energy rights-of-way.¹⁶¹

The Act encompassed hundreds of tribes as well as a wide variety of energy rights-of-way on tribal lands.¹⁶² As Paul Frye observed, Congress

153. Frye, *supra* note 33, at 84.

154. *See* *Appleton v. Kennedy*, 268 F. Supp. 22, 24 (N.D. Okla. 1967) (holding that the surface owners were permanently enjoined from interfering with the laying of the pipeline).

155. *Blackfeet Indian Tribe v. Mont. Power Co.*, 838 F.2d 1055, 1058 (9th Cir. 1988). *See also* Frye, *supra* note 33, at 84 (discussing the court’s holding in *Blackfeet Indian Tribe*).

156. *Blackfeet Indian Tribe*, 838 F.2d at 1059. *See also* 25 U.S.C. § 321 (allowing extension of right-of-way terms for another 20 years); 25 C.F.R. § 169.25(b) (granting a term of 20 years);

157. *Blackfeet Indian Tribe*, 838 F.2d at 1057.

158. Energy Policy Act of 1992, 42 U.S.C. §§ 13201–13574 (2012).

159. Energy Policy Act of 2005, Pub. L. No. 109-58, § 1813(a)(1), 119 Stat. 1127 (2005).

160. 25 U.S.C. § 3501(12) (2012).

161. Energy Policy Act of 2005, Pub. L. No. 109-59, § 1813(b), 119 Stat. 1127, 1128 (2005).

162. *Id.*

may have required the report out of concern that Indian energy rights-of-way issues might interfere with the interests of consumers or national security.¹⁶³ Meanwhile, native nations, on their own, have been working to address energy problems with their industry partners, thereby contributing to national energy security.¹⁶⁴ In fact, “[t]ribal representatives have been able to show that the amounts paid by energy consumers attributable to Indian energy rights-of-way are wholly insignificant.”¹⁶⁵

3. Rights-of-Way in Indian Country: 25 CFR part 169 (2016)

The rights-of-way regulations for Indian Country were originally issued in 1968 and last revised in 1982.¹⁶⁶ In April 2016, new DOI regulations comprehensively reformed the leasing process for Indian land.¹⁶⁷ This revision specifically impacted oil and gas pipelines as well as electric transmission and distribution lines—energy easements that are essential for transporting natural resources and electricity.¹⁶⁸ What the DOI described as a “supportive response to the leasing regulatory revisions” did not, in fact, account for treaty provisions, indigenous tribal law and customs, and tribal environmental justice considerations.¹⁶⁹ The DOI amended these rules to account for fiber optic cable construction, yet they had a secondary impact on the development of oil and gas pipelines and other energy corridors.

The BIA suggested that the changes to 25 CFR part 169 (2014) did “not constitute a major Federal action significantly affecting the quality of the human environment because these are ‘regulations . . . whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case.’”¹⁷⁰ This statement is technically and legally accurate because NEPA does not apply to the revised regulations on its face. However, without a NEPA review, the revised regulations fail to consider climate change impacts in the totality of

163. Frye, *supra* note 33, at 101.

164. *Id.*

165. *Id.*

166. 25 C.F.R. §§ 169.1–169.28 (2016).

167. *Id.*

168. Rights-of-Way on Indian Land, 79 Fed. Reg. 34,455, 34,459 (June 17, 2014) (to be codified at 25 C.F.R. pt. 169).

169. Rights-of-Way on Indian Lands, 80 Fed. Reg. 72,492, 72,492 (Nov. 19, 2015) (to be codified at 25 C.F.R. pt. 169).

170. Rights-of-Way on Indian Land, 79 Fed. Reg. 34,455, 34,460 (June 17, 2014) (to be codified at 25 C.F.R. pt. 169) (quoting 43 C.F.R. § 46.210(f) (2016)). No extraordinary circumstances exist that would require greater NEPA review.

the rules. The updates to the right-of-way regulations decreased the difficulty in obtaining rights-of-way in Indian Country. Thus, the cumulative effect of these rules will be the creation of more oil and gas pipelines. So, despite President Obama's advocacy for enhanced climate change governance, these rules will lead to more intensive oil and gas development on tribal lands, as well as throughout the U.S, especially in the era of the Trump administration.¹⁷¹

In one sense, these rules are providing increased economic opportunities for financially stressed and economically disadvantaged tribal communities. The revised regulations are not meant to be mitigating factors for project development.¹⁷² Rather, at the core, they are designated to streamline the right-of-way process so that tribes can come to the table as equal partners.¹⁷³

4. NEPA in Indian Country

Further oil and gas development on tribal lands, whether intentional or unintentional, is an inevitable consequence of these revised regulations. Simultaneously, tribal communities with a clear connection to nature will suffer deleterious direct and indirect climate change impacts as a result of these regulations. Even if each separate project is subjected to a separate NEPA examination, it is disingenuous to suggest that these rules would in any way help the tribes achieve the necessary mitigation goals of climate change policy. The lack of regulatory oversight for rulemaking is an inherent failure of NEPA. While other checks exist on the process of these regulations, NEPA, as the mother of environmental regulation, offers

171. EXEC. OFF. OF THE PRESIDENT, THE PRESIDENT'S CLIMATE ACTION PLAN 12–16 (2013), <https://obamawhitehouse.archives.gov/sites/default/files/image/president27sclimateactionplan.pdf>.

172. See Rights-of-Way on Indian Lands, 80 Fed. Reg. 72,492, 72,492 (Nov. 19, 2015) (to be codified at 25 C.F.R. pt. 169) (describing that the general approach for the final rule was to provide uniformity and “allow Indian landowners as much flexibility and control as possible over rights-of-way on their land”).

173. See, e.g., *DAPL War Rages On: “Water Protectors” Arrested as Protests Continue*, RT NEWS (Dec. 30, 2016, 00:45), <https://www.rt.com/usa/372202-arrests-opposition-dapl-council/> (reporting on continuing conflict between Dakota Access Pipeline and Standing Rock Sioux Tribe); Steven Mufson & Brady Dennis, *Obama Administration Cancels Oil and Gas Leases on Blackfoot Tribe's Sacred Grounds*, WASH. POST (Nov. 16, 2016), https://www.washingtonpost.com/news/energy-environment/wp/2016/11/16/obama-administration-reaches-deal-to-cancel-oil-leases-on-lands-tied-to-tribe/?utm_term=.bdd664f19bce (quoting the chairman of the Blackfeet National Tribal Business Council saying “[w]hile we’re not opposed to oil and gas exploration, we are opposed to oil and gas exploration in that area”); James Osborne, *Behind Pipeline Protests, Tension Among Native Americans Over Oil*, HOUS. CHRON. (Sept. 16, 2016), <http://www.houstonchronicle.com/business/article/Behind-pipeline-protests-Native-American-9228077.php> (describing the increasing friction between environmental costs and monetary benefits of oil and gas development on Indian lands).

limited protection to tribal communities in the path of energy development.¹⁷⁴ Although NEPA is applicable in Indian Country, NEPA is either underutilized or underemphasized.¹⁷⁵ Since these communities lack clear environmental protections, large energy projects by multinational oil and gas companies reduce the sovereignty element of tribal self-determination.¹⁷⁶ The federal government here falls short in its role as a fiduciary of the tribes. The U.S. Constitution does not protect the environment. However, Congress has a moral obligation to serve in a fiduciary capacity for the tribes.¹⁷⁷ This fiduciary role would require recognizing the harms tribes suffer due to increased traffic from oil and gas transport and other commercial activities.

Law serves simultaneously as a mechanism for anti-subordination and as a tool for subjugation.¹⁷⁸ Lauralyn Whitt argues that indigenous rights activists use a variety of legal tools and instruments to thwart ongoing colonial processes.¹⁷⁹ While NEPA is applicable in Indian Country, its effectiveness as a legal environmental protection measure is weak compared to its force when similar actions occur on non-Indian lands.¹⁸⁰ Part II.C will consider the intent behind NEPA and its impact statement provision. Part II.D will analyze two recent tribal claims alleging NEPA violations involving pipeline infrastructure projects to show how future

174. See generally Dean B. Suagee, *The Application of the National Environmental Policy Act to "Development" in Indian Country*, 16 AM. INDIAN L. REV. 377, 420–28 (1991) (discussing the limitations of NEPA on Indian lands); Andrea S. Miles, *Tribal Energy Resource Agreements: Tools for Achieving Energy Development and Tribal Self-Sufficiency or an Abdication of Federal Environmental and Trust Responsibilities?*, 30 AM. INDIAN L. REV. 461, 466–67 (2006) (discussing the history of NEPA and Indian lands).

175. *Davis v. Morton*, 469 F.2d 593, 597 (10th Cir. 1972) (holding that NEPA covers projects on Indian lands).

176. See *id.* (finding that all lands of the United States are under NEPA jurisdiction).

177. See *id.* (stating that, “[t]he fact Indian lands are held in trust does not take it out of NEPA’s jurisdiction”).

178. Joanne Barker, *For Whom Sovereignty Matters*, in *SOVEREIGNTY MATTERS: LOCATIONS OF CONTESTATION AND POSSIBILITY IN INDIGENOUS STRUGGLES FOR SELF-DETERMINATION* 1, 26 (Joanne Barker ed., 2005).

179. LAURELYN WHITT, *SCIENCE, COLONIALISM, AND INDIGENOUS PEOPLE: THE CULTURAL POLITICS OF LAW AND KNOWLEDGE* 178–79 (2009). Whitt demonstrates how the pursuit of knowledge of the natural world impacts, and is impacted by, indigenous peoples rather than nation-states. In what she refers to as “extractive biocolonialism,” the valued genetic resources and associated agricultural and medicinal knowledge of indigenous peoples are sought, legally converted into private intellectual property, transformed into commodities, and then placed for sale in genetic marketplaces. Her study of private intellectual property crosscuts private easement rights on tribal lands. Indigenous and Western knowledge systems interact to shape the dynamics of power, the politics of property, and the apologetics of law. *Id.*

180. See BUREAU OF INDIAN AFFAIRS, *INDIAN AFFAIRS NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) GUIDEBOOK* 6 (2012) (describing the BIA role in the NEPA process on Indian lands).

challenges on the basis of environmental law procedural grounds could be strengthened.

Incidentally, the most important environmental justice concern in Indian Country for the last three decades has been environmental programs to regulate non-Indian facilities on tribal and privately owned lands.¹⁸¹ A flurry of court decisions show “an unprincipled and unpredictable trend of restricting exercises of tribal sovereignty that affect non-Indian Americans within tribal territories in a variety of non-environmental cases.”¹⁸² The concern has been for Native Nations to maintain a level of sovereignty and preserve their land and cultural values associated with the land.¹⁸³ This meshing of environmental and property rights in Indian Country is unique because of the sacredness of nature to indigenous peoples. As such, tribal claims alleging NEPA violations can take advantage of the procedural remedies available.¹⁸⁴ While state procedural remedies may be successful, the federal government—as a trustee of tribal lands—has an explicit duty to protect native environments that state governments do not.¹⁸⁵

C. Contextualizing Environmental Impact Statements

NEPA went into effect January 1, 1970, and had a broad set of statutory goals.¹⁸⁶ With NEPA, Congress’s goals were:

To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; [and] to enrich the understanding of the ecological systems and natural resources important to the Nation¹⁸⁷

NEPA articulates a national policy “to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations

181. Grijalva, *supra* note 11, at 25.

182. *Id.* at 27 (citing David H. Getches, *Conquering The Cultural Frontier: The New Subjectivism of the Supreme Court of Indian Law*, 84 CAL. L. REV. 1573 (1996)).

183. Montgomery, *supra* note 7, at 198.

184. See Administrative Procedures Act, 5 U.S.C. § 706 (2012) (setting forth the standards of judicial review for agency actions meant to comply with a corresponding statute).

185. See *Coast Indian Cmty. v. United States*, 550 F.2d 639, 652–53 (Cl. Ct. 1977) (discussing the federal government’s duty as trustee).

186. National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (2012).

187. *Id.*

of Americans.”¹⁸⁸ Its intent is to promote “the understanding of the ecological systems and natural resources important to the United States.”¹⁸⁹

NEPA’s requirements for the Environmental Impact Statement (EIS) do not specifically mention the issues of climate change, global warming, and/or greenhouse gas emissions (GHGs).¹⁹⁰ Yet, both state and federal courts are beginning to scrutinize the EIS more closely in this regard.¹⁹¹ This Article, *inter alia*, looks at how issues of climate change, global warming, and GHGs can be factored into energy-siting projects in Indian Country and other lands over which tribes still have rights.

NEPA does not consider environmental impacts beyond the U.S. border,¹⁹² and NEPA’s equation for impact assessments does not consider global climate or population impacts. The statutory focus of NEPA also creates controversy over whether NEPA applies procedurally or substantively. Mason Baker explains that some, in applying NEPA, take into account the substantive meaning behind NEPA’s provisions. Others only consider the procedural components of NEPA, which require all agencies to “utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on [the] environment.”¹⁹³

Despite the lack of a private right of action, attorneys have been able to address environmental concerns through the NEPA process, through other executive and legislative action, media attention, grassroots organizations, and (occasionally) in the courts.¹⁹⁴ Several courts have recently concluded that agencies must analyze the effects of GHG emissions and global climate change in their reviews of environmental impacts.¹⁹⁵ The Environmental Protection Agency (EPA) “recognizes tribal sovereignty and encourages tribal participation, if not complete management, of delegable

188. *Id.* § 4331(a).

189. *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 756 (2004) (internal quotations omitted) (quoting 42 U.S.C. § 4321).

190. *See* 42 U.S.C. §§ 4332 (noting the absence of language referring to climate change, global warming, or greenhouse gases).

191. *See e.g.*, *San Diego Navy Broadway Complex Coal. v. U.S. Dep’t. of Def.*, 904 F. Supp. 2d 1056, 1061 (S.D. Cal. 2012) (taking climate change into consideration for the NEPA EIS requirements).

192. 42 U.S.C. §§ 4332 (showing the absence of language requiring agencies to consider international environmental impacts).

193. *See id.* § 4332(a) (showing no consideration of global environmental impacts).

194. Stephen M. Johnson, *NEPA and SEPA’s in the Quest for Environmental Justice*, 30 *LOY. L.A. L. REV.* 565, 571 (1997).

195. *See e.g.*, *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1198–1203 (9th Cir. 2008) (discussing NHTSA’s failure to consider the monetary benefits of carbon emission reduction, and holding that the decision was arbitrary and capricious).

environmental programs.”¹⁹⁶ At the same time, Indian tribes have sought recognition of their tribal governments to protect environmental quality.¹⁹⁷ This divide between the courts and the EPA is evident in pipeline-siting cases on tribal lands. While federal law and policy would be the natural choice for exercising and protecting tribal environmental and property rights, national law and policy is not always the most effective mechanism for doing so. The risks inherent in national, interstate, and international cross-border energy projects reduces the efficacy of federal law and policy. These laws are devised to protect individual and community rights, but they are also created to promote and encourage investment. In balancing and reconciling competing property rights and obligations, economic interests of powerful utility providers, pipeline operators, and energy companies are rarely subordinate to the interests and concerns of Native Nations.¹⁹⁸

196. Heather J. Tanana & John C. Ruple, *Energy Development in Indian Country: Working Within the Realm of Indian Law and Moving Towards Collaboration*, 32 UTAH ENVTL. L. REV. 1, 23 (2012). Tanana and Ruple note:

The EPA has supported its policy by emphasizing the unique connection between tribes and their land. Indian tribes, for whom human welfare is tied closely to the land, see protection of the reservation environment as essential to preservation of the reservations themselves. Environmental degradation is viewed as a form of further destruction of the remaining reservation land base, and pollution prevention is viewed as an act of tribal self-preservation that cannot be entrusted to others.

Id. at 24 (quoting ENVTL. PROT. AGENCY, FEDERAL, TRIBAL, AND STATE ROLES IN THE PROTECTION AND REGULATION OF RESERVATION ENVIRONMENTS I (July 10, 1991)). See also Judith V. Royster & Rory SnowArrow Fausett, *Control of the Reservation Environment: Tribal Primacy, Federal Delegation and the Limits of State Intrusion*, 64 WASH. L. REV. 581, 645–67 (1989) (summarizing the Supreme Court’s “fundamental ‘traditional notions’ of tribal sovereignty relevant to . . . pollution control”); Roger Romulus Martella, Jr., “Not In My State’s Indian Reservation”—*A Legislative Fix to Close an Environmental Law Loophole*, 47 VAND. L. REV. 1863, 1872 (1994) (emphasizing that a balance must be struck between upholding tribal sovereignty and ensuring environmental protection); Daniel I.S.J. Rey-Bear, *The Flathead Water Quality Standards Dispute: Legal Bases for Tribal Regulatory Authority Over Non-Indian Reservation Lands*, 20 AM. INDIAN L. REV. 151, 204 (1996) (analyzing jurisdiction disputes between federal, tribal, and state environmental authorities); Richard A. Du Bey et al., *Protection of the Reservation Environment: Hazardous Waste Management on Indian Land*, 18 ENVTL. L. 449, 487 (1988) (discussing the EPA’s policy for implementing environmental programs on Indian land. The EPA recognizes tribes’ “fundamental legal jurisdiction” to regulate pollution sources on the reservation.); Jennifer Smith Haner, *Tribal Solutions to On-Reservation Environmental Offenses: Jurisdictional Parameters, Cultural Considerations, and Recommendations*, 19 AM. INDIAN L. REV. 105, 114, 130 (1994) (pointing to the 1984 EPA Indian policy in which the EPA calls for federal restraint and encourages tribes to take responsibility for enforcing environmental regulation on their lands).

197. Tanana & Ruple, *supra* note 196, at 24.

198. See, e.g., Bradford D. Cooley, *The Navajo Uranium Ban: Tribal Sovereignty v. National Energy Demands*, 26 J. LAND RESOURCES & ENVTL. L. 393, 393–97 (2006) (discussing the competing interests of the Navajo nation and the federal government in the uranium mining in Navajo country); Associated Press, *Judge Rejects Tribes’ Request to Halt Dakota Access Pipeline Construction*, CHI.

D. Tribal Environmental Challenges

The ongoing alliance between the environmental movement and American Indians is demonstrated in the indigenous struggle to halt the Keystone XL pipeline project. The pipeline would transport crude oil from environmentally sensitive areas of Canadian tar sands across potentially culturally and ecologically sensitive areas in the United States. Since 2008, pipeline proponents have been lobbying to expand the Keystone XL pipeline by more than 1,700 new miles.¹⁹⁹

The breakthrough Nebraska case of *Thompson v. Heineman*, involving non-Indian ranchers, looked at the constitutionality of the approval process for the Nebraska leg of the Keystone XL pipeline.²⁰⁰ The case highlighted the difficulty that Indian plaintiffs would encounter in bringing constitutional, property rights, and environmental claims.²⁰¹ This disparity in access to the courts raises concerns about the effectiveness of NEPA as a litigation strategy for the tribes. Would the state courts be better equipped to protect tribal environmental sovereignty than the federal courts? Why is the federal government weaker in protecting tribal lands and environment? In *Thompson v. Heineman*, the Nebraska Supreme Court held that a Nebraska law passed in 2012, which expedited the approval process for a new controversial Keystone XL pipeline route through the State, was unconstitutional.²⁰² Article IV, § 20 of the Nebraska Constitution authorizes the Nebraska Public Service Commission (PSC) exclusive regulatory control over common carriers.²⁰³ The Court stated that oil pipeline carriers subject to LB 1161 are common carriers, and that the PSC's constitutionally enumerated powers include the ability to evaluate and approve an oil pipeline route through Nebraska.²⁰⁴ LB 1161 temporarily or permanently divested the PSC of control over oil pipeline routes subject to the Act. Further, LB 1161 vested regulatory control over common carriers in the

TRIB. (Feb. 13, 2017, 2:26 PM), <http://www.chicagotribune.com/news/nationworld/ct-judge-dakota-access-pipeline-work-20170213-story.html> (reporting that a federal judge denied a request for a temporary injunction amidst tribes' claims that affected water is important to the tribes' tradition); Joe Heim, *Native American Tribes Sense a Reawakening in Fight Over Oil Pipeline*, CHI. TRIB. (Sept. 8, 2016, 11:21 PM), <http://www.chicagotribune.com/news/nationworld/ct-native-american-tribes-oil-pipeline-20160908-story.html> (reporting a tribe's claim that the government broke treaties with tribes "whenever economic interests outweighed tribal rights").

199. Brianna Lee, *Keystone XL Pipeline*, PBS (last updated Jan. 18, 2012), <http://www.pbs.org/wnet/need-to-know/five-things/the-keystone-xl-pipeline/12200/>.

200. *Thompson v. Heineman*, 857 N.W.2d 731, 740 (Neb. 2015).

201. *Id.* at 745.

202. *Id.* at 746.

203. NEB. CONST. art. IV, § 20.

204. *Thompson*, 857 N.W.2d at 746.

Nebraska Department of Environmental Quality and the Governor, not in the legislature. As a result, the Court held that LB 1161 clearly violates Article IV, § 20, and was therefore unconstitutional.²⁰⁵

The industry lobbyists in favor of the Keystone XL Pipeline had greater resources than the opposition.²⁰⁶ The original Keystone pipeline operated by TransCanada Corp. runs from Hardisty, Alberta, Canada to Wood Park and Patoka, Illinois; Steele City, Nebraska; and Cushing, Oklahoma.²⁰⁷ The updated Keystone XL Pipeline would consist of 1,700 new miles of pipeline.²⁰⁸ Nebraska cattle buyer Randy Thompson led dozens of landowners in rejecting leases for the pipeline expansion project in *Thompson v. Heineman*.²⁰⁹ President Obama vetoed the bill for the Keystone XL Pipeline and later denied the presidential permit, but the Trump administration reversed course and approved the pipeline permit.²¹⁰ In fact, neither President Obama's earlier veto nor the Nebraska case would have caused pipeline projects to wane. Instead, hydrocarbon construction projects will continue to expand. Because of the new right-of-way regulations in Indian Country and changes in federal leadership, those energy projects will cross tribal lands. Balancing NEPA oversight and environmental due process will be one way to protect native lands from environmental degradation due to pipeline projects, notwithstanding the inherent weaknesses of NEPA.

Prior to *Thompson*, American Indians put forward the first major legal challenge to the initial Keystone pipeline by suing the U.S. Department of State in *Sisseton-Wahpeton Oyate v. U.S. Department of State and TransCanada Pipeline*. In 2009, the U.S. District Court of South Dakota

205. *Id.* Prior to reaching the merits, the Court held that plaintiffs established taxpayer standing to bring a constitutional challenge to the law, and that their claims were not rendered moot on January 22, 2013, when the Governor approved the Keystone XL route through the state. *Id.* at 745–46.

206. Colby Itkowitz, *Lopsided Lobbying on Keystone Pipeline*, WASH. POST (July 11, 2014), <https://www.washingtonpost.com/blogs/in-the-loop/wp/2014/07/11/lopsided-lobbying-on-keystone-pipeline/>.

207. *Keystone XL Pipeline*, CTR. FOR CLIMATE & ENERGY SOLS., <http://www.c2es.org/energy/source/oil/keystone> (last visited May 8, 2017).

208. *What Is the Keystone XL Pipeline?*, NPR: STATEIMPACT, <https://stateimpact.npr.org/texas/tag/keystone-xl-pipeline/> (last visited May 8, 2017).

209. Leslie Kaufman, *For the Keystone Battle, a Folk Hero*, N.Y. TIMES (Oct. 18, 2011, 3:10 PM), https://green.blogs.nytimes.com/2011/10/18/for-the-keystone-battle-a-folk-hero/?_r=1. Thompson received the land from his mother, who had deeded him 400 acres of farmland in Martell, Nebraska before she died last summer. *Id.*

210. Gregory Korte, *Obama: Keystone Pipeline Bill 'Has Earned my Veto'*, USA TODAY (Feb. 25, 2015, 8:03 AM), <http://www.usatoday.com/story/news/politics/2015/02/24/obama-keystone-veto/23879735/>. Fred Jauss, *Despite Trump Approval, Keystone Pipeline Still Has Hurdles to Cross*, THE HILL, Mar. 27, 2017, <http://thehill.com/blogs/pundits-blog/energy-environment/326015-despite-trump-approval-keystone-still-has-hurdles-to>

dismissed the case in the early stages.²¹¹ Yet, this South Dakota case, brought by Nebraska and South Dakota tribes, is worth reconsidering. *Sisseton-Wahpeton Oyate* can serve as the basis for Indian plaintiffs to challenge future energy-siting projects. In 2015, the Yankton Sioux Tribe requested dismissal of TransCanada's prior application to certify its existing construction, arguing that conditions of the original permit have changed enough to require recertification.²¹² If the South Dakota Public Utilities Commission had granted the Yankton Sioux Tribe's request for recertification, the pipeline operator, TransCanada, would have had to seek a new permit in the South Dakota leg of the Keystone XL Pipeline. Instead, the South Dakota Public Utilities Commission decided that TransCanada would be able to meet the conditions of the original permit granted in 2010, and rejected the recertification claim.²¹³ "American Indians have unique vulnerabilities to the impacts of climate change impacts because of the links among ecosystems, cultural practices, and public health, but also as a result of limited resources available to address infrastructure needs."²¹⁴

211. *Sisseton-Wahpeton Oyate v. U.S. Dep't of State*, 659 F. Supp. 2d 1071, 1083 (D.S.D. 2009).

212.

Under [South Dakota] state law, any project that has not been started within four years of its original permit being granted must seek certification from the commission The Yankton Sioux Tribe argues that the conditions in the original permit have changed enough to get it tossed out. Among the differences between the permit's initial granting in 2010 and the current version is that the pipeline, originally slated to carry crude from the Alberta oil sands, has been expanded to include oil from the Bakken formation under western North Dakota

Yankton Sioux Lead Fight Against TransCanada and Keystone XL in South Dakota, INDIAN COUNTRY MEDIA NETWORK (Jan. 5, 2015), <http://indiancountrytodaymedianetwork.com/2015/01/05/yankton-sioux-lead-fight-against-transcanada-and-keystone-xl-south-dakota-158562>.

213. *South Dakota PUC Certifies Keystone XL Construction Permit*, S.D. PUB. UTILITIES COMM'N (Jan. 5, 2016), <https://puc.sd.gov/News/2016/01052016.aspx>.

214. John T. Doyle et al., *Exploring Effects of Climate Change on Northern Plains American Indian Health*, in CLIMATE CHANGE AND INDIGENOUS PEOPLES IN THE UNITED STATES: IMPACTS, EXPERIENCES AND ACTIONS 135, 135–36 (Julie Koppel Maldonado et al. eds., 2013). For example,

[o]n the Crow Reservation in south-central Montana, a Northern Plains American Indian Reservation, there are community concerns about the consequences of climate change impacts for community health and local ecosystems. Observations made by Tribal Elders about decreasing annual snowfall and milder winter temperatures over the 20th century initiated an investigation of local climate and hydrologic data by the Tribal College. The resulting analysis of meteorological data confirmed the decline in annual snowfall and an increase in frost free days. In addition, the data show a shift in precipitation from winter to early spring. . . . Streamflow data showed a long-term trend of declining discharge. Elders noted that the changes are affecting fish distribution within local streams and plant species which provide subsistence foods. Concerns about warmer summer

Tribes have brought forth NEPA claims, tied to National Historic Preservation Act (NHPA) and Administrative Procedure Act (APA) issues, to contest pipeline permitting applications.²¹⁵ While a NEPA claim may appear as an ideal litigation strategy, the courts have not viewed such claims favorably.²¹⁶ Judicial interpretation of NEPA's language has prevented tribes from obtaining a remedy through the statute. The failure of tribal NEPA claims based on judicial precedent stems from the difficulty in assessing environmental harm. Environmental damages are vastly more intricate than monetary damages arising from claims for a contractual breach in a construction contract or failure to perform under a services contract. Environmental damages are multifaceted because of complex economic, social, cultural, and ecological variables. N.B. Dennis notes that, "most environmental conflicts are non-linear, characterized by multiple 'tracks' and multiple 'trains' (multiple stakeholders, resources, agency mandates and programs, spatial and temporal scales, approaches, objectives, and values)."²¹⁷ Environmentalists assess environmental damages based on "loss of intrinsic biodiversity values and future options," whereas "land developers would assess damages in the currency of land costs and costs associated with unpredictability and delay, and public officials would equate losses with tax revenues and jobs."²¹⁸

Sections 101(b) and 102(c) of NEPA lay the groundwork for NEPA's intent. NEPA fails to confront issues of sustainability directly, even though it lays out essential policy concerns.²¹⁹ What can be construed as a

temperatures also include heat exposure during outdoor ceremonies that involve days of fasting without food or water. Additional community concerns about the effects of climate change include increasing flood frequency and fire severity, as well as declining water quality.

Id.

215. *Sisseton-Wahpeton Oyate*, 659 F. Supp. 2d at 1079 (holding that NEPA did not create a private right of action for the tribe to contest construction of an oil pipeline); *Standing Rock Sioux Tribe v. Army Corps of Eng'rs*, No. 16-1534 (JEB), 2016 WL 4734356, at *1 (D.D.C. Sept. 9, 2016) (detailing the Standing Rock Sioux Tribe's suit against the Army Corps of Engineers for alleged violations of NEPA and NHPA); *Protect Our Cmty's. Found. v. Chu*, No. 12CV3062, 2014 WL 1289444, at *4 (S.D. Cal. Mar. 27, 2014) (finding that the DOE ignored an EIS when it approved the permit, thus violating the APA).

216. *Id.* See also *Grazing Dist. v. Secretary of U.S. Dept. of Agric.*, 266 F.3d 889, 889 (8th Cir. 2001) (holding that an agency's failure to consider factors under NEPA does not automatically satisfy standing requirements); *White Earth Nation v. Kerry*, No.14-CV-4726, 2015 WL 8483278, at *6 (D. Minn. Dec. 9, 2015) (explaining that the NEPA claim must fail because it is not final agency action).

217. N.B. Dennis, *What is an "Ecological Train Wrecks?" The Meaning of the Metaphor*, in ENVIRONMENTAL POLICY AND NEPA: PAST, PRESENT, AND FUTURE 141, 141 (Ray Clark & Larry Canter eds., 1997).

218. *Id.*

219. *Id.* at 156.

weakness in NEPA for environmental issues, particularly tribal concerns, can also be viewed as a strength. NEPA is effective because of its nuances. The three different interpretations of NEPA understand it from the perspective of a moral force and market regulator, as well as a way to mitigate the tensions inherent between economic development and environmental protection.²²⁰ This next subsection will analyze the cases of *Sisseton-Wahpeton Oyate v. U.S. Department of State (Sisseton-Wahpeton)*,²²¹ *White Earth Nation et al. v. U.S. Department of State (White Earth)*,²²² and the Dakota Access Pipeline.²²³

1. *Sisseton-Wahpeton Oyate* and Strengthening the Tribal Trust Claim

In *Sisseton-Wahpeton*, the U.S. District Court of South Dakota dismissed the tribal claims of NEPA, NHPA, APA, and treaty/trust provisions. The court stated:

Even if the most egregious violations of the NHPA and NEPA have occurred, which they have not, plaintiffs are asking the court to direct the Department to “suspend and/or revoke the Presidential Permit.” However, if the court were to do so, the President would still be free to issue the permit again under his inherent Constitutional authority to conduct foreign policy on behalf of the nation.²²⁴

The court emphasized the congressional intent of NEPA,²²⁵ which required “the federal government ‘use all practical means, consistent with other essential considerations of national policy [to] preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of

220. Mark Sagoff, *NEPA: Ethics, Economics, and Science in Environmental Law*, in *LAW OF ENVIRONMENTAL PROTECTION* 821, 822, 841–43, 851–52 (Scott E. Schang et al. eds., 2016).

221. *Sisseton-Wahpeton Oyate v. U.S. Dep’t of State*, 659 F. Supp. 2d 1071 (D.S.D. 2009).

222. *White Earth Nation v. Kerry*, No. 14-4726-(MJD/LIB), 2015 WL 8483278, at *1 (D. Minn. Dec. 9, 2015).

223. See, e.g., Healy, *supra* note 5 (describing the Dakota Access project); Samantha L. Varsalona, *Pipelines, Protests and General Permits*, *GEO. ENVTL. L. REV.* (Oct. 28, 2016), <https://gelr.org/2016/10/28/pipelines-protests-and-general-permits/> (examining Nationwide Permit 12, the underlying permit at issue in the Dakota Access controversy).

224. *Sisseton-Wahpeton Oyate*, 659 F. Supp. 2d at 1078 (referring to the National Historic Preservation Act of 1966 and the National Environmental Policy Act of 1969).

225. *Id.* at 1079 (stating that “Congress’ purpose . . . was, *inter alia*, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.”) (internal quotation omitted).

individual choice.”²²⁶ The court, relying on *Central South Dakota Co-op. Grazing District v. Secretary of the U.S. Dept. of Agriculture*, decided that NEPA did not give rise to a private right of action on its own.²²⁷ The court suggested that a NEPA challenge would have to be tied to an APA claim.²²⁸ The court then turned toward congressional intent in the enactment of NHPA, finding that, “the spirit and direction of the Nation are founded upon and reflected in its historic heritage.”²²⁹

Sisseton-Wahpeton Oyate cited the sole-organ doctrine in deciphering that no proper challenge lies through the APA and NEPA, since the permit was not an agency action.²³⁰ But in *Sierra Club v. Clinton*, the court rendered its opinion without any discussion of foreign relations law that NEPA applies via the APA to the State Department’s permitting decision—particularly given that the Department had, in fact, prepared an environmental impact statement.²³¹ Jean Galbraith and David Zaring considered these opinions in discussing soft law as foreign relations law, and noted the strains between NEPA and executive power.²³² “In analyzing these various opinions, a report prepared by the Congressional Research Service suggested that the executive branch could choose whether or not to make itself subject to NEPA based on whether or not it chose to conduct a NEPA review, at least for cross-border projects.”²³³ Because tribal lands are considered foreign and subject to different requirements from run-of-the-mill projects located on non-tribal U.S. lands, projects on tribal lands are similar to cross-border projects. These projects, specifically pipeline projects, should be subject to the same environmental scrutiny of cross-border projects, but without the imposition of the executive power to determine whether or not NEPA applies. As arms of the executive branch, the EPA and BIA should more carefully consider the adverse climate change impacts of pipeline permitting on tribal lands, as well as the encroachment of pipeline projects on tribal property rights.

226. *Id.* (quoting 42 U.S.C. § 4331(b)(2012)).

227. *Sisseton-Wahpeton Oyate*, 659 F. Supp. 2d at 1079. *See also* Cent. S.D. Coop. Grazing Dist. v. Secretary of U.S. Dept. of Agric., 266 F.3d 889, 894 (8th Cir. 2001) (finding that NEPA does not provide for a private right of action, but the APA does).

228. *Sisseton-Wahpeton Oyate*, 659 F. Supp. 2d at 1079.

229. *Id.* (quoting 16 U.S.C. § 470(b)(1) (2012)).

230. *Sisseton-Wahpeton Oyate*, 659 F. Supp. 2d at 1082. *See also* Nat. Res. Def. Council v. U.S. Dep’t of State, 658 F. Supp. 2d 105, 112–13 (D.D.C. 2009) (reaching a similar conclusion).

231. *Sierra Club v. Clinton*, 689 F. Supp. 2d 1147, 1157 (D. Minn. 2010).

232. Jean Galbraith & David Zaring, *Soft Law as Foreign Relations Law*, 99 CORNELL L. REV. 735, 770 (2014).

233. *Id.* at 770 n.173.

In *Sisseton-Wahpeton Oyate*, the proposed pipeline would be situated near land reestablished to the public domain.²³⁴ The court noted that in ceding land back to the United States, the Tribe relinquished land use rights and could no longer regulate the land use by non-Indians.²³⁵ The court reasoned that the plaintiffs had to “identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties.”²³⁶ The court indicated that the plaintiffs did not establish a valid trust claim,²³⁷ but the court emphasized that the decision still did not offer “the defendants a free pass to ‘do-as-they-please.’”²³⁸

2. *White Earth Nation v. Kerry*

White Earth Nation is a federally recognized Indian tribe in Northwestern Minnesota, established through the 1867 Treaty between the U.S. government and the Mississippi Band of Ojibwe.²³⁹ Tribal members have historically had rights to hunt, fish, gather, etc.²⁴⁰ In *White Earth Nation v. Kerry*, the tribe and other groups and organizations (including Honor the Earth, Indigenous Environmental Network, Minnesota Conservation Foundation, MN350, Center for Biological Diversity, Sierra

234. *Sisseton-Wahpeton Oyate*, 659 F. Supp. 2d at 1083 (citing *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 587–88 (1977)). See also *Oglala Sioux Tribe of the Pine Ridge Indian Reservation v. United States*, 21 Cl. Ct. 176, 179 (1990) (noting that the tribe ceded lands to the public); *Oglala Sioux Tribe v. U.S. Army Corps of Eng’rs*, 537 F. Supp. 2d 161, 171 (D.D.C. 2008) (noting that Congress authorized diminution of tribal lands); *DeCoteau v. Dist. Cty. Court for the Tenth Judicial District*, 420 U.S. 425, 427–28 (1975) (finding jurisdiction over members of the Sisseton-Wahpeton Tribe on lands that had reverted to the public domain).

235. *Sisseton-Wahpeton Oyate*, 659 F. Supp. 2d at 1083 (quoting *South Dakota v. Bourland*, 508 U.S. 679, 688 (1993)).

236. *Id.* (quoting *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003)).

237. *Id.* (dismissing Sisseton under FED. R. CIV. P. 12(b)(6)).

238. *Id.* The court indicated that,

[t]hey will, of course, still be subjected to the rigorous federal environmental and historical preservation laws throughout the construction and operation phases of the proposed pipeline. In this case, however, the court lacks the authority to strike down the issuance of the permit. Alternatively, if the court did have such power, I find that a good faith effort was made to identify historic properties that may be affected by this project. Even with the granting of the permit, North Dakota and South Dakota have and are exercising considerable state regulation of the construction and operation of the pipeline.

Id.

239. *White Earth Natural Resources Department*, WHITE EARTH NATION, http://www.whiteearth.com/programs@program_id=8.html (last visited May 8, 2017).

240. Complaint for Declaratory and Injunctive Relief at 4, *White Earth Nation v. Kerry*, 2015 WL 8483278 (D. Minn. Nov. 11, 2014) (No. 0:14-cv-4726-MJD-LI), 2014 WL 5844158.

Club, and National Wildlife Federation) argued that the State Department's authorization of the Enbridge Pipeline and the Bypass Project in the absence of a NEPA review violated NEPA's fundamental requirement to "look before you leap."²⁴¹ The plaintiffs contended that the State Department violated NEPA by allowing and authorizing Enbridge to proceed with its Line 67 Expansion Project prior to the completion of the ongoing NEPA review.²⁴²

The tribe and groups brought the action on behalf of their members

who live, work, and recreate in areas that will be affected by climate, air and/or water pollution from the New Pipeline, its facilities, and refineries processing oil transported by the New Pipeline, and by the deleterious impacts of increased emissions of greenhouse gases resulting from the refining and end-use of tar sands crude [and the concern for] increased risk of harm to their health, recreational, economic, and aesthetic interests as a result of the State Department's decision to allow a project with significant environmental impacts to proceed without fully analyzing and considering those impacts.²⁴³

The complaint put forth that "[t]he State Department's failure to provide required information and analyze and/or mitigate reasonably foreseeable direct, indirect, and cumulative impacts" of the project deprived the tribes of "their right to participate fully in the process leading to the issuance of the Presidential Permit."²⁴⁴ The lawsuit alleged that "[p]laintiffs' members use and enjoy areas that may be adversely affected by the New Pipeline for fishing, hunting, camping, photography, and for engaging in other environmental, vocational, scientific, educational, religious, cultural, aesthetic, and recreational activities."²⁴⁵ The proposed route for the New Pipeline would crisscross land near the 1855 Treaty Territory, where the tribes have rights to hunt, fish, gather, and engage in spiritual and cultural practices.²⁴⁶ These lands also include spiritually and culturally significant native plant and animal species, along with historic sites.²⁴⁷ Plaintiffs note in their complaint,

241. *Id.* at 2.

242. *Id.*

243. *Id.* at 6.

244. *Id.*

245. *Id.* at 7.

246. *Id.*

247. *Id.*

[b]oth Enbridge and the State Department consider[ed] this throughput increase a change in the operation of Line 67 at the U.S.-Canada border that requires an amended Presidential Permit. The State Department has acknowledged that the environmental impacts from the throughput increase are significant and were not considered in its earlier Final Environmental Impact Statement for Line 67 (“FEIS”). Therefore, the State Department has determined that in order to comply with NEPA it must first complete a Supplemental Environmental Impact Statement (“SEIS”) before authorizing the Line 67 Expansion Project.²⁴⁸

The U.S. Department of State, FERC, and DOE use their own interpretations when making decisions about directives in executive orders.²⁴⁹ Executive orders require the agency to “[g]ather necessary project-specific information from the applicant; [s]eek input from specific outside federal agencies; and [d]ecide whether to seek input from additional local, state, tribal, or federal agencies or from members of the public.”²⁵⁰ A Presidential Permit is issued if “the agency determines that the project would ‘serve the national interest’ (pursuant to E.O. 13337) or be ‘consistent with the public interest’ (pursuant to E.O. 10485).”²⁵¹

The lawsuit alleged that members of the represented groups

face increased risk of harm to their health, recreational, economic, and aesthetic interests as a result of the State Department’s decision to allow a project with significant environmental impacts to proceed without fully analyzing and considering those impacts.²⁵²

The case against Enbridge turned on whether judicial review was available in the State Department’s actions.²⁵³ The Minnesota District Court found that “the State Department’s actions in this case are Presidential in

248. *Id.* at 15.

249. LINDA LUTHER & PAUL W. PARFOMAK, CONGRESS. RES. SERV., PRESIDENTIAL PERMIT REVIEW FOR CROSS-BORDER PIPELINES AND ELECTRIC TRANSMISSION 2 (2015), <https://www.fas.org/sgp/crs/misc/R44140.pdf>.

250. *Id.*

251. *Id.*

252. Complaint for Declaratory and Injunctive Relief at 6, *White Earth Nation v. Kerry*, 2015 WL 8483278 (No. 14-4726 (MJD/LIB)).

253. *White Earth Nation v. Kerry*, No. 14-4726 (MJD/LIB), 2015 WL 8483278, at *7 (D. Minn. Dec. 9, 2015).

nature, and thus not subject to judicial review.”²⁵⁴ The court rejected plaintiffs’ arguments regarding the EIS process for a federal action.²⁵⁵ The court observed the distinction that the cases in *Sisseton-Wahpeton* and *Natural Resources Defense Council* consider “the State Department’s interpretation of a Presidential Permit rather than a determination on an initial application for a Presidential Permit,” but the court found that “both types of determinations are Presidential in nature and should not be subject to judicial review.”²⁵⁶

3. *Standing Rock Sioux Tribe v. Army Corps of Engineers*

The case involving the Dakota Access Pipeline (DAPL) has raised legal issues and political concerns for environmental and indigenous rights. The issue involves Dakota Access, LLC, which is a subsidiary of Energy Transfer Crude Oil Company, LLC, and the Standing Rock Sioux Tribe of North and South Dakota, a federally recognized Indian tribe.²⁵⁷ The Standing Rock Indian Reservation is located “half a mile upstream from where DAPL’s crude oil pipeline would cross the Missouri River underneath Lake Oahe in North Dakota.”²⁵⁸ The 1,172-mile-long proposed pipeline is expected to transport 470,000 barrels of oil per day across four states.²⁵⁹

254. *Id.*

255. The court states,

[p]laintiffs cite to a decision from this District in which the court, in a footnote, disagreed with the decisions in *Sisseton-Wahpeton* and *Natural Res. Def. Council* “insofar as they hold that any action taken by the State Department pursuant to an executive order, and in particular the preparation of an EIS for a major federal action, is not subject to judicial review.”

Id. (quoting *Sierra Club v. Clinton*, 689 F. Supp. 2d 1147, 1157 n.3 (D. Minn. 2010)). See also *Protect Our Cmty’s Found. v. Chu*, No. 12CV3062, 2014 WL 1289444, at *6 (S.D. Cal. Mar. 27, 2014) (denying the DOE’s motion to dismiss in a suit alleging that the agency ignored the results of an EIS, which the DOE based on the argument that its action was *presidential*, and thus immune to judicial review).

256. *White Earth Nation*, 2015 WL 8483278, at *7.

257. Varsalona, *supra* note 223. See also *Who is Dakota Access, LLC?*, DAKOTA ACCESS PIPELINE FACTS, https://daplpipelinefacts.com/dt_articles/dakota-access-llc/ (last visited May 8, 2017) (describing the partners in Dakota Access, LLC); Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 80 Fed. Reg. 1942, 1942–43, 1946 (Jan. 14, 2015) (listing the Standing Rock Sioux Tribe of North and South Dakota as a federally recognized tribe).

258. Varsalona, *supra* note 223. See also *Standing Rock Sioux Tribe v. Army Corps of Eng’rs*, No. 16-1534 (JEB), 2016 WL 4734356, at *6 (D.D.C. Sept. 9, 2016) (discussing tribal uses of the Missouri River banks).

259. Caroline Kenny et al., *Dakota Access Pipeline to Be Rerouted*, CNN (Dec. 5, 2016, 1:08 AM), <http://www.cnn.com/2016/12/04/politics/dakota-access-pipeline/>. The Dakota Access Pipeline

When the court denied the Standing Rock Sioux's request for a temporary injunction in September 2016, federal authorities said that they "would not allow work on the Dakota Access Pipeline to proceed on federal land near or under Lake Oahe pending more reviews of previous environmental decisions, and said the case highlights a need for more discussion on infrastructure projects near tribal lands, and possibly reform."²⁶⁰ A joint statement from the U.S. Department of Justice, Department of Army, and Department of the Interior stated that, "[t]he Army will not authorize constructing the Dakota Access pipeline on Corps land bordering or under Lake Oahe until it can determine whether it will need to reconsider any of its previous decisions regarding the Lake Oahe site under the National Environmental Policy Act (NEPA) or other federal laws."²⁶¹ The federal government requested the pipeline to "voluntarily pause all construction activity within 20 miles east or west of Lake Oahe."²⁶² The federal government also sought government-to-government consultations to consider more meaningful tribal input in infrastructure reviews, decisions for issues involving tribal lands, resources, and treaty rights within existing frameworks, and the possibility of new legislation.²⁶³

In 2016, the U.S. Army Corps said it would "not approve an easement that would have allowed the proposed Dakota Access Pipeline to cross under Lake Oahe in North Dakota."²⁶⁴ Even though the current pro-energy federal regime will allow the project to move forward, grassroots activists continue to target financial institutions in another avenue to thwart the

would connect the Bakken and Three Forks oil production areas in North Dakota to an existing crude oil terminal near Pakota, Illinois. The pipeline is 30 inches in diameter and is projected to transport approximately 470,000 barrels of oil per day, with a capacity as high as 570,000 barrels. U.S. FISH & WILDLIFE SERV., DAKOTA ACCESS PIPELINE PROJECT: ENVIRONMENTAL ASSESSMENT GRASSLAND AND WETLAND EASEMENT CROSSING 5 (May 2016), <https://www.fws.gov/uploadedFiles/DAPL%20EA.pdf>.

260. Daniel A. Medina, *Federal Judge Denies Tribe's Request to Halt Dakota Access Pipeline*, NBC NEWS (Sept. 9, 2016, 10:36 PM), <http://www.nbcnews.com/news/us-news/federal-judge-denies-tribe-s-request-halt-dakota-access-pipeline-n645616>.

261. Press Release, Dep't of Justice Office of Pub. Affairs, Joint Statement from the Dep't of Justice, the Dep't of the Army and the Dep't of the Interior Regarding Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs (Sept. 9, 2016), <https://www.justice.gov/opa/pr/joint-statement-department-justice-department-army-and-department-interior-regarding-standing>.

262. *Id.*

263. *Id.*

264. Michael Edison Hayden & Catherin Thorbecke, *Army Corps Will Not Grant Easement for Dakota Access Pipeline Crossing*, ABC NEWS (Dec. 4, 2016, 10:56 PM), <http://abcnews.go.com/US/army-grant-easement-dakota-access-pipeline-crossing/story?id=43969890>.

pipeline, with some banks already withdrawing financial support.²⁶⁵ Over the years, the legislative rules, administrative decisions, and judicial precedent have eroded the rights of tribes in environmental matters.²⁶⁶ Therefore, divestment options appear to be a more viable means to stop projects where legal protections have failed.

What is ironic is that there are greater legal protections for tribal mineral rights than tribal water and environmental protection rights. When the interests of the tribes align with the broader corporate interests of the oil and gas industry, the tribes benefit from property rights protection. When tribal interests are against the oil and gas interests, the same is not true. In other words, the interests and concerns of the oil and gas industry are paramount to tribal rights on tribal lands. For example, non-Indian owners of surface lands located within an area of the Osage Indian mineral estate brought a case to enjoin a gas purchaser under contract with an Osage tribal lessee from entering unleased lands and constructing pipelines between well sites and high-pressure lines. The court stated: “Implicit in the federal regulations is an imposition of the right of ingress and egress upon the unleased surface lands as a necessary incident to the Osage Tribe’s exercise

265. Perry Wheeler, *Largest Bank in Norway Sells Its Assets in Dakota Access Pipeline*, GREENPEACE, <http://www.greenpeace.org/usa/news/largest-bank-norway-sells-assets-dakota-access-pipeline/> (last visited May 8, 2017).

266. See *Fletcher v. Peck*, 10 U.S. 87, 146–47 (1810) (describing the state of Indian rights to land in terms of U.S. property law relative to the state of Georgia, and concluding that there was a “uniform practice of acknowledging [Natives’] right of soil” as sovereigns, and any interest by a state or the federal government was limited to the right to exclude competitors from purchasing or conquering it); *Shively v. Bowlby*, 152 U.S. 1, 52, 56–57 (1894) (summarizing that the grantee tribe retained neither right of exclusive access nor wharfage rights to the river. The state had absolute ownership of rights in front of high land given to grantee, which meant that the state had power to dispose of soil in the river, and wharfage rights in front of the high land.); *Alaska Pac. Fisheries v. United States*, 248 U.S. 78, 89 (1918) (holding that courts must construe statutes passed for the benefit of Native American tribes liberally and in favor of the tribes); *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 653 (1970) (finding that the tribe did not have rights over a river bed); *United States v. Holt State Bank*, 270 U.S. 49, 58–59 (1926) (holding that the use of navigable waters was not intended as an exclusive right to Native Americans when those waters were located on reservation land, and that the land below navigable waters is allocated for the benefit of the state); *Puyallup Tribe, Inc. v. Dep’t of Game*, 433 U.S. 165, 167 (1977) (summarizing that a court in Washington held that it had jurisdiction to regulate tribal activities on and off the reservation. The Washington court proceeded to limit the number of fish that members of the tribe may catch from the river.); *Montana v. United States*, 450 U.S. 544, 566–67 (1981) (stating that non-Indians may hunt and fish on land within the reservation, but not on land owned in fee by non-Indians without tribal regulation, unless non-Indian conduct threatens “political integrity, the economic security, or the health or welfare of the tribe”); *Lyon v. AMOCO Prod. Co.*, 923 P.2d 350, 352 (Colo. App. 1996) (dismissing the allegations of air, water, and soil contamination on tribal lands against the defendant oil companies); *Arrow Midstream Holdings, L.L.C. v. 3 Bears Constr., L.L.C.*, 2015 ND 302, ¶ 1, 873 N.W.2d 16, 18 (N.D. 2015) (holding that the pipeline construction lien was invalid).

of its ownership in the mineral estate,” and that these regulations did not constitute an unconstitutional taking of property.²⁶⁷

III. CAPACITY BUILDING

A. Tribal Treaty Provisions

Defining and reclaiming tribal sovereignty is at issue here. Tribal sovereignty is the authority of indigenous groups to govern themselves.²⁶⁸ This notion of tribal sovereignty protects the core values and governance systems of the native groups. Sarah Krakoff observes: “The possibility of an extra-colonial existence was extinguished the moment Europeans washed up—lost but ambitious—on the shores of North America.”²⁶⁹ She argues that, “courts must find ways to interpret their sovereignty as consistent with their current status.”²⁷⁰ What the Supreme Court has done is “institutionalize[] tribal sovereignty within the matrix of American democratic structure through language that alternately affirms tribal political existence into perpetuity and consigns such political existence to the whims of a superior power.”²⁷¹ “The conceptual construction and subjugation of Indian tribalism by Western legal and societal institutions reflect not merely the exertion of unequal power, but more generally a preexisting, persistent, and critical disjunction between these two cultural traditions.”²⁷²

The tribal trust responsibility is “a legally enforceable fiduciary obligation on the part of the United States to protect tribal treaty rights, lands, assets, and resources, as well as a duty to carry out the mandates of federal law with respect to American Indian and Alaska Native tribes and villages.”²⁷³ As early as 1790, Congress imposed limitations on tribal land

267. *Bell v. Phillips Petroleum Co.*, 641 P.2d 1115, 1120 (Okla. 1982).

268. *Tribal Sovereignty*, CIVIL RIGHTS.ORG, <http://www.civilrights.org/indigenous/tribal-sovereignty/> (last visited May 8, 2017).

269. Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177, 1265 (2001).

270. *Id.* at 1266.

271. N. Bruce Duthu, *Incorporative Discourse in Federal Indian Law: Negotiating Tribal Sovereignty Through the Lens of Native American Literature*, 13 HARV. HUM. RTS. J. 141, 150 (2000).

272. Scott C. Idleman, *Multiculturalism and the Future of Tribal Sovereignty*, 35 COLUM. HUM. RTS. L. REV. 589, 636 (2004).

273. *Frequently Asked Questions: Why Tribes Exist Today in the United States*, BUREAU OF INDIAN AFFAIRS, <http://www.bia.gov/FAQs/> (last updated May 8, 2017).

sales without federal approval.²⁷⁴ The Supreme Court has recognized “the undisputed existence of a general trust relationship between the United States and Indian people”²⁷⁵ where the federal government “has charged itself with moral obligations of the highest responsibility and trust.”²⁷⁶ The federal trust responsibility to Indian tribes applies to all federal agencies, and most agencies have developed policies and procedures to implement this responsibility.²⁷⁷ Inherent in this relationship is an enforceable fiduciary responsibility on the part of the federal government to Indian tribes to protect their lands and resources, unless altered by mutual agreement.²⁷⁸

Consultation is a key component in implementing the government’s trust responsibility and recognition of tribal sovereignty. Consultation is also a critical component of each of the laws: NEPA, NHPA, Native American Graves Protection and Repatriation Act (NAGPRA), Archaeological Resources Protection Act (ARPA), American Indian Religious Freedom Act (AIRFA), and Religious Freedom Restoration Act (RFRA).²⁷⁹ As President Obama noted at his first tribal meeting, “[M]eaningful dialogue between Federal officials and tribal officials has greatly improved Federal policy toward Indian tribes. Consultation is a critical ingredient of a sound and productive Federal-tribal relationship.”²⁸⁰ In 2000, President George W. Bush issued an Executive Order directing federal agencies to improve their consultation and coordination with tribal

274. See Act of July 22, 1790, ch. 22, 1 Stat. 137, 137 (codified as amended at 25 U.S.C. § 177 (2012)) (prohibiting persons from carrying on trade or intercourse with the Indian tribes without license).

275. *United States v. Mitchell*, 463 U.S. 206, 225 (1983).

276. *Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1941) (holding that a mere request for information is insufficient to constitute “reasonable effort” when the federal government knew tribal customs would likely restrict disclosure of information).

277. See *Nance v. Envtl. Prot. Agency*, 645 F.2d 701, 711 (9th Cir. 1981) (stating that “any Federal government action is subject to the United States’ fiduciary responsibilities toward the Indian tribes,” including the EPA).

278. See *Cobell v. Kempthorne*, 455 F.3d 301, 306–07 (D.C. Cir. 2006) (discussing the U.S. government’s federal trust responsibility for the Individual Indian Money trust). The *Cobell* litigation is a well-known example of the federal trust responsibility that over the course of 14 years, resulted in two Secretaries of the Department of the Interior being held in contempt, and legislation, signed into law by President Obama, awarding \$3.4 billion in damages. See Claims Resolution Act of 2010, Pub. L. No. 111-291, 124 Stat. 3064, 3066–70 (authorizing a settlement amount of over \$2 billion for the *Cobell* litigation, including attorney’s fees).

279. See, e.g., Riley, *supra* note 95, at 50 (discussing that the purpose of NAGPRA is to repatriate tribal remains and funerary objects to the tribes and set forth tribal consultations); Cecily Harms, *NAGPRA in Colorado: A Success Story*, 83 U. COLO. L. REV. 593, 602 (2012) (outlining the procedures of NAGPRA).

280. Tribal Consultation, 74 Fed. Reg. 57881 (Nov. 9, 2009).

governments.²⁸¹ In November 2009, President Obama identified a failure of the federal government to implement the 2000 Executive Order, and directed all federal agencies to promptly develop consultation implementation plans.²⁸² Consultation encompasses the notification of the proposed project and mechanism to seek input.²⁸³ Meaningful consultation is “a two-way exchange of information, a willingness to listen, and an attempt to understand and genuinely consider each other’s opinions, beliefs, and desired outcomes.”²⁸⁴ Many tribes grapple with ways to enhance economic development with employment and entrepreneurship opportunities, while managing natural resources and tribal traditions.²⁸⁵ Dean Suagee proposes the enactment and implementation of a kind of law generically known as a Tribal Environmental Policy Act (TEPA).²⁸⁶ A TEPA is a tribal law-adapted NEPA, a tribal counterpart to the kind of state laws often called “little NEPAs.”²⁸⁷ Tribal leaders have the option to enact a TEPA as part of a management strategy to increase transparency and “empower the people living or doing business within their reservation to

281. Exec. Order No. 13175, 66 Fed. Reg. 67249 (Nov. 6, 2000).

282. Tribal Consultation, 74 Fed. Reg. 57881 (Nov. 9, 2009). *See also* BUREAU OF LAND MGMT., MANUAL HANDBOOK, 8120–TRIBAL CONSULTATION UNDER CULTURAL RESOURCES (Dec. 3, 2004) (showing that agency-adopted consultation policies are generally available on agency websites).

283. REBECCA W. WATSON, MANAGING CULTURAL RESOURCE ISSUES ON INDIAN LANDS 4 (2011), <https://www.wsmllaw.com/assets/downloads/pdf/managing-cultural-resource-issues-on-indian-lands-RWW.pdf>.

284. NAT’L ASS’N OF TRIBAL HISTORIC PRESERVATION OFFICERS, TRIBAL CONSULTATION: BEST PRACTICES IN HISTORIC PRESERVATION 1 (2005), http://www.nathpo.org/PDF/Tribal_Consultation.pdf. Project proponents should tread carefully in initiating consultation with an affected tribe. It is important, first, to consult with the federal agency that is preparing the NEPA document or has the statutory duty to consult. A project proponent should recognize that consultation may be required with multiple tribes—those directly impacted by the proposed development, and other affected tribes that may have a cultural, spiritual, or historic relation to the project area. *Id.* at 14. Developers should appreciate that tribes may regard a cold contact by a private party as inappropriate in the context of the federal agency’s responsibility to the tribe in the government-to-government relationship. *Id.* at 12, 24–27. Finally, there are specific consultation requirements in each of the federal statutes discussed. *Id.* at 6–8. Failure to consult adequately can result in litigation and project delay. *Pueblo of Sandia v. United States*, 50 F.3d 856, 860 (10th Cir. 1995). *See also* Complaint for Declaratory, Injunctive, and Mandamus Relief at 4, *La Cuna de Aztlan Sacred Sites Prot. Advisory Comm. v. U.S. Dept. of the Interior*, No. 10-CV-2664 (WQH) (S.D. Cal. Dec. 27, 2010) (suing the DOI for failure to consult under the NHPA before approving multiple energy projects).

285. Dean B. Suagee, *Tribal Environmental Policy Acts and the Landscape of Environmental Law*, 23 NAT. RESOURCES & ENV’T 12, 12 (2009).

286. *Id.*

287. *Id.* “Fifteen states plus the District of Columbia and Puerto Rico have enacted little NEPAs.” *Id.* *See also* DANIEL R. MANDELKER ET AL., NEPA LAW AND LITIGATION § 12:1 (perm. ed. rev. vol. 2016) (discussing state laws modeled on NEPA).

become involved in the decision-making processes of tribal government agencies.”²⁸⁸

NEPA has provided a major shift in federal agency policy to include the public in decision-making processes.²⁸⁹ “One reason tribal leaders might want to enact a law to emulate this aspect of the federal experience with NEPA is that it could help to deflect the hostility that the Supreme Court has shown in recent decades to the exercise of tribal sovereignty.”²⁹⁰ As Philip Frickey notes, Supreme Court decisions inconsistent with the foundation principles of federal Indian law seem to be motivated by a “judicial aversion to basic claims of tribal authority over nonmembers,” and the Court seems to assume that Congress shares this aversion.²⁹¹

NEPA led the push for the enactment of State Environmental Policy Acts (SEPAs) in various states, which require the state to prepare an impact statement for government actions that have an impact on the environment.²⁹² “SEPAs differ in the procedural and substantive determinations they require, the definition of an ‘action,’ whether local governmental agencies are covered, what the standards are for determining threshold significance, when an EIS is sufficient, and what the standards are for judicial review.”²⁹³

Hydrocarbon transport infrastructure projects on tribal lands encounter various hurdles. Like federal lands, Indian lands have additional layers of federal laws and bureaucracy that disincentivize energy projects to some private developers.²⁹⁴ These obstacles are similar to the challenges for the creation of alternative energy development on Indian lands. Elizabeth Kronk Warner points out that the lack of necessary infrastructure, the

288. Suagee, *supra* note 285, at 13.

289. *Id.*

290. *Id.* See also COHEN’S, *supra* note 47, § 4.02(3)(a) (explaining that the Supreme Court created the theory of “implicit divestiture of [tribal] sovereignty” in order to deny tribes jurisdiction over criminal, civil, and adjudicative claims on their land).

291. Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 7 (1999).

292. Kathryn C. Plunkett, *The Role of Local Environmental Impact Review*, in NEW GROUND: THE ADVENT OF LOCAL ENVIRONMENTAL LAW 299, 301 (John Nolon ed., 2003). See also CAL. PUB. RES. CODE §§ 21000–21177 (West 2016) (establishing California’s statewide requirement and methods for environmental impact statements that were enacted in 1970); WASH. REV. CODE § 43.21C.010 (2009) (describing the purpose of Washington’s State Environmental Policy Act); N.Y. ENVTL. CONSERV. LAW § 8-0101 to 8-0117 (McKinney 2017).

293. Plunkett, *supra* note 292, at 301. See also David Sive & Mark A. Chertok, “Little NEPAs” and Their Environmental Impact Processes, 2005 ALI-ABA ENVTL. LITIG. 2–15 (comparing SEPAs using the six-factor framework); Stewart E. Sterk, *Environmental Review in the Land Use Processes: New York’s Experience with SEQRA*, 13 CARDOZO L. REV. 2041, 2042 (1992) (discussing factors that are considered when determining whether to conduct an EIS).

294. WATSON, *supra* note 283, at 1.

burdensome lease and siting review process, and the lack of adequate financial incentives on Indian lands prevent full-scale deployment of alternative energy.²⁹⁵ Typical challenges for renewable energy, in fact, become beneficial to the buildup of hydrocarbon infrastructure. The new right-of-way regulations minimize hurdles for hydrocarbon transport projects.²⁹⁶ Yet, existing procedural remedies of NEPA and the Council on Environmental Quality (CEQ) provisions can still allow for the administration of a more participatory process through capacity building for the environmental protection of tribal lands. With the proper information tools, tribes and their representatives can more readily access their environmental, social, and cultural needs for the preservation of tribal sovereignty and land rights. The intervention of Western property law regimes “privileges the already powerful and violates the sovereignty of indigenous peoples.”²⁹⁷ “[U]tter transparency regarding available capacity and the price of trades, a frictionless web-based exchange, an effective commodities clause, and incremental pricing of new capacity” are elements of the U.S. market for legal transport entitlement that are not available in Canada.²⁹⁸

By and large, the Bill of Rights provides negative protection for individuals from government action.²⁹⁹ The issues emerge whether the government should place affirmative duties on individuals to safeguard the natural environment, and whether the government has the same affirmative duties.³⁰⁰

B. International Regimes

While the domestic sovereignty system may inadequately address concerns of indigenous communities because membership and reservations regulate the bounds of tribal jurisdiction, international law offers alternate

295. Elizabeth Ann Kronk, *Alternative Energy Development in Indian Country: Lighting the Way for the Seventh Generation*, 46 IDAHO L. REV. 449, 467–68 (2010). See also Tracey A. LeBeau, *The Green Road Ahead: Renewable Energy Takes a Stumble But is on the Right Path, Possibly Right Through Indian Country*, FED. LAW., Mar.–Apr. 2009, 38, 41 (highlighting the “dire need” for upgrading the “United States’ old ‘decrepit’ electric infrastructure” to increase production of renewable energy, and the need to streamline the U.S. permitting process and develop a process for recovering the cost of investment).

296. Rights-of-Way on Indian Lands, 80 Fed. Reg. 72,492, 72,492 (Nov. 19, 2015) (to be codified at 25 C.F.R. pt. 169) (summarizing streamlined changes in regulation).

297. WHITT, *supra* note 179, at 5–6.

298. MAKHOLM, *supra* note 14, at 157.

299. THOMAS MORE HOBAN & RICHARD OLIVER BROOKS, GREEN JUSTICE: THE ENVIRONMENT AND THE COURTS 59 (2d ed. 1996).

300. *Id.*

legal tools to discuss climate change.³⁰¹ The United Nations Framework Convention on Climate Change (UNFCCC) entered into force in 1994; and by 2004, 189 countries, including the United States, ratified the Convention.³⁰² The 2015 Paris Climate Treaty is laying groundwork for greater climate change mitigation measures.³⁰³ Attempts at climate change adaptation, such as the updated CEQ Guidelines, do not sustain a level of commitment necessary to actually limit climate change substantially.

In the absence of true climate leadership, various international laws—specifically relating to international human rights and indigenous and tribal rights—may provide remedies for the efforts to limit hydrocarbon transport projects on tribal lands. Individuals are able to seek redress through an individual treaty body under three specific treaties: “[T]he Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Racial Discrimination (CERD), and the Convention against Torture (CAT).”³⁰⁴ The ICCPR can provide a means to submit an individual complaint. The admissibility requirements are: (1) the communication must be with respect to a State party to the Optional Protocol; (2) the complaint must be written by the victim of the alleged violation; and (3) the complaint must be in writing.³⁰⁵ The complaints committee first addresses the admissibility of the complaint and then considers the merits of the case.³⁰⁶ “A particularly critical issue of admissibility is the requirement of exhaustion of domestic remedies, unless they are unduly prolonged.”³⁰⁷ “The requirement that domestic remedies must be exhausted ensures that international procedures

301. Rebecca Tsosie, *Climate Change and Indigenous Peoples: Comparative Models of Sovereignty*, in CLIMATE CHANGE AND INDIGENOUS PEOPLES: THE SEARCH FOR LEGAL REMEDIES 79, 79–80 (Randall S. Abate & Elizabeth Ann Kronk Warner eds., 2013).

302. UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, THE FIRST TEN YEARS 14 (2004), http://unfccc.int/resource/docs/publications/first_ten_years_en.pdf.

303. *Id.*

304. Hilary Charlesworth, *Individual Complaints: An Overview and Admissibility Requirements*, in INDIGENOUS PEOPLES, THE UNITED NATIONS, AND HUMAN RIGHTS 74, 74 (Sarah Pritchard ed., 1998). The United States has ratified all three treaties. The ICCPR, which was ratified in 1992, provides a unique opportunity for tribes to challenge hydrocarbon transport projects that endanger their life, violate human rights, and impinge upon the right to self-determination. The ICCPR is the “supreme law of the land” under the Supremacy Clause of the U.S. Constitution. *FAQ: The Covenant on Civil & Political Rights (ICCPR)*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/other/faq-covenant-civil-political-rights-iccpr> (last visited May 8, 2017).

305. Optional Protocol to the International Covenant on Civil and Political Rights, art. 1–3, Dec. 19, 1966, 999 U.N.T.S. 302.

306. Charlesworth, *supra* note 304, at 74.

307. *Id.* at 77.

are used as a last resort, and prevents international committees from being overwhelmed with complaints.”³⁰⁸

The most critical right for indigenous peoples under the ICCPR is the Article 1 right to self-determination.³⁰⁹ Groups, not individuals, must claim this right.³¹⁰ Hilary Charlesworth says that indigenous groups must “think creatively about other provisions in the ICCPR,” which may apply.³¹¹ Other useful provisions, she notes, are the non-discrimination on the basis of race (Article 26) and the right to preservation of one’s culture (Article 27).³¹² The purpose of discussing international mechanisms for damages aside from traditional domestic remedies serves to provide a means for redress. Having a sense of heightened rights and remedies available can work to intensify efforts to preserve environmental rights and tribal sovereignty.³¹³ A variety of judicial remedies on the domestic and global front will work to raise greater awareness of the role of law in protecting tribal land rights.

Meanwhile, ICERD is established to “protect individuals and groups from discrimination based on race, whether the discrimination is intentional, or is the result of seemingly neutral policies.”³¹⁴ In 1994, the United States ratified ICERD and is, therefore, bound by all provisions of the treaty, including compliance review by the United Nations Committee on the Elimination of Racial Discrimination.³¹⁵ “ICERD does not explicitly address environmental concerns, environmental issues are frequently raised in reports to CERD, as well as in the types of supplemental information CERD requests from States Parties.”³¹⁶ The ICERD Committee has

308. *Id.*

309. AM. CIVIL LIBERTIES UNION, *supra* note 304.

310. Lubicon Lake Band v. Canada, Communication No. 167/1984, U.N. Doc. A/45/40 (Mar. 26, 1990) (complaint submitted to the U.N. Human Rights Committee).

311. Charlesworth, *supra* note 304, at 79–80.

312. *Id.*

313. See Gregory P. Crinion & Tracey Smith Lindeen, *Environmental Law & Indian Lands*, WIS. LAW., Sept. 1996, at 14, 17, 60 (describing the regulatory jurisdiction gap created in tribal territory regarding environmental protection regulation enforcement); Kevin Grover, *Environmental Regulation in Indian Country*, 52 ROCKY MTN. MIN. L. INST. § 20.05 (2006) (discussing growth of tribal regulatory programs under environmental statutes); Lilly Fang, *Environmental Review Problems of Cross-Border Projects Under NEPA: Lessons from the Tar Sands Pipelines*, 31 STAN. ENVTL. L.J. 285, 286 (2012) (stating that judicial review is an important component of environmental protection); Dean B. Suagee & Christopher T. Stearns, *Indigenous Self-Government, Environmental Protection, and the Consent of the Governed: A Tribal Environmental Review Process*, 5 COLO. J. INT’L ENVTL. L. & POL’Y 59, 62–67 (1994) (discussing international laws that may aid in the development of indigenous rights).

314. *Convention on the Elimination of All Forms of Racial Discrimination*, US HUMAN RIGHTS NETWORK, <http://www.ushrnetwork.org/our-work/issues/cerd> (last visited May 8, 2017).

315. *Id.*

316. Kristen Marttila Gast, *Environmental Justice and Indigenous Peoples in the United States: An International Human Rights Analysis*, 14 TRANSNAT’L L. & CONTEMP. PROBS. 253, 272 (2004). “[I]n 1995, CERD requested information from the Nigerian government on government efforts to

recognized that discrimination against Indigenous Peoples is included under the general prohibition of Article I, and that States Parties should safeguard indigenous cultures.³¹⁷ ICERD has recommended that:

with respect to local Indigenous Peoples, State Parties should provide conditions “allowing for a sustainable economic and social development compatible with . . . cultural characteristics,” and that they should respect Indigenous Peoples’ property rights over their traditional lands by returning those lands to indigenous control or, where this is not possible, providing “just, fair and prompt compensation” for those lands.³¹⁸

CONCLUSION

The U.S. commitment to protect tribal environmental sovereignty within its borders is crucial for its efforts and leadership toward environmental sustainability and natural resource preservation. The far-reaching implications of tribal environmental sovereignty collide with the U.S. economic and expansionist ambitions. While American borders will

preserve the identities of ethnic groups that had been adversely affected by environmental deterioration.” *Id.* “CERD expressed concern about potential rights violations in Papua New Guinea stemming from a large strip mining operation that adversely affected a local indigenous population and their environment.” *Id.* See also Caroline Dommen, *Claiming Environmental Rights: Some Possibilities Offered by the United Nations’ Human Rights Mechanisms*, 11 GEO. INT’L ENVTL. L. REV. 1, 13 (1998) (supporting the same sentiment as the quoted text).

317. Gast, *supra* note 316, at 272.

318. *Id.* at 272–73 (footnote omitted) (quoting Comm. on the Elimination of Racial Discrimination, Gen. Recommendation No. 23: Indigenous Peoples, ¶¶ 4–5, U.N. Doc. A/52/18, annex V (Aug. 18, 1997)). See also Douglas Luckerman, *Sovereignty, Jurisdiction, and Environmental Primacy on Tribal Lands*, 37 NEW ENG. L. REV. 635, 639 (2003) (explaining that although the State of Maine is concerned with tribes setting environmental regulations for tribal lands that are too stringent for businesses, tribal regulations are essential to maintaining a native way of life); Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225, 320–22, 330 (1996) (arguing that the incompatibility of Anglo-American values pervading federal environmental law and Indian tribal values inhibits the tribes’ environmental self-determination). Tsosie recommends several models, some of which involve building on community institutions, incorporating native peoples into majority institutions, or adapting the market economy to complement an indigenous economy. *Id.* Anna Fleder & Darren J. Ranco, *Tribal Environmental Sovereignty: Culturally Appropriate Protection of Paternalism*, 19 J. NAT. RESOURCES & ENVTL. L. 35, 40 (2004) (describing that if an agency supports tribal sovereignty, then that tribe will face fewer governmental challenges); Judith V. Royster, *Oil and Water in the Indian Country*, 37 NAT. RESOURCES J. 457, 489–90 (1997) (concluding that tribes must ensure environmental regulation of the oilfields); Allison M. Dussias, *Protecting Pocahontas’s World: The Mattaponi Tribe’s Struggle Against Virginia’s King William Reservoir Project*, 36 AM. INDIAN L. REV. 1, 120 (2012) (claiming that the “reserved water rights doctrine should provide the basis for reserved water rights for the Mattaponi tribe”).

likely not expand geographically, within the United States the borders can swell by encroaching upon Indian lands through the further exploitation and development of hydrocarbon resource projects. While tribal parties may not exactly be incongruent to these economic opportunities, the federal government has a duty to protect the tribes from further encroachment. Doing so is not only environmentally and ecologically sound, but justice and fairness require such integrity in resource management.