Montana Law Review

Volume 83 | Issue 1 Article 3

4-2022

Bezhigwan Ji-Izhi-Ganawaabandiyang: The Rights of Nature and its Jurisdictional Application for Anishinaabe Territories

Kekek Jason Stark
kekek.stark@umontana.edu

Recommended Citation
Kekek Jason Stark, *Bezhigwan Ji-Izhi-Ganawaabandiyang: The Rights of Nature and its Jurisdictional Application for Anishinaabe Territories*, 83 Mont. L. Rev. 79 (2022).

BEZHIGWAN JI-IZHI-GANAWAABANDIYANG: THE RIGHTS OF NATURE AND ITS JURISDICTIONAL APPLICATION FOR ANISHINAABE TERRITORIES

Kekek Jason Stark*

I. Introduction

The spiritual teachings, histories, and cultures of Indigenous Nations can be found in their stories relating to their lands and waters.[1] These stories contain the deeply rooted principles inherent to Indigenous Nations' relationships with their traditional territories.[2] For most Indigenous Nations,

* Assistant Professor of Law, Alexander Blewett III School of Law at the University of Montana.

1. Vine Deloria Jr., *Reflection and Revelation: Knowing Land, Places and Ourselves, in* For This Land: Writings on Religion in America 250 (James Treat ed., 1999).

2. Tsosie v. Deschene, 12 Am. Tribal Law 55, 62–63 (Navajo 2014) (the Navajo Nation Supreme Court explained the origins of sacred law as follows: "In this society, this Court has an obligation to interpret Navajo law and enforce Navajo law. When we carry out that responsibility, that responsibility is not limited to an interpretation of statutory laws—those laws made by human beings to regulate other human beings in society. We consider ancient laws also. The ancient laws of the Holy People take precedence because these are sacred laws that we were placed here with. As an illustration, we recount the time in our history when the Navajo people, after being placed on this Earth, lived with the Holy

the earth is considered to be alive.[3] As a living being, she has agency.[4] This notion, commonly referred to as the "rights of nature," is exemplified in the traditional law principles of Indigenous Nations, which are crucial for sustaining this relationship with their territorial lands and natural resources. Most recently, traditional law principles have informed the granting of legal status to wild rice, as in the case of *Manoomin; The White Earth Band of Ojibwe v. Minnesota Department of Natural Resources*.[5]

People so they would be educated about our ancient laws—the right and wrongs. But there came a time when the Holy People were about to leave. If you can picture that occasion, the people were in a hooghan and the Holy People were one-by-one filing out. One of them, *Haashch'éétti'í* (Talking God), poked his head back through the doorway and said, 'My children, there is one thing that I must tell you: do not forget the value system that we have given you.' In the Navajo language that system is expressed as *Naakits'áadahgo ójí*. Core to that system is the language. The value system—the law of the Navajo people—is embedded in the language. When *Haashch'éétti'í* said that to the people, that in itself became the establishment of a law—*bee haz'áanii*. Now you take that law and apply it. It is how our people survived as a society since time immemorial.").

3. Leroy Little Bear, *Aboriginal Relationships to the Land and Resources*, *in* SACRED LANDS: ABORIGINAL WORLD VIEWS, CLAIMS, AND CONFLICTS 19 (Jill Oakes et al. eds., 1998) ("To us land, as part of creation, is animate. It has spirit. Place is for the inter-relational network of all creation.").

4. Hannah White, *Indigenous Peoples, the International Trend Toward Legal Personhood for Nature, and the United States*, 43 AM. INDIAN L. REV. 129, 130 (2018).

5. Manoomin; White Earth Band of Ojibwe v. Minn. Dep't of Nat. Res., No. 0:21-cv-01869-WMW-LIB (White Earth Band of Ojibwe Tribal Ct. Aug. 5, 2021); *see also* Ktunaxa Nation v. British Columbia (Forests, Lands, and Nat. Res. Operations), 2 S.C.R. 386, 387–88, 392, 396, 410 (2017) (the traditional territory of the Ktunaxa Nation covers approximately 27,000 square miles within the Kootenay region of British Columbia, Alberta, Montana, Washington, and Idaho. Since time immemorial, the Ktunaxa people have engaged in seasonal hunting, fishing, and gathering within their traditional territory. The Ktunaxa fulfilled their subsistence, cultural, ceremonial, spiritual, and economic needs from nature. Within their traditional territory (in south-eastern British Columbia) is located an area the Ktunaxa call *Qat'muk*. *Qat'muk* is a place of spiritual significance for the Ktunaxa, because within the area resides the Grizzly Bear Spirit, which is a principal spirit according to Ktunaxa traditional law principles. Glacier Resorts sought government approval to build a year-round ski resort in *Qat'muk*. During the consultation process, the Ktunaxa raised the concern that the establishment of the ski resort within the area would disturb the Grizzly Bear Spirit that resides within the territory and would ultimately "drive Grizzly Bear Spirit from *Qat'muk* and therefore would irrevocably impair their religious beliefs and practices." In this case the Ktunaxa sought to "protect the presence of Grizzly Bear Spirit" within *Qat'muk* and the "subjective meaning they derive from it." The Court held that British Columbia did not have the duty to protect the object of belief or the spiritual focal point of worship, such as Grizzly Bear Spirit. The Court determined that it is the province's duty to protect "everyone's freedom to hold such beliefs and to manifest them in worship and practice or by teaching and dissemination." The Court held that the Minister was entitled deference in his decision that the Crown reasonably met its duty to consult and accommodate under the *Canadian Charter of Rights and Freedoms*, Part II of the *Constitution Act, 1982*, Section 35, as Section 35 guarantees a process, not a particular result. The Court utilized a balancing test between the Ktunaxa's 2(a) *Charter* right to freedom of religion and the Minister's statutory objectives to administer Crown land and dispose of it in the public interest); Amanda Pampuro, *Group Ends Quest Seeking Personhood for Colorado River*, COURTHOUSE NEWS SERV. (Dec. 5, 2017), https://perma.cc/A22W-ZQZG (discussing Colorado River Ecosystem v. Colorado, No. 1:17-cv-02316-NYW (D. Colo. Dec. 4, 2017), the Colorado Attorney General stated that the attempt to sue on behalf of the river "unacceptably impugned the state's sovereign authority to administer natural resources for public use.").

This article examines the tribal law acknowledging the Rights of Nature as a deeply embedded traditional Anishinaabe[6] law principle. This traditional law principle acknowledging the rights of nature is crucial for sustaining the Anishinaabe Nations' relationship with their territorial lands and natural resources. What does it mean to recognize the rights of manoomin (wild rice) to "exist, flourish, regenerate, and evolve" or to be protected in its traditional forms, natural diversity, and original integrity?[7] This article then delineates the various ways that the White Earth Band of Ojibwe has codified their relationship with their territorial lands and natural resources into tribal law.[8] While the rights of manoomin and similar laws have been widely touted in the press as important victories for tribal sovereignty, this article more deeply evaluates the practical effects and applications of this tribal law to determine whether this law can serve as a framework for other Tribal Nations or is merely a symbolic gesture.[9] Moving beyond symbolic gestures is essential for tribes to implement legal regimes more protective than those provided by states that may otherwise permit development activities by non-Indian parties within treaty territories.

As a matter of federal Indian law, the legal assertions in the Tribe's rights of manoomin enactments provide a complicated web of treaty-related jurisdictional protections for the Anishinaabe Nation. Furthermore, the Rights of Manoomin Ordinance establishes the beginnings of a tribal framework that can be utilized in the future as the tribal legal standard pursuant to numerous state and federal delegations. To further support these developments, this article advocates the need for legal reforms that can be exercised to strengthen the jurisdictional application of tribal law, including these im-

6. Anishinaabe is the general term that many Algonquian speaking peoples use to identify themselves including the Ojibwe, Cree, Saulteax, Odawa, Potawatomi, and others.

7. RIGHTS OF MANOOMIN ORDINANCE, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-009 (Dec. 31, 2018); RIGHTS OF MANOOMIN, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-010 (Dec. 31, 2018).

8. RIGHTS OF MANOOMIN ORDINANCE, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-009 (Dec. 31, 2018); RIGHTS OF MANOOMIN, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-010 (Dec. 31, 2018).

9. *See generally* RESOLUTION ESTABLISHING RIGHTS OF MANOOMIN ORDINANCE, 1855 Treaty Authority, Res. No. 2018-05 (Dec. 5, 2018); RESOLUTION ESTABLISHING RIGHTS OF THE KLAMATH RIVER, The Yurok Tribal Council, Res. No. 19-40 (May 9, 2019); Ponca Tribe of Oklahoma, Res. No. 01-01092018 (on file with the author); Community Environmental Legal Defense Fund, *White Earth Band Enacts First-Of-Its-Kind Rights of Nature Law*, CELDF.COM (Feb. 6, 2019), https://perma.cc/C8KM-R9LH; Winona Laduke, *The White Earth Band of Ojibwe Legally Recognized the Rights of Wild Rice*, YES! MAGAZINE (Feb. 1, 2019), https://perma.cc/V4TP-UAWG; Jennifer Bjorhus, *Minnesota Tribe Asks: Can Wild Rice Have Its Own Legal Rights?*, STAR TRIB. (Feb. 9, 2019), https://perma.cc/N6LN-2WGN; Lulu Garcia-Navarro, *Tribe Gives Personhood to Klamath River*, NAT'L PUB. RADIO (Sept. 29, 2019), https://perma.cc/W994-K9KF.

portant assertions by the White Earth Band of Ojibwe acknowledging the rights of manoomin.

II. Gidakiiminaan (Our Earth)

The traditional law principles of the Anishinaabe natural world are inherently domiciled in its creation story.[10] The following is a version of the Anishinaabe creation as told by Campbell Papequash:

> The Great Spirit beheld a vision. In this dream He saw a vast sky filled with Sun, Earth, Moon, and Stars. He saw an Earth made of mountains and valleys, islands and lakes, plains and forests. He saw flowers, grasses, fruits, and trees. He saw crawling, flying, swimming, and walking beings. He saw and witnessed birth, life, growth and the end of things – decay. And at the same time He saw other things live on. Amidst change there was constancy. He touched wind and rain. He felt love and hate, fear and courage, joy and sadness. The Great Spirit meditated to understand His vision. In His wisdom, the Great Spirit understood that His vision had to be fulfilled. He was to bring into being an existence that He had seen, heard, and felt. Out of nothing He made the sacred fire, rock, water and the winds. Into each he breathed the breath of life. On each He gave with His breathe a different essence and nature. Each substance had its own power, which became its soul spirit. From these four substances the Great Spirit created the physical world of sun, moon, and stars.
>
> To the sun, the Great Spirit gave the power of light and heat. To the earth, he gave the power of growth and healing. To the waters, He gave the power of purity and renewal. And to the winds, He gave the power of music and the breath of life itself.
>
> On earth the Great Spirit formed mountains and valleys, plains and forests, islands and lakes, bays and rivers. Everything was in its place. Everything was beautiful. Then the Great Spirit made the plant beings. There were four kinds, flowers, grasses, fruits and trees. To each He gave a spirit of life, growth, healing, and beauty. Each he placed were it would be the most beneficial and would lend to the earth its great beauty, harmony and order. After the plant beings the Great Spirit created the animal beings, and conferred on each special powers and natures. There were four kinds: crawlers, winged ones, swimmers, and the four-legged beings.
>
> Last of all, He made Man. Though last in the order of creation, least in the order of dependence, and weakest in bodily powers, Man had the greatest gift: the power to dream.
>
> The Great Spirit then made the Great Laws of Nature for the wellbeing and the harmony of all things and all creatures. The Great Laws governed the world, and movement of the sun, earth, moon and the stars. The Great Laws

10. Edward Benton-Benai, The Mishomis Book: The Voice of the Ojibway (Joe Liles ed., 1981).

> of Nature governed the fire, rock, water, and winds. The Great Laws governed the rhythm and continuity of birth, life, growth, and decay. All things lived and worked by these laws. The Great Spirit had brought into existence His vision. . . .
>
> There are four orders in creation: the physical world, the plant world, the animal world, and the human world. All four parts are so intertwined, and they make up life and one whole existence. With less than the four orders, life and being are incomplete and unintelligible. No one portion is self-sufficient or complete without, rather each component of creation derives its meaning from, and fulfils its function and purpose within the context of the whole creation. It is only by the relationship of the four orders that the world has sense and meaning. Without animals and plants, Man would have no meaning nor would he have much more meaning if he were not governed by some immutable law. There is a natural law. It is the law that everyone is ruled by, including all things in creation. It is an absolute law. It is a law that has no mercy. It is a law that will always prevail. The basis of this great law is peace. And peace is a dynamic force. Peace takes a lot of effort. It is harder to keep peace than to have war. For the wellbeing of all, there must be harmony in the world to be obtained by the observance of these laws.
>
> Man must seek guidance outside himself. Before he can abide by this law, human beings must understand the framework of the ordinances of creation. In this way, Man will honor the order as was intended by the Great Spirit. Both Sun and Earth were mutually necessary and interdependent in the generation of life. The sun illuminates, the earth sustains with beauty and nourishment. One cannot give or behold life without the other.[11]

For Anishinaabe people, as Henry Flocken explains, "language, culture, our connection to all living things on earth, our ceremonies, all come together to create an umbilical cord to the land, creation and the creator."[12] The Anishinaabe recognize creation as Gidakiiminaan (Our Earth).[13] The Anishinaabe have maintained a continuous relationship with creation since time immemorial.[14] As demonstrated by Campbell Papequash, this continu-

11. JAMES B. WALDRAM, THE WAY OF THE PIPE: ABORIGINAL SPIRITUALITY AND SYMBOLIC HEALING IN CANADIAN PRISONS 82–85 (1997); s*ee also* BASIL JOHNSTON, OJIBWAY HERITAGE 11–13 (1976).

12. Henry Flocken, *Warriors for Gidanishinaabemowininaan*, 3.1 OSHKAABEWIS NATIVE J. 13 (1996).

13. GREAT LAKES INDIAN FISH & WILDLIFE COMM'N, GIDAKIIMINAAN (OUR EARTH): AN ANISHINAABE ATLAS OF THE 1836 (UPPER MICHIGAN), 1837, AND 1842 TREATY CEDED TERRITORIES (2007), https://perma.cc/P4Q8-SEHB; *see also Aki*, OJIBWE PEOPLE'S DICTIONARY, https://perma.cc/67LJ-CPLB (last visited Nov. 17, 2021).

14. Grand Council Treaty #3, *Manito Aki Inaakonigaawin*, https://perma.cc/3CLH-7VNP (last visited Nov. 17, 2021); *Treaty of October 2, 1863, with the Red Lake & Pembina Bands of Chippewas*, 38th Cong. 1st Sess. (Jan. 8, 1864) (Message from Abraham Lincoln, President of the United States, to the Senate); Treaty with the Red Lake and Pembina Bands of Chippewa, Chippewa-U.S., Oct. 2, 1863, 13 Stat. 667 (Chief Little Rock stated, "Now, my friend, I am going to show you how we came to occupy this land. The Master of Life placed us here, and gave it us for an inheritance.").

ous relationship results in obligations and responsibilities to Gidakiiminaan as an inherently embedded principle of Anishinaabe traditional law.[15]

III. The Treaty with Manoomin

To the Anishinaabe, manoomin is "revered as a special gift from the Creator."[16] *Aw manidoo gaa-pagidendang yo omaa akiing da-biijikaamigak manoomin*.[17] This concept is translated as the Creator is the one that put this wild rice to be growing here on earth.[18] Therefore, "the Anishinaabeg consider [their traditional territory] as a spiritual homeland, and manoomin a sacred gift—and medicine . . ."[19] This principle is evidenced by the following widespread teaching: *Giishpin waabamaad awiiya Anishinaabewid*

15. Heidi Kiiwetinepinesiik Stark, *Nenabozho's Smartberries: Rethinking Tribal Sovereignty and Accountability*, 2013 Mich. St. L. Rev. 339, 347 (2013); Heidi Kiiwetinipinesiik Stark, changing the Treaty Question, in The Right Relationship: Reimagining the Implementation of Historical Treaties 268 (John Borrows & Michael Coyle eds., 2017) ("In invoking creation, in defining themselves as those last to be placed within creation, we recognize that we were brought into a complex web of relationships operating across *aki*. While our relationships to *aki* enable us to engage the land, animals, plants and *mandidoog* in meaningful ways that nourish us physically and spiritually, these relationships carry responsibilities. As the last placed within creation, we can not act in ways that would violate those relationships that came before us, they were already in existence across creation.").

16. Peter David et al., Manoomin, Version 1.0 at 22 (2019); Fred Ackley, *Manoomin—A Gift from the Creator*, *in* Proceedings of the Wild Rice Research and Management Conference 8, 8 (Lisa S. Willamson, et al. eds., 1999); Rachel Durkee Walker & Jill Doerfler, *Wild Rice: The Minnesota Legislature, A Distinctive Crop, Gmos, and Ojibwe Perspectives*, 32 Hamline L. Rev. 499, 510 (2009). Erma Vizenor, former Chairwoman of the White Earth Band of Ojibwe, described the migration story of the Anishinaabe in *Natural Wild Rice in Minnesota: A Wild Rice Study Document Submitted to the Minnesota Legislature by the MNDNR* (Feb. 15, 2008), https://perma.cc/B9ZW-XHYG ("According to our sacred migration story, in the long ago a prophet at the third of seven fires beheld a vision from the Creator calling the Anishinaabe to move west (to a land previously occupied long ago) until they found the place 'where food grows on the water.' The Anishinaabeg of the upper Mississippi and western Great Lakes have for generations understood their connection to anishinaabe akiing (the land of the people) in terms of the presence of this plant as a gift from the Creator."); Brenda J. Child, My Grandfather's Knocking Sticks: Ojibwe Family Life and Labor on the Reservation 161 (2014) ("Ojibwe people call wild rice manoomin, the good seed that grows in the water. Manoomin varies slightly in size and color, but it is always perfect. It is a sacred food intertwined in countless ways with Ojibwe spiritual practices, kinship relations, economies, gender roles, history, place, and contemporary existence. Naming feasts for infants and children always include wild rice, as do wakes and funerals and every meaningful cultural event in between birth and death.").

17. Bawdwaywidun (Eddie Benton), Manoomin Gakinoo'amaagewin: Wild Rice Teaching, in Dibaajimowinan: Anishinaabe Stories of Culture and Respect 162 (2013); *see also* Lac Courte Oreilles Tribal Code of Law tit. VI, § 1.501, https://perma.cc/3VL5-KH2Q.

18. Bawdwaywidun, *supra* note 17, at 168. R

19. David, *supra* note 16, at 25 (citing Ackley, *supra* note 16, at 8–10); *see also* James H. Schlender, *Forward to* Proceedings of the Wild Rice Research and Management Conference (Lisa S. Willamson, et al. eds., 1999). R

giwii-mikaan manoomin.[20] This concept is translated as wherever we find the Ojibwe people, we find wild rice.[21]

Through the gift of manoomin—by manoomin giving life to the Anishinaabe—the Anishinaabe have a cultural and spiritual relationship to manoomin, as evidenced in the following story:

> Wenabozho dibaajimaa gaa-izhi-waabanda'igod manoomin iniw zhiishiiban, Anishinaabe enaajimod.
>
> [As the Anishinaabeg Ojibwe tell the story, Wenabozho, the cultural hero of the Anishinaabeg, was introduced to wild rice by fortune, and by a duck.]
>
> Ingoding gii-azhe-giiwe a'aw Wenabozho giizhi-giiyosed, gaawiin dash awiiya ogii-ayaawaasiin. Ani-naazikang ishkode ogii-waabamaan zhiishiiban namadabinid okaadakikong dazhi-ondeg.
>
> [One evening Wenabozho returned from hunting, but he had no game. As he came towards his fire, there was a duck sitting on the edge of his kettle of boiling water.]
>
> Baanimaa animisenid iniw zhiishiiban gii-piinzaabi okaadakikong a'aw Wenabozho wayaabandang manoomin agwandeg. Gaawiin ogii-nisidawinanziin. Ogii-miijin i'iw okookaakakikong eteg. Ogii-maamo-minopidaan i'iw naboob apiich dash akina ishkweyaang gaa-kojipidang.
>
> After the duck flew away, Wenabozho looked into the kettle and found wild rice floating upon the water, but he did not know what it was. He ate his supper from the kettle, and it was the best soup he had ever tasted.]
>
> Mii dash gaa-izhi-gagwe mikan i'iw miijim gaa-mikang a'aw Zhiishiib gaa-ashamd. Baanamaa aanind gonagakin, Nenabozho gii-bakade. Nenabozho ogii-bimizha'aanan ingiw Zhiishiibag biinish dagoshiwag iwidi zaaga'iganing. Ogii-mikaan gitigaanan imaa zaaga'iganing. 'Gidaa-miijin ninawind' gaa-ikidowag ingiw gitigaanan.' Ni-chi-wiingipogozimin.' Omi-ijinan, Nenabozho ogii-nisidawanaan I'iw miijim gaa-miinaad a'aw Zhiishiib. "Aaniin ezhinikaazoyeg," Nenabozho gaa-kagwejimaag ingiw gitigaansan. "Manoomin indizhinikaazomin, Nenabozho," ingiw manoomin manidoog imaa aadazookaanag gaa-nakwetaagewaad.
>
> [Later, Wenabozho set out to find the food that Zhiishiib had served him. After several days, Wenabozho, hungry, followed a flock of ducks to a lake. He found tall, slender plants growing from the water. "Eat us,

20. *Giishpin Waabamaad Awiiya Anishinaabewid Giwii-Mikaan Manoomin* (Animikiins Stark, trans.) (unpublished draft) (on file with the author).

21. *Id.*; *see also* THOMAS VENNUM JR., WILD RICE AND THE OJIBWAY PEOPLE 62 (1988) (Vennum notes: "Wenabozhoo and his grandmother then sow wild rice seed from the lake of its origin into another lake. This corresponds with a widely held Ojibway belief that rice, once discovered (given by Wenabozhoo to the Indians), was deliberately but spiritualty sown from its original source into other bodies of water.").

> Wenabozho," the plants said. "We're good to eat." Eating some, he realized it was the food Zhiishiib had given him. "What do you call yourselves," Wenabozho asked the beautiful plants. "We are called manoomin, Wenabozho," the manoomin manidoog (spirit) in the aadizookaanag answered.]
>
> Niigaan ogii-kikendaan geget ge-dazhi-mikang miijim mizhodansig giiyosed.
>
> [After that, when Wenabozho did not kill a deer, he knew where to find food to eat.][22]

As this story depicts, "by accepting this gift from the Creator, and from manoomin itself, the Anishinaabe have entered into a relationship with manoomin which entails correlative duties and responsibilities to the sacred plant."[23] These duties and responsibilities are recognized by the "Treaty with Manoomin."[24] The principles of this Treaty are explained as follows:

> [M]anoomin was "the spiritual foundation of Anishinaabeg people and government." In our treaty [with manoomin], we are to care and respect manoomin, which will ensure that it grows in abundance. In return, manoomin will care for Anishinaabeg and be a plentiful source of nourishment for our bodies. Throughout many hard winters, manoomin has sustained our people, making sure we did not starve. Our treaty relationship with manoomin is based on respect, care, reciprocity, and interdependence.[25]

In this regard, "manoomin is harvested not only for the benefits provided but also because not harvesting would show a lack of appreciation for this gift and disrespect for the Creator."[26] This rule is further described in the following teaching:

> Aw manidoo gaa-pagidendang yo omaa akiing da-biijikaamigak manoomin. Mii dash iw wenji-asemaakeyang geyaabi bimiwidoodyang yo'o midewaajimon. Geyaabi da-gikendamang, gaawiin eta go da-

22. DAVID, *supra* note 16, at 22–24 (quoting MANOOMINIKE-GIIZIS - GAA-PI-IZHI-MIKANG MANOOMIN A'AW ANISHINAABE, THE WILD RICE MOON— OJIBWE LEGEND ABOUT THE DISCOVERY OF WILD RICE (Animikiins Stark & Gimiwan [Dustin Burnette] trans.)); Walker & Doerfler, *supra* note 16, at 509 ("Ojibwe understand their relationship to wild rice through stories known to many from childhood. These legends explain the origin of wild rice, depicting the advent of specific 'heroes' and their connection to Humans, animals, and plants. One story describes how Wenabozhoo, the main Ojibwe 'culture hero,' was introduced to wild rice."). **R** **R**

23. DAVID, *supra* note 16, at 25; *see also* VENNUM, *supra* note 21, at 62 (Vennum notes: "Wild rice is consequently a very special gift, with medicinal as well as nutritional values—a belief reflected in the Ojibwe use of wild rice as a food to promote recovery from sickness as well as for ceremonial feasts."). **R**

24. Jana-Rae Yerxa, *Gii-kaapizigemin manoomin Neyaashing: A Resurgence of Anishinaabeg Nationhood*, 3 DECOLONIZATION 159, 162 (2014) ("Anishinaabeg's treaty with manoomin is one of our most significant and oldest treaties. We revisit and renew our treaty with manoomin every harvesting season.").

25. *Id.* at 163 (quoting KATHI AVERY KINEW, MANITO GITIGAAN: GOVERNANCE IN THE GREAT SPIRIT'S GARDEN 152 (Sept. 1995) (Ph.D. thesis, University of Manitoba)).

26. DAVID, *supra* note 16, at 25; ACKLEY, *supra* note 16, at 8 ("Rice is from the Great Spirit and there's laws put here for man on earth to obey and when they say its time, that's the time. You break that time, you're breaking a convent or an agreement you have with the Great Spirit."). **R**

> mikwendamang da-gikendamang gaawiin naasaab i'iw debinaak, gaawiin debinaak da-minikwendamang, da-gikendamang mii ezhi-wiindamaagoyang. Mii dash a'aw asemaa giishpin asemaa weweni aabaji' aabaji'ang i'iw dabwaa-mamooyang yi'iw manoomin. Mii imaa wiindamawigeyang ezhi-miigwechiwitaagoziyang geyaabi o ezhi-manidoowaadak manoomin da-miigwechiwitaagoziwin. Mii omaa ge gii-wiindamaagemin weweni wii-kanawendamang weweni wii-izhitooyang gaawiin gidaa-manaajitoosiimin, gaawiin gidaswewebitoosiimin. Gaawiin gaye giwebinanziimin weweni giga-ganawendaamin da-wiisiniyang da-ashamang a'aw giniijaanisiminaang, da-ashamang gaye a'aw bekaded anishinaabe.[27]
>
> [The creator is the one that put this rice to be growing here on earth. That is why we offer tobacco so that we carry on these sacred teachings. To know these teachings, not only to think about it but to know it, not any ole way, not to think about them in any ole way, but to really know the teachings, this is what we were told. That is why tobacco is used before the rice is picked. This where we give our thanks for the sacredness of the rice, as we give thanks. This where we give our thanks to take care of and to make it we are not doing enough to take care of it, we don't give enough voice to it. We do not waste any of it, we take great care of it so that we can feed our children, so that we can feed the ones that are hungry.][28]

In honoring our Treaty responsibilities, as exemplified in this teaching, we acknowledge, respect, and give thanks to the manoomin spirit that watches out for the wild rice bed, which is known as *manidoo-gitigaan* and is translated as the Great Spirit's Garden.[29] As Erma Vizenor explained, Manoomin is inextricably bound to the religion and identity of the Anishinaabeg."[30]

IV. The Rights of Nature Movement

The "rights of nature" movement recognizes that nature, including all of the earth's natural ecosystems, has inalienable rights.[31] The Anishinaabe understand this principle as *bezhigwan ji-izhi-ganawaabandiyang*, which is translated as "the legal or moral rights which are incapable of being transferred or surrendered."[32] The rights of nature movement is rooted in a rule of law requiring that the rights of the earth must be balanced against the

27. Bawdwaywidun, *supra* note 17, at 162. **R**

28. *Id.* at 168.

29. Kinew, *supra* note 25, at 327–28.

30. Vizenor, *supra* note 16, at 5; *see also* Child, *supra* note 16, at 146 ("In the Great Lakes, manoomin, or wild rice, is the supreme plant, respected in ceremony and daily life."). **R**

31. Thomas Berry, The Great Work: Our Way Into the Future 161 (1999); *see also* Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. Cal. L. Rev. 450, 456 (1972).

32. *Bezhigwan ji-izhi-ganawaabandiyang*, Manitoba Aboriginal Legal Glossary: Ojibwe 27 (1993).

property and other rights of human beings.[33] In recognition of the interconnectedness of all ecosystems, the rights of nature movement acknowledges that nature in all its life forms has "the right to exist, the right to habitat (or a place to be), and the right to participate in the evolution of the Earth community."[34] As a result of the rights of nature movement, the Universal Declaration of the Rights of Mother Earth was established in 2010.[35] This international document codifies the rights of nature, establishing Mother Earth as a living being with rights, including the right to live, exist, regenerate, and be protected and respected.[36] Outside of the United States, this movement has gained footing with legal developments such as the Maori river settlements with the government of New Zealand and the India High Court's recognition of rights in certain rivers, lakes, and glaciers.[37]

Recently, in recognition of the rights of nature movement, several Indigenous Nations located within the United States have codified into tribal law their relationship with their territorial lands and natural resources.[38] These laws have been widely touted in the press as important victories for tribal sovereignty.[39] Of these laws, this article will examine the rights of manoomin (wild rice) in detail.

33. BERRY, *supra* note 31, at 161; *see also* Stone, *supra* note 31, at 456.

34. Michelle Maloney, *Building an Alternative Jurisprudence for the Earth: The International Rights of Nature Tribunal*, 41 VT. L. REV. 129, 133 (2016).

35. Ley de Derechos de la Madre Tierra [Law of the Rights of Mother Earth], Ley 071 (Dec. 2010) (Bol.), https://perma.cc/GJ9X-BSEP.

36. *Id.*

37. *Innovative Bill Protects Whanganui River with Legal Personhood*, NEW ZEALAND PARLIAMENT (Mar. 28, 2017), https://www.parliament.nz/en/get-involved/features/innovative-bill-protects-whanganui-river-with-legal-personhood/; *Himalayan Glaciers Granted Status of 'Living Entities'*, PHYS.ORG (Apr. 1, 2017), https://perma.cc/6EZ5-QPV6; Michael Safi, *Ganges and Yamuna Rivers Granted Same Legal Rights as Human Beings*, THE GUARDIAN (Mar. 21, 2017), https://perma.cc/BX3Y-2EG4; *Rivers Do Not Have the Same Rights as Humans: India's Top Court*, PHYS.ORG (July 7, 2017), https://perma.cc/K97S-8EFQ.

38. RESOLUTION ESTABLISHING RIGHTS OF THE KLAMATH RIVER, The Yurok Tribal Council, Res. No. 19-40 (May 9, 2019); RIGHTS OF MANOOMIN ORDINANCE, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-009 (Dec. 31, 2018); RIGHTS OF MANOOMIN, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-010 (Dec. 31, 2018); RESOLUTION ESTABLISHING RIGHTS OF MANOOMIN ORDINANCE, 1855 Treaty Authority, Res. No. 2018-05 (Dec. 5, 2018); Ponca Tribe of Oklahoma, Res. No. 01-01092018.

39. Community Environmental Legal Defense Fund, *supra* note 9; Laduke, *supra* note 9; Bjorhus, *supra* note 9; Garcia-Navarro, *supra* note 9.

A. The Rights of Manoomin (Wild Rice)

On December 5, 2018, the 1855 Treaty Authority[40] enacted Resolution No. 2018-05 establishing the Rights of Manoomin.[41] Shortly thereafter on December 31, 2018, the White Earth Band of Chippewa Indians enacted Resolution No. 001-19-009 codifying the Rights of Manoomin Ordinance as well as Resolution No. 001-19-010 recognizing the Rights of Manoomin.[42]

Both the 1855 Treaty Authority Resolution No. 2018-05 and the White Earth Band of Chippewa Indians Resolution No. 001-19-009 begin: "Manoomin, or wild rice . . . possesses inherent rights to exist, flourish, regenerate, and evolve, as well as inherent rights to restoration, recovery, and preservation."[43] The establishment of this right acknowledges the longstanding relationship that the Anishinaabe have with manoomin.[44] A relationship that exists outside of and without regard to external laws or legal frameworks.[45] These laws are substantially similar, with the major excep-

40. The 1855 Treaty Authority is comprised of the East Lake, Leech Lake, Mille Lacs, Sandy Lake, and White Earth Bands of Ojibwe. These Bands are the beneficiaries of the 1855 Treaty with the Chippewa. Treaty with the Chippewas, Chippewa-U.S., Feb. 22, 1855, 10 Stat. 1165 [hereinafter 1855 Treaty with the Chippewas]. *See generally* 1855 Treaty Authority, https://www.1855treatyauthority.org/ (last visited Feb. 5, 2022).

41. Resolution Establishing Rights of Manoomin Ordinance, 1855 Treaty Authority, Res. No. 2018-05 (the White Earth Band of Ojibwe is a member Tribe of the 1855 Treaty Authority and enacted this resolution as White Earth tribal law).

42. Rights of Manoomin Ordinance, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-009; Rights of Manoomin, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-010.

43. Rights of Manoomin Ordinance, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-009, § 1(a); Resolution Establishing Rights of Manoomin Ordinance, 1855 Treaty Authority, Res. No. 2018-05, § 1(a).

44. Charlene L. Smith & Howard J. Vogel, *The Wild Rice Mystique: Resource Management and American Indian's Rights as a Problem of Law and Culture*, 10 Wm. Mitchell L. Rev. 744, 749–51 (1984).

45. The long-standing relationship that the Anishinaabe have with Manoomin is subject to the four categories of Anishinaabe Inaakonigewin. *See* Kekek Jason Stark, Anishinaabe Inaakonigewin: Principles for the Intergenerational Preservation of Mino-Bimaadiziwin, 82 Mont. L. Rev. 293, 302–03 (2021) ("For the Anishinaabe, our law is broken into four areas or categories. The categories collectively produce *Anishinaabe-inaakonigewin*, Anishinaabe law. The first area of Anishinaabe law encompasses *manidoo-inaakonigewin*. This concept is defined as spirit law, or the Creator's law. The second area of Anishinaabe law encompasses *gaagige-inaakonigewin*. This concept is defined as eternal law, or 'the rights and responsibilities intrinsic to the belief systems of the Anishinaabeg.' The belief systems of the Anishinaabe as embodied in the term *gaagige-in aakonigewin* can be further explained by the principle *'Minik igo giizis bimosed, minik gegoo ji-nitaawigik, minik nibi ge-bimijiwang. Mii'iye gaagige-onakonigewin.'* This concept is understood to mean 'as long as the sun shines, grass grows, and the waters flow, that's eternal law.' The third area of Anishinaabe law encompasses *gete-inaakonigewin.* This concept is defined as traditional law. The fourth classification of Anishinaabe law encompasses *zaagimaa-inaakonigewin.* This concept is defined as natural law. Anishinaabe law, as produced from these four categorical areas, is 'instructive in nature' and is embodied in *anishinaabemowin,* the lan-

tion denoting the territorial applicability of the ordinance.[46] The White Earth Band of Ojibwe ordinance applies within the exterior boundaries of the White Earth reservation, while the 1855 Treaty Authority ordinance applies to the 1855 treaty territory.[47] Both of these laws acknowledge the rights of tribal members to engage in the harvest of manoomin and to protect and save manoomin seeds.[48] These resolutions also acknowledge the individual and collective rights of sovereignty[49] and acknowledge that these rights are self-executing.[50]

Interestingly, both ordinances include statements making it unlawful for any business, government, or other public or private entity to "engage in activities"[51] or permit activities[52] that violate or would likely violate these provisions. These ordinances also grant the White Earth Band of Ojibwe and the 1855 Treaty Authority the power to enforce these laws[53] and prohibit law enforcement personnel from arresting or detaining those directly

guage; *aadizookaanan*, traditional stories; *dibaajimowin*, personal narratives; and *izhitwaawin*, Anishinaabe culture.").

46. RIGHTS OF MANOOMIN ORDINANCE, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-009, § 1(a); RESOLUTION ESTABLISHING RIGHTS OF MANOOMIN ORDINANCE, 1855 Treaty Authority, Res. No. 2018-05, § 1(a).

47. RIGHTS OF MANOOMIN ORDINANCE, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-009, § 1(a); RESOLUTION ESTABLISHING RIGHTS OF MANOOMIN ORDINANCE, 1855 Treaty Authority, Res. No. 2018-05, § 1(a).

48. RIGHTS OF MANOOMIN ORDINANCE, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-009, § 1(b); RESOLUTION ESTABLISHING RIGHTS OF MANOOMIN ORDINANCE, 1855 Treaty Authority, Res. No. 2018-05, § 1(b).

49. RIGHTS OF MANOOMIN ORDINANCE, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-009, § 1(c) ("The White Earth Band and its members possess both a collective and individual right of sovereignty, self-determination, and self-government, which shall not be infringed by other governments or business entities claiming the right to override that right. This shall include the right to enforce this law free of interference from corporations, other business entities, governments, or other public or private entities. That right shall include the right of tribal members to be free from ceiling preemption, because this law expands rights-protections for people and manoomin above those provided by less-protective state, federal, or international law."); RESOLUTION ESTABLISHING RIGHTS OF MANOOMIN ORDINANCE, 1855 Treaty Authority, Res. No. 2018-05, § 1(c).

50. RIGHTS OF MANOOMIN ORDINANCE, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-009, § 1(d); RESOLUTION ESTABLISHING RIGHTS OF MANOOMIN ORDINANCE, 1855 Treaty Authority, Res. No. 2018-05, § 1(d). ("All rights secured by this law are inherent, fundamental, and unalienable, and shall be enforceable against both private and public actors without further implementing legislation.").

51. RIGHTS OF MANOOMIN ORDINANCE, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-009, § 2(a); RESOLUTION ESTABLISHING RIGHTS OF MANOOMIN ORDINANCE, 1855 Treaty Authority, Res. No. 2018-05, § 2(a).

52. RIGHTS OF MANOOMIN ORDINANCE, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-009, § 2(b); RESOLUTION ESTABLISHING RIGHTS OF MANOOMIN ORDINANCE, 1855 Treaty Authority, Res. No. 2018-05, § 2(b).

53. RIGHTS OF MANOOMIN ORDINANCE, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-009, § 3(d); RESOLUTION ESTABLISHING RIGHTS OF MANOOMIN ORDINANCE, 1855 Treaty Authority, Res. No. 2018-05, § 3(d).

enforcing these rights.[54] The 1855 Treaty Authority ordinance also explicitly grants individual tribal members the right to take "nonviolent direct action" to protect the rights of manoomin if the 1855 Treaty Authority fails to do so.[55] These laws also establish that any business, government, or other public or private entity that violates "any provision of this law" are guilty of an "offense" and are subject to the maximum fine allowable under tribal law.[56]

V. The Effects of the Indigenous Codification of the Rights of Nature

This section evaluates the practical effects and applications of these tribal laws regarding manoomin to determine if, as a tribal law framework, the laws have any "teeth" or if the laws serve merely as symbolic gestures. In turn, this section addresses whether these laws adequately provide for who speaks on behalf of manoomin, what geographic area and parties can be bound by manoomin laws, which tribal court has authority to adjudicate these laws, whether there is tribal authority over law enforcement, and what the penalties should be for violations.

A. Who Speaks on Behalf of the Resources?

At the outset, we must grapple with the question of who decides what it means for manoomin to "exist, flourish, regenerate, and evolve" or to be protected in its traditional forms, natural diversity, and original integrity.[57] As codified, the White Earth Band of Ojibwe and 1855 Treaty Authority resolutions establish that either the Tribe, the 1855 Treaty Authority, or individually enrolled tribal members may enforce the provisions of this law.[58] This right to enforce, however, does not fully answer the question of who gets to speak on behalf of manoomin.

54. Rights of Manoomin Ordinance, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-009, § 3(f); Resolution Establishing Rights of Manoomin Ordinance, 1855 Treaty Authority, Res. No. 2018-05, § 3(f).

55. Resolution Establishing Rights of Manoomin Ordinance, 1855 Treaty Authority, Res. No. 2018-05, § 3(f).

56. Rights of Manoomin Ordinance, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-009, § 3(b); Resolution Establishing Rights of Manoomin Ordinance, 1855 Treaty Authority, Res. No. 2018-05, § 3(b).

57. Rights of Manoomin Ordinance, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-009, § 1(a); Resolution Establishing Rights of Manoomin Ordinance, 1855 Treaty Authority, Res. No. 2018-05, § 1(a).

58. Rights of Manoomin Ordinance, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-009, § 1(c); Resolution Establishing Rights of Manoomin Ordinance, 1855 Treaty Authority, Res. No. 2018-05, § 1(c).

Who gets to speak on behalf of "nature" is a fundamental component of the "rights of nature" movement that is missing from these resolutions.[59] Tribes must exercise the principle of *ayaangwaamizi*, which is defined as to proceed with an action carefully and cautiously, in designating which individual or body of individuals speak on behalf of nature in a legal capacity.[60] As noted, what has made the Rights of Nature movement so compelling for Tribes is how it dovetails with the long held concept of "nature" as a living being.[61] Because this concept is an ancient belief held under traditional law, Tribes must use traditional law in deciding how to implement and enforce this principle.[62] According to traditional law, as referenced earlier in this article, Tribes have a spiritual connection with their natural resources.[63] This spiritual connection is typically connoted through ceremony, song, and prayer.[64] Therefore, in determining "how nature" feels about a specific incident, Tribes need to engage their traditions to make this determination.[65]

59. One possible solution for a designated body to speak on behalf of manoomin is the Rights of Manoomin Taskforce established pursuant to the White Earth Reservation Business Committee White Earth Band of Chippewa Indians. CREATION OF RIGHTS OF MANOOMIN TASKFORCE, Res. No. 057-21-004 (Dec. 11, 2020). Another possible solution for a designated body to speak on behalf of manoomin is the Tribal Wild Rice Task Force which was established pursuant to the Minnesota Chippewa Tribe. Res. No. 107-18 (Aug. 21, 2018). Possible solutions for a designated body to speak on behalf of manoomin in the Wisconsin portion of the Treaty Territories could be the Voigt Intertribal Taskforce, the Wild Rice Management Committee, the Tribal Wild Rice Authorities, or the tribal rice chiefs.

60. *Ayaangwaamizi*, OJIBWE PEOPLE'S DICTIONARY, https://perma.cc/935Y-DXVQ (last visited Nov. 17, 2021).

61. Little Bear, *supra* note 3, at 18–19 ("To us land, as part of creation, is animate. It has spirit. Place is for the inter-relational network of all creation."); Danielle Johnson, *Who is Manoomin? A Clash Between Culture and Climate Change*, INDIAN COUNTRY TODAY (Jan. 6, 2020), https://perma.cc/BQ8A-YH3Q. **R**

62. Stark, *supra* note 45, at 307 ("As Anishinaabe, we can achieve wisdom through their understanding of the 'ordinances of creation' by observing the earth and all of creation."); *see also* WALDRAM, *supra* note 11, at 82–85; JOHNSTON, *supra* note 11, at 11–13.

63. Spurr v. Tribal Council, No. 12-005APP (Nottawseppi Huron Band of Potawatomi Sup. Ct. Feb. 21, 2012) (unpublished opinion) ("All aspects of the natural world are imbued with law—the great laws of nature—and are ordered. These laws govern all aspects of the natural world, including human life. When these laws are followed, the result is harmony.").

64. Flocken, *supra* note 12, at 13.

65. Darren Courchene, *Anishinaabe Dibendaagoziwin (Ownership) and Ganawenindiwin (Protection)*, in INDIGENOUS NOTIONS OF OWNERSHIP AND LIBRARIES, ARCHIVES AND MUSEUMS 43–44 (Camille Callison, Loriene Roy & Gretchen Alice LeCheminant eds., 2016) (quoting DORIS PRATT, ET AL., UNTUWE PI KIN HE (WHO WE ARE): TREATY ELDER'S TEACHINGS 32–33 (2d ed. 2014) (according to elder D'Arcy Linklater, the Cree understand these Anishinaabe law principles as follows: "Kwayaskonikiwin means that the conduct of a person must be reconciled with Kiche'othasowewin (the great law of the Creator [natural law]); kistehichikewin means that the conduct of a person must be based on the sacred responsibility to treat all things with respect and honour. . . ; aski kanache pumenikewin means that the conduct of a person must be in accordance with the sacred duty to protect n'tuskenan [the land, life, home, and spiritual shelter entrusted to us by kihche'manitou for our children michimahch'ohchi (since time immemorial)]; ethinesewin which means traditional knowledge, including the influence of moons and seasons on climate, weather, animals, plants, and ethiniwuk (individuals) as well as seasonal harvesting cycles and practices. There is a duty to respect and seek ethinesewin; n'totumakewin means that

For the Anishinaabe, this principle is understood as *gidaa-wiidabimaa gidakiiminaan ji-naanaagadawenjigewaad*.[66] This concept has been defined as "you shall be a part of and sit with the land, to be in the presence of aki, the earth in order to seek knowledge through the careful, continuous, and pondering thought and reflection from collaboration of the heart and mind."[67] Tribes need to be careful and designate the appropriate individuals who will engage in ceremony and "sit with the land" in order to invoke the proper authority to speak on her behalf.

B. The Proclaimed Rights of Sovereignty

The White Earth Band of Ojibwe and 1855 Treaty Authority ordinances establishing the rights of manoomin both acknowledge the individual and collective rights of sovereignty.[68] These resolutions recognize that this right belongs to both the Tribe and its members.[69] This declaration is significant as it extends the rights of tribal sovereignty outside the bounds of existing law: "That right shall include the right of tribal members to be free from ceiling preemption, because this law expands rights-protections for *people* and *manoomin* above those provided by less-protective state, federal, or international law."[70] Currently, federal Indian law only recognizes that Tribal rights are communally held by the Tribe or collectively held by multiple Tribes on behalf of individual tribal members.[71]

---

a person must seek not to be understood but to first understand. It establishes a duty to teach as well as to understand and to share as well as to seek ethinesewin; aakwamisiwin means that a person must be caution of his or her action where there is uncertainty; oh'chinewin means that what a person does to nature will come back to that person; aniskowatesewe kanache pumenikewin means that a person must act in accordance with the sacred responsibility to protect heritage resources. . . .")).

66. *See* Scientific Investigation Permit for the Lac Courte Oreilles Harvest Education Learning Project (on file with the Lac Courte Oreilles Band of Lake Superior Chippewa Indians and the Great Lakes Indian Fish and Wildlife Commission).

67. *Id.*

68. RIGHTS OF MANOOMIN ORDINANCE, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-009, § 1(c) (Dec. 31, 2018); RESOLUTION ESTABLISHING RIGHTS OF MANOOMIN ORDINANCE, 1855 Treaty Authority, Res. No. 2018-05, § 1(c) (Dec. 5, 2018).

69. RIGHTS OF MANOOMIN ORDINANCE, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-009, § 1(c); RESOLUTION ESTABLISHING RIGHTS OF MANOOMIN ORDINANCE, 1855 Treaty Authority, Res. No. 2018-05, § 1(c).

70. RIGHTS OF MANOOMIN ORDINANCE, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-009, § 1(c) (emphasis added); RESOLUTION ESTABLISHING RIGHTS OF MANOOMIN ORDINANCE, 1855 Treaty Authority, Res. No. 2018-05, § 1(c).

71. *See* United States v. Washington, 520 F.2d 676, 688 (9th Cir. 1975); United States v. Michigan, 471 F. Supp. 192, 271 (W.D. Mich. 1979), *aff'd as modified*, 653 F.2d 277 (6th Cir. 1981); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 653 F. Supp. 1420, 1424–25 (W.D. Wis. 1987); Mille Lacs Band of Chippewa v. Minnesota, No. 3-94-1226 (D. Minn. Mar. 29, 1996) (unpublished decision).

C. Territorial Application—Subject Matter Jurisdiction

The White Earth Band of Ojibwe ordinance establishing the rights of manoomin applies within the exterior boundaries of the White Earth reservation[72] while the 1855 Treaty Authority ordinance applies to the 1855 treaty territory.[73] It is a general rule of federal Indian law that Tribes have the ability to exercise their own laws within their territorial boundaries.[74] This is usually confined to Indian Country.[75] However, courts have recognized that Tribes can extend their laws over their "members" in the area encompassing their traditional territories in certain instances, such as in the exercise of treaty reserved rights or in certain cases "involving the internal concerns of . . . members," which includes tribal membership, probate, child custody, and child support.[76] Tribes are typically foreclosed from exercising tribal jurisdiction outside of Indian Country over "non-members."[77]

As a general rule, the Tribe can apply its laws, in this instance its rights of nature law, to members within its respective reservation.[78] As a result of treaty principles, the Anishinaabe also can advocate for the appli-

72. RIGHTS OF MANOOMIN ORDINANCE, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-009, § 1(a).

73. RESOLUTION ESTABLISHING RIGHTS OF MANOOMIN ORDINANCE, 1855 Treaty Authority, Res. No. 2018-05, § 1(a).

74. Williams v. Lee, 358 U.S. 217, 220–23 (1959) ("[A]bsent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them . . . the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe the right of the Indians to govern themselves.").

75. 18 U.S.C. § 1151 (2018) (Tribes may assert jurisdiction if the cause of action occurs on the following: "(a) all land within the limits of any Indian reservation. . . (b) all dependent Indian communities. . . and (c) all Indian allotments."); *see also* Atkinson Trading Co. v. Shirley, 532 U.S. 645, 658 n.12 (2001) (tribal jurisdiction is, of course, cabined by geography. The jurisdiction of tribal courts does not extend beyond tribal boundaries).

76. 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 7.02 (2019). *See e.g.*, United States v. Winans, 198 U.S. 371, 381–82 (1905); Settler v. Lameer, 507 F.2d 231, 237–38 (9th Cir. 1974); United States v. Washington, 384 F. Supp. 312, 339–42 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676, 686 (9th Cir. 1974); Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 684–85 (1979); United States v. Michigan, 471 F. Supp. 192, 273 (W.D. Mich. 1979); United States v. Felter, 546 F. Supp. 1002, 1022–23 (D. Utah 1982), *aff'd*, 752 F.2d 1505 (10th Cir. 1985); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (LCO IV), 668 F. Supp. 1233, 1241 (W.D. Wis. 1987); United States v. Oregon, 787 F. Supp. 1557, 1566 (D. Or. 1992), *aff'd*, 29 F.3d 481 (1994); John v. Baker, 982 P.2d 738, 743 (Alaska 1999).

77. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148–49 (1973) (absent express federal law to the contrary, Indians going beyond the reservation boundaries have generally been held subject to nondiscriminatory state law); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 76, at § 7.02 (tribal jurisdiction may extend to non-members outside of Indian Country who have consented to tribal jurisdiction).

78. *See*, *e.g.*, Fisher v. Dist. Ct. of Sixteenth Jud. Dist., 424 U.S. 382, 389 (1976) (establishing exclusive tribal court jurisdiction in adoption proceeding involving tribal members).

cation of rights of nature laws to non-members within their treaty territories.

The White Earth Band of Ojibwe, for example, has declared the ability to enforce its rights of nature laws against any business, government, or other public or private entity that violates any provision of the law within its respective reservation.[79] Of particular note is the Tribe's ability to bind the State as a non-member since the State's regulatory actions, such as permitting activities that impact manoomin, can make it a primary violator of the rights of manoomin. Even if the State itself is not bound, it is important for a strong rights of nature law to bind individual non-members who might otherwise violate rights of manoomin under the color of state law. Whether the tribal rights of nature laws apply to non-members within Indian country and within the Tribe's treaty territories is complex and constantly evolving.

In addressing tribal jurisdiction, it is a general principle of federal Indian law that matters of tribal law should properly be interpreted by tribal courts.[80] As the Sixth Circuit Court of Appeals articulated, quoting the U.S. Supreme Court in *Iowa Mutual Insurance Co. v. LaPlante*,[81] "[o]rdinarily, we defer to tribal court interpretations of tribal law 'because tribal courts are best qualified to interpret and apply tribal law.'"[82] As a result of this premise, the tribal exhaustion doctrine establishes that the Tribal Court should have the first opportunity to evaluate the factual and legal basis for a challenge to its own jurisdiction.[83] This exhaustion requirement includes any appellate review by the tribal court.[84] Some courts have even held that

79. RIGHTS OF MANOOMIN ORDINANCE, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-009, § 2(a) (Dec. 31, 2018).

80. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 19 (1987); Navajo Nation v. Intermountain Steel Bldgs., Inc., 42 F. Supp. 2d 1222, 1229–30 (D.N.M. 1999) ("It is difficult to conceive how tribal self-government and self-determination will be advanced by the exercise of federal court jurisdiction over a matter involving the Navajo Nation, a Navajo commercial entity, and a contract between these Navajo parties and a non-Indian defendant to construct a Navajo-owned building located on Navajo land within the boundary of the Navajo Nation. This is especially true because the parties disagree about the applicability of Navajo law and custom . . . There is no reason to believe that the courts of the Navajo Nation would not be able to properly address the parties' dispute. To support tribal self-government, the Navajo tribal courts should be given the opportunity to do so . . . Moreover, if the Navajo Tribal Court reached the merits of the action, a federal court would have the benefit of the Navajo Tribal Court's prior interpretation of Navajo law and customs that may apply to this case.").

81. 480 U.S. 9 (1987).

82. Kelsey v. Pope, 809 F.3d 849, 864 (6th Cir. 2016) (quoting *Iowa Mut. Ins. Co.*, 480 U.S. at 16); *see also* United States v. Wheeler, 435 U.S. 313, 332 (1978) (recognizing that "tribal courts are important mechanisms for protecting significant tribal interests"); Water Wheel Camp Recreational Area, Inc. v. Larance, 642 F.3d 802, 808 (9th Cir. 2011); FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311, 1313 (9th Cir. 1990).

83. Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856–57 (1985).

84. *Iowa Mut. Ins. Co.*, 480 U.S. at 17; Elliot v. White Mt. Apache Tribal Ct., 566 F.3d 842, 847 (9th Cir. 2009); Davis v. Mille Lacs Band of Chippewa Indians, 193 F.3d 990, 992 (8th Cir. 1999).

"[e]xhaustion of tribal remedies is 'mandatory.'"[85] Tribal exhaustion is required to ensure certain tribal court interests are advanced, including: "(1) supporting tribal self-government and self-determination; (2) promoting the orderly administration of justice in the federal court by allowing a full record to be developed in the Tribal Court; and, (3) providing other courts with the benefit of the tribal court's expertise in their own jurisdiction."[86] In furtherance of the Tribal exhaustion doctrine, a federal court will not generally review a case on its merits and will focus solely on the issue of tribal court jurisdiction and whether all tribal remedies have been exhausted.[87]

For courts to even question the basis of tribal law and its application is an extension of the assimilative policies[88] of the past and is an infringement on inherent tribal sovereignty and the right of Tribes to be self-governing.[89] In the context of subject matter jurisdiction over a matter covered by the Rights of Manoomin Ordinance, a tribal court must determine the following: (1) does the Tribe have regulatory jurisdiction to impose the Rights of Manoomin Ordinance; and (2) does the Tribe have adjudicatory jurisdiction to enforce the Rights of Manoomin Ordinance in Tribal Court?[90]

85. Marceau v. Blackfoot Hous. Auth., 540 F.3d 916, 920–21 (9th Cir. 2008) (quoting Burlington N. R.R Co. v. Crow Tribal Council,?940 F.2d 1239, 1245 (9th Cir. 1991)); Stock West Corp. v. Taylor, 964 F.2d 912, 919–20 (9th Cir. 1992); Wellman v. Chevron U.S.A., Inc., 815 F.2d 577 (9th Cir. 1987); Texaco, Inc. v. Zah, 5 F.3d 1374, 1378 (10th Cir. 1993).

86. Hengle v. Asner, 433 F. Supp. 3d 825, 860 (E.D. Va. 2020) (citing *Nat'l Farmers Union Ins. Cos.*, 471 U.S. at 856–57).

87. Sibley v. Indian Health Servs., 111 F.3d 138 (9th Cir. 1997) (unpublished opinion).

88. United States v. Clapox, 35 F. 575, 576–77 (1888) (The Oregon district court acknowledged that: "These 'courts of Indian offenses' are not the constitutional courts provided for in section 1, art. 3, Const., which congress only has the power to 'ordain and establish,' but mere educational and disciplinary instrumentalities, by which the government of the United States is endeavoring to improve and elevate the condition of these dependent tribes to whom it sustains the relation of guardian. In fact, the reservation itself is in the nature of a school, and the Indians are gathered there, under the charge of an agent, for the purpose of acquiring the habits, ideas, and aspirations which distinguish the civilized from the uncivilized man." The curriculum established by the U.S. included punishment for certain "'Indian offenses,' such as the 'sun,' the 'scalp,' and the 'war dance,' polygamy, 'the usual practices of . . . selling Indian women for the purpose of cohabitation.").

89. *Nat'l Farmers Union Ins. Cos.*, 471 U.S. at 856 n.21; Burlington N. R.R. v. Red Wolf, 196 F.3d 1059, 1065 (9th Cir. 1999) (There are four exceptions however to the requirement for exhaustion of tribal court remedies: "(1) [A]n assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith; (2) the action is patently violative of express jurisdictional prohibitions; (3) exhaustion would be futile because of the lack of adequate opportunity to challenge the court's jurisdiction; or (4) it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by" the main rule of Montana v. United States, 450 U.S. 544, 576–77 (1981)) (internal citations omitted).

90. FMC Corp. v. Shoshone-Bannock Tribes, 942 F.3d 916, 931 (9th Cir. 2019); Knighton v. Cedarville Rancheria of N. Paiute Indians, 922 F.3d 892, 899 (9th Cir. 2019); Water Wheel Camp Recreational Area, Inc. v. Larance, 642 F.3d 802, 808–09 (9th Cir. 2011) ("To exercise its inherent civil authority over a defendant, a tribal court must have subject matter jurisdiction—consisting of regulatory and adjudicative jurisdiction. . . ."); *see also* AT&T Corp. v. Coeur d'Alene Tribe, 295 F.3d 899, 903–04 (9th Cir. 2002) ("[A] federal court may not readjudicate questions—whether of federal, state or

1. Regulatory Jurisdiction

Historically, the U.S. Supreme Court has established as a general rule that Tribes retained the right of self-governance over their traditional territory as an integral aspect of tribal sovereignty.[91] This principle was upheld in 1959 when the U.S. Supreme Court in *Williams v. Lee*[92] determined "there can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the reservation and the transaction with the Indian took place there."[93] A Tribe's ability to impose an ordinance pursuant to its regulatory jurisdiction over non-members is derived from "two distinct frameworks."[94] The first is the "right to exclude, which generally applies to non-member conduct on tribal land."[95] The second are "the exceptions articulated in *Montana v. United States*,[96] which generally apply to nonmember conduct on non-tribal land."[97]

In 1981, the U.S. Supreme Court decided *Montana v. United States* and for the first time "applied an implicit divesture approach" to tribal civil jurisdiction.[98] The Court determined that the "exercise of tribal power be-

tribal law—already resolved in tribal court absent a finding that the tribal court lacked jurisdiction or that its judgment be denied comity for some other valid reason.").

91. Worchester v. Georgia, 31 U.S. 515, 557 (1832) (Tribes are "distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States.").

92. 358 U.S. 217 (1959).

93. *Id.* at 223 ("[A]bsent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them . . . the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe the right of the Indians to govern themselves.").

94. *FMC Corp.*, 942 F.3d at 931.

95. *Id.*; *see also* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) (holding that the Tribe's inherent sovereignty reached the activities of non-members conducted on Indian owned land pursuant to leases with the Tribe); *Water Wheel*, 642 F.3d at 810–13 (rejecting the application of the *Montana* test in favor of following the *Merrion* rule, as the Tribal Appellate Court had done, confirming the Tribe's jurisdiction over the non-members); *Knighton*, 922 F.3d at 895 ("[A] tribe's regulatory power over nonmembers on tribal land does not solely derive for an Indian tribe's exclusionary power, but it also derives from its inherent sovereign power to protect self-government and to control internal relations.").

96. 450 U.S. 544, 565–66 (1981) ("Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands."); Bugenig v. Hoopa Valley Tribe, 266 F.3d 1201, 1209–10 (9th Cir. 2001) (discussing the same); *see also* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987) ("Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty."); Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Miss. in Iowa, 609 F.3d 927, 934–35 (8th Cir. 2010) (briefly discussing the historical scope of tribal sovereignty).

97. *FMC Corp.*, 942 F.3d at 931.

98. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 76, § 4.02; *see also FMC Corp.*, 942 F.3d at 925 (Judge Gabourie is quoted discussing the effects of the *Montana* decision: "[It] has been just murderous to Indian tribes").

yond what is necessary to protect self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."[99] As a result, the Court established as a general rule that the "inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe" except in the three circumstances referred to as the *Montana* exceptions: (1) "A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements;" (2) "a tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when the conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe"; (3) a Tribe may exercise jurisdiction over nonmembers when Congress authorizes them to do so.[100] Essentially, these three exceptions require that the application of the Tribe's rights of nature laws to non-members are "a necessary instrument of self-government and territorial management."[101]

Under the Montana exceptions, it is likely that the Tribe will be able to exercise its rights of nature laws within its respective reservations over nonmembers on tribal land; however, the U.S. Supreme Court in *Nevada v. Hicks*[102] found that "the ownership status of land . . . is only one factor to consider in determining whether regulation of the activities of nonmembers is 'necessary to protect tribal self-government or control internal relations.' "[103] In *Plains Commerce Bank v. Long Family Land & Cattle Co.*,[104] the U.S. Supreme Court continued along this same line of reasoning, explaining that the *Montana* exceptions "restrict[ ] tribal authority over nonmember activities taking place on the reservation, and [the case against jurisdiction] is particularly strong when the nonmember's activity occurs on land owned in fee simple by non-Indians. . . ."[105] The U.S. Supreme Court continued explaining that an action "must do more than injure the tribe, it

99. *Montana*, 450 U.S. at 564–65.

100. *Id.* at 564–66.

101. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137, 141 (1982) ("The power to exercise tribal civil authority over nonmembers 'does not simply derive from the Tribe's power to exclude such persons, but is an inherent power necessary to tribal self-government and territorial management.' ").

102. 533 U.S. 353 (2001).

103. *Id.* at 359–60; *see also* Water Wheel Camp Recreational Area, Inc. v. LaRance, 642 F.3d 802, 818 (9th Cir. 2011) (a "tribe's status as landowner is enough to support regulatory jurisdiction . . . [except] when the specific concerns at issue [in *Hicks*] exist . . . Doing otherwise would impermissibly broaden *Montana*'s scope beyond what any precedent requires and restrain tribal sovereign authority despite Congress's clearly stated federal interest in promoting tribal self-government.").

104. 554 U.S. 316 (2008).

105. *Id.* at 328.

must 'imperil the subsistence' of the tribal community."[106] Ultimately, the decision as to whether the Tribe could assert jurisdiction would be left up to the Tribal Court to decide and possibly the federal court as well. In making that determination, the court should conclude that the application of the *Montana* exceptions favors tribal jurisdiction.

a. Consensual Relations

Under the first *Montana* exception, "a tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."[107] In order to understand how the Anishinaabe Tribes can establish the existence of "consensual relationships" with the State pursuant to the Rights of Manoomin Ordinance, we must begin with the Indian canons of treaty construction.[108]

As a basic principle of federal Indian law, the canons establish that: (1) ambiguous expressions must be resolved in favor of the Indian parties concerned;[109] (2) Indian treaties must be interpreted as the Indian themselves would have understood them;[110] and (3) Indian treaties must be liberally construed in favor of the Indians.[111] Interpreting how the Anishinaabe understood their Treaty with Manoomin along with their subsequent treaties with the United States, and the correlative obligations and responsibilities associated with these treaties, can be evidenced by Aish-ke-bah-ge-ko-zhay, Chief Flat Mouth's speech made at the time of the 1837 treaty negotiations:

> My Father, Your children are willing to let you have their lands, but they wish to reserve the privilege of making sugar from the trees and getting their living from the Lakes and Rivers, as they have done heretofore, and of remaining in their country. It is hard to give up the lands. They will remain and cannot be destroyed- but you may cut down the trees, and others will grow up. You know we cannot live deprived of our Lakes and Rivers. There is some game on the lands yet; and that reason also, we wish to remain upon

106. *Id.* at 341 (quoting Montana v. United States, 450 U.S. 544, 566 (1981)).

107. *Montana*, 450 U.S. at 565–66.

108. Jones v. Meehan, 175 U.S. 1, 10–12 (1899); Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 200 (1999).

109. Winters v. United States, 207 U.S. 564, 576–77 (1908).

110. United States v. Winans, 198 U.S. 371, 380–81 (1905) ("And we have said we will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection,' and counterpoise the inequality 'by the superior justice which looks only to the substance of the right without regard to technical rules.' How the treaty in question was understood may be gathered from the circumstances.").

111. Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675–76 (1979); Choctaw Nation v. Oklahoma, 397 U.S. 620, 630–31 (1970); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 653 F. Supp. 1420, 1429 (W.D. Wis. 1987); Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985).

> them, to get a living. Sometimes we scrape the trees and eat the bark. The Great Spirit above, made the Earth and causes it to produce, which enables us to live.[112]

Later in the negotiations, Aish-ke-bah-ge-ko-zhay repeated this important point, stating: "You know that without the lands and the rivers and the lakes, we could not live. We hunt and make sugar, and dig roots upon the former, while we fish and obtain rice and drink from the latter."[113] Aish-ke-bah-ge-ko-zhay's speeches acknowledge the Anishinaabe's understanding that the earth, and all that she provided, including manoomin, was a gift from the Creator, and it was an obligation of the Anishinaabe to protect it.

> [T]he protection of, and access to rice beds was a paramount concern. As an example, Article 5 of the Treaty of 1837 reads: "The privilege of hunting, fishing, and *gathering the wild rice*, upon the lands, the rivers and the lakes included in the territory ceded, is guaranteed to the Indians, during the pleasure of the President of the United States." Manoomin is the only more-than-human being specifically mentioned in that treaty. Later, when negotiations were underway for the establishment of reservations, a petition from the head chiefs of the tribe dated February 7, 1849, read: "That our people . . . desire a donation of twenty-four sections of land, covering the graves of our fathers, our sugar orchards, *and our rice lakes and rivers*, at seven different places now occupied by us as villages . . ." Many of the lines that mark the boundaries of Ojibwe reservations on contemporary maps still reflect the consideration and eventual (at least partial) accommodation of this request, as many reservations were sited to include or have frontage on significant manoomin waters.[114]

This establishment of Anishinaabe Indian reservations encompassing manoomin waters was especially evident at Bad River, Mole Lake, Lac Courte Oreilles, St. Croix, Mille Lacs, Leech Lake, Bois Forte, and White Earth.[115]

---

112. Ratified Treaty No. 223 Documents Relating to the Negotiations of the Treaty of July 29, 1837, with the Chippewa Indians, NAMP RG 75, M T-494 Roll 3 (available at https://perma.cc/Q6Q7-CDJY (last visited Nov. 17, 2021)).

113. *Id.*

114. DAVID, *supra* note 16, at 29. R

115. *E.g.*, JOSEPH R. MCGESHICK, THE SOKAOGON CHIPPEWA AND THEIR LOST TREATY: "WE HAVE ALWAYS BEEN HERE" 25–26 (1993) ("Chief Willard Ackley describes a meeting between Chief Migizi and government officials late in 1854 at L'Anse, Michigan. A thirty square-mile reservation that was promised to the Sokaogon Band, but never received: 'Later Chief Mi-gee-see was able to lead his Band to L'Anse, Michigan, to receive their share of payments due them from funds created by sale and cessions of 1854. It was at this time that Chief Gitshee Mi-gee-see called the government officials attention to the fact that he had no reservation. The officials asked him where he wanted his reservation? He replied by showing them a handful of wild rice, explaining that the territory he referred to had many lakes and streams in which this rice grew wild. He also told them that there was a great quantity of timber, fish, and game in this territory; besides the wild rice which he held in his hand, was the staple food of his people. The officials agreed that this territory was the ideal location for the Sokaogon Chippewa.'"); Vizenor, *supra* note 16, at 5 ("Chief Chieg Nio'pet recounts that particular lakes never housed wild rice until his people began to frequent them; similarly, when tribal access to other lakes was foreclosed by treaty, formerly robust wild rice stands dwindled along those shores."). R

Further evidence of how the Anishinaabe understood their Treaty with Manoomin along with their subsequent treaties with the United States, and the correlative obligations and responsibilities associated with these treaties, can be evidenced by the Statement Made by the Indians ("Statement").[116] This is a bilingual petition prepared in 1864 for presentation to the Commissioner of Indian Affairs in Washington by a delegation of chiefs, headmen, and warriors of the Lake Superior Anishinaabe Bands.[117] This Statement was written during the winter of 1864 at council meetings that took place on the Bad River Reservation in northern Wisconsin.[118] The details included in this Statement were from the personal memories of attendees of the actual treaty deliberations.[119] This Statement references the 1825 Treaty of Prairie du Chien, 1826 Treaty of Fond du Lac, 1837 Treaty of St. Peters, 1842 Treaty of LaPointe, 1847 Treaty of Fond du Lac, and the 1854 Treaty of LaPointe.[120] Of particular relevance to manoomin, the Statement entails:

> Aaniish go sa maa ninga-bagidinamawaa onow isa gegwejimin zhingwaakwan. Gedako-minoga'igeyan, mii apii begidinamoonaan. Gaawiin wiin owidi ojiibikwwwid gibagidinamoosinoon. Miinawaa maandan dekonamaan ininaatig, miinawaa maandan mitigmizh miinawaa maandan bezhig mashkosiw dekonamaan, manoomin nindizhi-wiindaan maandan, gaawiin isa mamin gibagidinamoosinoon.[121]
>
> [Very well, I will sell him the Pine Timber as he requests me to, from (the) usual height of cutting a tree down and upwards to top is what I sell you, I reserve the root of the tree. Again this I hold in my hand the Maple Timber, also the Oak Timber, also this Straw that I hold in my hand. Wild Rice is what we call this. These I do not sell.][122]
>
> Ji-nishiwanaajitoosiwan maandan manoomin, ji-dazhiikawadwaa ogow mitigoog. Miinawaa zaasijiwang onow ziibiwan, mii imaa ji-awi'inaan, gedazhi-daashkiboonadwaa ogow mitigoog.[123]
>
> [That you may not destroy the rice in working the timber. Also the Rapids and Falls in the Streams I will lend you to saw your timber.][124]
>
> Gaawiin wiin gimiinisinoon, anishaa gidawi'in.[125]

116. STATEMENT MADE BY THE INDIANS: A BILINGUAL PETITION OF THE CHIPPEWAS OF LAKE SUPERIOR, 1864, at 1–5 (John D. Nichols ed., 1988).
117. *Id.* at 1.
118. *Id.* at 2.
119. *Id.* at 3–5.
120. *Id.* at 4.
121. *Id.* at 44.
122. *Id.* at 15.
123. *Id.* at 44–45.
124. *Id.* at 15.
125. *Id.* at 45.

> [I do not make you a present of this, I merely lend it to you.][126]

> Gii-ikido dash aw Anishinaabe, gaawiin nindaa-ikwabisii, geyaabi isa nindibendaan naamdan aki.[127]

> [Then it was that the Indian said, I will not remove and leave my lands. I own the lands yet.][128]

Pursuant to this understanding, the Anishinaabe believed they reserved exclusive possession of manoomin within their treaty territories. In the *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*[129] litigation, which determined the nature and extent of Anishinaabe treaty reserved rights in the portions of the 1837 and 1842 treaty territories located in the State of Wisconsin, the Bands initially pursued an exclusive claim to manoomin but eventually stipulated to an equal apportionment with the State.[130] The Bands, however, reserved the ability to bring their exclusive claim at a later time.[131] Through implementing their understanding that they retained exclusive possession to manoomin pursuant to their treaties, the Tribes have always exercised their responsibility pursuant to the Treaty with Manoomin to protect it, as evidenced by the following:

> The harvest of pine timber in the Great Lakes region was done by floating logs down streams and rivers to centralized saw mills. In the upper reaches of drainage systems this often entailed construction of holding dams in order to build a sufficient head of water to flush the logs downstream. In Wisconsin and Minnesota these dams played havoc with Indian rice marshes because pronounced fluctuations of water levels upstream would uproot young rice plants and ruin the crop. As early as 1843 the Chippewa responded to this threat by destroying dams on the Snake and Rum Rivers. In 1849, lumberman constructed a dam near the source of Rum River at Mille Lacs Lake. This dam backed water over one of the Chippewa's most important rice beds and became a focus of conflict between the Mille Lacs and their lumbermen neighbors. During the Spring of 1854 Indians lifted the gates of the dam to lower water levels and also threatened to tear out the dam entirely.

126. *Id.* at 15.

127. *Id.* at 68.

128. *Id.* at 21.

129. 775 F. Supp. 321 (W.D. Wis. 1991).

130. Wild Rice Regulatory Phase Consent Decree § C.6, *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 775 F. Supp. 321 (W.D. Wis. 1991) (No. 1222) [hereinafter Consent Decree] (in the Stipulation for the Wild Rice Trial, which was adopted by the Court pursuant to the Consent Decree, the Bands agreed to amend the Voigt Intertribal Task Force Protocol on Manoominikewin (Wild Rice Harvest) Levels "so that it does not purport to allow for the establishment of an exclusive tribal [manoomin] harvest on any waters of the State" prior to the entry of a final judgment in the case).

131. *Id.* (in the Stipulation for the Wild Rice Trial, the Bands reserved their rights to pursue such a claim in any later proceeding).

> Minnesota Governor Willis Gorman was forced to send an emissary to Mille Lacs to negotiate the dispute – an action which was unsuccessful.[132]

Efforts of the Anishinaabe to continue to protect manoomin is further evidenced by the following:

> Tribal elders and resource managers have historically monitored and managed water levels as part of wild rice management. For example, if a particular beaver appeared to be building a dam that might affect water levels and negatively impact wild rice growth, that beaver "ended up in the pot." In Nett Lake, Bois Forte Band of Chippewa, a boulder the size of a small car protrudes out of the water in front of Spirit Island. Historically, tribal elders determined the time of rice harvest, in part, by gauging when water levels reached a particular point on that rock.[133]

The Anishinaabe's interest in protecting manoomin is also incorporated in the Stipulation for the Wild Rice Trial, which includes the language: "The defendants [the State of Wisconsin] agree to consult with the Voigt Task Force [of the Tribes] before the issuance of any permit which is required to be obtained from the State regarding any activity which may reasonably be expected to directly affect the abundance or habitat of wild rice in the ceded territory."[134] The parties also agreed to open waters for wild rice harvesting concurrently with required consultation between Tribal Wild Rice Authorities and State managers on date-regulated waterbodies listed in the Voigt Intertribal Task Force Protocol on Manoominikewin (Wild Rice Harvest) Levels.[135]

In the implementation of the Indian law canons as to how the Anishinaabe understood their Treaty with Manoomin along with their subse-

132. Charles E. Cleland, *Preliminary Report of the Ethnohistorical Basis of the Hunting, Fishing, and Gathering Rights of the Mille Lacs Chippewa*, *in* FISH IN THE LAKES, WILD RICE, AND GAME IN ABUNDANCE 76 (James McClurken et al. eds., 2000).

133. Walker & Doerfler, *supra* note 16, at 507. **R**

134. Consent Decree, *supra* note 130, § C.1; DAVID, *supra* note 16, at 30–31. **R**

135. Consent Decree, *supra* note 130, § C.7; DAVID, *supra* note 16, at 33 (the *Manoominikewin Protocol* (as modified August 2, 2007) "lists fifty-three (53) off-reservation waterbodies that are date-regulated. One significant provision of this protocol is the ability of the bands to amend the list of date-regulated waterbodies by adding additional waters upon the recommendation of the Biological Services Division of GLIFWC. However, while the Tribes can easily add waters to the list and place this additional restriction on tribal members, the state process is more complex, taking several years to complete. Since the stipulation was signed in 1989, neither the State nor the Tribes have modified the stipulated list of date-regulated lakes, although prior to 1989, the state regularly modified the list of waters it regulated. Although the stipulation indicates that the decision to open date-regulated lakes is to be made jointly by a WDNR representative and a tribal representative (who is generally referred to by the traditional title of *Rice Chief*), in application local agreements have frequently been made between local tribal and state designees which allow one party greater control of the opening decision. Furthermore, during interim negotiations conducted in 1985, it was agreed that either party could open a lake without consultation if: a) either party made good faith repeated efforts to contact the other's delegate for 24 hours; or b) if either party had failed to respond to messages for 24 hours; or c) if either party had failed to appear at a site following meeting arrangements. This agreement has continued in practice, although it is not part of the final wild rice stipulation from the *LCO* case."). **R**

quent treaties with the United States, the correlative obligations and responsibilities associated with these treaties can be evidenced by the following explanation by Heidi Kiiwetinipinesiik Stark:

> Treaties created relationships. When Anishinaabe entered into treaties with the United States . . . Americans . . . became relatives of the Anishinaabe . . . [T]hese relationships were bound not by blood, but instead by ink. But neither blood nor ink carry much weight among the Anishinaabe. It is words that have force. Words can possibly be seen and understood as a law of creation as it was the breath of Gichi-Manidoo, the Creator, when combined with the Earth that made the Anishinaabe. Thus, any word [the Anishinaabe] utter is intimately connected not only to the act of our creation, but also to the one we call the kind-hearted spirit, Gizhe-Manidoo. [For the Anishinaabe, human beings'] breath is an extension of the Creator's . . . The Anishinaabe, made from the Earth and the Creator's breath, are connected to the land through [their] bodies. As Little Rock spoke [during the 1863 Treaty Negotiations][136] from his heart and breath, placed in him by the Creator, the Creator and the Earth could hear his words. Anishinaabe creation delineated a relationship between all beings, the Anishinaabe just one of many. Little Rock recognized that Anishinaabe actions, such as negotiating treaties, involved and affected all of creation. In uttering these agreements, which simultaneously established and renewed relationships, [the Anishinaabe] not only brought Anishinaabe *aki* into [their] relationship with the United States . . . but also brought the United States . . . into their relationship with *aki*. [The Anishinaabe] spoke not only for the land, but also for the newcomers to this land. [They] vouched for these newcomers. In doing so [the Anishinaabe] became responsible for [the] Americans . . . for how they would relate to *aki*. [The Anishinaabe] brought them into [their] long-standing relationships with *aki* and thus took on a responsibility for how they would relate with all of creation.[137]

As described in this excerpt and strengthened by the Indian law canons, the Anishinaabe's understanding of Anishinaabe traditional law is that the State entered into a consensual relationship with the Tribes pursuant to the various Anishinaabe treaties, through its occupation within the treaty territories and its utilization of the territory's resources on a "shared" basis with the

136. *Treaty of October 2, 1863, with the Red Lake & Pembina Bands of Chippewas*, 38th Cong. 1st Sess. (Jan. 8, 1864) (Message from Abraham Lincoln, President of the United States, to the Senate); Treaty with the Red Lake and Pembina Bands of Chippewa, *supra* note 14 (Chief Little Rock stated, "Now, my friend, I am going to show you how we came to occupy this land. The Master of Life placed us here and gave it us for an inheritance . . . I want the earth to listen to me, and I hope also that my grandfather may be present to hear what I have to say, and I invoke the Master of Life to listen to the words I have to speak. I hope there is not a single hole in the atmosphere in which my voice shall not be heard. My friend, the question you have laid before us is of great importance . . . My grandfather made my heart, and he also made my mouth, that all the land and the inheritance may listen to my voice when I speak his words . . . We have made reference to the Master of Life; we speak of him again. He is present now and hears what we have to say.").

137. STARK, *supra* note 15, at 266–68. **R**

Tribes.[138] In determining the existence of a consensual relationship for regulatory jurisdictional purposes, "consent may be established 'expressly or by [the nonmember's] actions.'"[139] The test is "whether under th[e] circumstances the non-Indian defendant should have reasonably anticipated that [its] interactions might 'trigger' tribal authority."[140]

Some may argue that the State did not enter into the Treaties with the Anishinaabe; the United States did. However, the Enabling Acts of each of the respective states within the Anishinaabe Treaty Territories provide for the State to acquire the natural resources within the State "on 'equal footing' with the original [s]tates."[141] As expressed in *Minnesota v. Mille Lacs Band of Chippewa Indians*[142] and upheld in *Herrera v. Wyoming*,[143] an Indian Tribe's rights to hunt, fish, and gather on state land, including the rights for tribal regulation of the natural resources, are not irreconcilable with a state's sovereignty over the natural resources in the State "as an essential attribute of its governmental existence[.]"[144] Therefore, "Indian treaty rights can coexist with state management of natural resources."[145] Furthermore, "[a]lthough States have important interests in regulating wildlife and natural resources within their borders, this authority is shared with the Federal Government when the Federal Government exercises one of its enumerated constitutional powers, such as the Treaty power.[146] As a result of this consensual relationship and as a matter of tribal law, the Tribes are

138. Puyallup Tribe v. Dep't of Game of Wash. (Puyallup I), 391 U.S. 392, 398 (1968); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (LCO VII), 740 F. Supp. 1400, 1416 (W.D. Wis. 1990); Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 684 (1979) (the resource allocation standard is grounded on the premise that both tribal and non-tribal users are entitled to a "fair share" of the harvest in the treaty territory or the area subject to nonexclusive treaty reserved harvest activities.)

139. Water Wheel Camp Recreational Area, Inc. v. LaRance, 642 F.3d 802, 818 (9th Cir. 2011) (citing Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316, 338 (2008)).

140. *Id.* at 817–18 (quoting *Plains Com. Bank*, 554 U.S. at 338 (stating also "[t]he Supreme Court has indicated that tribal jurisdiction depends on what non-Indians 'reasonably' should 'anticipate' from their dealings with a tribe or tribal members on a reservation.")).

141. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 203–04 (1999); Le Clair v. Swift, 76 F. Supp. 729, 733 (E.D. Wis. 1948) ("It is not only the right, but the duty, of the State to preserve for the benefit of the general public, the fish in its waters from destruction or undue reduction in numbers, whether caused by improvidence or greed of any interests. As trustee for the people, in the exercise of this right and duty, the State may conserve fish and wildlife by regulating or prohibiting the taking of same, as long as such action does not violate any organic law of the land. It is well established by the authorities that by virtue of residual sovereignty, a State, as the representative of its people and for the common benefit of all of its citizens, may control the fish and game within its borders, and may regulate or prohibit such fishing and hunting . . . subject however to the absence of conflicting federal legislation.").

142. 526 U.S. 172 (1999).

143. 139 S. Ct. 1686 (2019).

144. *Minnesota*, 526 U.S. at 203–04; *Herrera*, 139 S. Ct. at 1705–06.

145. *Minnesota*, 526 U.S. at 204; *Herrera*, 139 S. Ct. at 1695.

146. *Minnesota*, 526 U.S. at 204; *Herrera*, 139 S. Ct. at 1696–97.

allowed to uphold their treaty obligations with manoomin to protect the sacred plant and the water bodies that comprise its ecosystem from degradation and infringement by the State and non-member state citizens.[147] The regulation of this sort of conduct arises directly out of this consensual relationship, creating a nexus and thereby establishing the Tribes' ability to regulate.[148] Of importance to this analysis is that federal courts, when reviewing whether a Tribe possessed proper regulatory jurisdiction, "are required to defer to tribal court interpretations of tribal law."[149]

b. Direct Effect on the Political Integrity, the Economic Security, or the Health or Welfare of the Tribe

Under the second *Montana* exception "a tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when the conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[150] Tribal regulatory jurisdiction under this exception "may exist concurrently with federal regulatory jurisdiction."[151] In establishing this exception, a Tribe "may quite legitimately seek to protect its members from noxious uses that threaten tribal welfare or security, or from nonmember conduct on the land that does the same."[152] As expressed by the Ninth Circuit Court of Appeals, "Threats to tribal natural resources, including those that affect tribal cultural and religious interests, constitute

147. Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (LCO VI), 707 F. Supp. 1034, 1060 (W.D. Wis. 1989) (the State's management prerogative is restrained by the existence of the Tribe's rights: "The fact that plaintiffs may be regulating their members' exercise of their treaty rights does not make them the manager of the fisheries. That responsibility and authority remains the defendants'. They have the fiduciary obligation of managing the natural resources within the ceded territory for the benefit of current and future users. The tribes' regulation of their members does not relieve the department of this obligation or prevent it from carrying it out, although it narrows its management options to a significant degree, and imposes burdens on them beyond those it has carried out in the previous implementation of the [Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt (LCO I), 700 F.2d 341 (7th Cir. 1983)] decision.").

148. Knighton v. Cedarville Rancheria of N. Paiute Indians, 922 F.3d 892, 904 (9th Cir. 2019) (quoting Atkinson Trading Co. v. Shirley, 532 U.S. 645, 656 (2001) ("*Montana*'s consensual relationship exception requires that 'the regulation imposed by the Indian tribe have a nexus to the consensual relationship itself.'")); *see also* FMC Corp. v. Shoshone-Bannock Tribes, 942 F.3d 916, 935 (9th Cir. 2019) (citing Wilson v. Marchington, 127 F.3d 805 (9th Cir. 1997) ("The nexus question is part of the jurisdictional question. Once jurisdiction is established, lack of nexus is not a ground for denying comity under *Marchington*.")).

149. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 76, § 7.04(3); Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 19 (1987); Prescott v. Little Six, Inc., 387 F.3d 753, 756–57 (8th Cir. 2004); Basil Cook Enters., Inc. v. St. Regis Mohawk Tribe, 117 F.3d 61, 66 (2d Cir. 1997).

150. Montana v. United States, 450 U.S. 544, 565–66 (1981).

151. *FMC Corp.*, 942 F.3d at 935 ("'[T]here is no suggestion' in the *Montana* case law 'that inherent [tribal] authority exists only when no other government can act.'" (citation omitted)).

152. Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316, 336 (2008).

threats to tribal self-governance, health and welfare."[153] The rights of manoomin exemplify tribal cultural interests central to the health and welfare of the Tribes' members, and thus go to the heart of tribal self-governance.

In *Chilkat Indian Village, IRA v. Johnson*,[154] the Chilkat Indian Village Tribal Court determined that the Tribe had jurisdiction and possessed the authority to regulate the non-Indian defendant's conduct as well as his corporation.[155] The Court determined:

> The trial evidence convincingly demonstrated the continuing importance of the [Whale House] artifacts to the tribe. As such, this court concludes that the removal of the artifacts from Klukwan had a direct effect on and posed a distinct threat to the political integrity, health, and welfare of the Tribe. This court heard extensive, credible testimony about the significance of the artifacts of the Ganexteidi Clan as well as the entire tribe. All members of the village continue to rely on the artifacts for essential ceremonial purposes. The artifacts embody the clan's history. . . [Therefore,] the 1984 removal in violation of the tribe's 1976 Ordinance had a direct effect on the health and welfare of the tribe.[156]

In *Hoover v. Colville Confederated Tribes*,[157] the Colville Confederated Tribes Court of Appeals addressed a matter involving the Tribes' ability to regulate fee lands of a non-member within the exterior boundaries of the Colville Confederated Tribes Reservation.[158] The Court determined that the Tribes had jurisdiction to regulate the non-member's fee lands because the non-member's conduct would affect the health and welfare of members of the Tribes.[159] In doing so, the Tribe addressed the spiritual and cultural health of the Tribe in connection with its lands as follows:

> Plants and animals preserved through comprehensive management in the reserve are not only a source of food, but also play a vital and irreplaceable role in the cultural and religious life of Colville people. Annual medicine dances, root feasts, and ceremonies of the Longhouse religion all incorporate natural foods such as deer and elk meat and the roots and berries found in the Hellsgate Reserve. The ceremonies play an integral role in the current well being and [future] survival of Colville people, both individually and as a tribal entity.[160]

In upholding the importance of the spiritual and cultural health of the Tribes in connection with its lands, the Court determined that "[t]he inability of the

153. *FMC Corp.*, 942 F.3d at 935 (referencing *Plains Com. Bank*, 554 U.S. at 333); Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408, 441 (1989); Montana v. EPA, 137 F.3d 1135, 1139, 1141 (9th Cir. 1998).

154. 20 Indian L. Rep. 6127 (Chilkat Tribal Ct. 1993).

155. *Id.* at 6138–40.

156. *Id.* at 6139.

157. 29 Indian L. Rep. 6035 (Colville Ct. App. 2002).

158. *Id.* at 6035.

159. *Id.* at 6035, 6041.

160. *Id.* at 6039.

Tribes to apply comprehensive planning regulations to fee lands within the Reserve will substantially impair the Tribes' ability to preserve the general character, cultural and religious values, and natural resources associated with the Reserve."[161] The Court acknowledged that "spirituality" and its connection to the earth is "vital to the spiritual health of the Tribes and its members."[162] In doing so the Court adopted a "totality of the circumstances" test in weighing all the factors and interests involved in balancing the purpose of the land in question with the intent of the proposed regulatory action.[163]

With regard to manoomin, the "actions of any business entity or government, or other public or private entity" that "engage in"[164] or "permit"[165] activities that violate or would likely violate the provisions of the Rights of Manoomin Ordinance meet the second prong of the *Montana* test.[166] The activities in *Manoomin; The White Earth Band of Ojibwe v. Minnesota Department of Natural Resources* are a prime of example of such violations.[167] Furthermore, tribal claims regulating non-Indian conduct affecting tribal natural resources occurring off-reservation are not defeated simply because of the conduct's origin when the conduct has direct on-reservation or treaty

161. *Id.* at 6038.

162. *Id.* at 6039–40 ("It is well known in Indian Country that spirituality is a constant presence within Indian tribes. Meetings and gatherings all begin with prayers of gratitude to the Creator. The culture, the religion, the ceremonies—all contribute to the spiritual health of a tribe. To approve a planned development detrimental to any of these things is to diminish the spiritual health of the Tribes and its members. The spiritual health of the American Indian is bound with the earth . . . It is the land and the animals which renew and sustain their vigor and spiritual health.").

163. *Id.* at 6040–41 ("Again, we are of the opinion we should look at the totality of circumstances. We see the circumstances as this—the Tribes have express delegated authority to regulate water quality within the Reservation. The Tribes have enacted a Comprehensive Land Use and Development Code that is neutral in its application to Indians and non-Indians. The Tribes have closed the Reserve to unrestricted development and actively work to enhance its wildlife. The Reserve has a 'vital and irreplaceable role in the cultural and religious life of Colville people.' The large game animals within the Reserve are an important food source for the Colville people. Finally, Congress has appropriated millions of dollars for purchase of fee lands within the Reserve in order to help maintain the area in a natural state.").

164. RIGHTS OF MANOOMIN ORDINANCE, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-009, § 2(a) (Dec. 31, 2018); RESOLUTION ESTABLISHING RIGHTS OF MANOOMIN ORDINANCE, 1855 Treaty Authority, Res. No. 2018-05, § 2(a) (Dec. 5, 2018).

165. RIGHTS OF MANOOMIN ORDINANCE, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-009, § 2(b); RESOLUTION ESTABLISHING RIGHTS OF MANOOMIN ORDINANCE, 1855 Treaty Authority, Res. No. 2018-05, § 2(b).

166. Montana v. United States, 450 U.S. 544, 565–66 (1981) ("A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when the conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.").

167. No. 0:21-cv-01869-WMW-LIB (White Earth Band of Ojibwe Tribal Ct. Aug. 5, 2021).

territory effects.[168] This is particularly true with respect to unitary resources like wild rice and the waters upon which it depends.[169]

To elaborate, the record is replete with evidence that violations of the Rights of Manoomin Ordinance have a direct effect on and pose a distinct threat to the political integrity, health, and cultural welfare of the Tribe.[170] The Treaty with Manoomin clearly demonstrates the continuing cultural importance of manoomin to the Tribes.[171] All Anishinaabe continue to rely on manoomin for "essential ceremonial purposes."[172] Manoomin embodies the existence of the Anishinaabe Nation.[173] Therefore, as determined in the *Chilkat Indian Village, IRA*, and *Hoover* cases, activities that violate the Rights of Manoomin Ordinance have a "direct effect on the health and welfare of the tribe."[174]

This is so even with the U.S. Supreme Court's admonition that an action "must do more than injure the Tribe, it must 'imperil the subsistence' of the tribal community."[175] An environmental catastrophe impairing the rights of manoomin would "'imperil the subsistence' of the tribal community."[176] So, too, the cumulative impacts of multiple State decisions to allow actions collectively at odds with the rights of manoomin can "imperil the subsistence" of the tribal community. The devastation resulting from such actions would be more than just physical (such as loss of sustenance or loss of ecosystem services) but would also strike at the cultural identity of the Tribes, who have deep-rooted spiritual and ceremonial connection with

168. Montana v. EPA, 137 F.3d 1135, 1141 (9th Cir. 1998) ("We have previously recognized that threats to water rights may invoke inherent tribal authority over non-Indians. A tribe retains the inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the health and welfare of the tribe. This includes conduct that involves the tribe's water rights . . . [D]ue to the mobile nature of pollutants in surface water it would in practice be very difficult to separate the effects of water quality impairment on non-Indian fee land from impairment on the tribal portions of the reservation: 'A water system is a unitary resource. The actions of one user have an immediate and direct effect on other users.'").

169. *Id.*

170. Walker & Doerfler, *supra* note 16, at 509–10. **R**

171. *See generally* Part III.

172. Vizenor, *supra* note 16, at 5 ("Manoomin is just as central to our future survival as our past. **R** While we try to overcome tremendous obstacles to our collective health, the sacred food of manoomin is both food and medicine . . . Manoomin is inextricably bound to the religion and identity of the Anishinaabeg."); CHILD, *supra* note 16, at 146 ("In the Great Lakes, manoomin, or wild rice, is the supreme **R** plant, respected in ceremony and daily life.").

173. GREAT LAKES WILD RICE INITIATIVE, LAKE SUPERIOR MANOOMIN CULTURAL AND ECOSYSTEM CHARACTERISTICS STUDY, FINAL REPORT, at 3 (2020) ("Manoomin is central to the Anishinaabe cultural identity, traditions, and livelihood"); VENNUM, *supra* note 21, at 58.

174. Chilkat Indian Village, IRA v. Johnson, 20 Indian L. Rep. 6127, 6139 (Chilkat Tribal Ct. 1993).

175. Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316, 341 (2008) (citing Montana v. United States, 450 U.S. 544, 566 (1981)).

176. *Id.* at 341 (citing *Montana*, 450 U.S. at 566).

their territory and natural resources—such an outcome would indeed "imperil" tribal self-governance, health, and welfare.[177]

c. Congressional Authorization

Under the other exception a tribe may exercise jurisdiction over nonmembers when Congress authorizes them to do so.[178] There are a number of federal statutes and treaties in which Congress has expressly authorized tribal authority to regulate specific aspects of tribal territories as well as individuals conducting prohibited activities within these territories.[179]

In *Bugenig v. Hoopa Valley Tribe*,[180] the Hoopa Valley Tribal Court of Appeals addressed a matter involving the Tribe's ability to regulate fee lands of a non-member within the exterior boundaries of the Hoopa Valley Indian Reservation.[181] The court held that the Tribe retained regulatory authority over all land located within the boundaries of the Hoopa Valley Indian Reservation.[182] The Ninth Circuit Court of Appeals upheld tribal jurisdiction reasoning that Congress, in establishing the reservation and subsequently ratifying the Hoopa Valley Tribe's Constitution in the Hoopa-Yurok Settlement Act, effectively delegated federal authority to the Tribe to regulate non-Indians within the Hoopa Valley Indian Reservation.[183] As a result, the Tribe retained the ability to prohibit logging within a one-half

177. FMC Corp. v. Shoshone-Bannock Tribes, 942 F.3d 916, 929 (9th Cir. 2019) (citing Shoshone-Bannock Tribes Land Use Dep't and Fort Hall Bus. Council v. FMC Corp. (Shoshone-Bannock Tribal Ct. App. May 16, 2014) ("Th[e] groundwater contamination 'negatively affects the ecosystem and subsistence fishing, hunting and gathering by tribal members at the River, as well as the Tribes' ability to use this important resource as it has been historically used for cultural practices, including the Sundance.'")).

178. *Montana*, 450 U.S. at 564 ("But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation"); Bugenig v. Hoopa Valley Tribe, 266 F.3d 1201, 1210–11 (9th Cir. 2001) (partially quoting United States v. Mazurie, 419 U.S. 544, 556–57 (1975) (emphasis added) ("There is ample support for the general proposition the Congress *can* delegate jurisdiction to an Indian tribe. The Supreme Court has stated, repeatedly, that Congress can delegate authority to an Indian tribe to regulate the conduct of non-Indians on non-Indian land that is within a reservation . . . Although there are limits on the authority of Congress to delegate its legislative power, '[t]hose limitations are . . . less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter. Thus it is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory; they are a separate people possessing the power of regulating their internal and social relations.'")).

179. *See generally* Part VI; *FMC Corp*., 942 F.3d at 932 ("[A] Tribe may regulate the conduct of nonmembers on non-Indian fee land when that regulation is expressly authorized by federal statute or treaty."). *See also* Strate v. A-1 Contractors, 520 U.S. 438, 445–46 (1997); Montana v. EPA, 137 F.3d 1135, 1140 (9th Cir. 1998).

180. 5 NICS App. 37 (Hoopa Valley Tribal Ct. App. 1998).

181. *Id.* at 37.

182. *Id.* at 49.

183. *Bugenig*, 266 F.3d at 1204.

mile buffer zone adjoining the Hoopa Valley Tribe's sacred White Deerskin Dance Ground.[184] The court asserted:

> The White Deerskin Dance is a world renewal dance. And the intent of the dance . . . is to put everything back in balance that's gotten out of balance from dance to dance. And that's the main emphasis of the dance, it is not only for the good of the Hoopa Tribe, but for all people.[185]

The court continued by explaining the connection with its traditional territories:

> Beyond the coastal mountains of northwestern California, the Trinity River runs through a rich valley which has always been the center of the [Hoopa] world, the place where the trails return. There, the legends say, the people came into being, and there they have always lived. From this central valley, [Hoopa] land spread out in every direction . . . Within this land were fields of grass; groves of pine, madrona, and oak; streams, which supported many fish, birds, and animals; and mountain forests of pine, yew, fir, and oak filled with wildlife. The [Hoopa] used all of these resources, but they made their homes and villages beside the Trinity River, in the valley from which they took their name. At the very heart of that valley was *Takimildin*. This village known as the "Place of the Acorn Feast" was the site of three [Hoopa] ceremonies; the place from which the tribe's main spiritual leader was chosen, and the spiritual center for the people of the valley. For longer than any man could remember, the sacred house had stood there. For thousands of years, spiritual leaders and members of the tribe had come here to pray and meditate, and dancers had met outside the big house on the night before the most sacred White Deerskin Dance to practice.[186]

In reaching this conclusion, the Hoopa Valley Tribal Court of Appeals utilized several historical factors that can be applied similarly to jurisdictional questions involving rights of nature. The first factor was the establishment of the reservation. The Hoopa Valley Indian Reservation was established by Executive Order on August 21, 1865.[187] The exterior boundaries were approved and declared by the President on June 23, 1876.[188] The reservation

184. *Bugenig*, 5 NICS App. at 44, 49.

185. *Id.* at 38.

186. *Id.* at 39.

187. *Id.* at 41 ("On August 21, 1865, Austin Wiley, Superintendent of Indian Affairs for the State of California, acting under authority of the United States of America, issued an Executive Order stating, in part: 'I do hereby proclaim and make known to all concerned that I have this day located an Indian reservation to be known and called by the name and title of the Hoopa Valley Reservation, Cal., to be described by such metes and bounds as may hereafter be established by order of the Interior Department, subject to the approval of the President of the United States. Settlers in Hoopa Valley are hereby notified not to make any further improvements upon their places, as they will be appraised and purchased as soon as the Interior Department may direct.'").

188. *Id.* ("On June 23, 1876, President Ulysses S. Grant issued an Executive Order describing the reservation's boundaries encompassing a portion of lands adjoining the Trinity River the perimeter of which was 'declared to be the exterior boundaries of the Hoopa Valley Indian Reservation, and the land embraced therein, an area of 89,573.43 acres, be, and hereby is, withdrawn from public sale, and set apart for Indian purposes . . . .'").

boundaries were later extended by Executive Order in 1891.[189] The reservation was later partitioned "and returned to its original size pursuant to the Hoopa-Yurok Settlement Act of 1988."[190]

The second historical factor utilized in the court's analysis was the establishment and approval of the Tribe's existing governing documents. The Hoopa Valley Tribe is organized pursuant to the Indian Reorganization Act of 1934 under a "constitution and amendments approved by the Secretary of the Interior on November 20, 1933, September 4, 1952, August 9, 1963, and August 18, 1972."[191] The constitution was subsequently "ratified and confirmed" as a part of the Hoopa-Yurok Settlement Act.[192]

The third factor utilized in the court's analysis was the powers expressed in the Tribe's constitution.[193] Pursuant to Article II of the Tribe's constitution, the Tribe declared that it possessed jurisdiction within the exterior boundaries of the reservation.[194] Pursuant to Article IX, the Tribe declared the ability "to provide assessments and license fees upon non-members . . ."[195] and "to safeguard and promote the peace, safety, morals, and general welfare of the Hoopa Valley Indians by regulating the conduct of trade and the use or disposition of property . . . affecting non-members . . . ."[196]

189. *Id.*

190. *Id.* ("The reservation later partitioned and returned to its original size by the Hoopa-Yurok Settlement Act of 1988. That law states in part: 'Effective with the partition of the joint reservation as provided in subsection (a) of this section, the area of land known as the "square" (defined as the Hoopa Valley Reservation established under Section 2 of the Act of April 8, 1864, the Executive Order of June 23, 1876, and the Executive Order of February 17, 1912) shall thereafter be recognized and established as the Hoopa Valley Reservation. The unallotted trust land and assets of the Hoopa Valley Reservation shall thereafter be held in trust by the United States for the benefit of the Hoopa Valley Tribe.'").

191. *Id.* at 42.

192. *Id.* at 41–42 (The Hoopa-Yurok Settlement Act of 1988 states: "The existing governing documents of the Hoopa Valley Tribe and the governing body established and elected thereunder, as heretofore recognized by the Secretary, are hereby ratified and confirmed.").

193. *Id.* at 42.

194. *Id.* ("Article II of the Constitution and Bylaws of the Hoopa Valley Tribe states: 'The jurisdiction of the Hoopa Valley Tribe shall extend to all lands within the confines of the Hoopa Valley Indian Reservation boundaries as established by Executive Order of June 23, 1876, and to such other lands as may hereafter be acquired by or for the Hoopa Valley Indians.'").

195. *Id.* ("Article IX Powers and Duties of Tribal Council includes in Section 1 (f): '(1) To provide assessments or license fees upon non-members doing business or obtaining special privileges within the reservation, subject to the approval of the Commissioner of Indian Affairs or his authorized representative. (2) To promulgate and enforce assessments or license fees upon members exercising special privileges or profiting from the general resources of the reservation.'").

196. *Id.* ("Article IX, Section 1 (l) authorizes the governing Tribal Council: 'To safeguard and promote the peace, safety, morals, and general welfare of the Hoopa Valley Indians by regulating the conduct of trade and the use or disposition of property upon the reservation, provided that any ordinance directly affecting non-members of the Hoopa Valley Tribe shall be subject to the approval of the Commissioner of Indian Affairs or his authorized representative.'").

The fourth factor utilized in the court's analysis was the effects of allotment on the reservation. As the court explained, "The property involved in this dispute is located on the Hoopa Valley Indian Reservation in an area referred to as Bald Hill, and was originally allotted to members of the Hoopa Tribe under the General Allotment Act."[197]

The fifth factor utilized in the court's analysis was the scope of the regulatory action.[198] In this instance, the dispute involved the Tribe's harvest management plan.[199] The plan established that one of its goals was to "protect cultural and religious resources."[200] The prohibition on logging within a one-half mile buffer zone adjoining the Hoopa Valley Tribe's sacred White Deerskin Dance Ground was established pursuant to this stated goal.[201]

The court then proceeded to analyze these five factors pursuant to *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*.[202] The court explained:

> Our attention is drawn to the footnote accompanying the case law cited by the Supreme Court in support of the second *Montana* exception, wherein the Court stated: As a corollary, this Court has held that Indian tribes retain rights to river waters necessary to make their reservation livable. *Arizona v. California*, 373 U.S. 546, 599 (1963). Given that logic, it would seem to follow that a timber harvest regulation, neutrally applied, the purpose and effect of which is to preserve the sanctity of the Hoopa Tribe's most sacred spiritual location for the present and future use of tribal members would be a right retained by the Hupa people to ensure that their reservation remained livable. Or as Justice White would have it, the Hoopa Valley Tribe has

197. *Id.* at 42–43 ("One twenty-acre portion held in trust for Mae Wallace Baker was subsequently converted to fee simple patent in 1947. Another parcel, held in trust for Robert Pratt, was sold out of trust status in 1958 to Don H. Gould. Both parcels later became the property of a California Limited Partnership called the Gould Family Partnership. The present-day Hoopa Valley Indian Reservation, referred to as 'the Hoopa Square,' has less than one percent of its approximately ninety thousand acres held in fee simple status by non-Indians.").

198. *Id.* at 43–45.

199. *Id.* at 43.

200. *Id.*

201. *Id.* at 43–44 ("[T]he Hoopa Valley Tribe prepared an archaeological evaluation of the proposed timber harvest area and enlisted the participation of the Bureau of Indian Affairs in initiating a consultation with the State of California under Section 106 of the National Historic Preservation Act. The BIA letter stated in part: 'The results of [the] studies documented the presence of two archaeological/cultural sites in the APE that are evaluated as potentially eligible for inclusion on the National Register of Historic Places. The site of the White Deerskin Dance Grounds and trail is considered very significant to the tribe.' ").

202. 492 U.S. 408, 441 (1989); *Bugenig*, 5 NICS App. at 48–49 (The court upheld the decision of the trial court which determined as follows: "By conducting logging activities not in compliance with tribal law, the defendant acted in contravention of tribal law, threatening and physically disturbing the integrity and sacred status of the White Deerskin Dance area and Trail . . . the activity threatened the health and welfare of the tribe and the Hoopa Valley People's customs and traditions . . . The Hoopa Valley Tribe has the power and authority to define areas of sacred significance and through establishment of the buffer no-cut zone in the Bald Hill area, has exercised that power.").

> neither relinquished nor abrogated, in the fact of Appellant Bugenig's effort to "bring a pig into the parlor" to the White Deerskin Dance Ground, its inherent sovereign authority "to ensure that this area maintains its unadulterated character."[203]

Based upon the cultural and spiritual significance of the area, the court held:

> The *Brendale* standard . . . supports the right of the Hoopa Valley Tribe to implement neutral applied regulations to reasonably restrict encroachment upon . . . "that sacred place 'among the oak tops' on Bald Hill, where, the legends say, the immortal watch the people of the valley dance with the precious white deerskins and the sacred obsidian blades."[204]

In summary, the various above-described documents and actions all point toward Congress intending the Hoopa Valley Tribe to have retained its inherent sovereignty to regulate logging in the area in question.

Applying the five factors utilized in *Bugenig* to the Anishinaabe and the Rights of Manoomin Ordinance, a similar result is produced. The first factor entails the establishment of the reservation(s). Most of the Anishinaabe reservations were established pursuant to treaties and were later approved and declared pursuant to executive orders and statutes. For example, the White Earth Indian Reservation was established pursuant to the 1867 Treaty with the Chippewa.[205] Most of the reservations of the Lake Superior Anishinaabe Bands were established pursuant to the 1854 Treaty with the Chippewa.[206] The reservations of the Mississippi Bands of Ojibwe were originally established pursuant to the 1855 Treaty with the Chippewa.[207] The Red Lake and Pembina (Turtle Mountain) reservations were originally established pursuant to the 1863 Treaty with the Chippewa.[208] The White Earth, Red Lake, Leech Lake, Bois Forte, Grand Portage, and

203. *Bugenig*, 5 NICS App. at 48–49 (quoting *Brendale*, 492 U.S. at 441).

204. *Id.* at 46–49 (discussing *Brendale*, 492 U.S. at 441–44).

205. Treaty with the Chippewa Indians, Chippewa Indians-U.S., Mar. 19, 1867, 16 Stat. 719.

206. Treaty with the Chippewas, Chippewa-U.S., Sept. 30, 1854, 10 Stat. 1109. The Anishinaabe territories were collectively owned by the various Bands of the Ojibwe. See Article 5 of the 1842 Treaty which states, "Whereas the whole country between Lake Superior and the Mississippi, has always been understood, as belonging in common to the Chippewas, party to this treaty. . . ." Treaty with the Chippewas, Chippewa-U.S., Oct. 4, 1842, 7 Stat. 591. Article 1 of the 1854 Treaty established a division between the Mississippi and Lake Superior Bands and as a result established the Leech Lake Reservation as follows: "the Chippewas of Lake Superior hereby relinquish to the Chippewas of the Mississippi, all their interest in and claim to the lands heretofore owned by them in common, lying west of the above boundry-line." The formal establishment of the Leech Reservation occurred the following year pursuant to the 1855 Treaty with the Chippewas, *supra* note 40, which was later expanded and consolidated pursuant to the 1864 Treaty with the Chippewas, Chippewa-U.S., May 7, 1864, 13 Stat. 693. Article 2 of the 1854 Treaty established the L'Anse (Keeweenaw Bay Indian Community), the Lac Vieux Desert, and Ontonagon Reservations in Michigan; the Bad River and Red Cliff Reservations (LaPointe Bands), and the Lac Courte Oreilles and Lac du Flambeau Reservations in Wisconsin; and the Fond du Lac and Grand Portage Reservations in Minnesota.

207. 1855 Treaty with the Chippewas, *supra* note 40.

208. Treaty with the Red Lake and Pembina Bands of Chippewa, *supra* note 14.

Fond du Lac reservations were later amended pursuant to the Nelson Act.[209] In Wisconsin, the Bad River Reservation was further approved and declared by Executive Order on October 26, 1857.[210] The Lac Courte Oreilles Reservation was approved and declared by Executive Order on February 17, 1873.[211] The Red Cliff Reservation was further approved and declared by the Act of February 20, 1895.[212] And the Lac du Flambeau reservation was approved and declared by the Act of May 29, 1872.[213]

The second historical factor is the establishment and approval of the Tribe's existing governing documents. The Minnesota Chippewa Tribe, which is composed of the White Earth, Leech Lake, Mille Lacs, Fond du Lac, Bois Forte, and Grand Portage Bands, is organized pursuant to the Indian Reorganization Act of 1934 under a constitution and amendments approved by the Secretary of the Interior on March 3, 1964.[214] The existing powers and authorities established in the Minnesota Chippewa Tribe Constitution and approved by the Secretary were subsequently "ratified and confirmed" as a part of the White Earth Reservation Land Settlement Act of 1985.[215]

209. An Act for the Relief and Civilization of the Chippewa Indians in the State of Minnesota (Nelson Act), 25 Stat. 642 (Jan. 14, 1889).

210. Exec. Order of Oct. 26, 1857, *reprinted in* CHARLES J. KAPPLER, 1 INDIAN AFFAIRS: LAWS AND TREATIES, Part III, 928 (1902).

211. Exec. Order of Feb. 17, 1873, *reprinted in* KAPPLER, *supra* note 210, at 929–30.

212. Act of Feb. 20, 1895, 28 Stat. 970, *reprinted in* KAPPLER, *supra* note 210, at 933–36.

213. Act of May 29, 1872, 17 Stat. 190, *reprinted in* KAPPLER, *supra* note 210, at 932.

214. Constitution and Bylaws of the Minnesota Chippewa Tribe. *See also* Constitution and Bylaws of the Bad River Band of Lake Superior Chippewa Tribe of Indians (the Bad River Band is organized pursuant to the Indian Reorganization Act of 1934 under a constitution and amendments approved by the Secretary of the Interior on June 20, 1936); Constitution and Bylaws of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians (the Lac Courte Oreilles Band is organized pursuant to the Indian Reorganization Act of 1934 under a constitution and amendments approved by the Secretary of the Interior on November 2, 1966); Constitution and Bylaws of the Lac du Flambeau Band of Lake Superior Chippewa Indians (the Lac du Flambeau Band is organized pursuant to the Indian Reorganization Act of 1934 under a constitution and amendments approved by the Secretary of the Interior on June 25, 1943); Constitution and Bylaws of the Red Cliff Band of Lake Superior Chippewa Indians (the Red Cliff Band is organized pursuant to the Indian Reorganization Act of 1934 under a constitution and amendments approved by the Secretary of the Interior on October 24, 1943); Constitution and Bylaws of the Sokaogon (Mole Lake) Chippewa Indian Community (the Sokaogon (Mole Lake) Band is organized pursuant to the Indian Reorganization Act of 1934 under a constitution and amendments approved by the Secretary of the Interior on November 9, 1938); Constitution and Bylaws of the St. Croix Chippewa Indians (the St. Croix Band is organized pursuant to the Indian Reorganization Act of 1934 under a constitution and amendments approved by the Secretary of the Interior on November 12, 1942).

215. White Earth Reservation Land Settlement Act of 1985, Pub. L. 99-264, 100 Stat. 61 (1986), *amended by* Pub. L. 100-153, § 6(a), (b), 101 Stat. 887 (1987), *amended by* Pub. L. 100-212, § 4, 101 Stat. 1443 (1987), *amended by* Pub. L. 101-301, § 8, 104 Stat. 210 (1990), *amended by* Pub. L. 102-572 § 902(b)(2), 106 Stat. 4516 (1992), *amended by* Pub. L. 103-263, § 4, 108 Stat. 708 (1994) (Section 11 provides: "Nothing in this Act is intended to alter the jurisdiction currently possessed by the White Earth Band of Chippewa Indians, the State of Minnesota, or the United States over Indians or non-Indians within the exterior boundaries of the White Earth Reservation.").

The third factor utilized in the court's analysis was the powers expressed in the Tribe's constitution.[216] Pursuant to Article I of the Minnesota Chippewa Tribe Constitution, the Tribe declared:

> Section 3. The purpose and function of this organization shall be to conserve and develop tribal resources and to promote the conservation and development of individual Indian trust property; to promote the general welfare of the members of the Tribe; to preserve and maintain justice for its members and otherwise exercise all powers granted and provided the Indians, and take advantage of the privileges afforded by the Act of June 18, 1934 (48 Stat. 984) and acts amendatory thereof or supplemental thereto, and all the purposes expressed in the preamble hereof.[217]

> Section 4. The Tribe shall cooperate with the United States in its program of economic and social development of the Tribe or in any matters tending to promote the welfare of the Minnesota Chippewa Tribe of Indians.[218]

Pursuant to Article V, Section 1:

> The Tribal Executive Committee shall, in accordance with applicable laws or regulations of the Department of the Interior, have the following powers: . . . (f) Except for those powers hereinafter granted to the Reservation Business Committees, the Tribal Executive Committee shall be authorized to manage, lease, permit, or otherwise deal with tribal lands, interests in lands or other tribal assets; to engage in any business that will further the economic well-being of members of the Tribe . . . subject only to the approval of the Secretary of the Interior or his authorized representative, when required by Federal law or regulations. (g) The Tribal Executive Committee may by ordinance, subject to the review of the Secretary of the Interior, levy licenses or fees on non-members or non-tribal organizations doing business on two or more Reservations.[219]

---

216. *See* The Power of Indian Tribes, 55 Interior Dec. 14, 65–67 (1934) ("I conclude that under Section 16 of the Wheeler-Howard Act (48 Stat. 984) the 'powers vested in any Indian tribe or tribal council by existing law,' are those powers of local self-government which have never been terminated by law or waived by treaty, and that chief among these powers are the following: . . . (6) To remove or to exclude from the limits of the reservation nonmembers of the tribe, excepting authorized Government officials and other persons now occupying reservation lands under lawful authority, and to prescribe appropriate rules and regulations governing such removal and exclusion, and governing the conditions under which nonmembers of the tribe may come upon tribal land or have dealings with tribal members, providing such acts are consistent with Federal laws governing trade with the Indian tribes. (7) To regulate the use and disposition of all property within the jurisdiction of the tribe . . .").

217. MINNESOTA CHIPPEWA TRIBE CONST. art. I, § 3. *See also* MINNESOTA CHIPPEWA TRIBE CONST. pmbl. ("We, the Minnesota Chippewa Tribe, consisting of the Chippewa Indians of the White Earth, Leech Lake, Fond du Lac, Bois Forte (Nett Lake), and Grand Portage Reservations and the Nonremoval Mille Lac Band of Chippewa Indians, in order to form a representative Chippewa tribal organization, maintain and establish justice for our Tribe, and to conserve and develop our tribal resources and common property; to promote the general welfare of ourselves and descendants, do establish and adopt this constitution for the Chippewa Indians of Minnesota in accordance with such privilege granted the Indians by the United States under existing law.").

218. MINNESOTA CHIPPEWA TRIBE CONST. art. I, § 4.

219. *Id.* art. V, § 1.

The Anishinaabe Bands, with recognized treaty reserved rights, declared in their constitutions that they possessed jurisdiction within the exterior boundaries of their reservations and the treaty reserved territories.[220] For example, Article I of the Red Cliff Constitution establishes as follows:

> Section 1. Territory. The territory of the Red Cliff Band shall consist of all the land and water within the original confines of the Red Cliff Reservation as defined pursuant to the Treaty of September 30, 1854 (10 Stat. 1109), as well as such other lands and water as have been added or may hereafter be added thereto under the laws of the United States, except as otherwise provided by Federal law.[221]
>
> Section 2. Jurisdiction. The jurisdiction of the Red Cliff Band shall extend to all the land and water areas within the territory of the Band and to dependent Indian communities in Bayfield County, as they exist, and further, for the purpose of exercising and regulating the exercise of rights to hunt, fish, trap, gather wild rice and other usual rights of occupancy, such jurisdiction shall extend to Lake Superior and to all lands and waters described in treaties providing such rights, to which the Lake Superior Chippewa were a party, except as otherwise provided by Federal law.[222]

Pursuant to Article VI, Section 1, the Red Cliff Band declared the ability "to levy taxes or license fees, upon non-members doing business within the reservation . . . "[223] and "to safeguard and promote the peace, safety, morals and general welfare of the tribe by regulating the conduct of trade and the use and disposition of property upon the reservation."[224] The Band also declared the ability "to promulgate and enforce ordinances governing the conduct of persons subject to the jurisdiction of the tribe, and providing for the maintenance of law and order and the administration of justice by establishing a reservation court and defining its duties and powers."[225] These same powers exist in the other Anishinaabe Constitutions.[226]

The fourth factor entails the effects of allotment on the reservation. For the Bands that were signatories to the 1854 Treaty, allotments were made pursuant to the Treaty. For most of the other Bands, allotments were issued pursuant to the Nelson Act. Although the allotment period had devasting

220. Bugenig v. Hoopa Valley Tribe, 5 NICS App. 37, 42 (Hoopa Valley Tribal Ct. App. 1998) ("Article II of the Constitution and Bylaws of the Hoopa Valley Tribe states: 'The jurisdiction of the Hoopa Valley Tribe shall extend to all lands within the confines of the Hoopa Valley Indian Reservation boundaries as established by Executive Order of June 23, 1876, and to such other lands as may hereafter be acquired by or for the Hoopa Valley Indians.'").

221. RED CLIFF BAND OF LAKE SUPERIOR CHIPPEWA INDIANS CONST. art. I, § 1.

222. *Id.* art. I, § 2.

223. *Id.* art. VI, § 1(g).

224. *Id.* art. VI, § 1(i).

225. *Id.* art. VI, § 1(p).

226. *See* LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS OF WISCONSIN CONST. art. VI, § 1(a), (i), (l), (n), (w); LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS OF WISCONSIN CONST. art. V, § 1(f), (n), (p), (s), (q).

effects for the Anishinaabe, it did not diminish their reservations and the powers associated with them. In *State v. Clark*,[227] the court held the White Earth Reservation was not disestablished by the Nelson Act of 1889.[228] The court further explained that the Tribe's aboriginal rights were recognized pursuant to the Treaty of 1867 and were never thereafter extinguished.[229]

The fifth factor encompasses the scope of the regulatory action. In this instance, the dispute involves the Rights of Manoomin Ordinance.[230] The Ordinance established that its primary goals is that "manoomin, or wild rice . . . possesses inherent rights to exist, flourish, regenerate, and evolve, as well as inherent rights to restoration, recovery, and preservation."[231] The prohibition on any business, government, or other public or private entity to "engage in activities"[232] or permit activities[233] that violate or would likely violate the provisions of this law are established in the furtherance of this stated goal.

Analyzing these five factors as the court did in *Bugenig*, it is clear that if any business, government, or other public or private entity "engage[s] in activities"[234] or permits activities[235] that violate or would likely violate the Rights of Manoomin Ordinance "in contravention of tribal law, threatening and physically disturbing the integrity and sacred status" of manoomin, the activity would clearly threaten Anishinaabe "customs and traditions." Here, the White Earth Band "has the power and authority to define areas of sacred significance," and through establishment of the Rights of Manoomin Ordinance, "has exercised that power."[236] The "areas of significance" are

227. 282 N.W.2d 902 (Minn. 1979).

228. *Id.* at 908.

229. *Id.*

230. RIGHTS OF MANOOMIN ORDINANCE, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-009 (Dec. 31, 2018); RESOLUTION ESTABLISHING RIGHTS OF MANOOMIN ORDINANCE, 1855 Treaty Authority, Res. No. 2018-05 (Dec. 5, 2018).

231. RIGHTS OF MANOOMIN ORDINANCE, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-009, § 1(a); RESOLUTION ESTABLISHING RIGHTS OF MANOOMIN ORDINANCE, 1855 Treaty Authority, Res. No. 2018-05, § 1(a).

232. RIGHTS OF MANOOMIN ORDINANCE, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-009, § 2(a); RESOLUTION ESTABLISHING RIGHTS OF MANOOMIN ORDINANCE, 1855 Treaty Authority, Res. No. 2018-05, § 2(a).

233. RIGHTS OF MANOOMIN ORDINANCE, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-009, § 2(b); RESOLUTION ESTABLISHING RIGHTS OF MANOOMIN ORDINANCE, 1855 Treaty Authority, Res. No. 2018-05, § 2(b).

234. RIGHTS OF MANOOMIN ORDINANCE, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-009, § 2(a); RESOLUTION ESTABLISHING RIGHTS OF MANOOMIN ORDINANCE, 1855 Treaty Authority, Res. No. 2018-05, § 2(a).

235. RIGHTS OF MANOOMIN ORDINANCE, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-009, § 2(b); RESOLUTION ESTABLISHING RIGHTS OF MANOOMIN ORDINANCE, 1855 Treaty Authority, Res. No. 2018-05, § 2(b); Bugenig v. Hoopa Valley Tribe, 5 NICS App. 37, 48–49 (Hoopa Valley Tribal Ct. App. 1998).

236. *Bugenig*, 5 NICS App. at 48.

manidoo-gitigaan, the lakes and rivers that make up the wild rice beds.[237] As explained in the Statement Made by the Indians, "*manoomin nindizhi-wiindaan maandan, gaawiin isa mamin gibagidinamoosinoon*" [This Straw that I hold in my hand. Wild Rice is what we call this. These I do not sell.].[238] As a result, the Anishinaabe expressly reserved all rights and powers associated with manoomin, and Congress expressly authorized the existence of those rights and powers when it ratified the Anishinaabe treaties as the supreme law of the land.[239]

Thus, the Rights of Manoomin Ordinance "neutrally applied," the purpose and effect of which is to preserve the continuing cultural importance of manoomin as a sacred food that embodies the existence of the Anishinaabe Nation, is a right retained by the Anishinaabe people to ensure that the ecosystems that sustain manoomin maintain their "unadulterated character."[240] Based upon the cultural and spiritual significance of manoomin, the *Brendale* standard supports the right of the Anishinaabe to enforce these "neutrally applied" regulations that "reasonably restrict" infringement of the Treaty with Manoomin.[241] The combined effects of these five factors, as the Ninth Circuit Court of Appeals held in *Bugenig v. Hoopa Valley Tribe*,[242] constitute "an express delegation of authority to the Tribe[s]."[243]

2. Adjudicatory Jurisdiction

In *Strate v. A-1 Contractors*,[244] the U.S. Supreme Court explained that a Tribe's adjudicatory jurisdiction over nonmembers may not exceed its regulatory jurisdiction.[245] In interpreting the existence of a Tribe's adjudicatory jurisdiction, the U.S. Supreme Court has held that "where tribes possess authority to regulate the activities of nonmembers, 'civil jurisdiction over disputes arising out of such activities presumptively lies in the tribal courts.' "[246] Therefore, the existence of tribal regulatory jurisdiction, inher-

237. KINEW, *supra* note 25, at 327–28.

238. STATEMENT MADE BY THE INDIANS, *supra* note 116, at 44.

239. U.S. CONST. art. II, § 2 (Treaty Clause); U.S. CONST. art. VI (Supremacy Clause).

240. *Bugenig*, 5 NICS App. at 48–49; Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408, 444 (1989).

241. *Bugenig*, 5 NICS App. at 46–49; *Brendale*, 492 U.S. at 439–44.

242. 266 F.3d 1201 (9th Cir. 2001).

243. *Id.* at 1216.

244. 520 U.S. 438 (1997).

245. *Id.* at 453.

246. *Id.*; Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987) ("Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute."); Water Wheel Camp Recreational Area, Inc. v. LaRance, 642 F.3d 802, 814 (9th Cir. 2011); Knighton v. Cedarville Rancheria of N. Paiute Indians, 922 F.3d 892, 906 (9th Cir. 2019).

ent tribal sovereignty, and the federal trust responsibility combine to establish that a Tribe possesses adjudicatory jurisdiction.[247] As the Ninth Circuit Court of Appeals has stated, "[a]ny other conclusion would impermissibly interfere with the tribe's inherent sovereignty, contradict long-standing principles the Supreme Court has repeatedly recognized, and conflict with Congress's interest in promoting tribal self-government."[248] In regard to establishing the existence of adjudicatory jurisdiction involving the Rights of Manoomin Ordinance, the Anishinaabe can establish that they possess tribal regulatory jurisdiction, that they continue to possess inherent tribal sovereignty, and that the federal government continues to exercise its federal treaty trust responsibility.[249] Therefore, these factors combine to establish that the Anishinaabe possess adjudicatory jurisdiction involving the Rights of Manoomin Ordinance.

D. Tribal Authority Over Law Enforcement Officers

The Rights of Manoomin Ordinance directly prohibits law enforcement personnel from arresting or detaining those directly enforcing these rights.[250] In this context, the courts are likely to apply the holding in *Hicks* which established that "tribal authority to regulate state officers in executing . . . state laws is not essential to tribal self-government . . . ."[251] As a result of *Hicks*, it is highly unlikely that courts will uphold tribal authority over state law enforcement officers as established in the Rights of Manoomin Ordinance due to the competing state interest.[252]

247. FMC Corp. v. Shoshone-Bannock Tribes, 942 F.3d 916, 941 (9th Cir. 2019); *Knighton*, 922 F.3d at 906–07; *Water Wheel*, 642 F.3d at 814–16.

248. *FMC Corp.*, 942 F.3d at 941–42 (quoting *Water Wheel*, 642 F.3d at 816).

249. *See generally* Part V(C)(1).

250. RIGHTS OF MANOOMIN ORDINANCE, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-009, § 3(f) (Dec. 31, 2018); RESOLUTION ESTABLISHING RIGHTS OF MANOOMIN ORDINANCE, 1855 Treaty Authority, Res. No. 2018-05, § 3(f) (Dec. 5, 2018).

251. Nevada v. Hicks, 533 U.S. 353, 364 (2001).

252. White Earth Band of Chippewa Indians v. Alexander, 683 F.2d 1129, 1137–38 (8th Cir. 1982) ("To determine state authority over non-member activities within the Reservation requires a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law. The state has a strong legitimate interest in regulation of hunting and fishing because of its investment in and historic management of reservation game and fish resources. The Band's right to hunt, fish and gather wild rice is an attribute of its inherent sovereignty. The Band argues that the district court overvalued the state's interest and ignored significant interests of the Band. The district court applied *Bracker*'s two-prong test to determine state authority: (1) whether the exercise of state authority has been preempted by federal law, and (2) whether the exercise of state authority unlawfully infringes on the Band's right to make its own laws and be ruled by them. Considering the first prong, the district court appears to hold that the lack of direct evidence of a federal intent to preempt is fatal to the Band's argument. The Supreme Court, however, has rejected the notion that 'an express Congressional statement' is necessary to find federal preemption. The district court found that the Band's inherent sovereignty is 'only' a backdrop in determining whether there has been federal preemption. The Supreme Court, however,

However, state officers are likely preempted from preventing individuals, such as the water protectors sanctioned by the Tribe, from enforcing the Rights of Manoomin Ordinance.[253] As a basic principle of treaty law, the effective tribal self-regulation of a particular resource or activity precludes state regulation of that resource or activity as to the Tribes.[254] So, just as tribal conservation officers are allowed to carry firearms and use "red and blue" lights as part of their enforcement obligations and tribal biologists are allowed to use electrofishing equipment to conduct fishery surveys as part of their management responsibilities, the water protectors can likewise protect manoomin as part of their treaty obligations, as authorized by the Rights of Manoomin Ordinance.[255]

E. Penalties

These ordinances establish that any business, government, or other public or private entities that violate "any provision of this law" are guilty of an "offense" and are subject to the maximum fine allowable under tribal law.[256] The Indian Civil Rights Act limits tribal court citations to a maximum fine of $5,000.00;[257] however, the White Earth Band of Ojibwe was granted concurrent jurisdiction, which took effect on June 1, 2013, under the Tribal Law and Order Act, which allows the Tribe to implement enhanced sentencing provisions.[258] These ordinances also establish an additional liability for the recovery of any damages to manoomin or its habitat. Damages are measured as the cost of restoring manoomin and its habitat to

stated that tribal sovereignty is an 'important backdrop,' against which vague or ambiguous federal enactments must always be measured." (citations omitted)).

253. United States v. Winans, 198 U.S. 371, 381–82 (1905); Settler v. Lameer, 507 F.2d 231, 237–38 (9th Cir. 1974); United States v. Washington, 384 F. Supp. 312, 340–42 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676, 686 (9th Cir. 1974); Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 684 (1979); United States v. Michigan, 471 F. Supp. 192, 273 (W.D. Mich. 1979); United States v. Felter, 546 F. Supp. 1002, 1022–23 (D. Utah 1982), *aff'd*, 752 F.2d 1505 (10th Cir. 1985). S*ee generally* Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (LCO IV), 668 F. Supp. 1233, 1241 (W.D. Wis. 1987); United States v. Oregon, 787 F. Supp. 1557, 1566 (D. Or. 1992), *aff'd*, 29 F.3d 481 (1994).

254. *See Washington*, 520 F.2d at 686; *Michigan*, 471 F. Supp. at 274; *LCO IV*, 668 F. Supp at 1241–42; Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (LCO VI), 707 F. Supp. 1034, 1055 (W.D. Wis. 1989); Mille Lacs Band v. Minnesota, 952 F. Supp. 1362, 1369–75 (D. Minn. 1997).

255. *LCO IV*, 668 F. Supp. at 1237–39 (Tribes may block state regulation if Tribes effectively regulate themselves and protect legitimate state conservation, health, and safety interests); *See United States*, 384 F. Supp. at 340–41.

256. Rights of Manoomin Ordinance, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-009, § 3(b) (Dec. 31, 2018); Resolution Establishing Rights of Manoomin Ordinance, 1855 Treaty Authority, Res. No. 2018-05, § 3(b) (Dec. 5, 2018).

257. Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(a)(7)(B) (2018).

258. *United States to Accept Concurrent Jurisdiction Over White Earth Reservation in Minnesota*, U.S. Dep't of Justice (Mar. 15, 2013), https://perma.cc/8HT7-GZPY.

its "original state" before the violation.[259] An example of the potential cost can be shown from the Enbridge oil spill in Kalamazoo, Michigan which decimated the manoomin beds in the area; the company agreed to pay $75 million to the State of Michigan for various clean up and restoration projects in a settlement announced on May 13, 2015.[260] A little over a year later, the company entered into a consent decree with the U.S. EPA and the U.S. Department of Justice and agreed to pay $177 million in a settlement announced on July 20, 2016.[261] In total, the spill cost the company over $1.2 billion to clean up.[262]

VI. Express Congressional Delegation

There are number of laws enacted where Congress has expressly confirmed tribal authority to regulate specific aspects of their tribal territories as well as individuals conducting prohibited activities within these territories. Some of these express delegations include actions that result in violations related to natural resource habitat and environmental degradation in violation of the Clean Air Act,[263] Clean Water Act,[264] National Indian Forest Resources Act,[265] American Indian Agricultural Resources Management Act,[266] National Historic Preservation Act,[267] National Environmental Preservation Act,[268] Hazardous Materials Transportation Act,[269] Nuclear Waste Policy Act,[270] and the Safe Drinking Water Act[271] to name a few.

The tribal rights of nature ordinances establish a framework that Tribes can utilize as a tribal legal standard, pursuant to the implementation of these or future express federal delegations. Through the enactment of non-Tribal rights of nature, the major obstacle for full implementation is demonstrating standing. Pursuant to the Tribal enactments, the major obstacle to the imple-

259. Rights of Manoomin Ordinance, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-009, § 3(c); Resolution Establishing Rights of Manoomin Ordinance, 1855 Treaty Authority, Res. No. 2018-05, § 3(c).

260. Sabin Ctr. for Climate Change Law, *Kalamazoo River Oil Spill*, Colum. L. Sch. (May 19, 2015), https://perma.cc/RCS5-GTA6; *see also* Consent Judgment, *Mich. Dep't of Env't Quality v. Enbridge Energy* (Mich. Cir. Ct. May 13, 2015) (No. 15-1411-CE), https://perma.cc/8WAP-WTZN.

261. David Hasemyer, *Enbridge's Kalamazoo Spill Saga Ends in $177 Million Settlement*, Inside Climate News (July 20, 2016), https://perma.cc/R4FB-2SV6; *See also* Consent Order, *United States v. Enbridge Energy* (W.D. Mich. July 20, 2016) (No. 1:16-cv-914), https://perma.cc/64SZ-77C6.

262. *Kalamazoo River Oil Spill*, *supra* note 260; Hasemyer, *supra* note 261.

263. 42 U.S.C. § 7601(d)(1)(A) (2018).

264. 33 U.S.C. § 1377(e) (2018).

265. 25 U.S.C. §§ 3101–3120 (2018).

266. 25 U.S.C. §§ 3701–3746.

267. 54 U.S.C. §§ 300101–320303 (2018).

268. 42 U.S.C. §§ 4321–4370m-12 (2018).

269. 49 U.S.C. §§ 5101–5128 (2018).

270. 42 U.S.C. §§ 10101–10270 (2018).

271. 42 U.S.C. § 300f.

mentation of these tribal laws is the issue of jurisdiction. As established in this analysis, specifically as applied to the Rights of Manoomin Ordinance, Tribes can successfully establish jurisdiction pursuant to tribal law principles. The burden is the time and resources required to successfully defend challenges to a Tribe's ordinance. A recommendation for the future, as the Rights of Manoomin Ordinance and additional rights of nature ordinances are enacted and implemented or future express federal delegations are established, is for all actors, Tribal, Federal, State, individual, and corporate, to be bound by the traditional law principles of Tribes as they express and determine their responsibilities and obligations to their traditional territories.

VII. Conclusion

The Creator enacted the "Great Laws of Nature for the wellbeing and the harmony of all things and all creatures."[272] This inherently embedded principle of traditional law is supported in the obligations and responsibilities that many Indigenous Nations correlate with the Earth. In the implementation of tribal rights of nature laws, Indigenous Nations are able to recognize the *bezhigwan ji-izhi-ganawaabandiyang* (inalienable rights)[273] of the earth. Through these enactments, Tribes are able to acknowledge that nature in all its life forms has "the right to exist, the right to habitat (or a place to be), and the right to participate in the evolution of the Earth community."[274] As evidenced by the creation story told by Campbell Papequash, "Man must seek guidance outside himself. Before he can abide by this law [Great Laws of Nature], human beings must understand the framework of the ordinances of creation. In this way, Man will honor the order as was intended by the Great Spirit."[275]

272. Waldram, *supra* note 11, at 83. *See also* Nelson v. Yurok, 5 NICS App. 119, 123, 129–31 (1999) (The Yurok Tribal Court of Appeals addressed whether a conviction under the Tribal Fishing Rights Ordinance violated the Yurok Constitution, which protects "traditional practices" from infringement by acts of the Yurok Tribal Council. The Yurok Tribal Court of Appeals determined that "the tribe's exercise of its governmental powers was based upon a legitimate, rational, constitutionally provided mechanism to protect its tribal resources . . ." In doing so, the Court recognized that the purpose of the Tribal Fishing Rights Ordinance is "to protect the fishery resources and therefore, tribal fishing rights by establishing procedures for the conservation of fish stock and [the] exercise of federally reserved fishing rights" consistent with tribal customary law. The Court relied upon what it phrased as "two fundamental rules of traditional Indian law," which are as follows: "The [f]irst [r]ule is: 'Bring honor and respect to the family, clan, and tribe.' The [s]econd [r]ule is: 'Live in harmony with nature . . . In this case, we note that the Yurok Tribe has placed greater emphasis in its Constitution regarding the [s]econd [r]ule, to live in harmony with nature, over that of a traditionally exercising a fishing right . . . The Tribe has placed upon itself and its members a traditional obligation of living in harmony with nature.'"). **R**

273. Manitoba Aboriginal Legal Glossary: Ojibwe, *supra* note 32, at 27.

274. Maloney, *supra* note 34, at 133.

275. Waldram, *supra* note 11, at 84. **R**

As a matter of federal Indian law, the legal assertions in the Rights of Manoomin Ordinance establish jurisdictional protections for the Anishinaabe. These ordinances also establish the beginnings of a tribal framework, "the framework of the ordinances of creation,"[276] that can be utilized as a legal standard for other tribal governments that want to make similar enactments and can also be used as a legal standard pursuant to numerous federal delegations.

To summarize the takeaways from this analysis, there are numerous provisions that successfully implement the Rights of Manoomin Ordinance. The first provision that successfully implements the Rights of Manoomin Ordinance is the assertion that Manoomin possesses the inherent right to exist.[277] The establishment of this right successfully acknowledges the longstanding relationship that the Anishinaabe have with manoomin.[278] The second provision that successfully implements the Rights of Manoomin Ordinance is the assertion acknowledging the rights of tribal members to engage in the harvest of manoomin and to protect and save manoomin seeds.[279] The Rights of Manoomin Ordinance also successfully acknowledges the collective rights of sovereignty.[280]

The fourth provision that successfully implements the Rights of Manoomin Ordinance are the statements making it unlawful for any business, government, or other public or private entity to "engage in activities"[281] or permit activities[282] that violate or would likely violate the provisions of the ordinance and as a result subject violators to the maximum fine allowable under tribal law.[283] A particularly successful element of this provision is a Tribe's ability to bind the State as a non-member since its regulatory actions, such as permitting activities that impact manoomin, can make it a

276. *Id.*

277. RIGHTS OF MANOOMIN ORDINANCE, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-009, § 1(a) (Dec. 31, 2018); RESOLUTION ESTABLISHING RIGHTS OF MANOOMIN ORDINANCE, 1855 Treaty Authority, Res. No. 2018-05, § 1(a) (Dec. 5, 2018).

278. Smith & Vogel, *supra* note 44, at 749–51.

279. RIGHTS OF MANOOMIN ORDINANCE, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-009, § 1(b); RESOLUTION ESTABLISHING RIGHTS OF MANOOMIN ORDINANCE, 1855 Treaty Authority, Res. No. 2018-05, § 1(b).

280. RIGHTS OF MANOOMIN ORDINANCE, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-009, § 1(c); RESOLUTION ESTABLISHING RIGHTS OF MANOOMIN ORDINANCE, 1855 Treaty Authority, Res. No. 2018-05, § 1(c).

281. RIGHTS OF MANOOMIN ORDINANCE, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-009, § 2(a); RESOLUTION ESTABLISHING RIGHTS OF MANOOMIN ORDINANCE, 1855 Treaty Authority, Res. No. 2018-05, § 2(a).

282. RIGHTS OF MANOOMIN ORDINANCE, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-009, § 2(b); RESOLUTION ESTABLISHING RIGHTS OF MANOOMIN ORDINANCE, 1855 Treaty Authority, Res. No. 2018-05, § 2(b).

283. RIGHTS OF MANOOMIN ORDINANCE, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-009, § 3(b); RESOLUTION ESTABLISHING RIGHTS OF MANOOMIN ORDINANCE, 1855 Treaty Authority, Res. No. 2018-05, § 3(b).

primary violator of the rights of manoomin. Even if the State itself is not bound, it is important for a strong rights of nature law to bind and penalize individual non-members who might otherwise violate the rights of manoomin under the color of state law.

The fifth provision that successfully implements the Rights of Manoomin Ordinance is the territorial statement, applying the ordinance to both the exterior boundaries of the reservation[284] as well as the treaty territory.[285] Lastly, the Rights of Manoomin Ordinance successfully acknowledges Tribal jurisdiction, and in analyzing jurisdiction, the application of the *Montana* exceptions favors tribal jurisdiction pursuant to tribal law principles.[286]

The following provisions are not as successful in implementing the Rights of Manoomin Ordinance. The first provision that is not as successful in implementing the Rights of Manoomin Ordinance is the provision establishing that either the Tribe, the 1855 Treaty Authority, or individually enrolled tribal members may enforce the provisions of this law.[287] A recommendation moving forward that may make this provision more successful is for Tribes enacting Rights of Nature Ordinances to create additional mechanisms that specify in greater detail those who are allowed to enforce the law. The additional mechanism can be a tribal permit, resolution, or other authorization specifying that the identified individuals are able to enforce the provisions of this ordinance. The Anishinaabe Bands are accustomed to implementing this type of mechanism for both the harvest and management of their treaty reserved resources. To enact a similar mechanism, pursuant to the Rights of Nature Ordinances, is not unreasonable. Furthermore, the benefit of establishing a mechanism or procedure to identify the specific individuals authorized to enforce the law, rather than a blanket general authorization, ensures that the authorized individuals are acting in the implementation of the sovereign prerogatives of the Tribe in addition to those that are designated to speak on behalf of manoomin.

This right to enforce the Rights of Manoomin Ordinance does not fully answer the question of who gets to speak on behalf of manoomin. Tribes need to be careful and designate the appropriate individuals who will en-

284. RIGHTS OF MANOOMIN ORDINANCE, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-009, § 1(a).

285. RESOLUTION ESTABLISHING RIGHTS OF MANOOMIN ORDINANCE, 1855 Treaty Authority, Res. No. 2018-05, § 1(a).

286. RIGHTS OF MANOOMIN ORDINANCE, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-009, § 3(b); RESOLUTION ESTABLISHING RIGHTS OF MANOOMIN ORDINANCE, 1855 Treaty Authority, Res. No. 2018-05, § 3(b).

287. RIGHTS OF MANOOMIN ORDINANCE, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-009, § 1(c); RESOLUTION ESTABLISHING RIGHTS OF MANOOMIN ORDINANCE, 1855 Treaty Authority, Res. No. 2018-05, § 1(c).

gage ceremony and "sit with the land" in order to invoke the proper authority to speak on her behalf. A recommendation moving forward that may make this provision more successful is to designate a committee to speak on behalf of manoomin such as the Rights of Manoomin Taskforce, the Tribal Wild Rice Task Force, the Voigt Intertribal Taskforce, the Wild Rice Management Committee, the Tribal Wild Rice Authorities, or the Tribal rice chiefs.

The third provision that is not as successful in implementing the Rights of Manoomin Ordinance is the acknowledgment of the individual rights of sovereignty.[288] This declaration is significant as it extends the rights of tribal sovereignty outside the bounds of existing law as federal Indian law only recognizes that Tribal rights are communally held by the Tribe or collectively held by multiple Tribes, on behalf of individual tribal members.[289] A recommendation moving forward that may make this provision more successful is reframing this provision, not as an assertion of "expanded rights" but as an assertion of traditional tribal law principles. To the extent that traditional tribal law "expands rights-protections for *people* and *manoomin* above those provided by less-protective state, federal, or international law," this expansion of rights protections would be grounded in tribal law pursuant to the inherent sovereignty of the Tribe.[290]

The final provision that is not as successful in implementing the Rights of Manoomin Ordinance is the direct prohibition of law enforcement personnel from arresting or detaining those directly enforcing the Rights of Manoomin Ordinance.[291] As a result of the holding in *Hicks*, it is highly unlikely that courts will uphold tribal authority over state law enforcement officers as established in the Rights of Manoomin Ordinance due to the competing state interest.[292] A recommendation moving forward that may make this provision more successful is reframing this provision, not as a "prohibition" against law enforcement personnel from arresting or detaining

288. RIGHTS OF MANOOMIN ORDINANCE, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-009, § 1(c); RESOLUTION ESTABLISHING RIGHTS OF MANOOMIN ORDINANCE, 1855 Treaty Authority, Res. No. 2018-05, § 1(c).

289. *See* United States v. Washington, 520 F.2d 676, 688 (9th Cir. 1975); United States v. Michigan, 471 F. Supp. 192, 271 (W.D. Mich. 1979), *aff'd as modified*, 653 F.2d 277 (6th Cir. 1981); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 653 F. Supp. 1420, 1424–25 (W.D. Wis. 1987); Mille Lacs Band of Chippewa v. Minnesota, No. 3-94-1226 (D. Minn. Mar. 29, 1996) (unpublished decision).

290. RIGHTS OF MANOOMIN ORDINANCE, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-009, § 1(c); RESOLUTION ESTABLISHING RIGHTS OF MANOOMIN ORDINANCE, 1855 Treaty Authority, Res. No. 2018-05, § 1(c).

291. RIGHTS OF MANOOMIN ORDINANCE, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-009, § 3(f); RESOLUTION ESTABLISHING RIGHTS OF MANOOMIN ORDINANCE, 1855 Treaty Authority, Res. No. 2018-05, § 3(f).

292. Nevada v. Hicks, 533 U.S. 353, 364 (2001); White Earth Band of Chippewa Indians v. Alexander, 683 F.2d 1129, 1137–38 (8th Cir. 1982).

those directly enforcing the Rights of Manoomin Ordinance, but rather that law enforcement personnel are "preempted" from arresting or detaining those directly enforcing the Rights of Manoomin Ordinance. This is because State officers are likely preempted from preventing individuals from enforcing the Rights of Manoomin Ordinance because, pursuant to treaty law principles, the effective tribal self-regulation of a particular resource or activity precludes state regulation of that resource or activity.[293]

In a broader sense, the tribal rights of nature enactments are sparking dialogue about the rights of nature as traditional law principles that must be respected. There is a need for legal reform similar to the enactment of the Violence Against Women Reauthorization Act of 2013[294] or the Duro Fix[295] that can be exercised to further recognize and implement the important assertions by Tribal Nations that acknowledge the Rights of Nature.

293. *See Washington*, 520 F.2d at 686; *Michigan*, 471 F. Supp. at 274; Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (LCO IV), 668 F. Supp. 1233, 1241–42 (W.D. Wis. 1987); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (LCO VI), 707 F. Supp. 1034, 1055 (W.D. Wis. 1989); Mille Lacs Band v. Minnesota, 952 F. Supp. 1362, 1369–75 (D. Minn. 1997).

294. 25 U.S.C. § 1301(2) (2018); Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013).

295. 25 U.S.C. § 1304.

\\jciprod01\productn\M\MON\83-1\MON103.txt unknown Seq: 50 11-MAR-22 13:12