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ENVIRONMENTAL RACISM IN INDIAN COUNTRY:

AN ANALYSIS OF ITS IMPACTS ON THE ENVIRONMENT AND NATURAL RESOURCES AND ITS CONNECTION TO THE DIMINISHMENT OF TRIBAL SOVEREIGNTY

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This note seeks to discuss environmental racism and its connection to the diminishment of tribal sovereignty. First, there will be a discussion on the history and origin of tribal sovereignty, and the presence of tribes and Indigenous peoples in the United States. Second, there will be an examination of how the Clean Air and Clean Water Acts have been utilized to both diminish and promote tribal sovereignty. Next, case studies of state and federal actions against tribes will be analyzed to demonstrate the prevalence of environmental racism against Indigenous peoples today. Finally, this note generally seeks to address environmental racism in Indian country and how it works to diminish tribal sovereignty over land and natural resources—while also addressing how tribal sovereignty may be further used to combat serious environmental crises facing Indigenous communities across the United States.

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I. Introduction

It is no secret that the United States has an egregious history of horrendous racism and climate change disasters. Environmental racism is where both of these issues intersect. Indigenous people, in what is now the United States, have faced environmental racism for hundreds of years due to forced colonization.¹ Therefore, there has been a complete disregard for almost all aspects of Native American and Alaska Native culture.² Often, acts of environmental racism and injustice diminish tribal sovereignty and self-determination. Centuries before the United States was even established, Indigenous peoples were killed, infected with disease, and forcibly removed from their ancestral homelands by foreign invaders from all over the world—threatening Indigenous culture and existence.³ Today, American Indians and Alaska Natives still face extreme violence, but the violence is often less overt. It occurs through dump site contamination, nuclear testing facility contamination, and natural resource extraction. These acts then contribute to land, water, and air pollution.

This note explores how acts of environmental racism inflicted on American Indians and Alaska Natives diminishes tribal sovereignty. Although Indian tribes within the United States are sovereign nations, the federal and state governments regularly use environmental disasters and accidents as an opportunity to override tribal authority and eliminate the inherent sovereign right of tribal nations to take care of their ancestral lands and environments. For example, the United States government has allowed for and perpetrated acts of environmental racism on tribal nations like the Standing Rock Sioux Tribe and the Navajo Nation. Another case arises in Oklahoma, where the State has wrongfully taken control of hazardous waste dumping on tribal lands. This note will analyze these case studies and explore their effect on the inherent right of tribes to govern themselves.

Instances of environmental injustice and environmental racism occur in every state within the United States, but these acts of malfeasance particularly threaten the tribal sovereignty and self-determination of Native Americans and Alaska Natives when they take place in “Indian country.” “Indian country” is a legal term used to describe federal land under the jurisdiction of the United States. Indian country is defined under 18 U.S.C. § 1151 as:

¹ Sarah M. Morris, *The Intersection of Equal and Environmental Protection: A New Direction for Environmental Alien Tort Claims After Sarei and Sosa*, 41 Colum. Hum. Rights L. Rev. 275 (2009) (Environmental racism is the concept of racial discrimination in the environmental context).

² I acknowledge that Indigenous peoples around the world face environmental racism. This note focuses specifically on environmental racism faced by Indigenous peoples residing within the United States.

³ Robert Fortune. *Chills and fever: Health and disease in the early history of Alaska* (University of Alaska Press, 1989).

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. ⁴

To be sure, the pollution and contamination of "Indian country" does more than negatively impact the health of Indigenous people. Violence against Native Americans in the form of environmental racism and injustice works to eradicate culture, tradition, history, wildlife, religion, and a connection with the Earth that has existed since time immemorial. This note will explore specific instances where state and federal governments, and their courts, have diminished tribal sovereignty over the environment with intentional and calculated acts. Additionally, it will demonstrate the many ways in which tribal sovereignty over the environment has and continues to be eroded. It will also consider the ways tribal nations and their governments may combat this epidemic through legal or political action.

II. Background

A. Presence of Tribal Nations, Native Americans, and Alaska Natives within the United States

There are hundreds of Native American and Alaska Native tribes located across the country. Currently, "[t]here are 574 federally recognized Indian Nations (variously called tribes, nations, bands, pueblos, communities and native villages in the United States)."⁵ Of these nations, 229 are located in Alaska, while the remaining federally recognized tribes are located across 35 other states.⁶ Additionally, there are 63 state-recognized tribes in 11 states, the majority of which are located in the south and northeast part of the United States.⁷ While state recognition does allow for a tribe's existence to be legally acknowledged, state-recognized tribes do not receive the same benefits or support from the United States federal government as the 574 tribes who are federally recognized.⁸ The process of gaining federal recognition is complicated and extensive.⁹ Achieving federal recognition can take several decades and is tremendously expensive as it requires an immense amount of historical research, and specific identity requirements must be met.¹⁰

⁴ 18 U.S.C. § 1151.

⁵ *Tribal Nations and the United States: An Introduction*, NATIONAL CONGRESS OF AMERICAN INDIANS, <https://www.ncai.org/about-tribes> (last visited Oct. 25, 2021)

⁶ *Id.*

⁷ Martha Salazar, *State Recognition of American Indian Tribes*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Oct. 2016), <https://www.ncsl.org/research/state-tribal-institute/state-recognition-of-american-indian-tribes.aspx>.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

A tribe must possess federal recognition in order to benefit from the “trust relationship” between the tribes and the Federal Government.¹¹ According to the Bureau of Indian Affairs (BIA), this relationship means that the federal government has “a legal obligation under which the United States ‘has charged itself with moral obligations of the highest responsibility and trust’ toward Indian tribes.”¹² The federal Indian trust responsibility may also be described as: “a legally enforceable fiduciary obligation on the part of the United States to protect tribal treaty rights, lands, assets, and resources, as well as a duty to carry out the mandates of federal law with respect to American Indian and Alaska Native tribes and villages.”¹³ Although federal recognition is not the end-all and be-all for many tribal nations, that status of federal recognition allows for financial support that is not available to those tribes, bands, nations, or villages without it.¹⁴ The fiduciary obligation of the United States is demonstrated and expressed through acts of Congress such as the funding of a health care system specifically for American Indians and Alaska Natives, the Indian Health Services (IHS), the operation of schools on reservations, and infrastructure support. The United States government is also obligated to aid in the management of natural resources, land negotiations, and general environmental protection.

To further demonstrate the magnitude of Indigenous existence, power, and representation in the United States, approximately 9.7 million people identified as American Indian or Alaska Native in the 2020 Census.¹⁵ Indigenous peoples are often the most undercounted racial group of the Census—this leads to considerable financial disparities as federal funding is given based on the Census count.¹⁶ Any undercounting or error when completing the Census means less money to tribal nations and programs that could use the financial support.

Additionally, not only did the Native American and Alaska Native population grow 86.5% from 2010 to 2020 to 9.7 million people, representing a larger part of the United States’ general population, they also possess an immense amount of land. Tribal nations and their governments currently control about 100 million acres of land mass within the United States.¹⁷ To put that into perspective, if a single state owned the same amount of land, it would be the fourth largest state in the country.¹⁸ The Navajo Nation alone (who call themselves “Diné,” meaning “the people”), the largest federally recognized tribe in the United States, controls 16 million acres of land in Arizona,

¹¹ Matthew L.M. Fletcher, *Politics, History, and Semantics: The Federal Recognition of Indian Tribes*, 82 N.D.L. Rev. 487, 489 (2006).

¹² *Frequently Asked Questions*, U.S. Dept. of the Interior, Indian Aff., <https://www.bia.gov/frequently-asked-questions> (citing *Seminole Nation v. United States*, 1942, select “what is the federal Indian trust responsibility?”).

¹³ *Id.*

¹⁴ Salazar, *supra* note 8.

¹⁵ 2020 Census Results on Race and Ethnicity, U.S. Census Bureau (2020), <https://www.census.gov/content/dam/Census/newsroom/press-kits/2021/redistricting/20210812-presentation-redistricting-jones.pdf>.

¹⁶ Ben Kessler, *Native Americans, the census' most undercounted racial group, fight for an accurate 2020 tally*, NBC NEWS, (Dec. 29, 2019, 3:06 AM), <https://www.nbcnews.com/news/us-news/native-americans-census-most-undercounted-racial-group-fight-accurate-2020-n1105096>.

¹⁷ US Census Bureau, *supra* note 16; *Demographics: Indian country demographics*, NAT'L CONG. OF AMERICAN INDIANS, <https://www.ncai.org/about-tribes/demographics> (under heading “Tribal lands, forests and roads”).

¹⁸ *Id.*

Utah, and New Mexico.¹⁹ The Navajo Nation possesses more land than 10 states.²⁰ The Navajo Nation's land or "territory":

would comprise the 42nd largest state in the U.S., and is larger than the following 10 states: Connecticut, Delaware, Hawaii, Maryland, Massachusetts, New Hampshire, New Jersey, Rhode Island, Vermont, and West Virginia. An additional 19 tribal nations are each larger than the state of Rhode Island, while 12 tribal nations are each larger than the state of Delaware.²¹

This demonstrates the magnitude of the power tribal governments possess in the United States.

Also, American Indian and Alaska Native land make up approximately five percent of all renewable resources and possess 15 million acres of potential undeveloped mineral and other energy resources.²² Finally, tribal nations and their governments possess enough wind and solar power potential to provide the United States with almost 4.5 times the nation's energy needs.²³ Thus, tribal sovereignty over the environment is vital to Indigenous existence. State policies made to infringe on that sovereignty not only impact millions of people, but also millions of acres of valuable, irreplaceable land and resources.

B. Tribal Sovereignty and the Environment

Tribal control over Indian country and the environment has always been complicated as it frequently puts tribal nations at odds with both state governments and the federal government's desire to control and regulate everything that may be found within the boundaries of the United States. Tribal sovereignty refers to a tribal nation's ability to exert authority over their natural resources, citizens, and property—similar to how they were able to govern themselves before first encountering Europeans.²⁴ Although tribes have inherent sovereignty over their citizens and their territories, they are still considered "domestic *dependent* nations"²⁵ (emphasis added). This means that tribes possess inherent powers over themselves, their land, and their citizens, but remain subject to the authority of the federal government. For example, while tribal governments may

¹⁹ *History – The People, Navajo Nation*, Indian Health Serv., <https://www.ihs.gov/navajo/navajonation/> (last visited Oct. 25, 2021).

²⁰ *Indian Country Demographics*, NAT'L CONG. OF AMERICAN INDIANS, <https://www.ncai.org/about-tribes/demographic> (last updated June 1, 2020).

²¹ *Id.*

²² Regan, S. E., & Anderson, T. L. (2014). The energy wealth of Indian nations. *LSU J. Energy L. & Res.*, 3, 195,

<https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=1048&context=jelr>

²³ COLLEEN A. COOLEY, MITIGATING CLIMATE CHANGE ON A TRIBAL LEVEL 5 (2012), https://www.energy.gov/sites/prod/files/2016/01/f28/cooley_2012.pdf.

²⁴ *What does tribal sovereignty mean to American Indians and Alaska Natives?*, U.S. DEP'T OF INTERIOR, INDIAN AFF., <https://www.bia.gov/frequently-asked-questions> (last visited Oct. 25, 2021).

²⁵ See *Cherokee Nation v. State of Ga.*, 30 U.S. 1, 10 (1831); See also *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014).

make many of their own decisions regarding their land, Indian lands must still be held in trust by the United States—who is ultimately charged with its maintenance and protection.²⁶

The inherent sovereign authority of tribes is acknowledged because of tribes' statuses as "nations," and is recognized primarily through the Indian Commerce Clause of the United States Constitution. The Indian Commerce Clause establishes "[the Congress shall have power] . . . to regulate Commerce with foreign Nations, and among the several States, and with the *Indian Tribes*."²⁷ (emphasis added). Although Indian tribes are not sovereign like foreign nations in that they are dependent on the United States as a result of colonization, one reason many tribes are still considered sovereign nations is because they enter into nation-to-nation treaties with the United States. Generally, Sovereignty gives tribes the ability to tax activities that occur within their borders,²⁸ and sovereignty also makes them exempt from certain state taxes.²⁹ Some tribal nations also have the coveted authority to operate casinos on their land where gaming is legal.³⁰ Additionally, many tribes have the power to regulate hunting and fishing within their boundaries.³¹ Finally, a tribe's power of environmental regulation is paramount to tribal sovereignty and as such, is constantly being challenged and disputed.³²

The relationship between a tribal nation and the federal government is vastly different from the relationship between a tribe and a state government. In one of the first Supreme Court cases regarding Federal Indian Law, the Court found that the relationship between tribes and the federal government was one that resembles "that of a ward to its guardian."³³ The government has what is called a "federal trust duty," or relationship, to tribes. This requires the United States to support self-government and economic development, protect tribes and their citizens, and finally, respect treaties and tribal sovereignty.³⁴ The Supreme Court even went as far to say that the United States government "has charged itself with the moral obligations of the highest responsibility of trust" concerning tribal nations and Indian affairs.³⁵ This includes the protection, preservation, and conservation of the environment, land, and natural resources in Indian country.

As a result of the federal government's trust responsibility to handle Indian affairs, Congress has *exclusive* authority over Indian affairs. In *United States v. Mazurie*, the Supreme

²⁶ Mellie Haider & Manuel P. Teodoro, *Environmental Federalism in Indian Country: Sovereignty, Primacy, and Environmental Protection*, 49 Pol'y Stud. J. 887, 891 (2020).

²⁷ U.S. Const. art. I, §8, cl. 3.

²⁸ *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982) (holding the power to tax is an essential part of tribal sovereignty and that eliminating Tribes' ability to tax within their borders would contradict their status as domestic dependent nations).

²⁹ *McClanahan v. State Tax Commn. of Ariz.*, 411 U.S. 164, 165 (1973) (holding a state could not impose a tax on a tribal citizen's income when it was derived completely from reservation sources).

³⁰ See Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721.

³¹ See *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 337 (1983) (holding tribal laws regulating hunting and fishing on its reservation overrules state laws doing the same as the state laws would effectively eliminate tribal sovereignty on the issue).

³² This is not an exhaustive list of ways in which tribes may exercise their sovereignty.

³³ See *Cherokee Nation v. State of Ga.*, 30 U.S. 1, 10 (1831); See also *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014).

³⁴ See *Seminole Nation v. U.S.*, 316 U.S. 286, 297 (1942) (holding that the United States "has charged itself with moral obligations of the highest responsibility and trust" regarding Indian tribes.)

³⁵ *Id.* at 296.

Court held Congress's authority is "plenary," "broad," and "exclusive."³⁶ Additionally, in *United States v. Jicarilla Apache*, the Court determined that "[t]hroughout the history of the Indian trust relationship, [the Court] ha[s] recognized that the organization and management of the trust is a sovereign function subject to the plenary authority of Congress."³⁷ Accordingly, "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States."³⁸ Thus, Congressional actions concerning Indian affairs are not to be overridden or challenged by state or municipal governments. Although many Congressional policies give Native American and Alaska Native tribes the ability to regulate many different aspects of their land, environment, and resources, the federal government's exclusive authority over Indian affairs does not always protect tribes from attacks by state governments on their inherent sovereignty. Congress can modify the power states have over tribal governments and Indian Country if it wishes. There are several instances in which it has done so, especially concerning the environment.

State governments are often a more formidable adversary than the federal government when it comes to tribal sovereignty over land and natural resources due to the concept of federalism.³⁹ The type of federalism demonstrated between state and tribal governments may be defined as "relational federalism," which is "a situation in which power and responsibility for governance are shared among different units, but without either clear territorial boundaries or a clear national-substantial division of governmental power."⁴⁰ Relational federalism adequately describes the relationship between tribes and state actors because tribal governments are not "creatures of their neighboring states, as are counties or cities."⁴¹ Also, tribal and state governments do not possess an equivalent amount of power as the United States federal government nor are they in a "dominant-subservient relationship."⁴² This means that both tribal and state governments likely have competing interests and authority over environmental and natural resource issues.

In surveys completed by 49 states, the District of Columbia, and 77 tribal governments, the responses demonstrated that both tribal and state governments lacked a significant amount of administrative capacity to handle issues regarding the environment and natural resources on reservations.⁴³ The surveys found that when state governments did obtain a significant amount of administrative capacity, it was often used against Native American and Alaska Native interests.⁴⁴ Additionally, state and tribal perceptions of pollution on reservations varied—with states

³⁶ *United States v. Mazurie*, 419 U.S. 544, 554 n.11 (1975).

³⁷ *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 175 (2011).

³⁸ *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987).

³⁹ *Britannica* defines "federalism" as "Federalism, mode of political organization that unites separate states or other polities within an overarching political system in a way that allows each to maintain its own integrity. Federal systems do this by requiring that basic policies be made and implemented through negotiation in some form, so that all the members can share in making and executing decisions. The political principles that animate federal systems emphasize the primacy of bargaining and negotiated coordination among several power centres; they stress the virtues of dispersed power centres as a means for safeguarding individual and local liberties."

Federalism, ENCYCLOPEDIA BRITANNICA (2020), <https://www.britannica.com/topic/federalism>.

⁴⁰ Liliias J. Jarding, *Tribal-State Relations Involving Land and Resources in the Self-Determination Era*, 57 *Pol. Rsch. Q.* 295, 295 (2004).

⁴¹ *Id.* at 295

⁴² *Id.*

⁴³ *Id.* at 297

⁴⁴ *Id.* at 299

perceiving pollution problems as more “severe” than tribal governments.⁴⁵ The survey found that states were likely more antagonistic when environmental resource issues arose because of how they perceive these issues, finding that:

[o]ne reason states might be antagonistic when reservation resource issues arise would be that those issues are perceived as “problems.” To get this type of situation both states and tribes were asked for their views on the severity of environmental problems originating on reservation. Among states that responded, the most common answer (14) was that nearby reservation environmental problems were “average.” Three states said there were no environmental problems on nearby reservations, while two considered such problems “mild” and seven considered them “severe.”⁴⁶

In contrast, out of the tribal governments surveyed, “78 percent of reservation governments reported their pollution problems as being ‘mild’ or ‘average,’ compared to other reservations. Twelve percent reported no pollution problems, and only three percent reported ‘severe’ problems.”⁴⁷ These varying perceptions regarding pollution between states and tribes likely contribute to the general difference in opinions on how environmental issues on Indian reservations should be handled.

Also, evidence suggests that “state governments are most adversarial when *reservation* Native Americans are present”⁴⁸ (emphasis added); referring to Native Americans living on the reservation, not Native Americans living outside the boundaries of a reservation. This suggests that state governments take more negative or harmful actions when there is a presence of tribal governments *and* a Native land base, not just to Native people in general or those not living on a reservation.⁴⁹ Thus, states are often extremely adversarial regarding tribal governments, the environment, and natural resources.⁵⁰ Research suggests that conflict over natural resource issues are more likely with states that have a higher Native American population and those that are states contiguous to reservations. For example:

[c]learly, the presence of Native American populations and of reservation land bases plays an important role in how state government actors behave when facing issues involving native lands. For states that encompass higher Native American populations, there is evidence that elected officials act both offensively and defensively in their dealings with Native American resource issues. State officials both create anti-Indian policies and appear to react to native population growth. Whether acting offensively or reacting defensively the role of state elected officials in reservation resource issues primarily involves conflict when states are contiguous to reservations.⁵¹

⁴⁵ *Id.* at 300.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 299.

⁴⁹ *Id.*

⁵⁰ *Id.* at 300.

⁵¹ *Id.* at 302.

Thus, evidence suggests there is generally hostility between state governments contiguous to tribal governments and reservations regarding natural resources. This is troubling as it is likely that states with higher Native American populations have relatively more opportunities to enact policies that will harm Native communities. Also, it seems as though there is more conflict between tribal and state governments when more land and natural resources are involved. These conflicts likely contribute to the actions that diminish tribal sovereignty. As research suggests, state governments are often adversarial when Native American issues, especially those surrounding natural resources, are present. This adversarial nature is true with almost all levels of government—each with numerous instances where they have actively attempted to diminish tribal sovereignty and self-determination.

III. Relevant Law

As previously discussed, the federal government, through Congress, has exclusive authority to regulate Indian affairs. However, with that exclusive authority, Congress has the ability to modify the amount of power state governments have over tribal nations and their governments. The Clean Air Act (CAA) and the Clean Water Act (CWA) are two federal laws that may be utilized by tribes to make changes or improvements to air and water quality standards. Both acts give tribes “essentially the same role in Indian Country that states do within state lands.”⁵² These make tribal nations *eligible* to assume authority over implementation of the federal laws in Indian country—but the acts do not automatically grant tribes all the power.⁵³ Additionally, while these acts were amended to afford tribes many of the same opportunities granted to states, tribes still face numerous acts of environmental injustice such as insufficient enforcement of regulatory standards by the EPA, lack of funding, and barriers preventing or limiting tribal participation.

A. Tribal Sovereignty and the Clean Water Act

The Clean Water Act (CWA) is a federal law that “establishes basic structure for regulating discharges of pollutants into the waters of the United States and regulating quality standards for surface waters.”⁵⁴ When enacted in 1970, the CWA did not account for, recognize, or consider tribal authority at all.⁵⁵ In 1987, the CWA was amended by Congress to authorize EPA “to treat eligible Indian tribes with reservations in a manner similar to states (TAS) for a variety of purposes, including administering each of the principal CWA regulatory programs and receiving grants under several CWA authorities.”⁵⁶ For a tribe to be eligible for treatment as states (TAS), they

⁵² *Tribal Assumption of Federal Laws – Treatment as a State (TAS)*, U.S. Env't Prot. Agency <https://www.epa.gov/tribal/tribal-assumption-federal-laws-treatment-state-tas> (last updated September 2, 2021).

⁵³ Haider, *supra* note 27.

⁵⁴ *Summary of the Clean Water Act*, U.S. Env't Prot. Agency, <https://www.epa.gov/laws-regulations/summary-clean-water-act> (last updated September 9, 2020).

⁵⁵ See Andrea K. Leisy, *Inherent Tribal Sovereignty and the Clean Water Act: The Effect of Tribal Water Quality Standards on Non-Indian Lands Located Both Within and Outside Reservation Boundaries*, 29 Golden Gate Univ. L. Rev. 139 (1999).

⁵⁶ Revised Interpretation of Clean Water Act Tribal Provision, 81 Fed. Reg. 30183, 30183 (May. 16, 2016) (to be codified at 40 C.F.R. pts. 123, 131, 233, 501).

must be federally recognized, have a governing body that carries out substantial government duties and powers, have the ability to identify reservation boundaries, and be capable of identifying a basis for jurisdiction for non-reservation boundaries.⁵⁷ While the TAS programs allows for eligible tribes to create water standards congruent with tribal culture, the use of these programs may cause neighboring governments to exert more power, thus making the situation more hostile.

With TAS enabling tribes to generate more culturally relevant water quality standards, the program is one of the few US environmental policies offering this level of tribal governance authority. At the same time, tribes face significant barriers to accessing TAS programs, and for those tribes that do pursue WQSS under TAS, neighboring states and other local entities may be hostile toward assertions of tribal sovereignty.⁵⁸

TAS programs are not utilized by as many tribal nations as one might expect. For example, out of the 574 federally recognized Native American and Alaska Native tribes currently, 70 have been granted TAS status under the CWA.⁵⁹ This coveted treatment of tribes as states is another of the countless reasons demonstrating the importance of federal recognition status and why many non-federally recognized tribes continually fight to gain it. The 1987 change to the CWA granting tribes the eligibility to take over the implementation of water quality standards was frowned upon by many city and state governments.

The first case challenging such water quality standards by an Indian tribe with TAS status was *City of Albuquerque v. Browner*. Here, the City of Albuquerque brought action against EPA for its approval of certain water quality standards set by the Pueblo of Isleta. The Rio Grande flows through New Mexico and forms the border between Mexico and Texas. The City of Albuquerque was operating a waste treatment facility that was dumping into the Rio Grande, five miles north of the Isleta Pueblo reservation.⁶⁰ The Rio Grande river also runs directly through the Isleta Pueblo reservation.⁶¹ The Pueblo of Isleta, with the approval of EPA, passed water quality standards significantly more stringent than the City of Albuquerque's.⁶² Because of this, Albuquerque would have to change its hazardous dumping practices to align with the reservation's new standards.⁶³

Accordingly, the City argued that while the CWA does grant EPA the power to treat tribes as states, tribes should not be able to implement water quality standards more stringent than standards set by the federal government, nor allow tribes to enforce those standards outside reservation boundaries.⁶⁴ The Tenth Circuit dismissed both of Albuquerque's claims, holding that tribes with TAS status do have the authority to establish more stringent water quality standards

⁵⁷ *Tribal Authority Rule (TAR) Under the Clean Air Act*, U.S. Env't'l Prot. Agency, <https://www.epa.gov/tribal-air/tribal-authority-rule-tar-under-clean-air-act> (last updated February 17, 2020).

⁵⁸ Sibyl Diver et al., *Engaging Colonial Entanglements: "Treatment as a State" Policy for Indigenous Water Co-Governance*, 16 *Glob. Env't Pol.* 33, 34 (2019).

⁵⁹ Tribes Approved for Treatment as a State (TAS), U.S. Env't'l Prot. Agency, <https://www.epa.gov/tribal/tribes-approved-treatment-state-tas> (last updated September 2, 2021).

⁶⁰ *City of Albuquerque v. Browner*, 97 F.3d 415, 419 (10th Cir. 1996).

⁶¹ *Id.* at 419.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 421-22.

“because it is in accord with power inherent in Indian tribal sovereignty.”⁶⁵ As a result, cities and states located upstream from tribal nations with more stringent water quality standards may be required to meet tribal standards that are approved by EPA.⁶⁶ This case demonstrates a circumstance in which the existence of tribal sovereignty over the environment allowed for the implementation of greater land and natural resource protection.

The court’s findings in *Browner*, allowing the Tribe to monitor the water quality, also aligns with the empirical findings of a study regarding environmental protection under the CWA and sovereignty in Indian Country; both suggesting tribal enforcement of the CWA is likely better for the protection of the environment. In the study, wastewater treatment facilities regulated solely by tribes were compared to those operated by the federal government. The research suggests that water plant facilities under the authority of tribal nations with “primacy,” or the primary control over the implementation of the CWA, were inspected almost twice as frequently as facilities regulated by the federal government.⁶⁷

Specifically, we compare CWA enforcement activity for facilities regulated directly by tribes with enforcement for facilities regulated by the federal government. To summarize our main results, we find that a history of litigiousness positively predicts tribal primacy under the CWA, likely reflecting tribes’ organizational capacity and political claims of sovereignty. Moreover, we find that facilities that operate under tribal primacy are inspected far more frequently than those regulated by the federal government. These results indicate that, for American Indian tribes, primacy is not a means of shirking environmental regulation, but rather a way of asserting sovereignty and implementing environmental protections more vigorously.⁶⁸

Accordingly, “[t]hese findings . . . suggest tribal primacy over implementation of environmental regulation may substantially improve human health and environmental quality.”⁶⁹

B. Tribal Sovereignty and the Clean Air Act

Adopted in 1963, the Clean Air Act (CAA) is a federal law created to regulate air emissions and decrease pollutants that negatively affect public health and the environment.⁷⁰ It was not until 27 years later, in 1990, that Congress amended the CAA to allow tribes to administer programs under the act.⁷¹ The EPA’s Tribal Authority Rule (TAR) implemented the CAA’s provisions and authorized tribes to implement their own tribal air programs.⁷² Like the CWA, tribal nations must meet a certain number of requirements to receive treatment as states. Accordingly, “[s]everal

⁶⁵ *Id.* at 423.

⁶⁶ *Id.* at 423-24.

⁶⁷ Haider, *supra* note 27, at 902.

⁶⁸ *Id.* at 889.

⁶⁹ *Id.* at 904.

⁷⁰ 42 U.S.C. §7401 et seq. (1970).

⁷¹ *Tribes and EPA: 50 Years of Environmental Partnership*, U.S. Env’t Prot. Agency, <https://www.epa.gov/tribal/tribes-and-epa-50-years-environmental-partnership> (last updated April 22, 2021).

⁷² *Tribal Authority Rule (TAR) Under the Clean Air Act*, *supra* note 58.

federal environmental laws authorize EPA to treat eligible federally recognized tribes as states (TAS) for the purpose of implementing and managing certain environmental programs and functions, and for grant funding.”⁷³ The treatment of tribes as states under the CAA gives tribes the “authority over all air resources within the exterior boundaries of a reservation (including non-Indian owned fee lands).”⁷⁴ Like with challenges to the Clean Water Act, municipal and state governments continuously challenge tribes’ implementation of air quality standards under the CAA.

Currently, seven tribes have the authority to implement air quality standards under the CAA’s Tribal Implementation Plan (TIP).⁷⁵ Thanks to the 1990 amendment to the CAA, tribes with TAS status have the authority to influence the actions of bordering states:

Indian tribes [with TIP authority] also have the same power as states to petition the EPA to enforce CAA air quality requirements on surrounding states or tribes. States distributing permits to new polluters must notify tribes that have TAS status as part of the approval process with the EPA. Any Indian tribe that borders the state issuing the permit, is within fifty miles of the emission source, or will be impacted by the new air pollution, has the right to be notified, to make recommendations to the EPA concerning the permit, and to receive an explanation as to the EPA’s final decision. As a result, Indian tribes with TAS status have some influence over potential air polluters in surrounding states.⁷⁶

Under the Clean Air Act, tribal nations with TAS authority have a greater ability to demonstrate their tribal sovereignty over the environment than those who do not have TAS authority. Under the CAA, tribes also have the option to take part in numerous voluntary programs that allow them to better protect their land, air, and water. These voluntary programs allow for “addressing issues like tobacco smoke and mold; replacing woodstoves with cleaner models; testing homes for radon; reducing greenhouse gas emissions through energy efficiency and renewable energy use; preparing for and building resiliency to the impacts of climate change; [and] reducing diesel emissions.”⁷⁷

Many tribes have taken advantage of the TAS programs regarding the CAA. The Cherokee Nation of Oklahoma, one of the largest tribes in the United States with over 300,000 tribal citizens, amended its code to implement the “Cherokee Nation Air Quality Act of 2004.” The Cherokee Nation Air Quality Act allows the Cherokee Nation to ensure it “has an air quality code that is comprehensive and will ensure that the Nation has the authority in place to obtain treatment as states for air programs.” The Act’s purpose was “to provide the means to achieve and maintain atmospheric purity necessary for the protection and enjoyment of human, plant or animal life and property in this Nation.”⁷⁸

⁷³ *Tribes Approved for Treatment as a State (TAS)*, *supra* note 60.

⁷⁴ *Tribal Authority Rule (TAR) Under the Clean Air Act*, *supra* note 58.

⁷⁵ *Tribes Approved for Treatment as a State (TAS)*, *supra* note 60.

⁷⁶ *Id.* at 206.

⁷⁷ *Environmental Programs and Technical Assistance on Tribal Lands*, U.S. Env’tl Prot. Agency, <https://www.epa.gov/tribal-air/environmental-programs-and-technical-assistance-tribal-lands> (last updated June 14, 2021).

⁷⁸ Cherokee Nation Air Quality Act of 2004, https://www.cherokee.org/media/f3genc52/24356air-quality-code-la_42-04.pdf.

IV. Case Studies: Environmental Racism Today and the Diminishment of Tribal Sovereignty Over the Environment

Environmental racism and environmental injustice occurs when a group faces racial discrimination in the context of the environment.⁷⁹ This sort of racism occurs against minority groups in areas across the world and not exclusively against American Indians and Alaska Natives in the United States.⁸⁰ With the United States' long and turbulent history concerning Native Americans and Alaska Natives and the significant amount of land in their possession of tribal nations, it is not difficult to imagine a repeated pattern of environmental injustice. Below is an analysis of various instances of environmental racism against different tribes within the United States by state governments—with the approval of the federal government or through state and federal court actions. There will also be an analysis of possible legal mechanisms that may be utilized by tribal governments to combat these acts of injustice on their land, environment, and natural resources.

As previously discussed, state governments are generally more adversarial when it comes to the control and regulation of the environment and natural resources in Indian Country. This is due to the desire of state governments to control the land and natural resources within their state boundaries. While states generally cannot exercise control over tribal lands and natural resources, they can when given special authority by the federal government through laws passed by Congress. This section of the note analyzes instances where state governments have been allowed to diminish tribal sovereignty by employing federal laws and regulations to further their own economic and political agendas.

A. Environmental Protection Agency Grants State of Oklahoma Control Over Tribal Lands

In July 2020, the State of Oklahoma requested regulatory authority over almost all tribal lands within the state.⁸¹ In a seven-page letter to the Governor of Oklahoma, Kevin Stitt, EPA Administrator Andrew Wheeler granted Oklahoma the authority to administer a regulatory program “in the areas of the state that are in Indian Country, without any further demonstration of authority by the State.”⁸² Governor Stitt requested approval for regulatory authority under Section 10211(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005 (SAFETEA).⁸³ The purpose of the act was to “authorize funds for Federal-aid highways, highway safety programs, and transit programs, and for other purposes.”⁸⁴ The evocation of this uncommonly used provision in the Act, whose purpose was not intended to regulate the

⁷⁹ See fn. 2. Environmental racism is the concept of racial discrimination in the environmental context. Sarah M. Morris, *The Intersection of Equal and Environmental Protection: A New Direction for Environmental Alien Tort Claims After Sarei and Sosa*, 41 Colum. Hum. Rights L. Rev. 275 (2009).

⁸⁰ See Morris, *supra* note 2, at 309.

⁸¹ Rebecca Beitsch, *EPA gives Oklahoma authority over many tribal environmental issues*, The Hill, (Oct. 5, 2020, 4:33PM), <https://thehill.com/policy/energy-environment/519695-epa-gives-oklahoma-authority-over-many-tribal-environmental-issues>.

⁸² Letter from Andrew Wheeler, EPA Adm'r, to Kevin Stitt, Governor of Oklahoma (Oct 1, 2020).

⁸³ *Id.*

⁸⁴ Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users or “Safetea-Lu” , 109 Pub. L. No. 59, 119 Stat. 1144 (2005).

environment, serves only to undermine tribal authority over Indian country and eliminate the epitome of tribal sovereignty.

According to Administrator Wheeler's letter, Oklahoma's request for regulatory authority came in response to the Supreme Court decision in *McGirt v. Oklahoma*.⁸⁵ In *McGirt*, the Supreme Court held that the Muscogee Creek Nation's Reservation located in the eastern part of Oklahoma had not been disestablished by Congress and remained as part of Indian country under federal law.⁸⁶ In the Court's opinion, Justice Gorsuch opined how the United States has continually failed its federal trust duty to Native American tribes and tribal citizens and that the Court was finally "hold[ing] the government to its word" by recognizing and legitimizing treaties between the United States and Indian tribes.⁸⁷ This was an important acknowledgement of the hundreds of years of oppression, ignorance, and the blatant disregard of countless promises. That makes the State of Oklahoma's actions as a response to the *McGirt* decision even more egregious.

The *McGirt* opinion, which is celebrated as one of the most important decisions for Indigenous people in the last century, should not have been weaponized by the State of Oklahoma and the EPA to strip the 38 Native American tribes in Oklahoma of their sovereignty over environmental issues.⁸⁸ *McGirt* is crucial to Native Americans because it affirmed that only Congress can invalidate treaties and agreements between the United States and Indian tribes.⁸⁹

EPA's actions here effectively put Native American tribes in the same position they were prior to *McGirt* on environmental issues. For example, Oklahoma now has authority over issues such as hazardous waste dumping on tribal lands—which undoubtedly should not be under state control. The hazardous waste Oklahoma now has control over includes many toxic chemicals such as lead, mercury, asbestos, toxic air pollutants, and several others.⁹⁰ Additionally, EPA granted the State with the authority over Underground Injection Control, an EPA program used to permit fracking which is known to be a contributor to climate change and leaves behind toxic pollution and contaminated water.⁹¹ Some commentators have opined that fracking in Oklahoma is responsible for the significant rise in the State's number of earthquakes.⁹²

In addition to granting the State authority over hazardous waste dumping and fracking on tribal lands, EPA gave Oklahoma the power to protect large agricultural polluters like dairy, hog, and chicken farms—all of which are known to be capable of serious negative effects on the environment.⁹³ These large agriculture farms or Concentrated Animal Feeding Operations

⁸⁵ Letter from Andrew Wheeler, EPA Adm'r, to Kevin Stitt, Governor of Oklahoma. (Oct 1, 2020); *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).

⁸⁶ *McGirt*, 140 S. Ct. at 2452.

⁸⁷ *Id.* at 2459.

⁸⁸ Ti-Hua Chang, *EPA Grants Oklahoma Control Over Tribal Lands*, (Oct. 5, 2020), <https://tyt.com/stories/4vZLCHuQrYE4uKagy0oyMA/65Oa5a0nYI4rljnOqxhUto>.

⁸⁹ *McGirt one of the most significant Native American victories in a generation*, INDIAN COUNTRY TODAY, <https://indiancountrytoday.com/opinion/mcgirt-one-of-the-most-significant-native-american-victories-in-a-generation?redir=1> (last visited Oct. 26, 2021).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Nick Ramsey, *New Study Links Oklahoma Earthquakes to Fracking*, MSNBC (July 8, 2014, 2:44 PM), <https://www.msnbc.com/the-last-word/oklahoma-earthquakes-linked-fracking-study-msna365046>.

⁹³ Ti-Hua Chang, *supra* note 89.

(CAFOs) can be extremely harmful to the environment and have possible consequences to humans living near them.⁹⁴ According to the Sierra Club, the waste is hazardous and even deadly:

[t]he amount of urine and feces produced by the smallest CAFO is equivalent to the quantity of urine and feces produced by 16,000 humans. CAFO waste is usually not treated to reduce disease-causing pathogens, nor to remove chemicals, pharmaceuticals, heavy metals, or other pollutants. Over 168 gases are emitted from CAFO waste, including hazardous chemicals such as ammonia, hydrogen sulfide, and methane. Airborne particulate matter is found near CAFOs and can carry disease-causing bacteria, fungus, or other pathogens. Animals frequently die in CAFOs. Their carcasses, often in large numbers, must be dealt with. Infestations of flies, rats, and other vermin are commonplace around CAFOs and therefore around CAFO neighbors.⁹⁵

If tribal sovereignty were respected here, tribal governments would have the authority to decide if they wanted to allow these types of farms on their lands.

Governor Stitt argues that consistency is the reason behind these changes. When asked, he stated that EPA “helps to better protect public health and our environment by ensuring certainty and one consistent set of regulations for all citizens of Oklahoma, including those who are also citizens of one of Oklahoma’s federally recognized Tribes.”⁹⁶ Although consistency of regulations can play an important part in protecting our environment, consistency should not come at the cost of erasing tribal sovereignty. The ability of tribes to make decisions regarding their lands is vital to ensuring the continued existence and preservation of environmental resources for tribes—especially in a state such as Oklahoma where the production and extraction of oil and gas plays such a significant role in the economy.⁹⁷

B. Standing Rock Sioux Tribe and the Dakota Access Pipeline

Next, one of the most notorious instances of environmental racism in recent memory occurred against the Standing Rock Sioux Tribe (SRST) and its battle against the construction of the Dakota Access Pipeline (DAPL). Although the pipeline does not cross the SRST’s current reservation, it goes through the Tribe’s Treaty lands and waters, their ancestral lands, the Missouri River, and Lake Oahe. According to the SRST, “treaty lands” refer to the lands promised to the Sioux Tribes by the United States government in the 1851 Treaty of Fort Laramie.⁹⁸ The DAPL is an approximately 1,170-mile-long pipeline built to transport oil from North Dakota to Illinois. The

⁹⁴ *Why are CAFOs bad?, What is a CAFO?*, Sierra Club Michigan Chapter, <https://www.sierraclub.org/michigan/why-are-cafos-bad> (last visited Oct. 26, 2021).

⁹⁵ *What pollutants do CAFOs produce?, What is a CAFO?*, SIERRA CLUB MICHIGAN CHAPTER, <https://www.sierraclub.org/michigan/why-are-cafos-bad> (last visited [date]).

⁹⁶ Beitsch, *supra* note 82.

⁹⁷ See American Petroleum Institute, *Impacts of the Oil and Natural Gas Industry on the US Economy in 2019* (July 2021), <https://www.api.org/-/media/Files/Policy/American-Energy/PwC/API-PWC-Economic-Impact-Report.pdf> (Oil and natural gas industries directly or indirectly supported over 389,000 jobs in Oklahoma in 2019, or 16.7 percent of the total share of state employment, the highest in the country.).

⁹⁸ Pls.’ Mem. in Supp. of Mot. for Partial Summ. J., 2, No. 1:16-cv-1534-JEB, <https://earthjustice.org/sites/default/files/files/Memo-ISO-SRSTs-Mtn-for-PSJ.pdf>.

pipeline goes through Illinois, Iowa, South Dakota, and North Dakota, and crosses the Missouri River at a point less than a few miles from the Standing Rock Sioux's drinking water supply in North Dakota.⁹⁹ Along with endangering the Tribe's vital water source, the DAPL has destroyed sacred sites with great cultural, religious, and spiritual significance.¹⁰⁰

In July 2016, the United States Army Corps of Engineers, an agency of the United States government, issued Dakota Access the final permit necessary to construct the pipeline.¹⁰¹ Shortly after, the SRST filed a complaint against the United States Army Corps of Engineers in the United States District Court for the District of Columbia for issuing the permit and violating several other environmental law statutes.¹⁰² On November 21, 2016, the SRST issued a statement calling on President Obama to "investigate pipeline safety and protect tribal sovereignty."¹⁰³ The SRST, along with other Sioux Tribes, went beyond United States authorities for relief, and requested precautionary measures from the Executive Secretary of the Inter-American Commission on Human Rights, Mr. Emilio Álvarez Icaza Longoria. The Tribe's letter to the Executive Secretary demonstrated numerous reasons why the pipeline violates tribal sovereignty, along with how it negatively impacts the health, welfare, culture, liberty, and other rights of tribal citizens. The letter stated:

[G]ranting the easement allowing the final stage of construction would cause imminent, serious and irreparable violations of the Tribes' rights to culture, life, liberty and personal security, health, water, property, and equality before the law. Because the United States has failed to meaningfully consult with the Tribes in granting permits for the pipeline, or to perform an adequate assessment of the environmental and social effects of granting the permits, granting the final easement would also seriously and irreparably violate the Tribes' rights to information and participation in government.¹⁰⁴

The damage the DAPL could do to the SRST would be irreversible. For the Sioux, "all beings are connected, that all life—the people, animals, and plants, the air, land, and water—has a spirit and is related. Central to this cultural and spiritual understanding is the Sioux's relation to water."¹⁰⁵ An oil spill into or near the Missouri River would threaten the SRST's entire existence.

Additionally, the letter discussed the human rights violations that occurred against Indigenous protesters by law enforcement.¹⁰⁶ The controversy surrounding the Dakota Access Pipeline brought thousands of protestors to North Dakota in areas where the pipeline was being

⁹⁹ *Background on Dakota Access: Dakota Access Pipeline Facts*, INDIGENOUS RISING, <https://indigenoustrising.org/dakota-access-pipeline-facts/> (last visited Oct. 26 2021).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *The Standing Rock Sioux Tribe's Litigation on the Dakota Access Pipeline*, EARTHJUSTICE <https://earthjustice.org/features/faq-standing-rock-litigation> (last visited Oct. 26, 2021).

¹⁰³ *Id.*

¹⁰⁴ Letter from Standing Rock Sioux Tribe et al., to Emilio Álvarez Icaza Longoria, Exec. Sec'y, Inter-Am. Comm'n on Human Rights 1 (Dec. 2, 2016), <https://turtletalk.files.wordpress.com/2016/12/standing-rock-cheyenne-river-yankton-sioux-tribes-request-for-precautionary-measures-final-dec-02-2016.pdf> [hereinafter *Tribal Letter*].

¹⁰⁵ *Id.* at 3.

¹⁰⁶ *Id.* at 7.

constructed.¹⁰⁷ While the protest did not occur in areas where special use permits for gathering and demonstrations were granted, all of the gatherings took place on lands reserved to the Sioux Tribes by the Treaty of Fort Laramie.¹⁰⁸ Indigenous and non-Indigenous people protested and prayed peacefully for *tribal sovereignty* and land protection, but were attacked by law enforcement.¹⁰⁹ The water protectors and land defenders did their best to remain peaceful despite law enforcement's attempt to turn the protest violent.¹¹⁰ Dakota Access, LLC, the company developing the pipeline, hired private security forces who used pepper spray and released attack dogs on peaceful protesters.¹¹¹ Nonetheless, because of the protestors' efforts, "the gathering has galvanized Indigenous communities throughout the world, serving as a flashpoint for the shared experiences in protecting Indigenous land and resources from extractive and infrastructure projects."¹¹²

C. Uranium and the Navajo Nation

Similar to the Standing Rock Sioux Tribe, the Navajo Nation has also been the victim of severe damage to its land and people because of extractive industries; here by the federal government. The United States has a significant and complicated history of radioactive contamination in Indian Country. One legal scholar noted that "[r]adioactive contamination on American Indian reservations is a product of the United States' ability to control tribal lands under its 'trustee' role, as well as its commitment to develop nuclear energy and create nuclear weapons technology to enhance its military power."¹¹³ Policies incentivizing the production of uranium and the Navajo Nation's abundance of it within their lands led to the contamination of land, water, fish, and other natural resources. Areas within the Navajo Nation in New Mexico are some of the most contaminated areas in the United States due to the existence of uranium mines on the reservation.¹¹⁴ Uranium mining hit a "boom" with the creation of the United States nuclear program and the country's desire to mine the element within its borders.¹¹⁵

As a result, there are an estimated 1,000 abandoned uranium mine shafts on Navajo land.¹¹⁶ Thousands of Navajo Nation citizens were employed in these mines and lived in close proximity to the contaminated areas.¹¹⁷ In the 1930s, there was no doubt that uranium mining was closely related to high rates of lung cancer caused by continuous exposure to the incredibly toxic material.¹¹⁸ In 1952, the Federal Security Agency found the high mortality rate among uranium

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Tribal Letter*, *supra* note 104, at 7.

¹¹⁰ *Id.* at 8.

¹¹¹ *Id.*

¹¹² *Id.* at 7.

¹¹³ Rebecca Tsosie, *Indigenous Peoples and the Ethics of Remediation: Redressing the Legacy of Radioactive Contamination for Native Peoples and Native Lands*, 13 Santa Clara J. Intl. L. 203, 211 (2015).

¹¹⁴ *Id.* at 204.

¹¹⁵ Doug Brugge & Rob Goble, *The History of Uranium Mining and the Navajo people*, 92 Am. J. Pub. Health 1410, 1410 (2002).

¹¹⁶ *Id.* at 1411.

¹¹⁷ *Id.* at 1415.

¹¹⁸ *Id.* at 1412.

miners but deliberately failed to disclose the information to the Navajo Nation and its tribal members because they knew Navajo miners would quit if they found out the information.¹¹⁹

Uranium and its extractive processes not only affected Navajo miners, but it has also damaged the health of their entire households, land, water resources, and livestock.¹²⁰ In one area of the Navajo Nation, thousands of tons of uranium tailings (uranium waste byproduct) and millions of gallons of radioactive wastewater were spilled due to a failed mud dam—causing the largest nuclear spill in U.S. history.¹²¹ The spill caused irreparable damage to Navajo lands and resources:

Holding ponds on the reservation associated with the uranium mines were not well-maintained. In 1979, a mud dam near Church Rock, New Mexico failed, spilling over 1,100 tons of uranium tailings, and an estimated 100 million gallons of radioactive wastewater into the Rio Puerco River. This is the largest nuclear spill in U.S. history, and it caused extensive damage to the Navajo people, their lands, water resources and the livestock that drank the contaminated water.¹²²

Efforts to clean up the spill have commenced, but the site remains on EPA's "Superfund" list and is found to be harmful to rocks, water, and soil.¹²³ The Superfund list is a compilation of the most contaminated hazardous waste dumps, manufacturing facilities, processing plants, landfills, and mining sites EPA plans to clean up through the Comprehensive Environmental Response, Compensation and Liability Act (CERLA), established by Congress in 1980.¹²⁴

Exercising its tribal sovereignty and self-determination, the Navajo Nation enacted the Diné Natural Resources Protection Act of 2005 to remedy the environmental damage and contamination that occurred on its lands due to uranium mines on the Navajo Reservation.¹²⁵ According to the Diné Natural Resources Protection Act of 2005, its purpose is to ensure that no uranium mining will occur on Navajo lands until all adverse effects of the mining have been eliminated or substantially reduced to the satisfaction of the Navajo Nation government. The Act states:

The purpose of the Diné Natural Resource Protection Act of 2005 is to ensure that no further damage to the culture, society, and economy of the Navajo Nation occurs because of uranium mining within the Navajo Nation and the Navajo Nation Indian Country and that no further damage to the culture, society and economy of the Navajo Nation occurs because of uranium processing until all adverse economic, environmental and human health effects from past uranium mining and processing

¹¹⁹ Rebecca Tsosie, *Climate Change, Sustainability and Globalization: Charting the Future of Indigenous Environmental Self-Determination*, 4 *Env'tl & Energy L. & Pol'y J.* 188, 219 (2009) [hereinafter "*Climate Change, Sustainability and Globalization*"].

¹²⁰ *Id.* at 220.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 221

¹²⁴ *What is Superfund?*, U.S. Env'tl Prot. Agency, <https://www.epa.gov/superfund/what-superfund> (last updated October 9, 2020).

¹²⁵ *Climate Change, Sustainability and Globalization*, *supra* note 119, at 221.

have been eliminated or substantially reduced to the satisfaction of the Navajo Nation Council.¹²⁶

The Act makes clear that no uranium mining will be allowed until it is absolutely safe for all parties involved, and nothing will happen without the explicit approval of the Navajo Nation Council.¹²⁷

D. Water Polluting Mine Approved by Michigan and EPA Despite Protests of Menominee Indians

In 2019, EPA and the Michigan Department of Environmental Quality approved a permit, submitted by Aquila Resources, for the construction of an open-pit ore mine in the Upper Peninsula of the Menominee River.¹²⁸ The area is crucial for the fishing of walleye, a fish vital to the Menominee Indian Tribe of Wisconsin's economy.¹²⁹ The Menominee Indian Tribe is federally recognized and has called the Menominee River and its surrounding acreage home since time immemorial. Like the Standing Rock Sioux Tribe, water is crucial to the Menominee Tribe's way of life. According to Michigan environmental regulators, the mine would send "acidic mining wastes into the river and surrounding waterways, which would then spill into the Great Lake."¹³⁰ The extraction of natural resources from the "Back Forty Mine" would likely create sulfuric acid, a chemical that harms water quality and is toxic to fish like the walleye and other aquatic organisms.¹³¹ Additionally, the mine has the potential to produce toxic waste for decades or even centuries:

[T]ests show that most of the ore and surrounding rock is "reactive" – that is, it forms sulfuric acid when exposed to air and water. After mining is completed, Aquila proposes to backfill their deep pit with waste-rock and tailings slurry. Some tailings will remain as permanent features of the landscape, continuing to produce acid mine drainage for decades or centuries Aquila is also proposing two potential mines in northern Wisconsin, and has claimed they could "ship" ore to the Back Forty site for milling, which would add unknown quantities of waste tailings, and dramatically increase environmental risks posed by the Back Forty site in the long term.¹³²

¹²⁶ Resolution of the Navajo Nation Council Enacting The Diné Natural Resources Protection Act, 20th Navajo Nation Council, Third Year §2 (2005) <https://www.nrc.gov/docs/ML0723/ML072340482.pdf>.

¹²⁷ *Id.*

¹²⁸ Keith Matheny, *Tribe has stake in disputed ore mine near Menominee River*, Detroit Free Press, (Aug. 18, 2019), https://madison.com/ws/news/local/tribe-has-stake-in-disputed-ore-mine/article_b23c26d8-68d4-518f-96d1-5dcca4e86cfc.html

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Mining Action Group, *Aquila Back Forty Facts*, <http://savethewildup.org/about/aquila-back-forty-facts/> (last visited Nov. 09, 2021).

Not only will the mine harm organisms in the Great Lake and produce an unknown amount of toxic waste, it would also disturb the Menominee Tribe's culture.¹³³ The Tribe's creation story originates from the river's mouth, and numerous sacred burial grounds would likely be disturbed by the construction of the mine.¹³⁴ The mine is expected to produce millions of pounds of gold, zinc, copper, lead, and silver.¹³⁵ As a result, the State of Michigan has a considerable financial interest in the completion of the Back Forty Mine and thus is likely not as concerned with the Back Forty Mine's significant cultural and environmental consequences.

V. Recommendations and Conclusions

Environmental racism and the diminishment of tribal sovereignty are often related; this comes as the result of hundreds of years of oppression, neglect, and colonization. Countless acts of environmental racism occur across the United States against tribal nations every day, and these acts are generally perpetrated by the federal and state governments who only seek to exert their power over Indian tribes. The State of Oklahoma weaponized a landmark Indian law Supreme Court decision and a loophole provision in an environmental law to control hazardous waste dumping on tribal lands in the state. Oklahoma argued the law created more "consistency" in the enforcement of environmental laws, but in actuality that was a hollow excuse to eliminate tribal sovereignty. The United States government allowed for a dangerous pipeline to be built on sacred Standing Rock Sioux land and ignored the authority and incessant pleas of the Tribe to protect its sacred burial grounds and water source. Additionally, millions of tons of contaminated waste have been dumped on Navajo Nation tribal lands. The Tribes' lack of consent and awareness led to countless deaths and health issues. Finally, the State of Minnesota approved a mine that endangers land, fish, and water resources the Menominee Tribe has used and protected since time immemorial. If inherent tribal sovereignty were respected by the United States and state governments, these terrible acts of environmental racism would not have occurred, and many would be prevented.

¹³³ Matheny, *supra* note 128.

¹³⁴ *Id.*

¹³⁵ *Id.*