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Recommended Citation

Haley Edmonds, *Expanding American Indian Land Stewardship: An Environmental Solution for a Country in Crisis*, 25 Rich. Pub. Int. L. Rev. 241 (2022).

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EXPANDING AMERICAN INDIAN LAND STEWARDSHIP: AN ENVIRONMENTAL SOLUTION FOR A COUNTRY IN CRISIS

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“The white man...is a stranger who comes in the night and takes from the land whatever he needs. The earth is not his brother, but his enemy, and when he has conquered it, he moves on...his appetite will devour the earth and leave behind only a desert.”¹

ABSTRACT

Land is the central foundation around which all life is formed. Therefore, societies must have a stable connection with the land in order to be structurally sound. If this connection is weak or inflexible, every building-block of civilization laid on top of it will inevitably crumble. Some societies have established stable relationships with the land by working around and responding to nature’s rhythms in order to satisfy their needs. Whereas other societies have ignored nature’s intricacies and instead have tried to strong-arm nature into yielding to their whims. These two diametrically opposed approaches to conceiving of humans’ relationship with the land are exemplified by America’s Indigenous peoples and Colonial immigrants, respectively. Over the 15,000 plus years that American Indians have spent on this continent, they have developed a system of land use that has allowed them to live sustainably within their means. They have also created a system of land stewardship that reflects their deep reverence for the land as a living, breathing entity. This is in stark contrast to the system developed by White immigrants, which treats the land as a commodity, and fails to devote resources to its protection, unless it is benefitting a private interest. As this paper will demonstrate, these conceptions of land are deeply entrenched in each society’s identity. Thus, if America’s federal government is to find a solution to its self-inflicted climate crisis, it must look outside of itself for answers. It must instead look to the infinite stores of wisdom that have been passed down for generations by our Nation’s original inhabitants. But America must be careful not to perpetuate its appropriative track record by integrating this wisdom into its existing management system without also integrating the Indigenous peoples that provided it. Only by recognizing American Indian land rights will America have a fighting chance in saving this country from environmental extinction. As an achievable first step, the U.S. federal government must recognize American Indians’ international law right to Free, Prior, and Informed consent.

INTRODUCTION

America is at a critical juncture in environmental decision-making as it grapples with a self-inflicted climate crisis. The Environmental Protection

¹ Excerpted from a speech delivered by Chief Seattle in 1854. Chief Robert Wavey, *International Workshop on Indigenous Knowledge and Community-based Resource Management: Keynote Address*, in TRADITIONAL ECOLOGICAL KNOWLEDGE CONCEPTS AND CASES 12, 13 (Julian T. Inglis ed., 1993).

Agency (“EPA”) has recently announced that it will begin shifting its focus from climate mitigation to climate adaptation.² We are no longer at the point of stopping climate change—it is here, and now we must learn how to decelerate and ultimately adapt to its devastating effects.

As resources grow scarce, we will have to learn how to live narrowly within our means; something non-native citizens have historically never excelled at. American environmental policy will also be forced to reinvent itself. Our current human-centered, profit-driven, and fractionalized model of regulation is entirely ineffective against an all-pervasive climate disaster with unfathomable long-term costs, which we continually refuse to see as our bill to pay.

To adapt to this new reality, mainstream American environmentalism will be forced to look outside of itself for solutions. As this paper will demonstrate, these solutions have been here all along, passed down for thousands of generations by our nation’s original inhabitants.

Over the 15,000-plus years that American Indians have lived on this continent they have developed a conception of, and relationship with land that is entirely distinct from that of Euro-American immigrants. Indigenous Americans revered land as the physical and spiritual foundation for all life residing upon it. On the other hand, Colonial Americans, reduced land to a commodity—private property—that they were entitled to use and exploit as they pleased. This ideological difference has had, and continues to have, reverberating effects on the development of each group's relationship with the land and, thus, their approach to environmental stewardship.

Section I will provide the historical foundations for how Euro-Americans came to conceive of land, starting in feudal Europe. Section II will look at the history of American Indians to demonstrate how their diametrically opposed conception of land came to be. Section III will analyze Euro-Americans’ approach to environmental stewardship, and highlight the deficiencies in this approach. Section IV will showcase the “sufficiencies” of the Indigenous approach to demonstrate how the indigenous conception of land is a fundamentally superior foundation for developing a comprehensive system of environmental stewardship. Finally, Section V concludes by positing that an increase in indigenous stewardship through the recognition of American Indian land rights can serve as an effective solution for a country in crisis.

² EPA, CLIMATE ADAPTATION ACTION PLAN 1 (2021), <https://www.epa.gov/system/files/documents/2021-09/epa-climate-adaptation-plan-pdf-version.pdf>.

I. COLONIAL CONCEPTIONS OF LAND

A. European Foundations

To understand the commodification of land in America, we must start in 15th Century Europe, the turning point in the colonial conception of land. It is here we begin to see the shift from communal land use to private property, which laid the literal and figurative foundation upon which American society was built.

i. The Fall of Feudalism

The transformation of land from a means of sustenance to a commodity began when the feudal system in Europe shifted to a market economy.³ During the age of feudalism, all land was owned by the king and granted to his vassals in exchange for their services and adherence to customary laws.⁴ From an ecological perspective, the feudal system maintained stable relationships between humans and the ecosystem, as humans were bound to the land, and one another, for subsistence, income, social status, and kinship.⁵

This structure was radically changed, largely by the Enclosure Movement, which transformed once communal lands into private property enclosed by hedges and fences.⁶ The Enclosure Movement was undertaken to spur agricultural efficiency.⁷ Enclosure allowed larger, wealthier farmers to buy up arable lands, previously open to grazing for all farmers in common, to create more complex, sophisticated farming operations, as well as increase the amount of full-time pastorage.⁸ As land-bound industries increased in efficiency, feudal societies had more agricultural products than they needed to sustain themselves.⁹ As a result, communities began trading among and between one another. And soon, barter and direct exchange of goods were

³ RICHARD N.L. ANDREWS, *MANAGING THE ENVIRONMENT, MANAGING OURSELVES: A HISTORY OF AMERICAN ENVIRONMENTAL POLICY* 15 (Yale Univ. Press, 2d ed. 2006).

⁴ *Id.* at 16.

⁵ *Id.*

⁶ *Id.*; AUDREY SMEDLEY & BRIAN SMEDLEY., *RACE IN NORTH AMERICA: ORIGIN AND EVOLUTION OF A WORLDVIEW* 47 (Westview Press, 4th ed. 2012). The Enclosure Movement progressed at varying paces across Europe. In England, the movement proceeded rapidly from 1450 to 1640, and 1750 to 1860, and was virtually complete by the end of the 19th century. *Enclosure*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/enclosure> (last visited Apr. 10, 2022).

⁷ See Elias Beck, *Enclosure Movement*, HISTORY CRUNCH (Mar. 25, 2022), <https://www.historycrunch.com/enclosure-movement.html#/>.

⁸ This dislocation of small-scale farmers from communal lands is hypothesized to have fueled the industrial revolution, as poor farmers were forced into cities to find work. See *id.*

⁹ ANDREWS, *supra* note 3 at 16.

replaced by the commercial exchange of wage labor, currency, and the sale of land itself.¹⁰

The land and its resources were thus transformed from a means of subsistence to a commodity that had value beyond its intrinsic ecological value.¹¹ No longer were societies bound by obligation to the land and kinship structures—instead, they were defined by individualism, absolute private property, and the unrestrained accumulation of wealth.¹² No longer did people take only what they needed—they took whatever they could get.

ii. Early Imperialism

Soon, European nations began outgrowing their own natural resources and set their eyes on new frontiers.¹³ As European exploration and colonization commenced, the world's ecosystem underwent massive change.¹⁴ Living species and human populations were dispersed worldwide, resulting in the decimation of native populations with new deadly diseases and a rapid decrease in biodiversity.¹⁵ Only the most profitable species, human and non-human, were saved from extinction.¹⁶ A blatant disregard for the earth and its native inhabitants was well underway.

iii. The Age of Exploitation

With the rise of the scientific revolution, colonial societies became even more hostile towards the land.¹⁷ Once theological philosophies were replaced by empirical reasoning, nature was no longer viewed as a divine mystery but as a complex yet understandable mechanism that could be manipulated to their advantage.¹⁸ During Europe's industrial revolution, humans harnessed the natural world to achieve work that human and animal energy alone could not, like using mechanical energy to power a steam engine.¹⁹ The rise of industrial capitalism in Europe restructured how people interacted with their environment and laid the groundwork for America's revolution, which would

¹⁰ *Id.*

¹¹ *Id.* at 17.

¹² SMEDLEY & SMEDLEY, *supra* note 6 at 46.

¹³ ANDREWS, *supra* note 3 at 18.

¹⁴ *Id.* at 19.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 21–22.

¹⁸ *Id.*

¹⁹ *Id.* at 24.

come a century later.²⁰ Indeed, all of this transformation set the stage for the Europeans who arrived in the “new” world.²¹

B. Land in the “New” World

European Immigrants who flooded America’s borders brought with them their entrenched views of land as a commodity stripped of its intrinsic value. However, this conception of land took on its own identity on the shores of America’s seemingly limitless frontier.²²

One fundamental difference between Europe and America was America’s perceived abundance of land.²³ This “abundance,” of course, was a myth, as this land already belonged to the Indigenous Americans. However, this reality, unfortunately, had little bearing on settlers’ perceptions of its availability. Unlike Europe, where limited land parcels were concentrated in the hands of a few, America was a “land of opportunity,” where property rights could be diffused amongst a greater population.²⁴ Additionally, New England land was owned individually from the beginning, as feudalism, a system that prospers where land is scarce, served little function in this arena of abundance.²⁵ Freehold soon became synonymous with freedom, as property ownership was seen as the “surest guarantee” of inalienable rights such as liberty and self-governance.²⁶ America’s government was constructed around the core belief that a government should exist primarily to protect men in the free exercise of their property rights.²⁷ And initially, the only people who could participate in our democracy were those who were White, male, and land-owning. Property, quite literally, was power.

To make use of America’s frontier, settlers dangerously believed that they would first need to rid the country of its original inhabitants, whom they saw to be in the way of their manifest destiny. As we know from history, settlers’ solution to the so-called “Indian problem” was nothing short of mass genocide. As White settlements grew, Americans continued to establish

²⁰ *Id.* 21–22.

²¹ *Id.* at 14–15 (“[T]he cultural context of American colonization was the laws, economies, and customs of the societies from which the colonists came, especially England... American environmental policy today thus traces its roots back to this European upbringing.”).

²² *Id.* at 34.

²³ *Id.* at 36.

²⁴ *Id.*

²⁵ *Id.* at 35 (“Feudalism had prospered where land was scarce, but where land was abundant, and labor scarce and therefore expensive, people could not be kept within such a restrictive land-based system of social classes and controls”).

²⁶ SMEDLEY & SMEDLEY, *supra* note 6 at 166.

²⁷ *Id.* at 49.

mechanisms and excuses for killing or forcibly relocating American Indians and stealing their lands.

Religion was frequently used as one such justification. In the book of Genesis, God told Adam to increase, multiply, subdue, and dominate the earth.²⁸ The English settlers believed that if God had safely guided them to this “new world,” they must be God’s “chosen people,” responsible for carrying out this domination in their new Eden.²⁹ Therefore, according to the settlers, conquest was not only permitted but ordained by God. The narrative that, in humans’ first brush with the earth, man and woman were dispelled from nature after they were led astray by one of its creatures, also did not set the tone for a healthy relationship with the land.

Contemporary philosophy was also weaponized to justify this land theft. Influenced by the work of John Locke, colonists argued that, by living in harmony with nature and owning land communally, the Indigenous nations were not making “proper use” of this land.³⁰ According to Locke, “proper use” of the land would include individually enclosing the parcel, living on it, and improving the land using domesticated cattle and agriculture, as adding labor to land is how one made a parcel their own.³¹ Therefore, American Indians could be “justly deprived of [their land] by the more enterprising English.”³²

The colonists were also heavily influenced by puritanism. Puritan leader John Winthrop argued that the creation of land ownership through applied labor elevates man from a “state of nature” (where he only has “natural rights”) to membership within civilized society, where he thereby acquires more expansive “civil rights.”³³ By this flawed logic, it was thought that, by leaving the land in its natural state, American Indians only had the inferior

²⁸ Genesis 1:28 (King James) (“God said to them, ‘Be fruitful and multiply, and fill the earth and subdue it; and have dominion over the fish of the sea and over the birds of the air and over every living thing that moves upon the earth’”).

²⁹ Robert P. Hay, *Providence and the American Past*, 79 *IND. MAG. OF HIST.* 79, 81 (1969).

³⁰ Nicolas P. Canny, *The Ideology of English Colonization: From Ireland to America*, 30 *WM. & MARY Q.* 575, 596 (1973).

³¹ JOHN LOCKE, *TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION* 111 (Ian Shapiro ed., Yale Univ. Press 2003) (1690) (“every man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property.”).

³² Canny, *supra* note 30 at 596.

³³ MARCIA ELAINE STEWART, *REASONS FOR THE PLANTATION IN NEW ENGLAND* 3 (1628), <http://explorehistory.ou.edu/wp-content/uploads/2018/01/Winthrop-Plantation-1629.pdf> (“God hath given to the sons of men a double right to the earth – there is a natural right, and a civil right. The first was natural when men held the earth in common every man sowing and feeding where he pleased. Then as men and their cattle increased, they appropriated certain parcels of ground by enclosing and peculiar cultivation and this in time got them a civil right. . .”).

“natural rights” to land, which could be trumped by the superior rights of “civilized” settlers, under the discovery rule.³⁴ This pattern of exploitation and disassociation of “civilization” from “nature” is an unfortunate preview of America’s relationship with the environment.

II. INDIGENOUS CONCEPTION OF LAND: AMERICAN INDIANS

This section will explore the development of the Indigenous relationship with land by first looking at the history of American Indians’ subsistence-driven approach to land use and their communal system of land ownership, management, and stewardship. Then, this section will discuss how this long history of taking only what they needed, and leaving the rest to be communally stewarded, fostered a culture of respecting and caring for the land on which they lived.

A. Relationship with Land: Historical Foundations

i. Pre-Columbian Land Use

The history of North America’s first human inhabitants can be traced back to the stone age. Early estimates projected that Indigenous Americans first came to America some 12,000 years ago by traveling from Siberia to Alaska across an ice bridge known as the Bering Strait.³⁵ However, this “Bering Strait theory” has since been called into question.³⁶ Modern historians now believe Indigenous peoples arrived even earlier and that they traveled to the pacific coasts of North America not by land, but by boat.³⁷ Modest estimates project that this migration took place, at minimum, 15,000 years ago.³⁸ More ambitious estimates predict that arrival occurred closer to 50,000 years ago.³⁹

Indigenous Americans almost exclusively used the land for subsistence. In the tens of thousands of years on this continent, a landmass 3,000 miles wide, Indigenous Americans left this expanse of unimaginable abundance almost completely untouched. This fact cannot be explained away by a smaller population size, as it is estimated that by 1492, between seven and twelve

³⁴ Johnson v. McIntosh, 21 U.S. 543, 574 (1823).

³⁵ Joseph M. McCann, *Before: 1492: The Making of the Pre-Colombian Landscape: Part I: The Environment*, 17 *ECOLOGICAL RESTORATION* 15, 17 (1999).

³⁶ Phil Dierking, *Native Americans Call for Rethinking of Bering Strait Theory*, VOANEWS.COM (June 25, 2017), <https://learningenglish.voanews.com/a/native-americans-call-for-rethinking-of-bering-strait-theory/3908338.html>; Alexander Ewen, *How Linguists Are Pulling Apart the Bering Strait Theory*, INDIAN COUNTRY TODAY (Sept. 13, 2018), <https://indiancountrytoday.com/archive/how-linguists-are-pulling-apart-the-bering-strait-theory>.

³⁷ Dierking, *supra* note 36; Ewen, *supra* note 36.

³⁸ Ewen, *supra* note 36.

³⁹ Johanna Nichols, *Linguistic Diversity and the First Settlement of the New World*, 66 *LANGUAGE* 475, 504 (1990).

million Indigenous peoples called North America home.⁴⁰ American immigrants did not reach a population of such size until the 19th century.⁴¹

It also would be improper to assume that the land remained “untouched” because American Indians did not know how to “proper[ly] use” the land to meet their needs.⁴² American Indians actively refashioned their environment to meet their cultural and material needs through fire and water, brain and brawn, and trial and error.⁴³ Many tribes maintained highly-developed agrarian and town-dwelling societies.⁴⁴ However, unlike their immigrant counterparts, American Indians were able to do this all while living sustainably within their means.

ii. Pre-Columbian Land ownership

Pre-Columbian Indigenous nations also had a system of land management, though it differed in significant ways from that of European settlers.⁴⁵ Most notably, American Indian property rights were held communally by the entire tribe.⁴⁶ Also, agriculture in the pre-Columbian New World was purely crop-based, as animal husbandry was not present in the Americas until European contact.⁴⁷ Because there were no domesticated animals to contain, there was no need to enclose the land using hedges and fences.⁴⁸ However, this did not mean that there was no ordering system for how these land parcels were used. The conception of communal land as a chaotic free-for-all existed only in the imperial imagination.⁴⁹

The “inner commons”, were typically “claimed” by individual families or lineages for as long as the land was of use to them, in ways not unlike the European enclosure system.⁵⁰ However, European and Indigenous

⁴⁰ Russell Thornton, *Native American Demographic and Tribal Survival into the Twenty-first Century*, 46 AM. STUD. 23, 25 (2005).

⁴¹ *United States Population Chart*, OER SERVICES, <https://courses.lumenlearning.com/suny-ushistory2os2xmaster/chapter/united-states-population-Chart> (last visited Apr. 28, 2022) (American Immigrants reached an estimated population size of 7,239,881 in 1810).

⁴² David Rich Lewis, *Native Americans and the Environment: A Survey of Twentieth-Century Issues*, 19 AM. INDIAN Q. 423, 439–40 (1995).

⁴³ *Id.* at 423.

⁴⁴ ANDREWS, *supra* note 3 at 29.

⁴⁵ Allan Greer, *Commons and Enclosure in the Colonization of North America*, 117 AM. HIST. REV. 365, 369 (2012).

⁴⁶ *See id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 369, 372.

⁵⁰ *Id.* at 369–70. “Inner commons” refers to the lands cleared for agriculture, housing, and other developments. *Id.*

Americans differed in how they used the “outer commons.”⁵¹ European Americans considered these outer commons “waste” and sought to convert as much of them as possible into inner commons through privatization and development in order to render it “useful.”⁵² On the other hand, Indigenous Americans were able to successfully manage systems of concurrent land use for needs such as hunting, fishing, and foraging.⁵³ Generally, outer commons would be claimed and controlled by a specific Native nation, and then these nations would determine how they would be managed.⁵⁴

Unlike the modern version of non-native public land ownership we see in America today (e.g., our national parks system), this native system of communal land management is stewarded solely by those who have a direct relationship to the land. In other words, the people who are determining how the land will be engaged with are the same people who are hunting in its woods, fishing in its waters, and praying to its spirits. This intimate relationship with “public” lands is inherently different from non-Natives, who are generally only materially connected (legally, physically, spiritually) to lands that are in their direct dominion and control.

Also, unlike non-Natives, who sought to exploit all of the earth’s natural resources because they believed it was their God-given right, Native nations only used what they needed to sustain themselves and left the rest undisturbed. Here, we can see how American Indians’ historical conception of land has better suited them to live sustainably within their means and create an environmentally-friendly system of land management.

B. Relationship with Land: Cultural Implications

Indigenous Americans’ ability to maintain a stable system of sustainable stewardship for thousands of years can largely be attributed to their deep relationship with the land. By living alongside nature, largely in the same place for upwards of 15,000 years, American Indians accumulated an extensive body of localized, ecological knowledge.⁵⁵ Through this treasury of

⁵¹ *Id.* at 370. “Outer commons” refers to untouched wilderness regions, like mountains, rivers, and forests. *Id.*

⁵² *Id.* at 369; LOCKE, *supra* note 31 at 111 (“The earth, and all that is therein, is given to men for the support and comfort of their being. And [although it] belong to mankind in common...and no body has originally a private dominion, exclusive of the rest of mankind... being given for the use of men, there must of necessity be a means to appropriate them some way or other, before they can be of any use, or at all beneficial to any particular man.”).

⁵³ Greer, *supra* note 45 at 370.

⁵⁴ *Id.* at 371.

⁵⁵ This body of knowledge is referred to today as traditional ecological knowledge (TEK), which is defined as a “cumulative body of knowledge and beliefs, handed down through generations by cultural transmission, about the relationship of living beings (including humans) with one another and with their environment.” Fikret Berkes, *Traditional Ecological Knowledge in Perspective*, in TRADITIONAL ECOLOGICAL KNOWLEDGE: CONCEPTS AND CASES 1, 3 (1993).

indigenous wisdom, Indigenous Americans became highly attuned to the earth's rhythms and resources.⁵⁶ As a result, they were able to quickly adapt and respond to even the subtlest environmental disturbances.⁵⁷ As one anthropologist put it, "When you understand the potential uses and the values of hundreds of species, you see a forest differently than if you don't recognize that."⁵⁸ Because of this, "Aboriginal people often notice very minor changes in quality, odour and vitality long before it becomes obvious to government enforcement agencies, scientists or other [non-native] observers of the same ecological system."⁵⁹

This intimate connection with the land also established a strong, ecocentric foundation from which American Indian culture, spirituality, government, and economy ultimately grew. This serves as a stark contrast to the anthropocentric approach taken by Euro-American immigrants.⁶⁰ While colonial America was also centered around a relationship with land, the commodified parcels of privately owned properties that settlers rallied around were far removed from the living, breathing, natural entity that American Indians revered.

Among Indigenous cultures around the world, land is universally conceived "not as a means of production or a commodity to be acquired, but, rather, as an integral part of existence connecting all living beings, including humans and their spirituality."⁶¹ Robin Kimmerer, an author, botanist, and member of the Citizen Potawatomi Nation Tribe, posits that this indigenous conception of land creates a socioeconomic system that is fundamentally distinct from American capitalism.⁶² Whereas capitalism arises when land is viewed as a commodity to be exploited, Kimmerer says a "gift economy," occurs when land is viewed as a living entity endowing us with gifts, such as food, water, and shelter.⁶³ In this indigenous economy, there is no commercial transaction between giver and receiver. You do not have to write out a check to Mother Earth to enjoy these resources.

⁵⁶ Lewis, *supra* note 42 at 423.

⁵⁷ *Id.*

⁵⁸ Annie Sneed, *What Conservation Efforts Learn from Indigenous Communities*, SCI. AM. (May 29, 2019), <https://www.scientificamerican.com/article/what-conservation-efforts-can-learn-from-indigenous-communities/>.

⁵⁹ Wavey, *supra* note 1 at 12.

⁶⁰ David Throsby & Ekaterina Petetskaya, *Sustainability Concepts in Indigenous and Non-Indigenous Cultures*, 23 INT'L J. CULTURAL PROP. 119, 129 (2016).

⁶¹ *Id.* at 124.

⁶² ROBIN WALL KIMMERER, *BRAIDING SWEETGRASS: INDIGENOUS WISDOM, SCIENTIFIC KNOWLEDGE, AND THE TEACHINGS OF PLANTS* 17 (Milkweed Editions 2013).

⁶³ *Id.* at 24.

However, a reciprocal set of obligations is still owed when you accept these gifts. Instead of a bundle of rights, a gift economy dispenses upon land-owners a “bundle of responsibilities.”⁶⁴ Kimmerer says that these responsibilities are encapsulated within the indigenous proverb of the “honorable harvest,” which advises to take only what is given, use it well, be grateful for the gift, and reciprocate the gift.⁶⁵ When land is seen as a living being to which we are indebted, instead of a commodity to which we are entitled, a socioeconomic system fostering environmental stewardship is created.

III. DEFICIENCIES IN THE COLONIAL CONCEPTION OF LAND.

This section will first demonstrate how the transition of land use and management from Native to non-Native hands summoned a period of unprecedented ecological destruction. This section will then discuss how modern U.S. environmental policies are fundamentally ill-equipped to deal with the compounding climate disasters that were instigated by this incessant reign of destruction.

A. *Early Resource Management*

It is no coincidence that the rapid decline of America's native ecosystem coincided with the removal and replacement of Native American stewardship with European settlement.⁶⁶ It also is no surprise that early attempts of environmental restoration backfired when indigenous methods and practices were blatantly disregarded.

i. *Land Ownership*

American Indian stewardship was steadily reduced to a nominal fraction following the arrival of Columbus. Native nations first weathered the “Great Dying,” during which 90% of the Native population was decimated in the 100 years following European contact (largely due to the arrival of Old World

⁶⁴ *Id.* at 28. To demonstrate this, Kimmerer asks us to imagine going to a department store to buy a pair of socks. In this commercial exchange, no relationship has been created beyond a simple “thank you” given to the store clerk. Once you hand over the money, a mutual exchange has been completed. You now have a right to own those socks and can use them however you please. (“bundle of rights”). Now, imagine instead that your grandmother has instead knitted you a pair of socks for your birthday. You did not pay, or even ask, your grandmother to make you these socks— she has simply given them to you out of love. Now, Kimmerer says a “feeling bond” has been created, as you may likely feel obligated to repay your grandmother for this kind act by sending her a thank you note, taking good care of the socks, and even gifting her with a pair of socks when her birthday rolls around. (“bundle of responsibilities”).

⁶⁵ *Id.* at 20–21.

⁶⁶ *See generally* Wavey, *supra* note 1 at 11 (“After 500 years of continuous exploitation and development, guided by science and technological discovery, non-aboriginal management systems have created an era of unprecedented opportunity for widespread ecological catastrophe.”).

pathogens).⁶⁷ Indigenous peoples were then further challenged by predatory land practices aimed at relegating natives to the periphery of American society.⁶⁸

Between 1851 and 1887, East Coast American Indians were forced onto remote, unwanted parcels of land west of the Mississippi in order to make room for White settlement.⁶⁹ However, as settlers continued to multiply, westward expansion began to encroach upon even these reserved parcels. In an effort to break up tribally owned lands, transfer title into non-native hands, and assimilate Native peoples into White, agrarian society, Congress passed the Dawes General Allotment Act of 1887.⁷⁰ The law forced American Indians to either claim an individual allotment of their previously shared lands and use it for private farming or relinquish title to White settlers.⁷¹ As a result of these predatory land policies, Indigenous Americans lost title to an estimated 85% to 99% of their historic lands.⁷²

This mass transfer of lands into non-native hands rapidly devastated America's environmental landscape. As Euro-American farming practices replaced more sustainable native practices, field productivity quickly diminished, rendering tens of thousands of acres of farmland infertile.⁷³ Modern technology attempted to solve the issue by treating the land with pesticides, herbicides, and fertilizers, which merely poisoned the land and its residents.⁷⁴ Domesticated livestock competed with and ultimately replaced native animal species such as bison, disrupting land use patterns and changing the ecosystem.⁷⁵ Wild animals were hunted and fished to the brink of extinction.⁷⁶ Already-arid lands to the west struggled to support life with the increasing

⁶⁷ Kassidy Vavra, 'Great Dying' of Indigenous Peoples During Colonization of America Caused Earth's Climate to Change, NY DAILY NEWS (Jan. 31, 2019), <https://www.nydailynews.com/news/national/ny-news-great-dying-colonization-climate-change-20190131-story.html>.

⁶⁸ See, e.g., *The Dawes Act*, NAT'L PARK SERV., <https://www.nps.gov/articles/000/dawes-act.htm> (last updated July 9, 2021).

⁶⁹ *The Dawes Act*, KHAN ACADEMY, <https://www.khanacademy.org/humanities/us-history/the-gilded-age/american-west/a/the-dawes-act> (last visited Apr. 11, 2022).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Justin Farrell, et al., *Effects of Land Dispossession and Forced Migration on Indigenous Peoples in North America*, 374 SCI. 374 (2021). This recent study also found that 42.1% of tribes presently have no recognized land base, and for those that were relocated to land bases, that land is on average 2.6% the size of their historical area, significantly less economically viable, and at higher risk to the effects of climate change.

⁷³ Lewis, *supra* note 42 at 424–25 ("intensive replaced shifting cultivation, row agriculture replaced variable mound planting, monoculture replaced inter-cropping, and leveled fields replaced flood plane farming").

⁷⁴ *Id.* at 425.

⁷⁵ *Id.*

⁷⁶ See *id.* at 428–29.

demands for water.⁷⁷ Mining, oil, and gas operations permanently scarred and polluted thousands of acres of land, with little protections provided to their inhabitants.⁷⁸

ii. Land Management

Early federal environmental policies attempted to restore these quickly-depleting resources. However, these efforts repeatedly backfired, as they failed to consider native ecological explanations and methods.⁷⁹

For example, the Bureau of Indian Affairs (“BIA”) and Forest Service outlawed Indian slash-and-burn practices, as they believed this practice was destructive to dwindling timber resources.⁸⁰ However, these officials failed to understand that Native Americans employed these practices to clean the forest floor of accumulated debris, neutralize soil acidity, speed the germination of new vegetal materials, and reduce the potential for destructive forest fires.⁸¹ The BIA also built an elaborate irrigation system through the arid west in an attempt to divert water back to Indian Country, after it had been illegally siphoned towards settler land.⁸² However, these well-intentioned structures had unforeseen impacts on critical native food sources.⁸³ For example, the irrigation systems intercepted the spawning grounds and migration patterns of salmon and trout, leading to the decimation of these important aquatic species.⁸⁴ Without the generationally-acquired knowledge of indigenous peoples, environmental programs lacked the requisite foresight to create effective environmental regulatory regimes.

B. Modern climate action

This deficiency in indigenous involvement continues to plague U.S. environmental policy to this day, as America flounders to forestall a rapidly warming climate—an issue that was in many ways made in America.⁸⁵ Due

⁷⁷ *Id.* at 429.

⁷⁸ *Id.* at 431 (After the 1956 discovery of oil in Navajo Nation, oil companies drilled 577 wells and pumped an estimated 370.7 million barrels of oil. In 1990 alone, there were ninety-nine spills of oil, salt-water, and chemicals in the Aneth fields, damaging 36,622 acres, which oil companies neither sufficiently cleaned up, nor adequately compensated Navajos for.).

⁷⁹ *Id.* at 425.

⁸⁰ *Id.* at 426.

⁸¹ *Id.*

⁸² *Id.* at 429.

⁸³ *Id.* at 430.

⁸⁴ Craig Welch, *Climate Change May Shrink The World's Fish*, NAT'L GEOGRAPHIC (Aug. 21, 2017) <https://www.nationalgeographic.com/science/article/climate-change-study-ocean-fish-size#:~:text=A%20new%20study%20suggests%20warming,result%20in%20smaller%20fish%20sizes.&text=Warming%20temperatures%20and%20loss%20of,thought%2C%20a%20new%20study%20concludes.>

⁸⁵ The US has emitted more heat-trapping gasses into the atmosphere than any other nation, and in a cruel show of cosmic karma, climate change is also expected to disproportionately affect America. *See*

to non-Native Americans' inability to effectively live within their means, the U.S. has contributed 27% of the world's CO₂ emissions between the years 1850 and 2011, more than the combined total emissions of all twenty-eight countries of the European Union.⁸⁶ Despite being the number one global emitter of greenhouse gasses⁸⁷ and one of the wealthiest nations in the world, America ranks below twenty-three other developed countries in its efforts towards sustainability.⁸⁸ American climate policy continually fails because our current environmental regime is inherently anthropocentric, profit-driven, and segmented.

i. Anthropocentrism

First, U.S. environmental policy is by design anthropocentric. This begins with how environmental law defines standing. In order to bring suit against environmental perpetrators, a citizen must herself suffer an injury to a cognizable interest.⁸⁹ While the environment itself is often protected by association when relief is granted for the human plaintiff, no protection is directly provided to alleviate environmental harms unless a human is also injured in the process.⁹⁰ For example, to have an interest in protecting endangered elephants and leopards in Sri Lanka, a plaintiff must suffer the actual or imminent harm of traveling to Sri Lanka and finding no elephant or leopard there to admire.⁹¹

In his progressive *Sierra Club v. Morton* dissent, Justice Douglas proposed a more expansive definition of standing that allows "environmental objects to sue for their own preservation" through the representation of concerned citizens.⁹² He argued that it would not be a new concept to make inanimate objects the parties of litigation; in the past, courts have willingly given ships and corporations their own "legal personalit[ies]."⁹³ Justice

Chris Mooney, *The U.S. Has Caused More Global Warming Than Any Other Country. Here's How the Earth Will Get its Revenge*, WASH. POST (Jan. 22, 2015), <https://www.washingtonpost.com/news/energy-environment/wp/2015/01/22/the-u-s-has-contributed-more-to-global-warming-than-any-other-country-heres-how-the-earth-will-get-its-revenge/> (Due to our distance from the south pole and the laws of gravity, North America is projected to experience between 25 to 35% more sea level rise than the rest of the world).

⁸⁶ *Id.*

⁸⁷ While China now surpasses the U.S. in annual emissions, China's total emission still pale in comparison, due to America's substantial developmental head start. *Id.*

⁸⁸ *2020 EPI Results*, ENVTL. PERFORMANCE INDEX, <https://epi.yale.edu/epi-results/2020/component/epi> (last visited Apr. 17, 2022).

⁸⁹ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1992) ("[T]he 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured").

⁹⁰ *Id.* at 563–67.

⁹¹ *Id.* at 563–64.

⁹² *Sierra Club v. Morton*, 405 U.S. 727, 742 (1972).

⁹³ *Id.*

Blackman supported this proposition in his *Sierra Club v. Morton* dissent, assuring that:

We need not fear that Pandora's box will be opened or that there will be no limit to the number of those who desire to participate in environmental litigation. The courts will exercise appropriate restraints [e.g., the “zone of interest” test, causation, etc.] just as they have exercised them in the past.⁹⁴

Unfortunately, such arguments for granting nature personhood have not made their way into majority opinions, as American society still dissents to the idea of conceiving of land as anything more than a commodity. Therefore, our policies for environmental protection continue to fail to protect the environment, except when human inhabitants are injured.

ii. Commercialism

Second, modern environmental policy is inherently profit-driven. Environmental decisions are frequently driven by cost-benefit analyses. This kind of analysis is not itself the problem; a certain degree of interest balancing is necessary to ensure that industries and regulators are financially equipped to comply with and enforce progressing legislation. Rather, the deficiency lies in the value system in which these costs and benefits are calculated. In this economic calculation, dollar signs are much more easily assigned to the costs of implementing a certain pollution control technology than to more amorphous benefits like having clean water and a healthy ecosystem. Because of this, the environmental benefits that a profit-driven calculation include are often only those with a commercial price tag. Therefore, this cost-benefit analysis is perpetually skewed in favor of industries.

For example, in a 2009 Supreme Court case, a cost-benefit analysis was undertaken to determine what technology was the most economically feasible to prevent water intake facilities from impinging (squashing) aquatic life as they sucked in water from local streams to cool machinery.⁹⁵ The facilities in question were responsible for killing over 3.4 billion aquatic organisms a year, yet only 1.8% of those organisms were accounted for, since the EPA's calculation only included fish that were commercially marketable.⁹⁶ Therefore, 98.2% of the environmental benefits in this analysis were unaccounted, because the EPA believed doing so would not accurately depict the net benefits to society.⁹⁷ As a result, the costs of the more environmentally protective technology were found to outweigh the benefits.⁹⁸

⁹⁴ *Id.* at 758.

⁹⁵ *Entergy Corp. v. Riverkeepers, Inc.*, 556 U.S. 208, 217 (2009).

⁹⁶ *Id.* at 237–38 (Stevens, J., dissenting).

⁹⁷ *Id.* at 238.

⁹⁸ *Id.* at 216.

iii. Fractionalism

Finally, America takes a segmented approach to environmental policy, which is ill-equipped to combat an all-pervasive issue such as climate change. Before the EPA was created in 1970, federal regulation was divided among various departments and agencies by resource or pollutant.⁹⁹ President Nixon believed this system was “not structured to make a coordinated attack on [environmental] pollutants” because it did not reflect the fact that the environment is a “single, interrelated system.”¹⁰⁰ In an attempt to remedy this deficiency, Nixon consolidated these various regulatory entities into a single agency, the EPA.¹⁰¹ Unfortunately, the EPA, too, has failed to achieve the coordination Nixon envisioned. Though America’s environmental response is now consolidated in a singular agency, it is still fragmented amongst various statutes such as the Clean Water Act, Clean Air Act, and Endangered Species Act, and hogtied by constitutional restraints.¹⁰²

Federal statutes still fail to treat the environment as an ecologically interconnected entity, by arbitrarily compartmentalizing it by its particular resource and jurisdictional authority.¹⁰³ As a result, transboundary and trans-media issues largely go unregulated. For example, the atmospheric deposition of pollutants such as mercury and nutrients is a major water quality problem that neither the Clean Water Act (“CWA”) or Clean Air Act (“CAA”) is equipped to handle.¹⁰⁴ These depositions would seem to fall within the Clean Air Act, because the sources discharge their pollutants into the air.¹⁰⁵ But the CAA only sets National Ambient *Air* Quality Standards—not water quality standards.¹⁰⁶ Therefore CAA regulations don’t mitigate air pollutants once they make their way into the water.¹⁰⁷ And while Clean Water Act does set water quality standards that could remediate this issue, sources that emit pollutants into the air wouldn’t be within the CWA’s authority,

⁹⁹ ROBIN K. CRAIG, ENVIRONMENTAL LAW IN CONTEXT: CASES AND MATERIALS 28 (4th ed. 2016). For example, the Department of the Interior handled water quality, the Department of Health, Education, and Welfare handled air pollution control, and Department of Agriculture handled pesticide use.

¹⁰⁰ Reorganization Plan No. 3, 35 Fed. Reg. 15623 (July 9, 1970).

¹⁰¹ *Id.*

¹⁰² For example, some constitutional constraints include the commerce clause, federalism principles, and separation of powers issues. *See, e.g.,* Chernaik v. Kitzhaber, 328 P.3d 799, 808 (Ct. App. Or. 2014) (holding that the state of Oregon did not have a fiduciary duty under the public trust doctrine to protect the state’s citizens, atmosphere, water, land, fishery, and wildlife from the impacts of climate change, because the court lacked authority to grant such declaratory and injunctive relief, due to separation of powers principles.).

¹⁰³ CRAIG, *supra* note 99 at 28.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

because the CWA can only regulate sources that discharge into the jurisdictional waters of the United States.¹⁰⁸ Therefore, these depositions continue to go unregulated.¹⁰⁹

Our fragmented system has also made it impossible to combat climate change.¹¹⁰ For example, the EPA refuses to seriously consider regulating carbon dioxide as a criteria pollutant under the CAA, because they reasonably fear this decision would be categorized as administrative overreach. Since CO₂ is emitted from practically every entity, including humans, the EPA is averse to taking on such comprehensive regulatory authority. However, comprehensive regulatory action is exactly what our country needs to fight climate change. Yet such action seems unlikely in a political system where fragmentation is an essential ingredient of bedrock constitutional principles like checks and balances.

This fragmented approach reflects the colonial conception of land as enclosed parcels of privately owned land that are defined not by their ecological value but by who has legal title and what marketable resources they contain. Perhaps, too, non-natives fail to see the component parts as part of a larger whole, because they see themselves as disconnected entities existing outside of a natural ecosystem.¹¹¹ Therefore, despite non-natives' best efforts to achieve interrelatedness, they continue to default to a fragmented system, as it is all they know.

IV. SUFFICIENCIES IN THE INDIGENOUS CONCEPTION OF LAND

Increasing indigenous stewardship through the recognition of aboriginal land rights is a proven and effective means of combating climate change.¹¹²

¹⁰⁸ *Id.* at 28–29.

¹⁰⁹ *Id.* at 28.

¹¹⁰ *Id.* at 28–29.

¹¹¹ See *Wabananki Sweetgrass Harvesting in Acadia National Park*, ABBE MUSEUM (June 1, 2019), <https://www.abbemuseum.org/blog/2018/6/21/a8ox8s8wxde6nenklfm77gayl60h87>. While modern White Americans may not reject living within nature as vehemently as settlers did in the colonial era, non-aboriginal Americans still see themselves as existing outside of the natural world. *Id.* This can be seen in a study done on harvesting sweetgrass. In this study, non-indigenous researchers predicted that the sweetgrass would grow best if left untouched, while indigenous researchers correctly hypothesized that the sweetgrass would grow better if workers intermittently harvested it. *Id.* Robin Kimmerer reflected that, “their predictions for sweetgrass were consistent with their Western science worldview, which sets human beings outside of ‘nature’ and judges their interactions with other species as largely negative. They had been schooled that the best way to protect a dwindling species was to leave it alone and keep people away. But the grassy meadows tell us that for sweetgrass, human beings are part of the system, a vital part.” *Id.*

¹¹² See *Indigenous Peoples and Local Communities*, THE NATURE CONSERVANCY, <https://www.nature.org/en-us/about-us/who-we-are/how-we-work/community-led-conservation/>; see also David Kaimowitz, *Indigenous Peoples Must be Central to Tackling the Climate Crisis*, INT’L INST. FOR SUSTAINABLE DEVELOPMENT (Oct. 25, 2021), <https://sdg.iisd.org/commentary/guest-articles/indigenous-peoples-must-be-central-to-tackling-the-climate-crisis/>. It is worth mentioning that not only are

As discussed in the previous section, evidence of this can be gleaned from the direct correlation between environmental demise and the transferring of land from native to non-native management, as well the thousands of years of sustainable resource use before the arrival of White settlers. This section will continue to demonstrate how indigenous peoples are better equipped to act as environmental stewards by looking at actual studies conducted on this topic by other countries, as well as by looking at the progressive environmental policies implemented by Tribal nations here in the U.S.

A. Indigenous Stewardship Abroad

Despite making up less than 5% of the world's population, Native peoples hold 80% of the world's remaining biodiversity.¹¹³ The Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services ("IPBES") found that the decline in biodiversity happens at a slower rate on indigenous lands due to proactive management practices, ecological restoration projects, and long-term monitoring of ecosystems.¹¹⁴ The IPBES also acknowledges that indigenous people's "different view of nature" lies at the heart of this successful stewardship.¹¹⁵ They point specifically to indigenous communities' "deep understanding of the local ecosystem," their "social norms and rules" that regulate their natural resource use, their focus on "connectivity, [and] how different habitats can be managed to complement each other," and their "reciprocal relationship with nature."¹¹⁶

Research has shown that awarding titles to indigenous communities can play a critical role in reversing climate change.¹¹⁷ For example, research conducted in Peru found that titling Amazon rainforest land to indigenous communities has reduced deforestation by up to 97%.¹¹⁸ The reduction in the clearing and disturbance of carbon-sequestering organisms has "quickly and

Indigenous peoples a critical line of defense in climate change mitigation, they are also critically vulnerable to the effects of climate change. After being displaced from nearly 99% of their historic lands over time, American Indians have been relocated to places with higher climate risks, such as eroding coastal areas, and deserts facing drought and extreme heat. See Farrell et al., *supra* note 72 at 374. Should conditions worsen, Native Americans may again be forced to relocate from their homeland. *Id.*

¹¹³ Kanyinke Sena, *Recognizing Indigenous Peoples' Land Interests is Critical for People and Nature*, WORLD WILDLIFE FUND (Oct. 22, 2020), <https://www.worldwildlife.org/stories/recognizing-indigenous-peoples-land-interests-is-critical-for-people-and-nature>.

¹¹⁴ Sneed, *supra* note 58.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ See Peter Veit, *Land Matters: How Securing Community Land Rights Can Slow Climate Change and Accelerate the Sustainable Development Goals*, WORLD RES. INST. (Jan. 24, 2019), <https://www.wri.org/insights/land-matters-how-securing-community-land-rights-can-slow-climate-change-and-accelerate>.

¹¹⁸ Allen Blackman et al., *Titling Indigenous Communities Protects Forests in the Peruvian Amazon*, PNAS (Apr. 18, 2017), <https://www.pnas.org/content/114/16/4123>.

significantly” reduced the amount of climate-warming gasses being released into our atmosphere.¹¹⁹

B. Indigenous Stewardship in the U.S.

Proper stewardship by Indigenous Americans is further exemplified by the progressive management programs tribes have implemented when given a decision-making role in federal environmental policies in the United States. While this decision-making role is presently limited due to the lack of American lands under tribal jurisdiction, such provisions provide a preview of the kinds of environmental policies that would proliferate with an expansion of tribal sovereignty.

In most major environmental statutes, tribes can elect to be treated as states for the purpose of implementing, managing, and receiving funding for certain environmental programs through what are known as “tribes-as-states” provisions.¹²⁰ Under the Clean Water Act, states and tribes can be authorized to set water quality standards for the water bodies within their jurisdiction, which the EPA must then consider when prescribing regulations.¹²¹ Seventy-seven tribes have been authorized to operate this regulatory program so far.¹²² The stringency of these water quality standards depends on what the tribe or state asserts to be the waterbody’s “designated use.”¹²³ For example, standards for a water body designated for navigation will be less stringent than one designated for swimming. These provisions provide examples of how tribal environmental policies take fundamentally different approaches to stewardship, compared to the anthropocentric, profit-driven, and segmented approaches employed by non-native policies.

i. Anti-Anthropocentrism

The water quality standards adopted by the Fort Peck Tribe provide an example of how indigenous ingenuity can spur ecocentric advancements in environmental policy. Whereas most water quality standards set limits by creating maximum thresholds on chemical emissions in the water, the Fort Peck Tribe created a new system of measuring water quality using biological criteria.¹²⁴ Biological criteria allow tribes to set goals for water bodies based

¹¹⁹ Veit, *supra* note 117; Blackman et al., *supra* note 118.

¹²⁰ *Tribes Approved for Treatment as a State (TAS)*, EPA, <https://www.epa.gov/tribal/tribes-approved-treatment-state-tas#regulatory-tas> (last updated Apr. 2022).

¹²¹ 33 U.S.C.S. § 1313 (LexisNexis, Lexis Advance through Public Law 117-80, approved December 27, 2021); 33 U.S.C.S. § 1251 (LexisNexis, Lexis Advance through Public Law 117-80, approved December 27, 2021).

¹²² *Tribes Approved for Treatment as a State (TAS)*, *supra* note 120.

¹²³ Water Quality Standards, 24 C.F.R. § 131 (2019).

¹²⁴ EPA, CASE STUDY: THE FORT PECK TRIBES USE BIOLOGICAL CRITERIA FOR THEIR WATER QUALITY STANDARD 1 (Apr. 15, 2003).

on what types and numbers of aquatic species should be present in the water-body.¹²⁵ Tribes then developed a scoring system to determine which waters were meeting these goals.¹²⁶ By making the goal itself the standard, instead of working backwards to a chemical threshold that didn't always prove to be sufficient to protect aquatic organisms, the Fort Peck Tribe created a more effective, ecocentric tool for water management.¹²⁷

ii. Anti-Commercialism

The Sokaogon Chippewa Community acted similarly in setting water quality standards, even though doing so meant sacrificing profits. The northern Wisconsin Tribe made the “unique decision” to designate all of its water bodies as outstanding natural resource waters (“ONRWs”)—the highest level of antidegradation protection available.¹²⁸ Such a designation prevents any new or increased discharges into the waterways that would degrade the ONRW's water quality.¹²⁹ This designation imposed construction limits on an on-reservation gaming facility, which created significant financial burdens for the Tribe.¹³⁰ However, the Tribe was willing to accept such expenses to protect its sacred waters, as it considers water to be “the life-supporting blood of Mother Earth that human beings share in common with all living things.”¹³¹ Such an approach can be contrasted with the profit-driven regime implemented in America's current environmental regime.

The designation undertaken by the Sokaogon Chippewa Community also foreclosed off-reservation mining companies from occupying a mining site upstream of the ONRW, a site over which the companies had been competing for over thirty years.¹³² Since the off-reservation activity would adversely affect the ONRW's water quality, the Tribe was able to prevent any mining operation from taking place, demonstrating just how powerful tribal sovereignty can be when employed to intercept environmental threats both on and off-reservation.¹³³

¹²⁵ *Id.*

¹²⁶ *Id.* at 2.

¹²⁷ *Id.*

¹²⁸ EPA, CASE STUDY: THE SOKAOGON CHIPPEWA COMMUNITY I (2006), <https://www.epa.gov/sites/default/files/2014-11/documents/casestudy-sokaogon.pdf>.

¹²⁹ *Id.*

¹³⁰ *Id.* at 2.

¹³¹ *Id.* at 1.

¹³² *Id.* at 2.

¹³³ *Id.*

iii. Anti-Fractionalism

The Confederated Salish and Kootenai Tribes of the Flathead Reservation provided for a holistic, comprehensive, and coordinated approach in their water quality standards. In order to target pollution from agricultural runoff, the Tribes took a “watershed approach” that included regulating nonpoint sources (i.e., non-discernable dischargers of pollutants that don’t come from the traditional end-of-pipe point source).¹³⁴ These sources generally remain unregulated, as they fall within the gaps of Clean Water Act jurisdiction.¹³⁵ Yet the Tribe fearlessly took on this “ambitious undertaking,” likely because they have recognized that distinguishing between point source and nonpoint source is of little utility when all sources of discharge end up in the same water body.¹³⁶ In other words, the Tribe’s ability to see the earth as one interconnected entity, rather than a collection of disjointed resources, allowed them to establish a more comprehensive and effective approach to environmental stewardship.

V. REMEDYING COLONIAL DEFICIENCIES THROUGH INDIGENOUS SUFFICIENCIES

A. Past Methods of Integration

Pushing for the integration of indigenous wisdom into environmental decision-making is not a new concept, but there has been a significant push recently to integrate Traditional Ecological Knowledge (“TEK”) into environmental decision-making.¹³⁷ One such avenue is through the Environmental Impact Statements (“EIS”) required by the National Environmental Policy Act (“NEPA”).¹³⁸

An EIS is a comprehensive report that federal agencies must put together before undertaking a “major federal action significantly affecting the quality of the human environment.”¹³⁹ The report considers all ecological, aesthetic,

¹³⁴ CONFEDERATED SALISH & KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, NATURAL RESOURCES DEPT., SURFACE WATER QUALITY STANDARDS AND ANTIDEGRADATION POLICY 31 (2006); *Basic Information About Nonpoint Source (NPS) Pollution*, EPA, <https://www.epa.gov/nps/basic-information-about-nonpoint-source-nps-pollution> (last visited Apr. 28, 2022).

¹³⁵ 33 U.S.C.S. § 1362(14).

¹³⁶ EPA, CASE STUDY: CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD INDIAN RESERVATION 2 (2006).

¹³⁷ Memorandum from Eric S. Lander, President’s Science Advisor and Director, Office of Science and Technology Policy & Brenda Mallory, Chair, Council on Environmental Quality, Indigenous Traditional Ecological Knowledge and Federal Decision Making 1 (Nov. 15, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/11/111521-OSTP-CEQ-ITEK-Memo.pdf>.

¹³⁸ 42 U.S.C.S. § 4332.

¹³⁹ National Environmental Policy Act of 1969 § 102(2)(c); 42 U.S.C § 4332.

historic, cultural, economic, social, and health effects of the project.¹⁴⁰ Therefore, the localized knowledge provided by native tribes about the flora and fauna of the area in question is incredibly helpful to this assessment. A similar integration of TEK has also been utilized in cost-benefit analysis calculations.

While TEK integration is a step in the right direction, it is a measure entirely too conservative to adequately remedy the deficiencies in the colonial perspective, as it merely co-opts this knowledge from indigenous peoples and injects it into a fundamentally flawed scientific instrument.¹⁴¹ This co-optation is not only inadequate, but detrimental, because it strips indigenous knowledge from its native context to serve an appropriated colonial agenda. Oftentimes, non-natives “White-wash” the Indigenous knowledge that they have been provided by omitting any traditional, spiritual, or metaphorical language, and keeping only the information that they consider to be “hard science.”¹⁴² Appropriations such as these are an affront to American Indian culture and deter Indigenous peoples from contributing this essential body of knowledge.¹⁴³

The only way to integrate indigenous wisdom in environmental decision-making, while protecting it from losing its indigenous identity, is to integrate the indigenous person who has provided it. As Chief Robert Wavey of the Fox Lake First Nation of Manitoba put it, “Maintaining complete indigenous control of traditional land use information is a cornerstone in developing a link between traditional ecological knowledge and science.”¹⁴⁴

B. New Approach: Recognizing Indigenous Land Rights

How a society defines its relationship to the land serves as the blueprint for the entire society, especially its environmental policies. Because of indigenous people’s deep relationship with the land and dedication to environmental conservation, they are uniquely qualified as stewards of the land.¹⁴⁵ It,

¹⁴⁰ Tiffany Middleton, *What is an Environmental Impact Statement?*, ABA (Mar. 2, 2021), [https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/teaching-legal-docs--what-is-an-environmental-impact-statement-/#:~:text=The%20environmental%20impact%20statement%20\(EIS,federal%20law%20for%20certain%20projects](https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/teaching-legal-docs--what-is-an-environmental-impact-statement-/#:~:text=The%20environmental%20impact%20statement%20(EIS,federal%20law%20for%20certain%20projects).

¹⁴¹ See generally Anthony Moffa, *Traditional Ecological Knowledge in Environmental Decisionmaking*, 49 ENVTL. L. REP. 10309, 10310–11 (2019).

¹⁴² See *id.* at 10316.

¹⁴³ See *id.*

¹⁴⁴ Wavey, *supra* note 1.

¹⁴⁵ It is important to note that Native Americans are not a monolith, and some tribal members have been converted to the ways of exploitative capitalism. Also, “[t]aken to the extreme, equating Indians with nature has the potential to deny Indians their history, their humanity, and even their modernity.” MICHAEL E. HARKIN & DAVID RICH LEWIS, *NATIVE AMERICANS AND THE ENVIRONMENT: PERSPECTIVES ON THE ECOLOGICAL INDIAN* xxii (Univ. Neb. Press 2007).

therefore, follows that a method of ensuring better environmental stewardship is to put more land under native control.

One strategy for increasing indigenous stewardship is through the recognition of indigenous land rights. These rights have long existed in federal treaties, but, unfortunately, the United States has historically denied rights under these treaties without recourse.¹⁴⁶ A newfound recognition of these land rights within U.S. law may arise following a recent landmark Supreme Court case, which uncharacteristically upheld a long-breached federal treaty that had established a reservation for the Creek Nation.¹⁴⁷

However, a more reliable basis for upholding these rights still appears to be through international law, as these territorial rights “exist even without state actions which specify them” or without formal titling.¹⁴⁸ Indigenous rights made their way into the forefront of international law during the 1992 United Nations Conference on Environment and Development (“UNCED”) Earth Summit.¹⁴⁹ They were later codified into binding legal documents, such as Article XXII of the American Declaration of Rights and Duties of Man and Article 21 of the American Convention of Human Rights.¹⁵⁰

As opposed to the individualized fundamental freedoms recognized by the United States, indigenous human rights are collective and ensure that the cultural integrity and self-determination of the entire community are protected.¹⁵¹ At the heart of these collective rights are indigenous rights to land, as collective property ownership is essential to preserving the tribe’s integrity and sovereignty.¹⁵² These land rights are no different from non-indigenous

¹⁴⁶ Between 1778 to 1871, the federal government entered into more than 500 treaties with Indian Nations, and in the years since, every single one of them has been “broken, changed or nullified when it served the government’s interests.” Gale Courey Toensing, *Honor the Treaties’: UN Human Rights Chief’s Message*, INDIAN COUNTRY TODAY MEDIA NETWORK (Aug. 23, 2013), <https://web.archive.org/web/20161007155452/http://indiancountrytodaymedianetwork.com/2013/08/23/honor-treaties-un-human-rights-chiefs-message-150996>.

¹⁴⁷ See *McGirt v Oklahoma*, 51 S. Ct. 2452, 2459 (2020).

¹⁴⁸ Inter-American Commission on Human Rights (IACHR), *Indigenous and Tribal Peoples’ Rights Over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of The Inter-American Human Rights System*, 35 AM. INDIAN L. REV. 263, 308 (2010).

¹⁴⁹ U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (Vol. III) (Aug. 12, 1992).

¹⁵⁰ Inter-American Commission on Human Rights, *supra* note 148 at 168–69.

¹⁵¹ Meghan Theresa McCauley, *Empowering Change: Building the Case for International Indigenous Land Rights in the United States*, 41 ARIZ. ST. L.J. 1167, 1177 (2009).

¹⁵² See *id.* at 1179 (“It preserves cultural integrity by supporting the development of the community through its collective nature and ensures self-determination by allowing the property right to sustain the community as an organized group of people who have the liberty to develop as a collective unit.”).

rights to property, though they are instead conferred onto the tribe as a whole.¹⁵³

Recognizing a complete bundle of rights for indigenous peoples may currently be more aspirational than applicable.¹⁵⁴ However, the internationally recognized right of Free, Prior, Informed Consent (“FPIC”) can serve as an achievable, efficient mechanism to grant decision-making authority to indigenous peoples for the time being.¹⁵⁵ This consent can ideally expand the bounds of Indigenous stewardship beyond what is presently designated as “Indian country.”

Under FPIC, Article 32 of the United Nations Declaration of the Rights of Indigenous People (“UNDRIP”) requires nations to obtain FPIC “prior to the approval of any project affecting [indigenous] lands or territories and other resources,¹⁵⁶ particularly in connection with the development, utilization or exploitation of mineral, water or other resources.”¹⁵⁷ If FPIC is triggered, public and private developers must negotiate with the affected tribes at every step of the development process, and cannot proceed until a settlement has been reached.¹⁵⁸ Because FPIC is a collective right, the entire indigenous community must reach an informed decision together.¹⁵⁹

While UNDRIP is not binding law, 144 countries have since adopted it into their respective legal instruments.¹⁶⁰ The United States is not one of these countries. The U.S. currently only requires the weaker standard of tribal

¹⁵³ *Id.*

¹⁵⁴ However, a full recognition of land rights may be closer than we think, thanks to a recent international law case. In *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, the court broadly construed the right to property contained in Article 21 of the American Convention on Human Rights to include property held communally by indigenous peoples. Inter-Am. Ct. H.R. (2001). The decision was the “first legally binding decision by an international tribunal to uphold the collective land and resource rights of indigenous peoples in the face of a state’s failure to do so”. S. James Anaya & Claudio Grossman, *The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples*, 19 ARIZ. J. OF INT’L AND COMPAR. L. 1, 2 (2002).

¹⁵⁵ *Indigenous Peoples: Free, Prior and Informed Consent*, FOOD AND AGRIC. ORG. OF THE U.N., <https://www.fao.org/indigenous-peoples/our-pillars/fpic/en/> (last visited Apr. 28, 2022).

¹⁵⁶ This includes activities happening off-reservation, if that activity affects the lands and people under tribal jurisdiction. George K. Foster, *Community Participation in Development*, 51 VAND. J. TRANSNAT’L L. 39, 73 (2018). For example, if an off-reservation project violated a tribe’s treaty rights to hunt and fish or harmed culturally significant sites. *Id.*

¹⁵⁷ FPIC also applies when indigenous peoples’ cultural, intellectual, political, religious, or spiritual property is infringed upon (see Articles 10, 11, 19, and 29), though the environmental decision-making component is the central focus of this discussion. U.N. DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 23 (2007).

¹⁵⁸ *See generally id.* at 16.

¹⁵⁹ *Id.* at 7.

¹⁶⁰ *Adoption of the United Nations Declaration on the Rights of Indigenous Peoples: 13 Years Later*, U.N. DEP’T OF ECON. & SOC. AFFAIRS (Sept. 12, 2020), <https://www.un.org/development/desa/indigenouspeoples/news/2020/09/undrip13/>.

consultation in environmental decision-making, though talk of integrating FPIC has arisen in prominent liberal documents such as the Green New Deal.¹⁶¹ Unlike consent, which requires tribal approval before a project can begin, consultation only calls for the “regular and timely input of tribal officials.”¹⁶² Therefore, even if tribes vehemently oppose the project, so long as developers discuss their plans with the affected tribes and submit a summary of this discussion, the duty of consultation has been satisfied.¹⁶³ It is argued that the construction of the Keystone and Dakota Access pipelines would never have taken place if the FPIC had been operative.¹⁶⁴

The primary contention that stands in the way of FPIC is its applicability. Opponents believe that FPIC is still shrouded by ambiguity. However, most of this ambiguity is, in fact, created by these opponents.¹⁶⁵ For example, opponents of FPIC continuously debate the meaning of “consent.”¹⁶⁶ The plain meaning of requiring free and informed consent “prior to” undertaking “any project affecting [indigenous land]” seems to obviously articulate that indigenous peoples have the power to veto a project’s construction by withholding their consent.¹⁶⁷ However, opponents have repeatedly tried to water down this right by construing consent as merely a form of consultation.¹⁶⁸ While opponents of FPIC paint this debate as one mired in “ambiguity,” such differing interpretations do not arise so long as protecting the humanity and sovereignty of indigenous peoples remains the priority.¹⁶⁹

It would be improper to paint a diverse group of over 6.79 million people and 574 federally recognized tribes as a monolith in regard to their perspectives towards nature.¹⁷⁰ However, this article argues that it is not a

¹⁶¹ H.R. Res. 109, 116th Cong. (2019) (the “Green New Deal will require... obtaining the free, prior, and informed consent of indigenous people for all decisions that affect indigenous peoples and their traditional territories”).

¹⁶² Consultation and Coordination With Indian Tribal Governments, 3 C.F.R. § 13175 (2020).

¹⁶³ *Id.*; Nicholas A. Fromherz, *From Consultation to Consent: Community Approval as a Prerequisite to Environmentally Significant Projects*, 116 W. VA. L. REV. 109, 111 (2013) (“By its very nature, consultation implies limited influence”).

¹⁶⁴ Kelsey Landau, *On Indigenous Peoples Day, new ideas for American Indian land rights*, BROOKINGS (Oct. 14, 2019), <https://www.brookings.edu/blog/fixgov/2019/10/14/on-indigenous-peoples-day-new-ideas-for-american-indian-land-rights/>.

¹⁶⁵ See Martin Papillon et al., *Free, Prior and Informed Consent: Between Legal Ambiguity and Political Agency*, 27 INT’L J. ON MINORITY AND GRP. RTS. 223, 223 (2020).

¹⁶⁶ See Brant McGee, *The Community Referendum: Participatory Democracy and the Right to Free, Prior and Informed Consent to Development*, 27 BERKELEY J. INT’L L. 570, 591–93 (2009).

¹⁶⁷ *Id.* at 592.

¹⁶⁸ See *id.* at 591–93.

¹⁶⁹ See Papillon et al., *supra* note 165 at 228–29.

¹⁷⁰ *The Native American Population 2022*, WORLD POPULATION REV., <https://worldpopulationreview.com/state-rankings/native-american-population> (last visited Apr. 11, 2022). “Taken to the extreme, equating Indians with nature has the potential to deny Indians their history, their humanity, and even their

mischaracterization to find that American Indians' intimate, 15,000-year relationship with the environment has had a lasting impact on their conception of land, just as Colonial Americans' lack of such a relationship has impacted their conception.¹⁷¹

It would also be naïve to believe that Native Americans will consistently choose the environment over personal profit, given the fierce economic pressures many tribes currently face. However, this decision-making authority could at least ensure that making decisions that undermine their cultural, spiritual, economic, and political values would at least be a last resort, rather than business as usual. When bestowed with greater decision-making authority over the management of our nation's lands, American Indians are one of the most effective backstops we have against further environmental degradation.

CONCLUSION

There was an essential developmental difference between America's early colonial and indigenous inhabitants: European Americans commodified America's land, while Indigenous Americans revered it. A comparative historical and anthropological analysis shows how this happened. Colonial America's commodification resulted from Euro-America's deification of private property, lack of historical and cultural ties to the land, and capitalistic ideals of proper use. Indigenous Americans' revelry of the land resulted from thousands of years of localized ecological knowledge, strong spiritual and cultural ties to the land, and communal ethics of conservation.

A comparative analysis of history and environmental policy shows how this difference impacted each group's approach to environmental stewardship. Colonial Americans' commodification of land resulted in a system of mismanagement that is anthropocentric, profit-driven, and segmented. Conversely, Indigenous Americans' revelry of the land resulted in a system of stewardship that is ecocentric, sustainable, and holistic.

This essential difference cannot be undone. It has fundamentally altered the trajectory of each society's socio-cultural development. White America's "childhood" was developmentally stunted by colonial Americans' toxic relationship with the land, and despite modern efforts to unlearn these behaviors, certain ideologies are, for better or for worse, fixed characteristics of the non-native American identity. The reverse is true for Indigenous Americans.

modernity." MICHAEL E. HARKIN & DAVID RICH LEWIS, *NATIVE AMERICANS AND THE ENVIRONMENT: PERSPECTIVES ON THE ECOLOGICAL INDIAN* xxii (Univ. Neb. Press 2007).

¹⁷¹ See generally Lewis, *supra* note 42 at 423–50. "The White man does not understand the Indian for the reason that he does not understand America. He is too far removed from its formative processes." LUTHER STANDING BEAR, *LAND OF THE SPOTTED EAGLE* 248 (Univ. of Neb. Press 1978).

Despite relentless assimilative efforts by colonists,¹⁷² American Indians still retain a rich relationship with nature that will never be erased.

It is time to not just give Native peoples a seat at the table for environmental decision-making but to give them a table of their own.¹⁷³ Recent efforts to integrate American Indian voices into environmental decision-making have been predictably assimilative. Instead of delegating authority to sovereign Tribal nations, Native wisdom has been stripped of its indigenous context and inserted into non-native environmental agendas. Only by shifting land management and environmental policy decision-making authority into the hands of Tribal governments created by and for the American Indian, through the expansion of free, prior, and informed consent, will pivotal change finally occur in American environmental stewardship.

¹⁷² I.e., through genocide, exile to the Country's peripheries, American Indian boarding schools, and fierce economic coercion.

¹⁷³ "The primary goal and need of Indians today is not for someone to feel sorry for us and claim descent from Pocahantas to make us feel better. Nor do we need to be classified as semi-white and have programs and policies made to bleach us further. Nor do we need further studies to see if we are feasible. We need a new policy by Congress acknowledging our right to live in peace, free from arbitrary harassment. We need the public at large to drop the myths in which it has clothed us for so long. We need fewer and fewer "experts" on Indians. What we need is a cultural leave-us-alone agreement, in spirit and in fact." VINE DELORIA, JR., CUSTER DIED FOR YOUR SINS 27 (Norman and London 1988).