

# ENVIRONMENTALISM AND HUMAN RIGHTS LEGAL FRAMEWORK:

## The Continued Frontier of Indigenous Resistance



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### *Abstract*

Indigenous nations need to build a strategic resistance to dismantle the legal status quo and assert their inherent sovereignty and human legal rights to destroy the settler colonial project of climate change. This type of resistance needs to be internalized within the Indigenous nation and actively asserted throughout local, state, national, and international legal systems. This article takes a two-step approach: first, it argues that Native nations must internalize resistance to the settler colonial project of climate change and take substantial steps to implement tribal codes and adopt customary laws, supplemented with U.S. laws and programs, to protect their own people from the impacts of climate change. Second, this article argues that Native nations must assert their inherent sovereign rights, as well as their rights guaranteed under the UN Declaration on

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the Rights of Indigenous People (UN DRIP), to demand government-to-government consultation and participation in future international climate change agreements and in U.S. national, state, and local environmental policies and programs. Settler colonial states are not honoring the sovereignty of Indigenous communities or focusing enough effort on finding solutions to the environmental harms of climate change and the particular impact those harms have on Indigenous communities. The solution is for Indigenous communities to develop a legal strategy that asserts their inherent sovereignty and UN DRIP rights in effort to force colonial settler states to honor and adopt a human rights legal framework that addresses climate change.

### **Introduction: A Resistance Strategy to Dismantling the Settler Colonial Project of Climate Change**

The water protectors' resistance against the expansion of the Dakota Access Pipeline outside the Standing Rock Sioux's territory will become the iconic Native rights movement of the 21<sup>st</sup> century.<sup>1</sup> The approval and rapidly escalating construction of the Dakota Access Pipeline is an assault on Native sovereignty, Indigenous rights, and environmental protection.<sup>2</sup> This assault follows the December 2015 21<sup>st</sup> Conference of the Parties in Paris, France (COP21) climate change agreement, which outlined plans to develop programs and solutions for nations to cut down greenhouse gas emissions. The agreement did not include Indigenous nations, nor did it provide any Indigenous representation during key negotiation and policy conversations. COP21 was a missed opportunity to advocate for better protections of Indigenous communities from the impacts of climate change. Indigenous rights movements, like the one at Standing Rock, demonstrate the negative outcomes from excluding Indigenous people from the COP21 agreements. This paper discusses what Native nations can do in a post-COP21 world to resist the impacts of climate change in their communities.

Indigenous nations and advocates for Indigenous rights need to build a strategic resistance to the legal status quo and assert their inherent sovereignty and human rights to dismantle the settler colonial project of climate change. This type of resistance needs to be internalized within Indigenous nations as well as actively asserted throughout local, state, national, and international legal systems. This Article primarily focuses on implementing a strategy that is in resistance to environmental and climate change harms inflicted against Native nations located within the United States.<sup>3</sup> To discuss the application of a resistance strategy, this

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<sup>1</sup> STAND WITH STANDING ROCK, <http://STANDWITHSTANDINGROCK.NET>; *see infra* note 94.

<sup>2</sup> In this Article, I use the term "Indigenous" when discussing people, movements, and laws in the international context. I use the term "Native" when discussing people, movements, and laws within the United States borders.

<sup>3</sup> This strategy—herein designated as the "resistance strategy"—advocates for the creation and utilization of specific tribal, state, federal, and international laws to honor

article takes a two-step approach: first it argues that Native nations must internalize resistance to the settler colonial project of climate change and take substantial steps to implement tribal codes and adopt customary laws, supplemented with U.S. laws and programs, to protect their own people from the impacts of climate change. Second, the article argues that Native nations must assert their inherent sovereign rights, as well as the rights guaranteed under the UN DRIP, to demand government-to-government consultation and participation in future international climate change agreements and in U.S. national, state, and local environmental policies and programs. Settler colonial states are not honoring the sovereignty of Indigenous communities nor taking adequate efforts to find solutions to the environmental harms caused by climate change and its particular impact on Indigenous communities. The solution is for Indigenous communities to develop a legal strategy that asserts their inherent sovereignty and UN DRIP rights in an effort to force colonial settler states to honor and adopt a human rights legal framework<sup>4</sup> that addresses climate change.

Part I of this paper discusses Native peoples' cultural connections to the land and how colonialism and the development of the colonial settler market caused ecological destruction, impacted Natives' connections to the land, and caused Native people to participate in ecological destruction for economic self-sufficiency. Part II addresses the particular impacts of climate change on Native nations, their sovereignty, and cultural resources. Further, this section discusses how the colonial settler market still forces Native nations to use ecological destruction for economic self-sufficiency through the development of extractive industries, thus contributing to climate change. Part III discusses the adoption of the UN DRIP; how this agreement can be used for Indigenous ecological resistance through asserting inherent sovereignty and demand government-to-government consultation and consent in climate change policies. Part IV, argues that Native nations should internalize ecological resistance to pursue environmental regulations, mitigation, and adaptation projects to reduce emissions and prepare communities for the harms of climate change. Part V argues that Native nations need to develop an

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and enhance sovereignty while combating environmental and climate change harms on Indigenous communities.

<sup>4</sup> See, United Nations Human Rights Office of the High Commissioner, *United Nations Commission on Human Rights*, UNITED NATIONS, <http://www.ohchr.org/EN/HRBodies/CHR/Pages/CommissionOnHumanRights.aspx>, for information about the United Nations Commission on Human Rights; see also, *Overview of the Human Rights Framework*, INT'L JUSTICE RESOURCE CENTER, <http://www.ijrcenter.org/ihr-reading-room/overview-of-the-human-rights-framework>, for an overview on the Human Rights Framework including the adoption of the Universal Declaration of Human Rights (*Universal Declaration of Human Rights*, UNITED NATIONS, <http://www.un.org/en/universal-declaration-human-rights/index.html>) and Inter-American Human Rights Courts (CORTE INTERAMERICANA DE DERECHOS HUMANOS, <http://www.corteidh.or.cr/index.php/en>) that provide for an international legal framework and judicial system to address human rights violations committed by Nations.

ecological resistance strategy to assert inherent sovereignty and demand government-to-government consultation and consent on local, state, national, and international environmental policies and programs. Further, Indigenous nations need to be granted official representation in COP22 and all future international climate change negotiations and agreements. Consequently, through resistance and the implementation of a human rights legal framework, Indigenous communities can assert their inherent sovereignty and UN DRIP rights to force colonial settler states to address climate change and ecological destruction.

## **Background: Settler Colonial Theory — Historic and Contemporary Ecological Destruction as a White Settler Colonial Project**

### **I. Settler Colonial Markets and Ecological Destruction**

Since contact in the Americas, Europeans have been altering the environment not only to benefit their economic and political structures, but also as an active strategic tactic of war against Natives and as a tool for colonization and genocide.<sup>5</sup> The European invasion “was the chief agent of environmental change” on the East Coast and arguably across the whole of North America.<sup>6</sup> Natives have lived on the continent since time immemorial, and while they alter the environment to fit their own purposes, Natives generally do not narrow the value of land on pure ownership terms.<sup>7</sup> In contrast, white colonists view the land as a commodity that includes permanent and exclusive rights of usage.<sup>8</sup>

Settler colonial theory provides a theoretical framework for understanding racial privilege and subordination in the United States and how ecological destruction was, and remains, a tool for colonialism.<sup>9</sup> Settler colonists are usually bound by ties of ethnicity and faith with the intent of establishing a society on what “they persistently define as virgin or empty land.”<sup>10</sup> Further, the settler project typically depends on

<sup>5</sup> G.A Res. 260 A (III) (Dec. 9, 1948), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CrimeOfGenocide.aspx> (defining genocide as “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.”).

<sup>6</sup> WILLIAM CRONON, *CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND*, 160 (Hill and Wang 1983).

<sup>7</sup> FRANK POMMERSHEIM, *BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION 14–15* (2009).

<sup>8</sup> *Id.* at 14. The comparison is between “two human ways of belonging to an ecosystem.” *Id.*

<sup>9</sup> Natsu Taylor Saito, *Race and Decolonization: Whiteness as Property in the American Settler Colonial Project*, 31 HARV. J. RACIAL & ETHNIC JUST. 31, 46 (2015).

<sup>10</sup> Anthony O’Rourke, *Theorizing American Freedom*, 110 Mich. L. Rev. 1101, 1104

forever expanding their frontier, taking land from indigenous people, and eliminating indigenous populations and culture.<sup>11</sup> Warfare with Indigenous people is central to most origin stories for settler societies. This is especially true for the United States, where armed conflict seemed necessary from the mere fact that Indigenous people were living on the land.<sup>12</sup> Under settler colonialist theory, white settler society identity is intrinsically linked to the conquest and destruction of Indigenous people and the control over the use and occupation of the land and ecological resources.<sup>13</sup> This conquest is in tension with the settler ideological justifications for conquest, including the framing of white settler civilization as a superior civilization, the establishment of democratic and humanitarian values, and the developing of a narrative of progressive human development.<sup>14</sup> This tension can be seen in the American Manifest Destiny narrative, which asserts that the strength of the U.S. was built on conquering land and spreading American ideals.<sup>15</sup>

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(2012) (quoting Caroline Elkins & Susan Pederson, *SETTLER COLONIALISM: A CONCEPT AND ITS USES*, IN *SETTLER COLONIALISM IN THE TWENTIETH CENTURY: PROJECTS, PRACTICES, LEGACIES* 1, 2 (2005)).

<sup>11</sup> Rourke, *supra* note 10, at 1104.

<sup>12</sup> Saito, *supra* note 9, at 46.

<sup>13</sup> *Id.* at 49.

The White settlor frenzy for Native land can be seen in the description of the Cherokee removal:

Families at dinner were startled by the sudden gleam of bayonets in the doorway and rose up to be driven with blows and oaths along the weary miles of trail that led to the stockade [where they were held prior to the removal itself.] Men were seized in their fields or going along the road, women were taken from their wheels and children from their play. In many cases, on turning for one last look as they crossed the ridge, they saw their homes in flames, fired by the lawless rabble that followed on the heels of the soldiers to loot and pillage. So keen were these outlaws on the scent that in some instances they were driving off the cattle and other stock of the Indians almost before the soldiers had fairly started their owners in the other direction. Systematic hunts were made by the same men for Indian graves, to rob them of the silver pendants and other valuables deposited with the dead. A Georgia volunteer, afterward a colonel in the Confederate service, said: "I fought through the civil war and have seen men shot to pieces and slaughtered by thousands, but the Cherokee removal was the cruelest work I ever knew."

Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8(4) *J. OF GENOCIDE RESEARCH*, 387, 391–92 (2006) (citing JAMES M. MOONEY, *Historical Sketch of the Cherokee*, 124 (Aldine Transaction 1975) (1990)).

<sup>14</sup> Saito, *supra* note 9, at 47.

<sup>15</sup> Robert J. Miller, *American Indians, the Doctrine of Discovery, and Manifest Destiny*, 11 *WYO. L. REV.* 329, 332 (2011).

Manifest Destiny is generally defined by three aspects, and all three reflect the rhetoric of an American continental empire. First, the belief the United States has some unique moral virtues other countries do not possess. Second, the idea the United States has a mission to redeem the world by spreading republican government and the American way of life around the globe. And, third, that the United States has a divinely ordained destiny to accomplish these tasks.

The conquest of Indigenous people and land is central to the romanticized story of the creation of white settler—especially United States—society, and encourages and promotes further growth and development of stolen land as an act of conquest. European governments, with the support of the Catholic Church, developed and utilized the Doctrine of Discovery as enforceable international law to justify and create legal title to the stolen land taken through conquest.<sup>16</sup>

The United States has an unarguable history of promoting white ownership of property at the expense of Native people. Chief Justice Marshall, in *Johnson v. M'Intosh*, has legally institutionalized this U.S. origin story with the adoption of the Discovery Doctrine.<sup>17</sup> His ruling stated that while Natives were the rightful “occupants” of the soil, the U.S. government, as the “discoverers,” had exclusive title to the land and thus could ultimately determine ownership of the land.<sup>18</sup> This split of title, between “ultimate title” and “title of occupancy,” paired with the Supreme Court rulings in *Cherokee Nation v. Georgia*<sup>19</sup> and *Worcester v. Georgia*<sup>20</sup> setting the stage for the Removal Acts in the early 1800s.<sup>21</sup>

The Removal Acts in the early 1800s forced approximately eighty thousand Natives to relocate from the eastern part of the United States to reservations in Indian country, now known as the state of Oklahoma.<sup>22</sup> This land was determined to be unwanted and useless.<sup>23</sup> Shortly after

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<sup>16</sup> ROBERT J. MILLER, ET AL., *DISCOVERING INDIGENOUS LANDS: THE DOCTRINE OF DISCOVERY IN THE ENGLISH COLONIES* 2 (2010). The authors theorize that the Doctrine of Discovery is the first international law doctrine and through the adoption of the Doctrine in domestic courts, became enforceable as international common law. The authors provide ten “elements” of the Doctrine of Discovery and have been used, with the precedence of *Johnson v. M'Intosh*, in countries who were all English colonies. These elements are; (1) first discovery of a European nation; (2) actual occupancy and current possession; (3) preemption/European title; (4) Indian title or Native title; (5) Indigenous nations limited sovereign and commercial rights; (6) contiguity; (7) terra nullius, meaning land that is empty or null or void; (8) Christianity; (9) European definition of civilization; (10) conquest. *Id.* at 6–8.

<sup>17</sup> *Johnson v. M'Intosh*, 21 U.S. 543 (1823).

<sup>18</sup> *Id.* at 574. Chief Justice Marshall’s argument relies not on U.S. law, but international rule of the doctrine of discovery. See Angela R. Riley, *The History of Native American Lands and the Supreme Court*, J. OF S. CT. HISTORY 369, 370. The doctrine of discovery was based on the practice of “[t]he exclusion of all other Europeans . . . gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.” *M'Intosh*, 21 U.S. at 573.

<sup>19</sup> *Cherokee Nation v. Ga.*, 30 U.S. 1, 10 (1831) (determining Native nations as “domestic dependent nations” in relation with the U.S.).

<sup>20</sup> *Worcester v. Ga.*, 31 U.S. 515, 531 (1832) (determining states did not have jurisdiction in Indian country).

<sup>21</sup> Riley *supra* note 18, at 372–73.

<sup>22</sup> *Id.* at 373.

<sup>23</sup> REGINALD HORSMAN, *RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLLO-SAXONISM* 191 (1981).

removal, Congress passed the General Allotment Act of 1887<sup>24</sup>, which allowed the U.S. government to take tribal lands, divide it into allotments, and redistribute it to individual Natives.<sup>25</sup> The “surplus” land not redistributed was opened up for white settlement, thus once again taking land from Native ownership.<sup>26</sup> The policies of removal and allotment left many Native nations without an economic base to support their communities and ensured spiraling economic depression.<sup>27</sup> From the adoption of the Discovery Doctrine, to implementation of the Removal Acts, and the redistribution of land through the General Allotment Act, the United States has an unarguable history of promoting white ownership of property at the expense of Native people.<sup>28</sup> This white ownership of property is essential to the American settler identity and is intrinsically tied with the conquest and development of land. This view is at odds with Native traditions and values associated with identity and connection to the land.

For many Native nations, the land and environment is a sacred resource, and many hold the belief that “as a people, they literally came from the land, are defined by the land, and have a responsibility to the earth that is integral to their identity as peoples.”<sup>29</sup> All aspects of Native communities, of peoplehood, are tied up with the land from which they came.<sup>30</sup> A peoplehood is defined as “an inclusionary and involuntary group identity with a putatively shared history and distinct way of life” and can be identified through shared genealogy or geography as well as language, religion, culture, or consciousness.<sup>31</sup> Understanding the ownership of property through the terms of an established peoplehood connected to the land challenges the notion of ownership of property as an individual commodity and instead emphasizes a collective stewardship model.<sup>32</sup> This model provides for multiple levels of interaction between key players to ensure a variety of constituencies—current members, future generations, and past members now deceased—are represented in the protection of not only the peoplehood, but also of the land and

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<sup>24</sup> General Allotment Act of 1887, 25 U.S.C.A § 331 (repealed 2000).

<sup>25</sup> Riley *supra* note 18 at 374–75. The goal of the General Allotment Act of 1887 was to “recognize the Indian as an individual and not as a member of a tribe” to “kill the Indian, save the man.” *Id.*

<sup>26</sup> *Id.* at 376. 118 reservations were allotted and out of those, forty-four were opened for white settlement.

<sup>27</sup> *Id.*

<sup>28</sup> See generally, Carole Goldberg, *Overview: U.S. Law and Legal Issues*, in THE NATIVE NORTH AMERICAN ALMANAC, 470–73 (Duane Champagne, ed., 2001) discussing how the United States had entered into hundreds of treaties and agreements with Native nations to gain Native cession to lands in exchange for “protection,” reservation lands, hunting and fishing rights, federal control over non-Indians on Native lands, and needed supplies and services from the United States government.

<sup>29</sup> Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022, 1112 (2009).

<sup>30</sup> *Id.* at 1112.

<sup>31</sup> *Id.* at 1054.

<sup>32</sup> *Id.* at 1071. A stewardship theory is a “pro-organizational, collectivistic behaviors have higher utility than individualistic, self-serving behaviors.” *Id.*

environment.<sup>33</sup> The protection and preservation of nature is a duty that living tribal members owe to their ancestors and the seven coming generations.<sup>34</sup> The colonizing project of white settlers and the U.S. government stole Native peoples' land through removal and allotment policies, which has stressed, but not broken, Natives' sacred connection to the land.

While a stewardship model is important for understanding Native connection to the land in the context of the history of U.S. colonialism, it is important to challenge the romantic stereotype of Natives as only environmental stewards and not also people who use the land and natural resources for economic development.<sup>35</sup> The common romantic conception of Natives as "children of Nature," always living in harmony with nature, is a stereotype that works to dehumanize and freeze Native peoples into a false historical caricature and disregards modern reality.<sup>36</sup> The balance every Native government must face is one of honoring their peoples' historical association and connection with the land against the economic utility the land has to offer in the modern era.<sup>37</sup> Power disparity between Native nations, the federal government, and non-Indian corporations in the creation of treaties and contracts, limited the amount of choice many Native nations had when "agreeing" to give away land or situate harmful environmental waste on their reservations.<sup>38</sup> Further, Native nations' economic desolation and individual poverty, caused by colonialism, forces many Native nations to "choose" ecologically destructive economic development without the present force of the U.S. government or private corporations.<sup>39</sup>

<sup>33</sup> *Id.* at 1072. Environmentalists have argued that a stewardship legal model for managing land resources increases the utility function of land for humans and all other living beings on the planet. *Id.* at 1076.

<sup>34</sup> *Id.* at 1077. An Iroquois leader beautifully explains the idea behind protecting the interests of the "Seventh Generation,"

In our way of life . . . we always keep in mind the Seventh Generation to come. It's our job to see that the people coming ahead, the generations still unborn, have a world no worse than ours- and hopefully, better. When we walk upon Mother Earth we always plant our feet carefully because we know the faces of our future generations are looking up at us from beneath the ground. We never forget them. Through religion, law, and culture, many indigenous communities express the duty to preserve natural resources, maintain tribal culture and lifeways, keep language alive, and ensure the continuance of ceremonies for the generations yet to come. *Id.*

<sup>35</sup> Ezra Rosser, *Ahistorical Indians and Reservation Resources*, 40 ENV'TL. L. 437, 465 (2010)(explaining that in the early 1970s, a public service television commercial showed a stoic Indian crying because of pollution: "Indian and environmental concern became synonymous, and public discussion turned to whether America might somehow tap native wisdom in solving the environmental problems facing Mother earth.").

<sup>36</sup> *Id.* at 467-68.

<sup>37</sup> *See id.* at 468-69.

<sup>38</sup> *Id.* at 474. Some examples of this coerced "choice" include removal treaties, the Secretary of Interior contract with the MHA Nation to acquire land for a reservoir, and through the application of U.S. power and law, forcing tribes to accept nuclear waste onto their lands. *Id.* at 475.

<sup>39</sup> For example, the Goshute Nation, a small nation within the borders of Utah State

The colonization and development of the land through colonial markets linked the use of natural resources and environment degradation to economic activity and gain.<sup>40</sup> Natives were not merely passive in this economic transition. Rather, they autonomously acted to meet the challenges white institutions posed on their lives and the ecosystems.<sup>41</sup> For example, the fur trade was originally a colonial European driven market, which caused the near extinction of the beaver, but Native hunters also economically benefited from the fur trade.<sup>42</sup> For many, this economic benefit was necessary for the survival of Native people and nations in shifting political and social structures associated with white settler conquest and land development agendas. With fewer beavers, there were fewer beaver-made dams, thus causing increased water flow in rivers, creating meadows and reducing the forage for deer, moose, and bears.<sup>43</sup> Not only did Native and non-Native societies change with the beaver hide industry, but the actual ecological environment was heavily impacted as well.

The shift in political and social structures that were created by American white settler society growth is exemplified by the mass slaughter of buffalo for their hides, the pursuit to use the land for domesticated cattle, and as an act of war against the Plains Indians.<sup>44</sup> The U.S. military used similar scorch the earth<sup>45</sup> tactics from the Civil War and refused to enforce treaty provisions, like The Treaties of Medicine Lodge,<sup>46</sup> with the

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with a weak economic base and rampant poverty, made the decision to contract with a private company to store nuclear waste on its lands. Sierra M. Jefferies, *Environmental Justice and the Skull Valley Goshute Indians' Proposal to Store Nuclear Waste*, 27 J. LAND, RESOURCES & ENVTL. L. 409, 410 (2007). The Nation's borders became surrounded by a federal storage facility for nerve agents, a nerve gas incinerator, weapons testing, and a weapons training range. *Id.* These uses essentially destroyed the environment with hazardous waste. *Id.* at 410–411.

<sup>40</sup> Pommersheim, *supra* note 7, at 14–15.

<sup>41</sup> Cronon, *supra* note 6, at 160. Cronon discusses the shift of Native to English dominance as “the replacement of an earlier village system of shifting agriculture and hunter-gatherer activities by an agriculture which raised crops and domesticated animals in household production units that were contained within fixed property boundaries and linked with commercial markets.” *Id.* at 160–61. “[T]hose Indians who remained in New England were confined to reservations, forced onto inferior farmlands, left without animals to hunt or fish, and so had to make their ecological adjustments in a far from ideal setting. Being overpowered is not a sign of passivity . . . .” *Id.* at 164–65.

<sup>42</sup> Pommersheim, *supra* note 7, at 14.

<sup>43</sup> *Id.*

<sup>44</sup> Andrew C. Isenberg, *The Destruction of the Bison: An Environmental History, 1750–1920*, at 129 (Cambridge University Press 2000).

<sup>45</sup> General Sherman used scorch the earth tactics to burn a path through Georgia and South Carolina to destroy Confederate resources during the Civil War. Sherman adopted the same strategy to eradicate the bison to force plain nomads to reservations. *Id.* at 128.

<sup>46</sup> The Treaties of Medicine Lodge was a treaty agreed upon by the U.S. Peace Commissioner and over five thousand Comanches, Kiowas, Southern Cheyennes, and Southern Arapahos. *Id.* at 124. The treaty promised that Natives had the right to hunt south of the Arkansas “so long as the buffalo may range thereon in such numbers as

policy that “every buffalo dead, is an Indian gone.”<sup>47</sup> For Plains Indians, the bison provided everything they needed, from their food and clothes, to their lodgings.<sup>48</sup> The destruction of the bison was the destruction of the Plains Indians’ way of life. Because of the economic stress caused by the advancement of American settler society into the Plains, Natives, either for their own economic advancement or to provide for their communities, also had to participate in the capitalist market of killing and trading bison hides for their own economic prosperity.<sup>49</sup> By the 1880s, the bison were nearly exterminated, leading to the transformation of natural landscape and the disruption of Native peoples’ cultural and economic well-being.<sup>50</sup> The disappearance of the buffalo was viewed by many as a triumph of civilization over savagery and cleared the path for American colonialism in the Plains area.<sup>51</sup>

Along with the extermination of the bison for their hides, the rapidly growing tanning industry led to widespread deforestation through the burning of Eastern hemlock trees, leading to the destruction of local wildlife habitats and increased erosion of soil into streams.<sup>52</sup> The tanning process also produced large amounts of organic pollution that found its way into the rivers.<sup>53</sup> White settler destruction of the bison was a calculated tactic for the conquest of the Western Plains from the Native people. Because of the shifting political and social structures and the advancements in settler society, many Native nations were forced to participate in ecological destruction in the hopes of providing for their people.

While colonialism was the leading cause of environmental degradation, it is important to understand Natives’ role as active and responsive to the challenges brought by colonizers, not a passive and “natural” role. Native people were active in the fur and bison hide trades, and their economic advances also created ecological destruction. Native people needed to pursue economic gains because of the systematic U.S. settler policy to destroy Native people and communities, partially through ecological destruction as a tactic of war. Thus, the sad irony is, Natives were and are participating in the colonial project of ecological destruction as

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to justify the chase” and forbade white settlers to hunt or live south of the Arkansas. *Id.*

<sup>47</sup> *Id.* at 155 (“Some Army officers in the Great Plains in the late 1860s and 1870s, including William Sherman and Richard Dodge, as well as the Secretary of the Interior in the 1870s, Columbus Delano, foresaw that if the bison were extinct, the Indians in the Great Plains would have to surrender to the reservation system.”).

<sup>48</sup> *Id.* at 65.

<sup>49</sup> *Id.* at 134.

<sup>50</sup> *Id.* at 162. Plains Indians, who once used bison as their primary resource, were decimated and relied primarily on government beef distribution on the reservations. *Id.*

<sup>51</sup> *Id.* at 162–63. The *New York Times* in 1875 discussed the conquest of the plains: “the red man will be driven out, and the white man will take possession. This is not justice, but it is destiny.” *Id.* at 156. Statements like this helped rationalize assumptions of the superiority of white men and the “domestication” of the western plains. *Id.*

<sup>52</sup> *Id.* at 132.

<sup>53</sup> *Id.*

a way of surviving that same colonial project. These two examples, the beaver fur and bison hide trades, illustrate the historical context of today's tension between white settlers' colonial ecological destruction and Native nations' sacred understanding of environmental protection.

## II. The Impacts of Climate Change on Native People

In the present day, new colonial, capitalist, and economic projects are leading to ecological destruction in the form of climate change. Generally, climate change is defined as the warming of the earth from the increased amount of greenhouse gases entering the atmosphere, primarily from human activity.<sup>54</sup> These human-made emissions derive from the burning coal, oil, and gas, the clearing of forests, and “big agricultural” practices.<sup>55</sup> These practices produce a mixture of carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride; each gas, when combined with the others, causes global climate change and has adverse effects on public health and welfare.<sup>56</sup> While human activities are correctly to blame for climate change, the majority of the carbon and other greenhouse gases in the atmosphere can be traced to a handful of oil and gas companies.<sup>57</sup> These companies have spent considerable amounts of money influencing governments to limit the amount of regulation on their activities in order to protect their profits.<sup>58</sup> Their actions, and the U.S. government's compliance with their demands, have demonstrated a total disregard of the scientific proof that the burning of oil and gas is causing climate change, destroying the earth, and harming people. The impacts of climate change include: the warming of the atmosphere and oceans, the melting of snow and ice, rising sea levels, and increased concentrations of greenhouse gases in the

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<sup>54</sup> Jamie Kay Ford & Erick Giles, *Climate Change Adaptation in Indian Country: Tribal Regulation of Reservation Lands and Natural Resources*, 41 WM. MITCHELL L. REV. 519, 523 (2015). See also John Cook, et. al., *Quantifying the Consensus on Anthropogenic Global Warming in the Scientific Literature*, 8 ENVTL. RES. LETT., Apr.-June 2013, at 1 (“[T]he number of papers rejecting the consensus on AGW [anthropogenic global warming] is a vanishingly small proportion of the published research.”). For a summarized discussion of global climate change science and for access to in-depth scientific reports, see also Union of Concerned Scientists, *Global Warming Science*, UNION OF CONCERNED SCIENTISTS, <http://www.ucsusa.org/our-work/global-warming/science-and-impacts/global-warming-science#.WA0zhfkrLIU> (last visited Oct. 23, 2016).

<sup>55</sup> Ford & Giles, *supra* note 54, at 523–24.

<sup>56</sup> *Id.*

<sup>57</sup> Aaron Huertas, *Dear Humans: Industry is Causing Global Warming, Not Your Activities*, UNION OF CONCERNED SCIENTISTS: THE EQUATION (Apr. 7, 2015, 10:22 AM), <http://blog.ucsusa.org/aaron-huertas/dear-humans-industry-is-causing-global-warming-not-your-activities-697> (“[T]wo-thirds of all industrial carbon emissions come from just 90 institutions. Several of those institutions, including Chevron, ExxonMobil, BP, Shell, and Conoco Phillips, have extracted more carbon from the earth than most countries.”).

<sup>58</sup> *Id.*

atmosphere.<sup>59</sup> The warming of the planet causes extreme weather and climate events, such as stronger and more frequent storms, higher saline levels in the oceans, species extinction and migration, and rising sea levels from ice melt and thermal expansion, causing land loss.<sup>60</sup>

Policymakers across the world are balancing policy decisions between implementing preventative, mitigating, and adaptive measures against the impacts of climate change. Because many Native communities have already felt climate change impacts, this paper will not address preventative measures. Mitigating measures are defined as “human intervention[s] to reduce the sources or enhance the sinks of greenhouse gases.”<sup>61</sup> Examples of mitigation projects include a wide range of technological, socioeconomic, and institutional developments that decrease the amount of emissions produced and decreased the amount of greenhouse gases trapped in the atmosphere.<sup>62</sup> Adaptive measures are defined as “[t]he process of adjustment to actual or expected climate [change] and its effects. In human systems, adaptation seeks to moderate or avoid harm or exploit beneficial opportunities.”<sup>63</sup> Some examples of adaptation projects include: disaster risk management, infrastructure adjustments, public health measures, water management, reforestation, improving energy infrastructure, and crop resiliency.<sup>64</sup> Various mitigating and adaptive measures are being discussed and implemented around the world at various levels of government. Native nations must work to internalize similar measures as part of their resistance strategies to combat the impacts of climate change and colonial ecological destruction.

Climate change will impact Indigenous communities first, and likely the hardest, because they are “heavily dependent on natural resources, severe weather events like droughts, floods, wildfires, and snowstorms make tribal communities particularly vulnerable and impact American Indians and Alaska Natives more than they impact the general population.”<sup>65</sup> Native nations are often extremely poor, have little access to

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<sup>59</sup> INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *Summary for Policymakers*, in CLIMATE CHANGE 2013: THE PHYSICAL SCIENCE BASIS. CONTRIBUTION OF WORKING GROUP I TO THE FIFTH ASSESSMENT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 2 (Thomas F. Stocker et al. eds., 2013).

<sup>60</sup> *Id.* at 5–13.

<sup>61</sup> INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *Summary for Policymakers*, in CLIMATE CHANGE 2014, MITIGATION OF CLIMATE CHANGE. CONTRIBUTION OF WORKING GROUP III TO THE FIFTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 4 (Ottmar Edenhofer et al. eds. 2014).

<sup>62</sup> *Id.* at 10.

<sup>63</sup> INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *Summary for Policymakers*, in CLIMATE CHANGE 2014: IMPACTS, ADAPTATION, AND VULNERABILITY. PART A: GLOBAL AND SECTORAL ASPECTS. CONTRIBUTION OF WORKING GROUP II TO THE FIFTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 5 (Christopher B. Field et al. eds., 2014).

<sup>64</sup> *Id.* at 8.

<sup>65</sup> Aileo Weinmann, *Climate Change Hurts Indian Tribes Disproportionately, Report Finds Droughts, water scarcity, fires, flooding, snowstorms are especially harsh for American Indians and Alaska Natives*, NATIONAL WILDLIFE FEDERATION (2011) <https://>

support from the federal government, and their culture and religious traditions are connected to the land and ecosystems.<sup>66</sup> While each Native nation has its own traditions and differing connections to the land and natural resources, most nations depend on the natural environment for their subsistence.<sup>67</sup> Further, because many Native nations are struggling for economic self-sufficiency, they are adopting and depending on ecologically destructive practices to provide for their communities.<sup>68</sup> Many Native nations have been forced to again relocate, find new hunting and fishing areas, and rebuild infrastructure to meet their needs in a changing environment.<sup>69</sup>

Example of the particular impacts of climate change on Native people are the experiences of the Grand Bayou Village, Grand Caillou/Dulac, Isle de Jean Charles, and Pointe-au-Chien Indian Tribes (“the coastal Louisiana tribal communities”).<sup>70</sup> Living in the southern Louisiana area, these nations have experienced sea level changes, land sinking and shrinking, increased intensity of hurricanes, and impacts from petroleum industry spills.<sup>71</sup> Most of the nations’ pre-contact land base is close to and dependent on the water from the bayous and the Mississippi River, thus any changes to the water level has severe impacts on their everyday lives.<sup>72</sup> Additionally, tribal lands are shrinking from erosion caused by the oil industry dredging canals that cut into the land and laying pipelines that, like levees, are removing natural protections from hurricanes. These

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[www.nwf.org/News-and-Magazines/Media-Center/News-by-Topic/Global-Warming/2011/08-03-11-Climate-Change-Hurts-Indian-Tribes-Disproportionately.aspx](http://www.nwf.org/News-and-Magazines/Media-Center/News-by-Topic/Global-Warming/2011/08-03-11-Climate-Change-Hurts-Indian-Tribes-Disproportionately.aspx).

<sup>66</sup> E. Rania Rampersad, *Indigenous Adaptation to Climate Change: Preserving Sustainable Relationships Through an Environmental Stewardship Claim & Trust Fund Remedy*, 21 GEO. INT’L ENVTL. L. REV. 591, 594 (2009).

<sup>67</sup> Jamie Kay Ford & Erick Giles, *Climate Change Adaptation in Indian Country: Tribal Regulation of Reservation Lands and Natural Resources*, 41 WM. MITCHELL L. REV. 519, 525 (2015). Subsistence can be synonymous with culture, identity, and self-determination. A statement from a Ponca Tribal member, Casey Camp-Horinek, captures the sentiments of many Native people; “[m]y people, the Ponca people of Oklahoma, are dying as a result of the practices of the extractive industry. Stop the commodification of all that is keeping life going on our Mother Earth. One should not be able to buy and sell the air, the water, and the Earth or anything that moves within the natural laws.” *Indigenous Voices: On Climate Change, From The Arctic To The Amazon. A call to action from 15 Indigenous leaders and activists from around the world*, THE THIRD-EYE.CO.UK (2016) <http://www.thethird-eye.co.uk/indigenous-voices-climate-change-arctic-amazon-portraits-by-sophie-pinchetti>.

<sup>68</sup> See generally Geneva E.B. Thompson, *The Double-Edge Sword to Sovereignty by the Barrel: How Native Nations Can Wield Environmental Justice in the Fight Against the Harms of Fracking*, 63 UCLA L. R. 1819 (2016) (for a discussion of the Mandan, Hidatsa, and Arikara Nation development of oil and gas extractive industry).

<sup>69</sup> Ford & Giles, *supra* note 54, at 525.

<sup>70</sup> Natasha Steinman & Kirsten Vinyeta, *Gulf Coast: Vulnerability of Coastal Louisiana Tribes in a Climate Change Context*, NORTHERN ARIZONA UNIVERSITY (2012), [http://www7.nau.edu/itep/main/tcc/docs/tribes/tribes\\_CoastalLA.pdf](http://www7.nau.edu/itep/main/tcc/docs/tribes/tribes_CoastalLA.pdf).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

effects are leading to decreased land resources, loss of storm protection from forests, and decreased air quality from the tree loss.<sup>73</sup>

The Isle de Jean Charles has lost a significant amount of land from climate change. In the 1950s, the island was 11 miles long and 5 miles across and now it's no more than 2 miles long and a quarter mile across.<sup>74</sup> This loss of land has forced many people to move because of their inability to engage in subsistence practices like gardening, gathering traditional medicines, and hunting.<sup>75</sup> In a PBS NewsHour broadcast, Chief Naquin explained that "when we all move off of the island and our people move into other communities, we lose our culture, our people, our land . . . [b]asically we're losing everything that an Indian tribe has."<sup>76</sup> The coastal Louisiana tribal communities are unable to grow traditional foods and medicinal plants and are becoming reliant on grocery stores, thus altering their diets and impacting their health.<sup>77</sup> Furthermore, tribal members can no longer find their medicinal plants and are having to pay for medical services.<sup>78</sup> These changes in lifestyle disconnect tribal members from traditional cultural practices and force them to depend on non-tribal systems.<sup>79</sup> To further complicate matters, many of these tribal communities are not federally recognized and do not have access to federal assistance, like other Native nations.<sup>80</sup> The Grand Bayou Village, Grand Caillou/Dulac, Isle de Jean Charles, and Pointe-au-Chien Indian Tribes provide a few examples of the many Native communities being harmed by climate change.<sup>81</sup> Their examples demonstrate that it is necessary to assert a human rights legal model and develop international support for Indigenous communities and their environments.

### **III. Native Governments are Inadvertently Participating in the Settler Colonial Project by Contributing to Climate Change**

Many Native nations are feeling the impacts of climate change on their communities. However, some Native nations are also contributing to climate change through ecological destruction in pursuit of economic development. Native nations can be compared to developing nations because of high poverty rates, unemployment, and infrastructure that is insufficient to attract economic development outside of exploiting their

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Another example are the Inuit People, whose culture and relationship, which are uniquely related to the Arctic ecosystem, are impacted by the warming of the sea and the destruction of marine mammals and birds habitats. See Duane Smith, *Climate Change In The Arctic: An Inuit Reality* (2007), <https://unchronicle.un.org/article/climate-change-arctic-inuit-reality>.

natural resources.<sup>82</sup> While economic development is important to improving the lives of Native people and strengthening sovereignty, ecological destruction continues the white settler project that harms Native people.

The actions of the Mandan, Hidatsa, and Arikara Nation (MHA Nation) provide an example of how a Native nation can contribute to climate change by using its natural resources for economic development. The MHA Nation's reservation sits on the Bakken oil fields and the growing oil and gas extractive industries serves as the main source of income for the Nation. The booming oil and gas economy has brought prosperity, but at the cost of much environmental and social harm.<sup>83</sup> For example, citizens the MHA Nation are breathing polluted air, drinking polluted water, and the increased presence of non-Natives is destroying reservation infrastructure and causing an increase in criminal behavior. However, the development of the Bakken oilfields and the oil and gas industry has brought economic prosperity to the MHA Nation. Economic self-reliance is a significant concern for many members, and the development of the Bakken oil fields opened up new opportunities to bring the nation out of poverty.<sup>84</sup> Citizens are looking for individual self-sufficiency and long-term economic opportunities for their nation as a whole.<sup>85</sup> Native-owned oil and drilling firms have opened up and new jobs, in both the energy industry and non-oil businesses, have helped with unemployment and low wages.<sup>86</sup> MHA members own most of the 150 oilfield firms

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<sup>82</sup> *Id.* at 252.

<sup>83</sup> See generally Shelby Bohnenkamp, Alex Finken, Emily McCallum, Audrey Putz, & Gary A. Goreham, *Concerns of the North Dakota Bakken Oil Counties: Extension Service and Other Organizations' Program Responses to These Concerns* (August 2011), <https://www.ag.ndsu.edu/ccv/documents/bakken-oil-concerns> (providing a detailed account of the concerns surrounding the boom and bust economy associated with oil and gas extraction in the Bakken oil fields).

<sup>84</sup> In 1944, the U.S. Congress further handicapped the MHA Nation's economy by passing the Flood Control Act and approving the construction of the Garrison Dam that would flood the premium agricultural land and main source of food and economic income for the Nation. ROY W. MEYER, *THE VILLAGE INDIANS OF THE UPPER MISSOURI: THE MANDANS, HIDATASA, AND ARIKARAS*, xi–xii (1977). The construction of the dam destroyed the MHA community's way of life and was the key factor that drove the reservation and its members into poverty. *Id.*

<sup>85</sup> See Suzanne Coonan, Rich Johnson, Sarah Johnson, Brittany Rohner & Curt Wang, *Sustainable Prosperity: Building a Bridge to a Brighter Tomorrow*, CASE W. RESERVE UNIV. MASTERS IN POSITIVE ORGANIZATIONAL DEVELOPMENT STUDENT CONSULTING TEAM 15 (Nov. 26, 2012), <http://www.visionwestnd.com/documents/MHANation-SustainableProsperityReportFinalVersion-2.pdf> [<https://perma.cc/RGG2-YFYF>]. A notable quote recorded in the Sustainable Prosperity report states the importance of self-sufficiency and how the “[d]iscovery of oil is our opportunity to rebound. We're impacted with all the traffic, but we own most of the land it's on. We need to reserve/put away most of this oil money.” *Id.* at 16.

<sup>86</sup> Phil Davies, *Bakken has Brought Prosperity, Challenges, to Fort Berthold Indian Reservation*, FAIR FIELD SUN TIMES (Nov. 20, 2014), [http://www.fairfieldsuntimes.com/business/article\\_994375e8-69e3-11e4-82f2-57ff0a29cc9f.html](http://www.fairfieldsuntimes.com/business/article_994375e8-69e3-11e4-82f2-57ff0a29cc9f.html).

in the MHA Nation and these firms are given preferential treatment for contracts and oilfield work on the reservation.<sup>87</sup>

Yet, the economic success of the MHA Nation's oil and gas industry has caused some major environmental and social drawbacks due to hydraulic fracturing and oil spills. Oil and gas extraction, specifically hydraulic fracturing<sup>88</sup> ("fracking"), emit large amounts of carbon and methane, a greenhouse gas exponentially more potent than carbon, into the atmosphere at multiple steps during the fracking process.<sup>89</sup> In 2014, fracking wells across the United States released 5.3 billion pounds of methane into the atmosphere through intentional venting of gas and accidental gas leaks.<sup>90</sup> This amount of methane gas is equivalent to the annual global warming emissions from 22 coal-fired power plants.<sup>91</sup> The MHA Nation is contributing to this amount of methane with its 1,300 oil wells scattered across more than 1,500 square miles of the reservation and the production of more than 386,000 barrels of oil every day.<sup>92</sup> The MHA Nation's environmental director and his team deal with at least one, and up to three, spills a day.<sup>93</sup> Mark Fox, MHA Nation's new chairman, is trying to balance oil and economic development with environmental protection, but he has made little progress.<sup>94</sup> This balance between economic devel-

<sup>87</sup> *Id.*

<sup>88</sup> A method used to extract natural gas from gas reserves below shale and rock formations. Mike Malfettone, Note, *A Nation Fractured: Drilling into the Debate Over Fracking*, 2 ARIZ. J. ENVTL. L. & POL'Y 1039, 1039 (2012). This method uses high-pressure injections of water, sand, and chemicals underground to release trapped gas. Joe Schremmer, Note, *Avoidable "Fraccident": An Argument Against Strict Liability for Hydraulic Fracking*, 60 U. KAN. L. REV. 1215, 1219–20 (2012).

<sup>89</sup> Elizabeth Ridlington, Kim Norman, & Rachel Richardson, *Fracking by the Numbers: The Damage to Our Water, Land and Climate from a Decade of Dirty Drilling*, ENVIRONMENT AMERICA & FRONTIER GROUP, Report, 14 (2016), <http://www.environment-america.org/reports/ame/fracking-numbers-0> ("Over a 100-year timeframe, a pound of methane has 34 times the heat-trapping effect of a pound of carbon dioxide."). See Owen A. Sherwood et. al., *Groundwater methane in relation to oil and gas development and shallow coal seams in the Denver-Julesburg Basin of Colorado*, NATIONAL ACADEMY OF SCIENCE OF THE UNITED STATES OF AMERICA, Abstract (2016), <http://www.pnas.org/content/113/30/8391.full> (discussing research finding of dissolved methane in 593 out of 924 sample water wells in the Denver-Julesburg Basin of northeastern Colorado—an area that has 60 year long history of hydraulic fracturing. This study determined "[i]nadequate surface casing and leaks in production casing and wellhead seals in older, vertical oil and gas wells were identified as stray gas migration pathways.").

<sup>90</sup> Ridlington, Norman & Richardson, *supra* note 89, at 14–15.

<sup>91</sup> *Id.* at 5.

<sup>92</sup> George Lerner & Christof Putzel, *Tribal environmental director: 'We are not equipped' for N.D. oil boom*, AL JAZEERA AMERICA (May 16, 2015), <http://america.aljazeera.com/watch/shows/america-tonight/articles/2015/5/16/tribal-environmental-director-we-are-not-equipped-for-nd-oil-boom.html>.

<sup>93</sup> *Id.* ("I'll just come out and admit it: We can't handle it right now," Edmund Baker said. "We are not equipped. We are not staffed . . . You need competent people, you need people who are not only scientifically equipped, you need people who know how to understand the law, and enforce the law and hold companies accountable.").

<sup>94</sup> *Id.* ("We're restructuring, we're changing," Fox said of the tribal government. "The changes are not going to happen overnight. I've got to find personnel first.").

opment through oil and gas extraction and environmental protection impacts not only the MHA Nation, but many other Native nations, who must struggle with the necessity of providing for their people and protecting their lands.

While economic self-reliance is an honorable and necessary goal for all Native nations, participating in oil and gas extraction and causing ecological destruction parallels the previous examples of Natives hunting beavers and bison to near extinction. While Native owned and operated oil and gas extraction provides economic self-sufficiency today, by relying on this industry, the MHA Nation and others are participating in the white colonial project of ecological destruction, which will inevitably circle back and harm all Native communities. Ideally, Native nations should advocate for leaving oil and gas in the ground, rather than pursuing extractive industries. Native nations who do continue to participate in environmentally harmful industries for economic development should do so in the cleanest and safest way possible.

#### **A. Analysis: The Resistance Strategy**

This article advocates for a two-step approach in implementing a resistance strategy for opposing the white settler colonial project of ecological destruction and climate change. First, Native governments need to internalize the resistance strategy by limiting their own emissions, establishing customary laws and procedures to hold their members and others accountable for their emissions, and develop mitigation and adaptation measures to protect their communities in the event of environmental catastrophe. Second, Native governments, advocates, and Native rights organizations need to assert Native nations' inherent sovereignty and international human and Indigenous rights in all legal claims in local, state, and national administrative and judicial proceedings effecting the environment.

The water protectors<sup>95</sup> and the Standing Rock Sioux Tribe's government demonstrate aspects of this resistance strategy that Native nations should adopt to combat the white settler colonial project of climate change. Currently, water protectors have and are gathering along the Missouri River in Cannon Ball, North Dakota, protesting the "\$3.8 billion Dakota Access Pipeline which, if completed, would carry half a million gallons of crude oil per day ultimately to refineries along the Gulf of Mexico."<sup>96</sup> The pipeline, if built, will cross within half a mile of the

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<sup>95</sup> The people at Standing Rock prefer the term "water protector" or "protector" over the term "protestor" because "[t]he term protestor is a colonized term for standing up for what's right." Allison Herrera, *Standing Rock activists: Don't Call Us Protesters. We're Water Protectors*, PRI (Oct. 31, 2016) <http://www.pri.org/stories/2016-10-31/standing-rock-activists-dont-call-us-protesters-were-water-protectors>.

<sup>96</sup> Kristen A. Carpenter and Angela R. Riley, *Standing Tall: The Sioux's Battle Against a Dakota Oil Pipeline is a Galvanizing Social Justice Movement for Native Americans*, SLATE (Sept. 23, 2016), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2016/09/why\\_the\\_sioux\\_battle\\_against\\_the\\_dakota\\_access\\_pipeline\\_is\\_such\\_a\\_big\\_deal.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2016/09/why_the_sioux_battle_against_the_dakota_access_pipeline_is_such_a_big_deal.html).

Standing Rock Sioux Reservation and treaty-guaranteed lands, under the Missouri River, the tribe's main source of drinking water, and through Sioux sacred sites.<sup>97</sup> The U.S. government is not fulfilling its affirmative obligation under the Treaty of Fort Laramie of 1851 and various federal laws, to protect Standing Rock water, land, culture, and religion, and is merely waiting to see it "play out" before determining a resolution.<sup>98</sup> Furthermore, the UN Expert Member of the Permanent Forum on Indigenous Issues who was invited to investigate the situation wrote in his report that "the constant aerial surveillance by drones, airplanes and helicopters and on-the-ground surveillance by officers in vehicles stationed on high points of land adjacent to the south camp" contributed to a "war zone" atmosphere.<sup>99</sup> In the report, he discusses that when Morton County Sheriffs arrested water protectors, they were physically marked by number and held in dog kennels inside the Morton County jail garage.<sup>100</sup> As of August 10, 2016, over 400 people have been arrested by law enforcement<sup>101</sup> through the use of pepper spray, rubber bullets, strong-arm tactics, abuse, and unlawful arrests to disrupt the protectors' resistance.<sup>102</sup>

Stopping the Dakota Access Pipeline has become a larger movement for Native resistance to ecological destruction, especially against oil and gas development, and the assertion of sovereignty and human rights of Native people.<sup>103</sup> The water protectors and the Standing Rock Sioux Tribe, through their advocacy to stop the construction of more oil and gas infrastructure, their appeal to international forums, and environmentally

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<sup>97</sup> *Id.*

<sup>98</sup> Carpenter & Riley, *supra* note 96. See also Gyasi Ross, *Obama, Extortion and the DAPL: Joye Braun Explains Why "There Are No Acceptable Rerouting Options,"* INDIAN COUNTRY TODAY MEDIA NETWORK (Nov. 3, 2016), <http://indiancountrytodaymedianetwork.com/2016/11/03/obama-extortion-and-dapl-joye-braun-explains-why-there-are-no-acceptable-rerouting> (reporting President Obama's statements "... let it play out for several more weeks and then determine whether or not this can be resolved in a way that I think is properly attentive to traditions of the first Americans" and "I think that right now the Army Corps is examining whether there are ways to reroute this pipeline.").

<sup>99</sup> Report and Statement from Chief Edward John, Expert Member, United Nations Permanent Forum on Indigenous Issues, *Firsthand Observations of Conditions Surrounding the Dakota Access Pipeline* (Nov. 1, 2016) <https://www.culturalsurvival.org/news/un-expert-releases-report-conditions-surrounding-dakota-access-pipeline>.

<sup>100</sup> *Id.*

<sup>101</sup> Brad Parks, et. al., *Dakota Pipeline: Will Police Crackdown Dampen Protests?*, CNN (Oct. 28, 2016, 9:31 PM), <http://www.cnn.com/2016/10/28/us/dakota-access-pipeline-protests>.

<sup>102</sup> Mary Annette Pember, *DAPL Crackdown Continues with Rubber Bullets and Mace as Water Protectors Form New Front Line*, INDIAN COUNTRY TODAY MEDIA NETWORK (Oct. 24, 2016), <http://indiancountrytodaymedianetwork.com/2016/10/24/dapl-crackdown-continues-rubber-bullets-and-mace-water-protectors-form-new-front-line>.

<sup>103</sup> Standing Rock Sioux have been organizing letters and resolutions in support of their efforts. As of August 29, 2016, 188 tribal and first nation tribal governments and 108 organizations, cities, and businesses have pledge their support. Standing Rock Sioux Tribe, News: Call to Action Update (Aug. 29, 2016), <http://standingrock.org/news/call-to-action-update>.

conscious construction of camps, provide an example of many of the aspects of the type of resistance strategy needed for Native people to resist the white settler colonial project of climate change.

#### **IV. Native Governments Need to Internalize Resistance Strategies to Resist the Settler Colonial Project of Climate Change**

The first step for Native nations to build and implement a successful resistance strategy to the settler colonial project of climate change is to internalize the resistance into their own communities. Internalizing the resistance requires Native nations to implement and enforce laws and regulations through tribal codes and customary law to regulate the pollution of air, water, and land and enforce these laws against both Native and non-Native violators. Native nations can use aspects of U.S. law and federal programs as secondary sources to supplement the implementation of tribal codes and customary laws and to tap into money set aside by Congress for Native support programs.<sup>104</sup> By limiting the impacts of climate change through the implementation of customary law and programs, Native nations can internalize the resistance to the settler colonial project of climate change.

##### **A. *Inherent Tribal Sovereignty and Tribal Customary Law***

Native nations have inherent tribal sovereignty to implement their own culturally informed environmental laws and regulations.<sup>105</sup> Since time immemorial, Native nations are sovereign entities by “conducting their own affairs and depend[ing] upon no outside source of power to legitimize their acts of government.”<sup>106</sup> The colonial European powers, by treating Native nations as foreign nations through treaties and leaving them to implement their own laws, recognized the sovereign status of Native nations.<sup>107</sup> This recognition of sovereign status, not derived from the federal government, was reaffirmed in the Supreme Court case *Worcester v. Georgia*.<sup>108</sup> To strengthen sovereignty and create community buy-in,

<sup>104</sup> The Standing Rock Sioux Tribal Code of Justice, the Tribe has not formally codified its’ peoples environmental ethics and customary law *See generally* STANDING ROCK SIOUX TRIBAL CODE OF JUSTICE, (last accessed Nov. 8, 2016), <http://standingrock.org/government>. This statement is not a criticism on the Standing Rock Sioux, but is provided to merely show the missing aspects of the resistance strategy offered by this Article. As will be seen later in this Article, there are many legitimate reasons why a Native nation does not codify its environmental ethics. I do not presume to know the decisions of why the Standing Rock Sioux do not have environment Tribal codes.

<sup>105</sup> Rebecca Tsosie, *Climate Change, Sustainability, and Globalization: Charting the Future of Indigenous Environmental Self-Determination*, 4 ENV’T. & ENERGY L. & POL’Y. J. 189, 256 (2009) (“[H]ave the sovereign right to develop their lands and resources, and they have the sovereign right to incorporate traditional environmental values into their own laws and policies.”).

<sup>106</sup> WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW: IN A NUTSHELL*, 73 (6<sup>th</sup> ed. 2015).

<sup>107</sup> *Id.*

<sup>108</sup> 31 U.S. 515, 519 (1832) (holding “The Indian nations had always been considered

Native nations need to exercise their inherent sovereignty and develop environmental tribal codes and customary law consistent with their environmental ethics.<sup>109</sup>

Many Native nations have adopted a contemporary legal system, including constitutions, laws and codes, and courts.<sup>110</sup> These contemporary legal systems can set up legislative-like entities—such as tribal councils—to draft, pass, and implement tribal codes that re-enforce “the legal norms, structures, and practices of both the tribe’s traditional legal system and its newer legal system.”<sup>111</sup> Native nations have adopted tribal codes that vary from a western-style statute format, to writing down an elder’s testimony, to creating laws and regulations for the nation to follow and enforce.<sup>112</sup> Tribal codes provide a nation with the opportunity to have its own environmental regulations and policies tailored to the needs of the community. However, tribal codes can also be time consuming, expensive, and difficult to enforce without ample resources. Native nations with less economic opportunity tend to have a harder time drafting, implementing, and enforcing tribal codes.<sup>113</sup>

Besides the adoption of tribal codes, customary law can be used to assist Native nations in policy making in the context of executive, legislative, or adjudicative processes.<sup>114</sup> A working definition of customary law includes the nation’s “worldview, values, [and] socially reinforced norms. . . .”<sup>115</sup> Further, substantive customary law includes “(1) custom as a kernel of law; (2) custom of a legal nature in its natural setting; and (3) custom that is enforceable under tribal law.”<sup>116</sup> Custom as a kernel of law includes elements of (1) objective and measureable habits, practices,

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as distinct, independent, political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception . . . which excluded them from intercourse with any other European potentate . . .”).

<sup>109</sup> Warner, *infra* note 134 at 796.

<sup>110</sup> JUSTIN B. RICHLAND & SARAH DEER, INTRODUCTION TO TRIBAL LEGAL STUDIES 11 (Jerry Gardner et al. eds., 3d ed. 2015).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 18 (providing the Nez Perce Tribe’s Constitution and Bylaws as an example of tribal codes that follows a more western-style codification of tribal law; *Id.* at 27 providing the Native Village of Venetie Tribal Government’s Protection of the Environment and Natural Resources Ordinance (94-03) as an example of tribal codes that provides testimony of tribal members to show the legislative intent for the tribal code).

<sup>113</sup> *Id.* at 159. The enforcement of tribal codes could require Native nations to have a police force or environmental inspectors and a tribal court system developed enough to hear environmental civil cases.

<sup>114</sup> Pat Sekaquaptewa, *Key Concepts in the Finding, Definition and Consideration of Custom Law in Tribal Lawmaking*, 32 AM. INDIAN L. REV. 319, 322 (2008).

<sup>115</sup> *Id.* at 322 (Native traditions can be understood through the study of elders and storyteller’s stories and the manner and circumstances in which they are told by Native people to each other). See also RICHLAND & DEER, *supra* note 110 at 44 (traditions can be understood through reviewing historical or ethnographic resources).

<sup>116</sup> Sekaquaptewa, *supra* note 114, at 324.

and conduct as well as (2) subjective feelings and beliefs.<sup>117</sup> For a custom kernel to be legal, the custom should be a “long-established practice, recognized and applied by an authority, and enforced by sanction.”<sup>118</sup> Lastly, to ensure success, nations must use and enforce customary law in Tribal courts against members and nonmembers violating the law.<sup>119</sup>

While Native nations may not choose to develop tribal regulations for many reasons, such as high costs, more pressing priorities, or limited land base and natural resources, nations still benefit from establishing their environmental ethics in either tribal codes or in customary law.<sup>120</sup> This establishment will allow nations to develop a legal standard for environmental protection that can later justify environmental regulations and climate change adaptation policies and programs. For example, The Onondaga Nation adopted a vision statement for the Onondaga Lake without drafting and implementing environmental regulations.<sup>121</sup> This vision statement includes an explanation of how the lake was traditionally used and the importance of keeping the lake waters clean.<sup>122</sup> By making an environmental ethics statement, the tribe demonstrated the importance of the lake and how the community should honor it, and took a starting step toward building tribal legal institutions around environmental protection.

### **B. *Native Nations can use Federal Law and TAS Status to Supplement Customary and Tribal Law***

While many U.S. court cases, federal laws, and policies have been created to limit Native nations’ sovereignty, destroy Native communities, and essentially wipe out Native people, there are some seeds of worthy U.S. law and policy that Native nations can use to supplement customary law and tradition.<sup>123</sup> Native nations must first implement customary law and then, through that customary law, explicitly adopt pieces of U.S. law and programs that enhance customary law. This implementation can look different for each Native nation, but it is essential that customary law and

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<sup>117</sup> *Id.* at 324–325.

<sup>118</sup> *Id.* at 326.

<sup>119</sup> Sekaquaptewa, *supra* note 114, at 326. *See generally* Pat Sekaquaptewa, *Evolving the Hopi Common Law*, 9 KAN. J. L. POL’Y 761 (2000). (discussing The Hopi Appellate Court’s use of the Hopi Constitution and Hopi customary law to settle housing and land disputes between villages and families. This example can be helpful for other Native nations trying to balance their constitutions, codes, and customary law in cases in Tribal court).

<sup>120</sup> Elizabeth Ann Kronk Warner, *Examining Tribal Environmental Law*, 39 COLUM. J. OF ENV’T. L. 42, 94–95 (2014).

<sup>121</sup> *Id.* at 94–95.

<sup>122</sup> *Id.* The Nation’s the motivation of the vision statement because “[f]rom time immemorial, our ancestors lived near Onondaga Lake. The lake, its waters, plants, fish, shore birds, and animals are an intrinsic part of our existence.”

<sup>123</sup> *See generally*, WALTER ECHO-HAWK, IN THE COURTS OF THE CONQUEROR: THE 10 WORST INDIAN LAW CASES EVER DECIDED (2012) (discussing the ten worst Supreme Court cases in federal Indian law and the impacts of those cases on Native people and nations).

tradition inform the decision to garner the trust and ensure legitimacy from the community.<sup>124</sup>

Aspects of U.S. law that can supplement Native nations' customary environmental laws and programs include: (1) the U.S. environmental statutes that allow Native nations to be eligible regulatory entities similar to states under "tribes as states" (TAS) clauses and (2) the Environment Protection Agency's (EPA) policy to promote a government-to-government relationship with federally recognized Native nations.<sup>125</sup> Some of these U.S. federal statutes include the Clean Air Act (CAA), the Clean Water Act (CWA), and the Safe Drinking Water Act (SDWA). Each can be a useful tool for Native nations to implement in order to regulate the actions of members of the nation and nonmembers polluting Native lands.<sup>126</sup> By supplementing tribal codes and customary law with positive U.S. law, Native nations can assert regulatory authority over nonmembers and non-Natives within their territories and limit the risks of U.S. courts limiting Native nations' authority.

To utilize these statutes, the EPA requires "a showing that the potential impacts of regulated activities on the tribe are serious and substantial" and that "activities regulated under the various environmental statutes generally have serious and substantial impacts on human health and welfare" before granting authority over nonmembers to nations with TAS status.<sup>127</sup> Since 1984, however, the EPA has promoted a government-to-government relationship with Native nations and is granting more authority under the rationale that Native nations should be the primary parties for setting standards and managing programs on Native lands, even over nonmembers.<sup>128</sup> Further, courts are upholding EPA and Native nation government-to-government agreements, which is a

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<sup>124</sup> Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1087–93 (2007) ("As evidenced by the name, 'cultural matching' simply means there is a match between the 'governing institutions' of the particular tribe and its 'indigenous political culture.' In other words, a tribal community's ideas regarding the proper use and scope of authority must be reflected in the tribe's governing institutions. Without this match, members will often see the government as illegitimate, resulting in its inability to garner the trust and loyalty of the polity.").

<sup>125</sup> Heather J. Tanana & John C. Ruple, *Energy Development in Indian Country: Working Within the Realm of Indian Law and Moving Towards Collaboration*, 32 UTAH ENV'T. L. REV. 1, 21 (2012) (explaining that to meet the TAS requirements, a nation must show: (1) the nation's governing body can carry out substantial governmental duties and powers; (2) the management and protection of resources occurs within exterior boundaries of the reservation or other areas within the nation's jurisdiction; and (3) the nation is expected to be capable of carrying out the functions of the regulation.

<sup>126</sup> *Id.* The Navajo Nation met the TAS standards under the CWA, and to ensure stricter standards than the federally mandated minimum, passed the Navajo Nation Clean Water Act (NNCWA) to provide more protection for Dinè, the Navajo people. See generally NAVAJO NATION ENVIRONMENTAL PROTECTION AGENCY, NAVAJO NATION CLEAN WATER ACT, §§ 103 (a)(3)–(4), <http://www.navajonationepa.org/Pdf%20files/Clean%20Water.pdf> [https://perma.cc/26NL-SMTK].

<sup>127</sup> *Id.* at 22.

<sup>128</sup> *Id.* at 23.

positive direction for environmental Native law. For example, the D.C. Circuit upheld the EPA's delegation of authority to the Gila River Indian Community to regulate air quality on all land within the reservations, including fee land held by private landowners who are nonmembers.<sup>129</sup> Upon summarizing the holding of the case, the majority writes “[w]e find petitioners’ challenges to be mostly meritless” and uphold the EPA’s decision and tribal authority to regulate fee land of nonmembers under the CAA.<sup>130</sup>

The Navajo Nation provides an example of a Native nation using tribal codes supplemented by TAS laws to protect the environment. The Navajo Nation created the Navajo Nation Environmental Protection Agency (NNEPA) and has its own process of review under the Navajo Nation Uniform Regulations (NN Uniform Regulations) to regulate implementation of, and compliance with, environmental laws, review permit applications, and establish standards for rulemaking.<sup>131</sup> The NN Uniform Regulations created additional requirements for the approval process of any permit falling under Navajo environmental laws, placed control with the NNEPA director for all permitting processes, and set out steps and requirements for the public comment process.<sup>132</sup> This process ensures for robust and expansive environmental regulations and models the U.S.’s environmental protection processes, providing an example of how tribal codes can be supplemented with U.S. law to protect the environment from further harm.

Even with positive case law<sup>133</sup> and examples provided by other Native nations, many Native nations are not adopting federal environmental

<sup>129</sup> *Arizona Pub. Serv. Co. v. U.S. Evtl. Prot. Agency*, 211 F.3d 1280, 1284 (D.C. Cir. 2000). The petitioners in this case (1) argued Congress did not expressly delegate to Native nations the authority to regulate air quality on all land within reservations, and (2) questioned if the EPA properly construed “reservation” to include trust lands, including fee land owned by nonmembers. *Id.* at 1284.

<sup>130</sup> *Id.* Justice Ginsberg, who at the time served on the D.C. Circuit, dissented in this case. She argued, “an Indian tribe lacks inherent authority to regulate the conduct of a nonmember on land he owns within the boundaries of the tribe’s reservation. Lacking inherent authority, a tribe may exercise regulatory authority over such non-Indian lands only by express congressional delegation.” *Id.* at 1300. In her reading of the CAA, Congress did not expressly delegate power to Native nations to regulate nonmembers on fee simple land.

<sup>131</sup> *NAVAJO NATION ENVIRONMENTAL PROTECTION AGENCY, UNIFORM REGULATIONS FOR PERMIT REVIEW, ADMINISTRATIVE ENFORCEMENT ORDERS, HEARINGS, AND RULEMAKING UNDER NAVAJO NATION ENVIRONMENTAL ACTS*, § 101 <http://www.navajonationepa.org/Pdf%20files/Uniform.pdf>.

<sup>132</sup> *Id.* at §§ 201–214.

<sup>133</sup> *See Wisconsin v. U.S. Evtl. Prot. Agency*, 266 F.3d 741, 750 (7th Cir. 2001), *cert. denied*, 535 U.S. 1121 (2002) (holding that the EPA correctly granted TAS status under the second *Montana* exception to Mole Lake Band of Lake Superior Chippewa Indians to regulate their water on Mole Lake Reservation); *Montana v. U.S. Evtl. Prot. Agency*, 137 F.3d 1135, 1142 (9th Cir. 1998), *cert. denied*, 525 U.S. 921 (1998) (determining the EPA correctly approved the Confederated Salish and Kootenai Tribes’ authority to regulate non-Indians and businesses within the Flathead reservation finding the “activities of the non-members posed such serious and substantial threats to

statutes. First, enforcing environmental regulations are costly and complex, and many Native nations do not have the resources or legal support to interpret, implement, and enforce the requirements of the federal environmental laws.<sup>134</sup> Second, the “[a]doption of western law can create a gap between the adopted law and the people to whom it is applied” and a government can inadvertently alienate its own people.<sup>135</sup> Further, the option to supplement tribal codes and customary law with federal U.S. law is only available for federally recognized tribes. Perhaps, due to these issues, many Native nations have decided to implement their own laws through inherent tribal sovereignty and customary law.

Native nations need to internalize the resistance to the settler colonial project of climate change through the implementation of tribal codes and customary law, with possible supplementation of U.S. federal law. This internalization of the resistance will create environmental regulations and legal tools to hold members and nonmembers accountable for their pollution and limit the nation’s contribution to climate change. By developing a regulatory scheme tailored to fit the needs of the community, Native nations can use their sovereignty as a tool to resist the settler colonial project of climate change and ensure the protection of Native lands and Native environments.

### C. *Mitigation and Adaptation Projects*

For many Native nations, adopting environmental regulations will not be enough to internalize the resistance to the colonial settler project of climate change and tribes will need to adopt projects that work to counter the environmental harms already committed by internal and external pollution. Native nations have various options for climate change mitigation and adaptation projects that range in expense, difficulty, and partnerships.

When developing Native-specific mitigation and adaptation projects, Native governments should utilize traditional ecological knowledge to detect environmental changes, gather and share information with other Native communities, involve youth to teach future generations, and develop responses to meet the needs of the people.<sup>136</sup> Native governments

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Tribal health and welfare that Tribal regulation was essential”); *City of Albuquerque v. Browner*, 97 F.3d 415, 429 (10th Cir. 1996) (holding the Isleta Pueblo can enact water quality standards more stringent than the federal standards under the powers of inherent tribal sovereignty).

<sup>134</sup> Elizabeth Ann Kronk Warner, *Tribes as Innovative Environmental “Laboratories,”* 86 U. COLO. L. REV. 789, 834 (2015).

<sup>135</sup> *Id.* at 844. “Where there is cultural match, citizens are able to trust in government and actually work with it to achieve desired community ends. Where government institutions allocate power and decision-making in a way that feels culturally illegitimate to the community, citizens’ tendency is to ignore government, criticize it, disrupt its functioning, or use it for self-interested purposes.” MELISSA L. TATUM, MIRIAM JORGENSEN, MARY E. GUSS, & SARAH DEER, *STRUCTURING SOVEREIGNTY: CONSTITUTIONS OF NATIVE NATIONS* 16 (2014).

<sup>136</sup> Northwest Indian Applied Research Institute, *Northwest Tribes: Meeting the*

can utilize their treaties with the U.S. to pressure the federal government into fulfilling its trust responsibility to protect tribal resources being impacted by climate change.<sup>137</sup> For example, if a tribe's treaty has fishing rights associated with the agreement, and the effects of climate change are destroying the fish's habitat, then the tribe's remedy to the federal government's breach of trust would be to demand that the U.S. reduce its carbon emissions.<sup>138</sup> Native governments should also prioritize developing renewable energies, secure freshwater supplies, secure food supplies, and prepare for impacts on species.<sup>139</sup> Mitigation and adaptation projects allow for Native governments to prepare for immediate harms associated with climate change. As an example, The Standing Rock Sioux tribal elders accepted a gift of mobile solar panels to bring renewable energy to the water protectors' camps in order to show their dedication to moving away from fossil fuel and toward renewable energy.<sup>140</sup> To best show the range of mitigation and adaptation projects, the next section will discuss examples from multiple Native nations varying on type, expense, and effectiveness to demonstrate some best practices for other Native nations to adopt.

## 1. Examples of Native Nations' Mitigation and Adaptation Projects

### a. Mescalero Apache

To ensure food security and the survival of the Rainbow and Cutthroat trout, the Mescalero Apache Tribe (Mescalero), in New Mexico, revitalized the Mescalero Tribal Fish Hatchery.<sup>141</sup> In 2003, the Southwest Tribal Fisheries Commission<sup>142</sup> (STFC) was created to support the self-determination of tribes, pueblos, and nations, through the operation of sustainable, recreational, and native fishery programs.<sup>143</sup> The reopening

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*Challenge of Climate Change*, 10 (2006), <http://academic.evergreen.edu/g/grossmaz/climatechangebooklet.pdf>.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* This is a creative legal solution to holding the U.S. accountable for its contributions to climate change. It is unclear how U.S. courts will interpret breach of trust legal claims in a climate change context. This Article suggests Native nations to use this argument to hold the U.S. government to its treaties and to ensure the U.S. is paying for its contributions to climate change.

<sup>139</sup> *Id.*

<sup>140</sup> *Mark Ruffalo Delivers Solar Panels to Camp Where Thousands Are Fighting the Dakota Access Pipeline*, EcoWATCH (Oct. 27, 2016, 07:56 AM), <http://www.ecowatch.com/ruffalo-solar-dakota-access-pipeline-2066031293.html>.

<sup>141</sup> *Mescalero Tribal Fish Hatchery*, MESCALERO APACHE TRIBE, <http://mescaleroapachetribe.com/mescalero-tribal-fish-hatchery> (last visited Apr. 13, 2016). The hatchery was operated by the US Fish and Wildlife Service, between 1966 and 2001, but after a series of floods in 1999 and 2000, the U.S. Fish and Wildlife ceased operations.

<sup>142</sup> *Id.* The mission of STFC is to assist tribes with creating and facilitating inter-governmental and non-governmental partnerships, providing advocacy needed to obtain funding and support, providing tangible services in the form of technical assistance and equipment when developing and running individual fisheries.

<sup>143</sup> *Id.*

of Mescalero Tribal Fish Hatchery in 2004 was borne out of a memorandum of understanding between STFC and the Mescalero to provide young fish to 17 tribal fisheries programs in New Mexico, Arizona, and Colorado.<sup>144</sup> The fish hatchery also serves to teach Native youth about natural resource management and encourages the pursuit of higher education and professional careers in resource management.<sup>145</sup> This hatchery demonstrates how Native governments can ensure food security for their community and work in partnership with other Native governments to limit the impacts of climate change on their food systems and share the cost of implementing and running mitigation programs.<sup>146</sup>

*b. Santa Ynez Band of Chumash Indians*

In California, the Santa Ynez Band of Chumash Indians (Santa Ynez) have developed solar projects that provide 42% of the electricity usage of the Tribal Hall and Health Clinic buildings and is estimated to offset 1,597 tons of greenhouse gas emissions (GHGs) from power plants.<sup>147</sup> Further, their solar projects reduce the Tribal Hall and Health Clinic's electricity bill by at least 44% and are expected to pay for themselves within 10 years.<sup>148</sup> Their solar projects are both a mitigating and adaptive project, which allow for the nation to have a smaller carbon footprint and develop energy self-reliance, independent from California, in the case of an energy crisis triggered by climate change.

*c. Nez Perce Tribe*

The Nez Perce Tribe of Idaho is working to restore the forests within the reservation and paying for it through carbon credits. The benefits from afforestation<sup>149</sup> include, "improved water quality through watershed protection, reduced soil erosion and sedimentation, which improves fish habitat in the river below, and the restoration of wildlife habitat."<sup>150</sup> The afforestation project generates jobs for members, creates a place for recreational activities, and contributes to the regrowth of traditional roots, berries, and medicinal plants needed for cultural practices.<sup>151</sup> To pay for the afforestation project, the Nez Perce are using the carbon sequestration environmental benefits from the new trees to sell marketable carbon sequestration credits on the carbon market.<sup>152</sup> The Nez Perce's afforestation

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<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Solar Projects*, SANTA YNEZ CHUMASH ENVTL. OFF., <http://syceo.org/programs/energy/solar-projects> (last visited Apr. 13, 2016).

<sup>148</sup> *Id.*

<sup>149</sup> Afforestation is the "act or process of establishing a forest especially on land not previously forested." MERRIAM-WEBSTER'S DICTIONARY, <http://www.merriam-webster.com/dictionary/afforestation> (last visited Nov. 21, 2016).

<sup>150</sup> Rachel Mosley & Scott Turnoy, *Nez Perce Tribe: Carbon Sequestration Program*, N. AZ. U. TRIBAL CLIMATE CHANGE PROFILE PROJECT (2007), [http://www7.nau.edu/itep/main/tcc/Tribes/pn\\_nezperce](http://www7.nau.edu/itep/main/tcc/Tribes/pn_nezperce).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* The nation partnered with Montana Carbon Offset Coalition (MCO), now

project is not only a mitigating project, to reduce the amount of greenhouse gases in the atmosphere, but it also brings in revenue and protects their land and cultural resources.

*d. Newtok Village*

The Newtok Village, in Alaska, has developed the ultimate, and most unfortunate, adaptation plan—evacuation.<sup>153</sup> With erosion and permafrost melt, the small Newtok Village land base is being consumed by the Ninglick River, a channel between Baird Inlet and Hazen Bay on the west coast of Alaska.<sup>154</sup> After working with an engineering firm and talking with the community, the village determined that relocating would be the most cost effective and sustainable solution.<sup>155</sup> The “key components of the plan included a strategic focus on community development, site preparation for a new relocation site, housing, transportation, water, and energy.”<sup>156</sup> Currently, their limited FEMA funding has run out and the nation is struggling to attract additional funding for its relocation.<sup>157</sup> While it is a tragedy the Newtok Village has to evacuate from their traditional homelands, their climate change adaptation plan is forward-looking and it provides a detailed route for the community to follow in a time of emergency.

These are just a few examples of Native nations establishing mitigation and adaptation projects that plan to limit the harms of climate change on their communities. Native governments should use these examples, and many more, to develop their own mitigation and adaptation projects that best work for their communities. Through the implementation of mitigation and adaptation projects, Native governments can resist the impacts of the settler colonial project of ecological destruction and protect their communities from the environmental harms associated with climate change.

## **V. Developing a Resistance Strategy to Assert Inherent Sovereignty and Rights under International Human Rights Law**

Internalizing the resistance to the colonial settler project of climate change is not enough. Native nations must also assert their inherent sovereignty and rights under international human rights law to demand government-to-government consultation and consent with international, national, state, and local governments to ensure environmental and

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known as the NCOC (National Carbon Offset Coalition) and the Chicago Climate Exchange (CCX), to develop two carbon credit portfolios to sell the credits on the carbon market. *Id.*

<sup>153</sup> MARY BLACK ET AL., TRIBAL LEADERS SUMMIT ON CLIMATE CHANGE: A FOCUS ON CLIMATE ADAPTATION PLANNING AND IMPLEMENTATION 15 (2015), [http://ccass.arizona.edu/sites/default/files/Tribal%20Leaders%20Summit%20Final%20Report\\_2.pdf](http://ccass.arizona.edu/sites/default/files/Tribal%20Leaders%20Summit%20Final%20Report_2.pdf).

<sup>154</sup> *Id.* at 14.

<sup>155</sup> *Id.* at 15.

<sup>156</sup> *Id.* at 16.

<sup>157</sup> *Id.*

climate change policies and programs consider the needs of Native people. As discussed above, inherent sovereignty is not dependent on any outside power, thus Native nations should operate as nation states and be given the respect of sovereign governments by all other local, state, federal, and international governmental entities.<sup>158</sup> This assertion can take on many forms, including, but not limited to, the advocacy of local, state, and federal legislation and executive orders requiring government-to-government consultation<sup>159</sup>, asserting tribal court jurisdiction in litigation disputes<sup>160</sup>, and the use of banishment to remove unwanted persons from a Native nation's territory.<sup>161</sup>

Further, Native nations must assert that they have the same standing as small nation states in the United Nations to ensure international recognition of their inherent sovereignty and to enforce the rights granted by the adoption of the UN Human Rights Commission's UN Declaration on the Rights of Indigenous People (UN DRIP). World leaders, by adopting UN DRIP in 2007, declared that Indigenous communities and people have the right to protect their territory, to honor their cultural relationship with the land, to assert and repair the injustices inflicted by colonization, and each members' individual right to their distinct cultural heritage and identity.<sup>162</sup> Native nations must advocate for these rights to

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<sup>158</sup> Canby, *supra* 106, at 73.

<sup>159</sup> For example, California legislation, AB 52, amended the California Environmental Protection Act to require all lead state and local agencies to consult with Native nations before the drafting of an Environmental Impact Report to ensure the protection of cultural resources through Native informed mitigation measures. Cal. Code Regs. 21080.3.1; *see also* THE SECRETARY OF THE INTERIOR, SECRETARIAL ORDER NO. 3342: IDENTIFYING OPPORTUNITIES FOR COOPERATIVE AND COLLABORATIVE PARTNERSHIPS WITH FEDERALLY RECOGNIZED INDIAN TRIBES IN THE MANAGEMENT OF FEDERAL LANDS AND RESOURCES (Oct. 21, 2016) (a Secretarial Order to ensure Native nations have meaningful and substantive roles in managing public lands with special geographical, historical and cultural connections to the nation).

<sup>160</sup> *See* Dollar General Corp. v. Mississippi Band of Choctaw Indians, No. 13-1496, 2016 WL 3434397 at \*1 (U.S. June 23, 2016) as an example of a Native nation's court asserting civil jurisdiction of a tort case against a nonmember corporation. The Supreme Court did not issue an opinion because it was a 4-to-4 tie and thus upheld the 5th Circuit decision that the Choctaw Nation had civil jurisdiction over the nonmember corporation.

<sup>161</sup> *See* Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1103 (2007) (discussing banishment as a traditionally imposed form of punishment for wrong doers and as a way to legally remove non-Native persons from Native territories.) This form of punishment is a tool that all inherently sovereign nations have.

<sup>162</sup> G.A. Res. 61/295, annex, Declaration on the Rights of Indigenous Peoples (Sept. 12, 2007), [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf). This historic Declaration took over 20 years of negotiations and work and was not originally supported by Australia, Canada, New Zealand, or the United States. *See* Nicole Friederichs, *A Reason to Revisit Maine's Indian Claims Settlement Acts: The United Nations Declaration on the Rights of Indigenous Peoples*, 35 AM. INDIAN L. REV. 497, 499 (2011). The United States was the last state to support UN DRIP in December 2010, but still holds the position that UN DRIP is not legally binding. *Id.*; *Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples*, TURTLE TALK 1, <https://turtletalk.files.wordpress>.

be incorporated in all future international agreements as required under the right to environmental self-determination and a human rights legal framework.<sup>163</sup>

#### **A. Asserting Native Nations' Inherent Sovereignty and UN DRIP Rights in International Forums**

Native nations need to assert their inherent sovereignty and UN DRIP rights in international forums as part of the resistance strategy to the colonial settler project of climate change. While many international laws and courts do not currently provide remedies to the harms of climate change, through asserting inherent sovereignty and UN DRIP rights, Native nations can shift international law away from favoring colonial states and towards serving Indigenous communities. The participation in the United Nations Framework on Climate Change Conference of the Parties is one example of an international agreement that Native nations must assert their inherent sovereignty and rights under UN DRIP.

The United Nations Framework on Climate Change Conference of the Parties was established because of the global nature of climate change and the need for international leaders to establish a world agreement to lower greenhouse gases, and to develop mitigating and adaptive projects to try to slow or stop climate change. The first United Nations Framework on Climate Change Conference of the Parties entered into force in 1994 and the first Conference of the Parties (COP1) took place in Berlin, Germany, the following year.<sup>164</sup> During COP1, the parties realized there needed to be a stronger global response to climate change with higher emission reduction provisions.<sup>165</sup> Countries created the Kyoto Protocol in 1995, which established legally binding language to hold developed countries to emission reduction targets.<sup>166</sup> The United States never ratified the Kyoto Protocol, thus never agreed to be bound by the language requiring the implementation of emission reduction targets.<sup>167</sup> The United States' decision not to ratify the Kyoto Protocol was based on a domestic cost-benefit analysis that concluded the U.S. would spend a great deal of financial resources for insufficient economic gain.<sup>168</sup>

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com/2010/12/12-17-10-announcement-of-us-support-for-undrip.pdf (last visited Jan. 27, 2017).

<sup>163</sup> Rebecca Tsosie, *Climate Change and Indigenous Peoples: Comparative Models of Sovereignty*, 26 TUL. ENVTL. L.J. 239, 256 (2013). "It is in the interest of all indigenous governments to participate in the discussion of climate equity and formulate an account of environmental self-determination for place-based peoples."

<sup>164</sup> *Background on the UNFCCC: The International Response to Climate Change*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, [http://unfccc.int/essential\\_background/items/6031.php](http://unfccc.int/essential_background/items/6031.php). (last visited Jan. 27, 2017),

<sup>165</sup> See generally, *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Status of Ratification of the Kyoto Protocol*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, [http://unfccc.int/kyoto\\_protocol/status\\_of\\_ratification/items/2613.php](http://unfccc.int/kyoto_protocol/status_of_ratification/items/2613.php) (last visited Jan. 27, 2017).

<sup>168</sup> Cass R. Sunstein, *Of Montreal and Kyoto: A Tale of Two Protocols*, 31 HARV. ENVTL.

Furthermore, many other states did not uphold the agreed-upon emission standards, and developing countries, like China, were not bound to emission limits.<sup>169</sup> Under these circumstances, the Kyoto Protocol did not provide the mechanism the world needed to limit the ever-increasing impacts of climate change.

In 2015, the agreement from COP21 provided new hope for a successful worldwide agreement to reduce emissions. At COP21, representatives from each nation voted to adopt an agreement, including the United States, which holds developed and developing countries to their Intended Nationally Determined Contributions (INDCs).<sup>170</sup> The INDCs are a public declaration of what each country is willing to do to limit emissions from their country.<sup>171</sup> There is some debate as to whether the agreement can legally bind countries. Additionally, there are no specific plans to ensure that Indigenous peoples are protected from the harms of climate change. Recognizing this likely reality, Indigenous people of the world gathered at the COP21 and demanded: access to the negotiation table, recognition, and protection as nations within the final agreement between the parties.<sup>172</sup> The goals of the Indigenous delegation were to show the world the harms from colonization and climate change suffered by Indigenous people, to advocate for tailored solutions to those harms, and to be respected by the world as leaders of nations. The COP21 agreement succeeded in creating a worldwide statement and agreement that will require nations to limit greenhouse gas emissions, implement adaptation polices, and encourage green innovative development. Unfortunately, the final COP21 agreement fails to provide legally binding language that protects human rights and Indigenous peoples' rights when addressing and adapting to climate change.<sup>173</sup> The decision not to provide legally binding language for Indigenous protection "was made in part by

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L. REV. 1, 5–6 (2007).

<sup>169</sup> *Id.* at 4.

<sup>170</sup> *What Is an INDC?*, WORLD RESOURCES INSTITUTE, <http://www.wri.org/indc-definition> (last visited Jan. 27, 2017).

<sup>171</sup> *Id.*

<sup>172</sup> Indigenous scholars have demonstrated that Native nations have and should assert control over environmental decision-making. *See, e.g.,* Rebecca Tsosie, *Indigenous People and Environmental Justice: The Impact of Climate Change*, 78 U. COLO. L. REV. 1625, 1654 (2007) (Indigenous leaders should have "participatory control over national or international environmental decision-making that impacts indigenous peoples . . . recognition of indigenous rights may not be legally required as an aspect of property or other political or civil rights, but, for moral and equitable reasons, it would be unjust not to recognize their unique claims.").

<sup>173</sup> *Adoption of the Paris Agreement*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE 21, <https://unfccc.int/resource/docs/2015/cop21/eng/109r01.pdf>; *What the Paris Climate Agreement Means for Indigenous Rights and Hydroelectric Dams*, ECOWATCH.COM (Dec. 14, 2015), <http://ecowatch.com/2015/12/14/indigenous-rights-cop21>. "As the final agreement appears, language pertaining to indigenous groups resides in the preamble—a completely non-binding portion of the text. The only other mention includes a recognition of indigenous ecological knowledge, although the wording provides no protection for such peoples."

pressure from the UK, Norway, the EU, and the U.S., who fear the legal liability that would follow mandated recognition of indigenous groups.”<sup>174</sup> This failure sparked significant criticism from Indigenous communities and climate justice organizations, who wanted more from the COP21 negotiations. Despite this setback, Indigenous leaders should keep pushing for recognition as nations and acknowledgement of their inherent sovereignty and UN DRIP rights to continually assert their sovereign status as nations. Further, industrialized and high-polluting countries should be held directly liable for the harms committed to the earth and should pay for all damages inflicted on Indigenous communities.

UN DRIP can be a powerful tool for protecting Indigenous rights if utilized correctly. UN DRIP specifically recognizes that Indigenous peoples’ rights are both collective and individual, thus allowing for standing as individuals and as a collective people.<sup>175</sup> Further, UN DRIP Article 19 provides the requirement that Indigenous people are given the “right to participate in decision making and free, prior, and informed consent.”<sup>176</sup> This provision requires nations to include Indigenous people in making any decision that affects their lives; consultation must not try to coerce Indigenous people into agreement; the government must give Indigenous communities all the information they need to make their decision; Indigenous communities must be given enough time to make an informed decision; consultation must only end when an agreement has been made; and Indigenous people must have the right to make decisions according to their own decision-making processes.<sup>177</sup>

Additionally, Article 27 of UN DRIP provides the crucial component of redress where the Declaration “calls upon states to establish an independent, impartial, open transparent process in which Indigenous peoples participate to resolve and adjudicate claims to their lands, territories, and resources.”<sup>178</sup> Furthermore, UN DRIP creates a baseline standard for evaluating domestic law pertaining to Indigenous rights, and urges nations to create laws consistent with the scope and content of the rights articulated in the Declaration.<sup>179</sup> However, because of the slow and

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<sup>174</sup> Alexandra Karambelas, *What the Paris Climate Agreement Means for Indigenous Rights and Hydroelectric Dams*, EcoWATCH.COM (Dec. 14, 2015), <http://ecowatch.com/2015/12/14/indigenous-rights-cop21>.

<sup>175</sup> G.A. Res. 61/295, annex, Declaration on the Rights of Indigenous Peoples (Sept. 12, 2007), [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf).

<sup>176</sup> G.A. Res. 61/295, annex, Declaration on the Rights of Indigenous Peoples (Sept. 12, 2007), [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf).

<sup>177</sup> G.A. Res. 61/295, annex, Declaration on the Rights of Indigenous Peoples (Sept. 12, 2007), [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf).

<sup>178</sup> G.A. Res. 61/295, annex, Declaration on the Rights of Indigenous Peoples (Sept. 12, 2007), [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf); G. William Rice, *The Indian Reorganization Act, the Declaration on the Rights of Indigenous Peoples, and a Proposed Carcieri “Fix”*: *Updating the Trust Land Acquisition Process*, 45 IDAHO L. REV. 575, 591 (2009). The author suggests the leading reason the United States chose to vote against UN DRIP was the right of redress.

<sup>179</sup> Wenona T. Singel, *New Directions for International Law and Indigenous Peoples*,

uncertain process of human rights cases in international courts and the active resistance against Indigenous rights from the United States, Native nations within the U.S. border must push for recognition in future international agreements and act locally to meet the immediate needs of their communities to mitigate and adapt to the impacts of climate change. Further, by engaging the U.S. in an international setting, Native nations can assert their sovereignty as nations and use international law to actively resist against the settler colonial project of climate change and ecological destruction.

To understand and illustrate the strength of using the international forum as a way of resisting U.S. settler colonialism, it is helpful to look once again at the example set by the Standing Rock Sioux Tribe. Dave Archambault II, chairman of the Standing Rock Sioux Tribe, delivered a speech to the United Nations Human Rights Commission, asking for the members “to condemn ‘the deliberate destruction of our sacred places.’”<sup>180</sup> Archambault informed the Commission of the oil companies and the U.S. government’s failure to respect the Standing Rock Sioux’s sovereign rights to oppose the construction of the pipeline on their lands.<sup>181</sup> He further informed the Commission of the destruction of sacred sites and burial grounds as well as the use of attack dogs, pepper spray, and militarized police to harm and intimidate Protectors.<sup>182</sup> Three days later, the Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz, called upon the United States. to immediately halt the construction of the Dakota Access Pipeline.<sup>183</sup>

While appealing to the United Nations Human Rights Commission is significant to asserting the Standing Rock Sioux’s sovereignty and publicly denouncing the actions of the U.S. government, very little help has come from the international community. International courts have not utilized UN DRIP or the COP21 to hold the U.S. accountable for the ecological destruction of the Standing Rock Sioux’s land, water, and cultural resources. While relief was not granted to the Standing Rock Sioux, it was another step forward in asserting sovereignty and human rights against the United States. Native nations must band together and continuously demand international recognition to actively resist settler colonial ecological destruction of their lands and assert their sovereignty. Hopefully, in the future, UN DRIP will be given the legal weight needed to hold

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45 IDAHO L. REV. 509, 511 (2009).

<sup>180</sup> Mike Nowatzki, *Standing Rock Chairman Asks U.N. Commission to Oppose Dakota Access Pipeline*, BISMARCK TRIBUNE (Sept. 20, 2016), [http://bismarcktribune.com/news/state-and-regional/standing-rock-chairman-asks-u-n-commission-to-oppose-dakota/article\\_421a94ad-d90d-5223-a1ab-fe466860d295.html](http://bismarcktribune.com/news/state-and-regional/standing-rock-chairman-asks-u-n-commission-to-oppose-dakota/article_421a94ad-d90d-5223-a1ab-fe466860d295.html).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> Tom Goldtooth, *United Nation Experts Validate Standing Rock Sioux Opposition to Dakota Access Pipeline*, INDIGENOUS ENVIRONMENTAL NETWORK (Sept. 23, 2016), <https://www.mynewsletterbuilder.com/email/newsletter/1412718766>.

settler nations, like the U.S., accountable for the ecological destruction of Indigenous lands.

**B. Asserting Native Nations' Inherent Sovereignty and UN DRIP Rights in Local, State, and Federal Policies and Litigation**

Asserting inherent sovereignty and UN DRIP rights should also be implemented in local, state, and federal litigation as a strategic plan to overturn the Doctrine of Discovery and implement a human rights legal framework within the United States domestic legal system. Through this human rights framework, Native nations can demand stronger protections from the white settler colonial project of climate change. Walter Echo-Hawk in his book, *In the Light of Justice*, constructs a legal strategy plan of overturning the Doctrine of Discovery in the United States.<sup>184</sup> He argues there needs to be a national Native American campaign working to implement UN DRIP in all stages of advocacy, including conferences, meetings, hearings, and litigation.<sup>185</sup> While this legal strategy is an exciting thought, it has not taken root, mostly because it poses a monumental task for Native advocates, which is complicated further by the complacency around the utilization and enforcement power of UN DRIP.<sup>186</sup> However, at the grassroots level, some steps have been taken towards complete rejection of the Doctrine of Discovery. For example, at Standing Rock, more than 500 interfaith clergy joined Water Protectors at the camp in symbolically burning copies of religious documents and papal decrees

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<sup>184</sup> WALTER R. ECHO-HAWK, *IN THE LIGHT OF JUSTICE: THE RISE OF HUMAN RIGHTS IN NATIVE AMERICA AND THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES* (2013). Echo-Hawk uses the NAACP's legal strategy of overturning *Plessy v. Ferguson* in *Brown v. Board of Education* as a case study to inform his research on the legal steps Native nations need to adopt to implement UN DRIP and overturn the legal effects of the Doctrine of Discovery. *Id.* at 236–239.

<sup>185</sup> *Id.* at 245. Echo-Hawk explains that the strategy includes:

(1) [creation of] a theoretical framework for law reform; (2) overturn *Johnson v. M'Intosh*; (3) make courts perform their bulwark function; (4) reform trusteeship and the “dark side” of guardianship; (4) reform the plenary power doctrine and overturn *Lone Wolf*; (5) overturn *Lyng* and strengthen cultural sovereignty; and (8) find effective ways to protect indigenous habitat. *Id.* at 243.

<sup>186</sup> *Id.* at 251. There have been very few cases in the United States that have ruled on UN DRIP claims and none seriously briefed or particularly relevant to Indigenous rights. See *Gonzalez v. Ocwen Home Loan Servicing*, 74 F. Supp. 3d 504, n. 9 (D. Conn. 2015) (holding the Plaintiffs “erroneously equate a Declaration of the United Nations with the United States Constitution” and that UN DRIP is not legally binding, but “represent[s] the dynamic development of international legal norms and reflect[s] the commitment of states to move in certain directions, abiding by certain principles”); *Smith-Bey v. Wolfe*, 2015 U.S. Dist. LEXIS 52859, at\*3 (D. Md. 2015) (holding the United States does not recognize a “Moorish/Muurish Nation” as a sovereign, but not holding on any UN DRIP claims brought by the Plaintiff); *Abdul-Hakim Bey v. Iaquinto*, 2015 U.S. Dist. LEXIS 135636 (S.D. N.Y. 2015) (holding a copy of the front page of UN DRIP is not relevant to the court jurisdiction).

creating the Doctrine of Discovery and encouraging the oppression, enslavement, and killing of Native people.<sup>187</sup>

Native nations and advocates should attempt to shift domestic common law away from the Doctrine of Discovery and toward the legal standards set out in UN DRIP to ensure proper consultation and consent procedures are followed and adequate compensation is paid for past harms.<sup>188</sup> Other countries are beginning to adopt UN DRIP into their domestic legal systems. For example, in *Aurelio Cal et al v. Belize*,<sup>189</sup> the Belize Supreme Court found that through the interpretation of the Belize's constitution, opinions of human rights systems, and UN DRIP, the defendants were "bound by domestic and international law 'to respect the rights to and interests of the claimants as members of the indigenous Maya community'" and recognize traditional uses of land as legitimate property rights.<sup>190</sup> Similarly, in the Botswana High Court acknowledged land rights of San Hunter-gatherers using principles map onto those in UN DRIP.<sup>191</sup> These two cases can provide a start to an international legal movement away from Doctrine of Discovery and toward UN DRIP principles, which will ultimately increase Indigenous rights, sovereignty, and environmental protection.

For the United States, the State Department has supported UN DRIP and expressed that, while UN DRIP is non-binding, it has "moral and political force."<sup>192</sup> Further, the State Department has asserted, "the United States is committed to serving as a model in the international community in promoting and protecting the collective rights of indigenous peoples as well as the human rights of all individuals."<sup>193</sup> United States litigants should start using the statements and commitment of the State Department and particular articles of UN DRIP as moral and political authority to support domestic legal claims to begin pushing courts to discuss UN DRIP in their holdings and develop judicial common law.<sup>194</sup>

<sup>187</sup> Carol Kuruvilla, *Standing Rock Protestors Burn Document that Justified Indigenous Oppression*, HUFFINGTON POST (Nov. 14, 2016, 4:27 PM), [http://www.huffingtonpost.com/entry/interfaith-clergy-dapl-doctrine-of-discovery\\_us\\_581cb86ae4b0aac62483d92f](http://www.huffingtonpost.com/entry/interfaith-clergy-dapl-doctrine-of-discovery_us_581cb86ae4b0aac62483d92f).

<sup>188</sup> See Kristen A. Carpenter & Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Movement in Human Rights*, 102 CAL. L. REV. 173, 211 (2014) (discussing how other countries have begun adopting UN DRIP into their domestic legal systems).

<sup>189</sup> *Aurelio Cal v. Belize* (2007) (Sup. Ct. Belize, Claims No. 171 and 172 of 2007).

<sup>190</sup> Carpenter & Riley, *supra* note 188, at 213.

<sup>191</sup> *Id.* at 214 (citing *Alexkor Ltd. V. Richtersveld Cmnty* 2003 (5) SA 460 (CC) at 38–39, para. 5 (S. Afr.), <http://www.saflii.org/za/cases/ZACC/2003/18.html>).

<sup>192</sup> *Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples*, U.S. DEP'T OF STATE 1, <http://www.state.gov/documents/organization/184099.pdf>. (Nov. 15, 2016).

<sup>193</sup> *Id.* at 2.

<sup>194</sup> For state law cases and administrative judicial hearings, the strategy would be the same, but would be strengthened if the state has also declared its support for UN DRIP. See, e.g., J. Res. 42, 14 Assemb., Reg. Sess. (Cal. 2014) (resolving California to endorsing the principles of UN DRIP). The more acknowledgement of domestic legal entities, the stronger moral and political force UN DRIP will have and will make it easier for courts to establish judicial common law.

The Standing Rock Sioux's litigation against the U.S. Army Corps of Engineers provides an example of a missed opportunity to assert UN DRIP rights.<sup>195</sup> The complaint, filed by Earthjustice on behalf of the Standing Rock Sioux, asserts several strong federal environmental claims under the Clean Water Act and the National Environmental Protection Act, as well as consultation claims under the National Historic Preservation Act.<sup>196</sup> Yet, there was no assertion of the Standing Rock Sioux's UN DRIP rights. Thus, this case is a missed opportunity to use the publicity of the resistance to the Dakota Access Pipeline to pressure courts to grapple with, and hopefully adopt, UN DRIP. By focusing the litigation strategy in purely environmental and consultation terms, the Standing Rock Sioux run the risk of minimizing the impacts of the construction of the pipeline on the nation's sovereignty and the human rights of its people. All Native nations take this risk when they bring environmental legal claims in local, state, and federal courts without asserting inherent sovereignty and UN DRIP rights. Unless Native advocates start asserting human rights and UN DRIP claims in their complaints, the Doctrine of Discovery will never be overturned and UN DRIP will never be adopted into U.S. common law.

The failure of the U.S. to address climate change's impact on land loss, destruction of cultural resources, and Native ways of life "is not much different from the 19th century notion of the 'vanishing redman,' which posited that indigenous peoples would disappear in the face of civilization."<sup>197</sup> While Native nations have survived hundreds of years of colonization and will continue to survive in the face of future harms,

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<sup>195</sup> Nowatzki, *supra* note 180.

<sup>196</sup> Complaint for Declaratory & Injunctive Relief, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, (2016).

(No. 16-05259), <http://earthjustice.org/sites/default/files/files/3154%201%20Complaint.pdf>. Some UN DRIP claims that could have been paired with the Earthjustice complaint include: Article 11 of UN DRIP the right "to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature"; Article 18 and 19 the right "to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions" and to "consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them." G.A. Res. 61/295, annex, Declaration on the Rights of Indigenous Peoples (Sept. 12, 2007), [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf).

<sup>197</sup> Rebecca Tsosie, *Climate Change, Sustainability and Globalization: Charting the Future of Indigenous Environmental Self-Determination*, 4 ENV'TL. & ENERGY L. & POL'Y J. 188, 192 (2009). If the particular impacts of climate change on Indigenous communities are not properly addressed in a culturally sensitive matter and are only interpreted in a cost effective manner, the disappearance of Indigenous people will become a mere "footnote to globalization." *Id.* at 191.

Native nations must be ready to make a stand and actively fight against ecological destruction. By adopting a resistance strategy, Native nations must assert their inherent sovereignty and UN DRIP rights in local, state, national, and international forums to ensure environmental protection of their lands, overturn the Doctrine of Discovery through changing the United States legal framework, and work to ensure the protection of Native nations and people in the face of climate change.

### **Conclusion**

Native nations must actively resist the settler colonial project of climate change. As this article has elucidated, this goal can be accomplished through a resistance strategy in two parts. First, Native nations must internalize resistance through the creation of tribal codes and adoption of customary laws, which can be supplemented with select U.S. laws and programs. Second, they must assert their inherent sovereignty and UN DRIP rights in local, state, federal, and international litigation. Through this resistance strategy, Native nations can fight against the settler colonial project of climate change and work to ensure the protection of the environment and Indigenous ways of life.