# HAMPTONS AESTHETICS VS. SHINNECOCK RIGHTS: HOW THE FEDERAL GOVERNMENT IS FAILING TO PROTECT INDIGENOUS SOVEREIGNTY FROM STATE JUDICIAL INFRINGEMENT

*Lindsay M. Brocki*[*]

*Gaining federal recognition solidifies that [the Shinnecock Nation] has a government-to-government relationship with the federal government, that we have trust resources that should be protected, including our lands, our waters, and our culture resources. Yet we continue to fight social injustices and discrimination in one of the wealthiest abodes in the state, and we're working to defend our sovereignty and tribal territory from further theft and intrusion.*[1]

- Kelly Dennis, Esq., Shinnecock Nation Council of Trustees

## TABLE OF CONTENTS

I. INTRODUCTION .......... 196
II. BACKGROUND .......... 199
  A. *The Evolution of Tribal Sovereignty* .......... 199
  B. *Federal Trust Responsibility: The Federal Government's Duty to Indigenous Tribes* .......... 203
  C. *The Bureau of Indian Affairs* .......... 204
  D. *Federal Recognition of the Shinnecock Nation* .......... 206
  E. *The Monuments* .......... 207
III. THE PROBLEM: A LACK OF PROTECTION FROM THE FEDERAL GOVERNMENT .......... 210

[*] Lindsay M. Brocki is the Managing Editor of the *Cardozo Journal of Equal Rights and Social Justice*, an Advanced Legal Intern with the Kathryn O. Greenberg Immigration Justice Clinic, and a Research Assistant to Professor Lindsay Nash. She wishes to thank her family for their support in drafting her note, especially her husband Michael. A special thanks to the Council of Trustees of the Shinnecock Indian Nation for taking the time to discuss their important work in fighting the injustices they face everyday.

[1] Interview with Bryan Polite, Chairman, Shinnecock Nation Council of Trustees, Donald Williams Jr., Councilman, Shinnecock Nation Council of Trustees, Germain Smith, Councilman, Shinnecock Nation Council of Trustees, Kelly Dennis Esq., Councilwoman, Shinnecock Nation Council of Trustees, Seneca Bowen Councilman, Shinnecock Nation Council of Trustees (March 1, 2022).

A. *Pattern of State Interference with Sovereign Tribal Land* ...... 210
B. *The Legal Fiction of Tribal Immunity* .................................... 211
C. *A Closer Examination: The Shinnecock Billboard Lawsuit* .... 212
1. Sovereignty Issues within the Shinnecock Billboard Lawsuit ............................................................... 215
D. *The "Spirit of the Law"* .......................................................... 215
E. *Potential Future Issues* ........................................................... 216
IV. PROPOSAL: A MORE ROBUST APPROACH TO PRESERVING TRIBAL SOVEREIGNTY ................................................................................ 217
A. *Legislative Remedies* .............................................................. 218
1. True Protection of Tribal Immunity .................................. 218
B. *Remedy through Administrative Agency* ................................ 219
1. Reorganization of the Bureau of Indian Affairs ................ 219
2. Creation of a New Administrative Agency ........................ 220
V. CONCLUSION ................................................................................. 221

# I. INTRODUCTION

On the eastern end of Long Island, New York, a power imbalance has been perpetuated for generations: the fundamental inequality between the original dwellers of the land, the Shinnecock Indian Nation, and the opulent summer community that has come to surround it.[2] This inequality manifests itself in numerous ways, including state and local government infringement on the Shinnecock Nation's rightful use of its sovereign land.[3]

The meaning of the word "sovereign" has a long and storied history in relation to indigenous tribes in the United States. The United States federal government has recognized the sovereignty of indigenous tribes since colonial times, yet the actual significance of this recognition has never been

[2] Comm'r of N.Y State Dep't of Transp. v. Polite, 67 Misc. 3d 1222(A) (N.Y. Sup. Ct. 2020).

> Not only is it undisputed that the Nation owns the land in question…but there is no doubt that the Nation has owned it for many decades, if not centuries, predating most, if not all, significant development in the area and that it is the only remaining part of their once-extensive demesne that touches the Peconic Bay side of Long Island.

*Id.* at *2.

[3] Corey Kilgannon, *Why a Hamptons Highway Is a Battleground Over Native American Rights*, N.Y. TIMES (May 27, 2019), https://www.nytimes.com/2019/05/27/nyregion/hamptons-shinnecock-billboards.html; Lina Mann, *Self Determination without Termination: President Richard M. Nixon's Approach to Native American Policy Reform*, THE WHITE HOUSE HIST. ASS'N, (Nov. 3, 2021), https://www.whitehousehistory.org/self-determination-without-termination; *Polite*, 67 Misc 3d 1222(A).

made clear.[4] The federal government has transitioned through several phases in its approach to affording sovereignty to indigenous tribes, resulting in the Nixon Administration's support for "tribal self-determination" in 1970.[5] However, even a federally-recognized indigenous tribe does not possess absolute sovereignty, as this Note will explain, and this gray area leads to friction between tribes, states, and the federal government.[6]

This friction erupted once again in 2019 when the Shinnecock Indian Nation began construction on the first of two sixty-one-foot electronic billboards to be placed on two pieces of their land ("the Westwoods Property") located on the east and westbound sides of New York State Route 27 ("Sunrise Highway"), in the town of Southampton, New York.[7] Southampton is located in the Hamptons community—a collection of towns, hamlets, and villages on Eastern Long Island[8]—widely known for its "fancy eateries and movie-star summer residents,"[9] with seasonal visitors arriving, often via helicopter, to enjoy their "summer playground."[10] The Shinnecock Nation's plans sparked outrage amongst these wealthy summer residents who complained that the billboards were "clearly out of character" with the area's affluent and understated atmosphere,[11] with one objector stating, "I believe

---

[4] *Polite,* 67 Misc. 3d 1222(A), at *1; *see, e.g*., Michael P. Gross, *Indian Self-Determination and Tribal Sovereignty: An Analysis of Recent Federal Indian Policy*, 56 TEX. L. REV. 1195, 1199 (1978) ("[W]hile [The Indian Self-Determination and Education Assistance Act of 1975] recognizes that 'the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons,' the Act nevertheless continues to impose particular forms of those relationships."); *see also* Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 700 (1989) ("What are the bases of a vision that recognizes the autonomy of 'sovereigns' within another sovereignty? What is meant by that autonomy? How much of that autonomy is dependent upon a vision of 'sovereignty' that, if ever true, has surely vanished?").

[5] Geoffrey D. Strommer & Stephen D. Osborne, *The History, Status, and Future of Tribal Self-Governance Under the Indian Self-Determination and Education Assistance Act*, 39 AM. INDIAN L. REV. 1, 17 (2015).

[6] Conference of Western Attorneys General, American Indian Law Deskbook Ch. 3 Introduction 2022.

[7] Lisa Finn, *State Threatens To Remove Shinnecock Nation's 2 Large Billboards*, PATCH (Feb. 3, 2021, 8:31 AM), https://patch.com/new-york/southampton/state-threatens-remove-shinnecock-nations-2-large-billboards.

[8] LONGISLAND.COM, https://www.longislandexchange.com/long-island/the-hamptons/#:~:text=The%20Hamptons%20is%20a%20group,Quogue%2C%20Sag%20Harbor%20and%20Montauk (last visited Sept. 13, 2022).

[9] Jennifer Steinhauer, *Beverly Hills 11968: Once for Artists, the Hamptons are now Home to Glittering Hordes.*, N.Y. TIMES (May 31, 1998), https://archive.nytimes.com/www.nytimes.com/books/98/05/31/reviews/980531.31steinht.html.

[10] Jacob Bernstein, *As the Hamptons Boom, a New World of Luxury Problems: Ragers on the Beach. Art Galleries on Main Street. Reservations Disappearing. Who Remembers the Pandemic?*, N.Y. TIMES at 1 (June 1, 2021), https://www.nytimes.com/2021/05/29/style/hamptons-summer-2021.html.

[11] Kilgannon, *supra* note 3.

that it doesn't allow you to maintain the purity of an enclave here."[12] In response to these complaints, Chairman Bryan Polite of the Shinnecock Nation stated, "[w]e're a sovereign nation and they have no authority to tell us what we can and cannot do on our tribal land."[13] Further, Polite maintained, "[w]e're the forgotten people of the Hamptons, so now we have our marker on the Gateway to the Hamptons, reminding people that they're all visitors on our land."[14]

Despite Polite's affirmation of sovereignty, the Commissioner of the New York State Department of Transportation and the state of New York filed suit against members of the Shinnecock tribe, including Polite, seeking to enjoin the construction of the billboards in the case *Comm'r of N.Y. State Dep't of Transp. v. Polite*.[15] The New York State Supreme Court denied the preliminary injunction without prejudice, finding that the plaintiffs failed to show a likelihood of irreparable harm in the absence of an injunction.[16] While the court dismissed New York State's motion for a preliminary injunction, New York has made it clear that it intends to continue pursuing legal action against the Shinnecock Indian Nation to remove the billboards.[17]

The case of *Comm'r of N.Y. State Dep't of Transp. v. Polite*[18] demonstrates an overarching problem between state governments and indigenous tribes in general. Federally-recognized tribes have the right to self-determination and self-government, yet they often face obstruction from the government when they use their land in a way that offends local, state, or federal interests.[19] In the case of the Shinnecock Nation, the tribe seemingly faced backlash based on the mere fact that it used its land in a manner that did not aesthetically please its wealthy neighbors and, further, faced a lawsuit from the state of New York.

Part II of this Note will examine the evolving relationship between indigenous tribes, the states, and the federal government. Part III of this Note will discuss how tribes' sovereign rights are slowly being stripped away by states encroaching upon these rights, combined with a lack of protection from the federal government. Finally, Part IV of this Note will propose legislative

---

[12] The Daily Show with Trevor Noah, *A Monumental Dispute in the Hamptons*, YOUTUBE, at 01:13 (Sept. 20, 2019), https://www.youtube.com/watch?v=-ipVqEHlsl8 (Correspondent Michael Kosta interviewed shoppers on Main Street about the billboard, who were quoted as saying, "[I]t is kind of an eyesore . . . . [y]ou know, you come here for [the Hampton's] beautiful nature and environment and to see [the billboard] it's out of place." Another called it, "[v]ery obtrusive and distracting.").

[13] *Id.* at 01:54.

[14] *Id.* at 02:05.

[15] Comm'r of N.Y State Dep't of Transp. v. Polite, 67 Misc. 3d 1222(A) at *1 (N.Y. Sup. Ct. 2020).

[16] *Id.*

[17] Finn, *supra* note 7.

[18] *Polite*, 67 Misc. 3d 1222(A).

[19] Mann, *supra* note 3.

and administrative solutions to this longstanding issue. This Note will explore this infringement of sovereignty through the lens of the Shinnecock Nation's ongoing legal battle surrounding billboards it constructed on its sovereign land and propose a policy change that will better reflect the spirit of self-determination, as well as more securely protect the sovereign rights of indigenous tribes.

## II. BACKGROUND

### *A. The Evolution of Tribal Sovereignty*

While the word "sovereignty" is defined as "[s]upreme dominion, authority, or rule," indigenous tribes have never truly been afforded this level of power by the federal government.[20] Instead, the government views indigenous tribes as "domestic, dependent nations."[21] This ambiguous and fluctuating view of indigenous sovereignty has had many iterations spanning several centuries.[22]

The United States Constitution gives Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes,"[23] and establishes that treaties made with sovereign nations shall be the supreme law of the land.[24] Therefore, the federal government recognizes and has power over Indian affairs through the Constitution.[25] Federal authority over Indian affairs results in "little room for state involvement" unless Congress "grants to a state the power to regulate persons or conduct inside Indian land."[26]

---

[20] *Sovereignty*, BLACK'S LAW DICTIONARY (11th ed. 2019);

> [A]fter the Revolutionary War of 1776 and formation of the United States Constitution in 1789, the relationship between the United States and tribal governments was ambivalent.18 On the one hand, treaties between the United States and Indian tribes served as formal recognition of government-to-government relationships.19 On the other hand, the cultures of the so-called 'savages' were seen as inferior to white 'civilization,' and thus were treated as doomed to disappear.

Strommer & Osborne, *supra* note 5, at 6.

[21] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, WHAT IS FEDERAL INDIAN LAW? (Nell Jessup Newton ed., 2019).

[22] Mann, *supra* note 3.

[23] U.S. CONST. art. I, § 8, cl. 3.

[24] *See* U.S. CONST. art. VI ("[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby[.]").

[25] *See* Brandon Byers, *Federal Question Jurisdiction and Indian Tribes: The Second Circuit Closes the Courthouse Doors in* New York v. Shinnecock Indian Nation, 82 U. CIN. L. REV. 901 (2014); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 21.

[26] Byers, *supra* note 24; COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 21.

The relationship between indigenous tribes and the federal government has undergone many transformations throughout history.[27] Throughout the nineteenth century, the federal government enacted and administered aggressive and violent policies toward indigenous tribes, such as the Indian Removal Act of 1830, which enforced the displacement and relocation of thousands of Native Americans from their ancestral lands.[28] While removal was said to be voluntary under the Act, President Andrew Jackson ensured that "tribes refusing to relocate would lose federal protection and be subject to state laws and jurisdiction" and "[i]n the end, those who did not move "voluntarily" (generally through fraud or coercion) were removed forcibly."[29]

During this devastating time for indigenous tribes, the Supreme Court ruled in *Johnson v. M'Intosh* that "European discovery did not extinguish tribal property rights; although the federal government held 'ultimate title,' tribes retained the right of possession and use."[30] This decision "recognized tribes as separate governments" without "important political and property rights."[31]

In the late 1800's, westward expansion in the United States led to "the reversal of Indian policy from isolation to assimilation."[32] In 1887, Congress banned the formation of new treaties between Indian tribes and the federal government, effectively ending the "government-to-government" relationship with the tribes.[33] Further, in the same year, Congress enacted the General Allotment Act (the "Dawes Act"), which "provided for the breakup of tribally owned reservation lands by allotting them to individual Indian owners."[34] In the fifty years following this policy, the native tribal land base decreased from 138 million acres to forty-eight million acres.[35] Though later overturned, the impact of the legislation is still visible today through the "high parcelization, varying and multiple ownership, and jurisdictional 'checkerboard' of many reservations."[36]

---

[27] Strommer & Osborne, *supra* note 5, at 9.

[28] *May 28, 1830 CE: Indian Removal Act*, NAT'L GEOGRAPHIC, https://www.nationalgeographic.org/thisday/may28/indian-removal-act/#:~:text=On%20March%2028%2C%201830%2C%20Congress,as%20the%20Trail%20of%20Tears.&text=Native%20Americans%20opposed%20removal%20from,battles%20with%20local%20white%20settlers (last visited Sept. 13, 2022).

[29] Gross, *supra* note 4, at 1197.

[30] Strommer & Osborne, *supra* note 5, at 10 (citing Johnson v. M'Intosh, 21 U.S. 574 (1823)).

[31] Gross, *supra* note 4, at 1197 (citing *Johnson*, 21 U.S. 574).

[32] Strommer & Osborne, *supra* note 5, at 10.

[33] *Id.*

[34] *Id.* at 13-14.

[35] *Id.* at 14.

[36] *Id.*

In 1934, Congress officially repudiated the Dawes Act through the passage of the Indian Reorganization Act (the "Wheeler–Howard Act"), which was "aimed at decreasing federal control of American Indian affairs and increasing Indian self-government and responsibility."[37] To accomplish these goals, the Wheeler-Howard Act halted the "future allotment of tribal communal lands to individuals and provided for the return of surplus lands to the tribes rather than to homesteaders," as well as "encouraged written constitutions and charters giving Indians the power to manage their internal affairs."[38]

Next, the Termination Era began with the Hoover Commission's advocacy for "full assimilation of Indians into the dominant American culture" in 1948.[39] In the 1950's, Public Law 83-280 was passed, which ceded from the federal government "criminal and civil jurisdiction over Indians to some states and authorized other states to assume jurisdiction over federally recognized tribes within their borders."[40] Through the Termination Act of 1954, the federal government aimed to "end federal supervision, . . . . weaken tribal governments, and assimilate individual Indians."[41]

However, by the late 1960's, Native Americans were openly opposed to further assimilation efforts by the government. Tribal leaders sought self-determination, arguing that they "should have autonomy and the opportunity to create programs and services themselves."[42] The deep problems with Termination were on display in the 1968 Supreme Court case of *Menominee Tribe of Indians v. U.S.*, in which the Menominee Tribe argued that it maintained hunting and fishing rights in the Wolf River Reservation through a previous treaty with the federal government, despite the fact that the tribe's reservation was "terminated" by the Termination Act.[43] While the Termination Act provided that "the laws of the several States shall apply to

[37] The Editors of Encyclopedia Britannica, *Indian Reorganization Act*, ENCYC. BRITANNICA, https://www.britannica.com/topic/Indian-Reorganization-Act; Strommer & Osborne, *supra* note 5, at 14.

[38] *Id.* "[T]he [Wheeler-Howard Act] remains the basis of federal legislation concerning Indian affairs. The act's basic aims were reinforced in the 1960s and '70s by the further transfer of administrative responsibility for reservation services to the Indians themselves, who continued to depend on the federal government to finance those services." *Id.*

[39] Emily Kane, *State Jurisdiction in Idaho Indian Country Under Public Law 280*, 48 JAN ADVOC. 10 (2005).

[40] Strommer & Osborne, *supra* note 5, at 15.

[41] *Id.* at 15-16; Menominee Tribe of Indians v. U.S., 391 U.S. 404, 407-08 (1968).

[42] Mann, *supra* note 3, at 2.

[43]

> [T]he purpose of the 1954 Act was by its terms 'to provide for orderly termination of Federal supervision over the property and members' of the tribe. Under its provisions, the tribe was to formulate a plan for future control of tribal property and service functions theretofore conducted by the United States.

Menominee Tribe of Indians, 391 U.S. at 407-08.

the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction," the Court held that this language did not serve "as a backhanded way of abrogating the hunting and fishing rights of these Indians."[44] Additionally, the Court upheld the treaty as an authorization of the Menominee Tribe to preserve and maintain their lands as a reservation and as means to uphold their way of life, including hunting and fishing.[45]

A significant shift occurred in governmental and tribal relations when President Gerald Ford signed the Indian Self-Determination and Education Assistance Act into law in January 1975.[46] The passage of this act meant that, for the first time, Native Americans could "assume responsibility for . . . . the most important services provided for them by the federal government without risking termination—a dreaded and recurrent federal Indian policy that removed, by an Act of Congress, the special federal status of an Indian tribe when the tribe undertook to provide certain services itself."[47] This legislation arose largely from the efforts of the Nixon administration to "overhaul Native American policy and work to return land to Indigenous groups while facing mounting protests from the Native American community."[48] President Richard Nixon announced his plan to address the concerns of the indigenous community during his presidential campaign in 1968, laying out a plan to "uplift reservations through economic development, as well as a rejection and reversal of the United States "termination" policy that had been law for fifteen years."[49] This plan was designed to "reverse nearly a century of policies meant to assimilate Native Americans into white society."[50] When advocating for self-determination, Nixon stated:

> Because termination is morally and legally unacceptable, because it produces bad practical results, and because the mere threat of termination tends to discourage self-sufficiency among Indian groups, I am asking the

---

[44] *Id.* at 406, 412.

[45] *Id.*

[46] Mann, *supra* note 3.

[47] Gross, *supra* note 4, at 1197.

[48] Mann, *supra* note 3, at 1.

[49] *Id.* at 1.

[50] Mann, *supra* note 3;

> The First Americans—The Indians—are the most deprived and most isolated minority group in our nation. On virtually every scale of measurement—employment, income, education, health—the condition of the Indian people ranks at the bottom. This condition is the heritage of centuries of injustice. From the time of their first contact with European settlers, the American Indians have been oppressed and brutalized, deprived of their ancestral lands and denied the opportunity to control their own destiny. Even the Federal programs which are intended to meet their needs have frequently proven to be ineffective and demanding.

*Id.*

> Congress to pass a new Concurrent Resolution which would expressly renounce, repudiate and repeal the termination policy. . . . [S]elf-determination among the Indian people can and must be encouraged without the threat of eventual termination. In my view, in fact, that is the only way that self-determination can be effectively fostered.[51]

The federal government's trust relationship with Indian tribes derives from the original understanding of the government-to-government relationship of established sovereigns.[52] This trust relationship authorizes the federal government to preserve the property rights of Indian tribes.[53] Therefore, efforts by the federal government to regulate property belonging to Indian tribes are subject to the highest fiduciary duty, known as the federal trust responsibility.[54]

### *B. Federal Trust Responsibility: The Federal Government's Duty to Indigenous Tribes*

The U.S. federal government has enormous control over assets in tribal territory, and the concept of federal trust responsibility maintains that the federal "government owes a duty of care to Indian country for these assets."[55] Federal trust responsibility was originally developed in the nineteenth century through the Supreme Court cases *Cherokee Nation v. Georgia* and *Worcester v. Georgia*; in which both decisions were written by Chief Justice Marshall.[56] In *Cherokee Nation v. Georgia*, the Court found that the relationship between the federal government and indigenous tribes was "perhaps unlike that of any other two people in existence" and that while indigenous tribes may be considered "states," they are not quite "foreign lands."[57] In *Worcester v. Georgia*, Marshall found that "the federal government's authority in Indian country is exclusive over state intrusion" and, in essence, both decisions found that the federal government owes indigenous tribes a "certain responsibility to ensure that the federal government resolved matters affecting Indian country in the best interest of the tribes."[58] Over time, this duty of care owed by the federal government to

---

[51] Strommer & Osborne, *supra* note 5 at 17.

[52] *See* Restatement of the Law of American Indians § 2 DD No 2 (2014).

[53] *Id.*

[54] *Id.*

[55] Elizabeth Ann Kronk, *United States v. Jicarilla Apache Nation: Its Importance and Potential Future Ramifications*, 59 APR FED. L. 4 (2012).

[56] *Id.* at 5; Cherokee Nation v. Ga., 30 U.S. 1 (1831); Worcester v. State of Ga., 31 U.S. 515 (1832).

[57] Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, 1216 (1975) (citing *Cherokee Nation*, 30 U.S. 1).

[58] Kronk, *supra* note 55, at 5.

indigenous tribes was considered more of a "moral" trust responsibility and not enforceable in court.[59]

However, in 1980, the Quinalt Tribe brought suit against the United States government in the Supreme Court case *United States v. Mitchell* ("*Mitchell I*"), asserting that, based on the General Allotment Act, the government had "breached its responsibility under the federal trust doctrine to effectively manage the tribe's natural resources."[60] While the Court initially rejected this argument, the Quinalt Tribe brought suit again in *United States v. Mitchell* ("*Mitchell II*"), this time relying on several federal statutes requiring the federal government to manage and administer tribal resources in a particular way.[61] The Court agreed with the tribe, finding that a federal trust responsibility existed through the statutes, giving the federal government the responsibility of managing the resources at issue.[62]

The Court affirmed its *Mitchell II* decision in two subsequent cases, *United States v. White Mountain Apache Tribe* and *United States v. Navajo Nation*.[63] In *White Mountain Apache Tribe*, the Court found that a statute—providing that the United States hold a former military post in trust for an indigenous tribe—established a fiduciary relationship between the U.S. government and the tribe.[64] "[T]hus, breach of fiduciary duty by United States gave rise to tribe's substantive claim for money damages under the Indian Tucker Act."[65] Similarly, in *Navajo Nation*, the Court acknowledged that the "undisputed existence of general trust relationship" between the United States and indigenous tribes may reinforce the conclusion that a relevant statute or regulation serves to impose fiduciary duties.[66] The Court's decisions in these two cases further established a judicially enforceable federal trust relationship between the federal government and indigenous tribes.[67]

### C. The Bureau of Indian Affairs

In 1824, the federal government created an administrative agency, the Bureau of Indian Affairs (the "BIA"), intended to "oversee and carry out the

[59] *Id.*

[60] U.S. v. Mitchell, 445 U.S. 535 (1980); *see* Kronk, *supra* note 55, at 5.

[61] U.S. v. Mitchell, 463 U.S. 206 (1983); *see* Kronk, *supra* note 55, at 5.

[62] "Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties. It is well established that a trustee is accountable in damages for breaches of trust." *Mitchell*, 463 U.S. at 226.

[63] U.S. v. White Mountain Apache Tribe, 537 U.S. 465 (2003); U.S. v. Navajo Nation, 537 U.S. 488 (2003).

[64] *White Mountain Apache Tribe*, 537 U.S. at 474-76.

[65] *Id.*

[66] *Navajo Nation*, 537 U.S. at 506.

[67] Kronk, *supra* note 55, at 5.

Federal government's trade and treaty relations with the tribes."[68] This agency was transferred to the Department of the Interior in 1849 and remains there to this day.[69] Throughout its almost two centuries of existence, the BIA has played a central role in the relationship between the U.S. government and federally-recognized tribes—designed to serve as a partner to tribes to "help them achieve their goals for self-determination while also maintaining its responsibilities under the Federal-Tribal trust and government-to-government relationships."[70]

In 1921, Congress further established the BIA's presence and impact through its passage of the Snyder Act, which expanded the BIA's authority to disburse funds for reservation activities including education, healthcare, and the development of property.[71] Congress later acknowledged the many shortcomings of the BIA, noting that "officials of the BIA assumed the role of colonial administrators on the reservations and administered programs and services on the reservations under a policy which later became known as 'paternalism.'"[72]

The BIA is responsible for the administration and management of the 55.7 million acres of land held in trust by the United States for American Indians, Indian tribes, and Alaska Natives.[73] The BIA's responsibility includes "developing forestlands, leasing assets on these lands, directing agricultural programs, protecting water and land rights, developing and maintaining infrastructure and economic development are all part of the agency's responsibility."[74]

As U.S. policy towards Native Americans has evolved over the past 200 years, so too has the BIA's mission.[75] Ross O. Swimmer, a former Assistant Secretary for Indian Affairs, has stated that "the mission of the Bureau is to promote and execute the policy of the day of any given Administration and Congress dealing with American Indians and their governing organizations."[76]

While the BIA was enacted to "serve" federally recognized tribes, this has not always been the case.[77] In 1972, members of the American Indian Movement ("AIM") took over the BIA building in protest, arguing for the

[68] BUREAU OF INDIAN AFF. (BIA), https://www.bia.gov/bia (last visited Dec. 29, 2021).

[69] *Id.*

[70] *Id.*

[71] Strommer & Osborne, *supra* note 5, at 14; 25 U.S.C. § 13.

[72] *Id.*

[73] Robert McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians*, 19 BYU J. PUB. L. 1, 14 (2004).

[74] *Id.*

[75] *Id.*

[76] *Id.* at 12.

[77] BUREAU OF INDIAN AFF. (BIA), *supra* note 68.

reformation of the BIA and the renegotiation of treaties between sovereign tribes and the federal government.[78] Further, while the BIA has existed for almost 200 years, only six of forty-five commissioners of Indian Affairs[79] have been American Indian or Alaska Native.[80] Additionally, even the Supreme Court has raised the question as to whether the doctrine of self-determination is compatible with the United States' trust responsibility.[81]

One particularly significant flaw of the BIA is that it does not have a system to provide technical or legal assistance to Native Americans.[82] At one point, through the Association on American Indian Affairs, the BIA financed a modest legal assistance program.[83] Tribal groups were able to obtain legal help to launch self-determination projects by contacting either the Association's Washington-based legal counsel or its New York Headquarters.[84] However, this program was halted in 1978, and the program that was set forth to replace it was underfunded and not able to provide widespread, comprehensive technical assistance across the nation.[85]

### *D. Federal Recognition of the Shinnecock Nation*

The Shinnecock Nation was originally recognized as a tribe by New York State in 1789, and shortly thereafter, the state passed legislation that "recast the tribe's leadership structure into a trusteeship whose trustees have been voted on by tribe members ever since."[86] Despite the tribe's longstanding recognition by New York State, the Shinnecock Nation was not officially recognized as an Indian Tribe by the federal government until 2010.[87]

Gaining federal recognition was monumental for the Shinnecock Nation, as it established a federal trust responsibility between the Shinnecock tribe and the federal government—meaning that the federal government owes a duty to the Shinnecock Nation to ensure good faith dealings and fiduciary

---

[78] Mann, *supra* note 3.

[79] "William Hallett was the last to serve as BIA Commissioner following the establishment of the Assistant Secretary-Indian Affairs position within the Interior Department in 1977. Since then, 12 individuals, all American Indians, have been confirmed by the United States Senate for the post[.]" BUREAU OF INDIAN AFF. (BIA), *supra* note 66.

[80] BUREAU OF INDIAN AFF. (BIA), *supra* note 68.

[81] McCarthy, *supra* note 73, at 10.

[82] Gross, *supra* note 4, at 1231.

[83] *Id.* at 1230.

[84] *Id.*

[85] *Id.* at 1230.

[86] Frank James, *NY's Shinnecock Indians Gain Official Status*, NPR (June 15, 2010), https://www.npr.org/sections/thetwo-way/2010/06/15/127858064/ny-s-shinnecock-indians-gain-official-status#:~:text=The%20Shinnecock%20Indian%20Nation%20of,as%20an%20official%20Indian%20tribe.

[87] *Id.*

duties.[88] Kelly Dennis, a councilwoman on the Shinnecock tribal council, has commented that federal recognition means the Nation may engage in environmental consultation to protect their lands, waters, and cultural resources.[89] Dennis stated that "[t]hat's something we did not have prior to federal recognition—being able to seek grants . . . . get assistance with health and education, have Indian health services, access to important resources—these are supposed to be good faith negotiations happening with the state and it's something we tried before federal recognition."[90]

### *E. The Monuments*

The Shinnecock Nation began construction on the first of two sixty-one-foot electronic billboards (referred to by the Shinnecock Tribe as the "monuments" or the "billboards") on tribal-owned land near the eastbound lane of Sunrise Highway for "the dual purposes of generating revenue and marking its sovereign land."[91] In May 2019, the Commissioner of the New York State Department of Transportation, along with New York State, filed suit against members of the Shinnecock tribe, seeking to enjoin the construction of the first monument.[92] The court denied the preliminary injunction without prejudice, finding that the plaintiffs would "suffer no irreparable harm in the absence of a preliminary injunction, and that the equities do not balance in favor of the defendants, provided defendants have constructed and are operating the billboards in compliance with the appropriate structural and other safety standards."[93] In 2021, the Shinnecock Nation constructed a second monument located near the westbound lane of Sunrise Highway, and, on January 28, 2021, the New York State Department of Transportation delivered a stop-work order to the tribe to halt the construction.[94]

---

[88] Kronk, *supra* note 55, at 5.

[89] Interview with Bryan Polite, *supra* note 1.

[90] *Id.*

[91] Finn, *supra* note 7; Nick Martin, *A Vacation Enclave in the Hamptons, Two 61-Foot Billboards, and an Endless Fight for Tribal Sovereignty*, THE NEW REPUBLIC (Nov. 25, 2020), https://newrepublic.com/article/160310/vacation-enclave-hamptons-two-61-foot-billboards-endless-fight-tribal-sovereignty;

> [N]ot only is it undisputed that the Nation owns the land in question…but there is no doubt that the Nation has owned it for many decades, if not centuries, predating most, if not all, significant development in the area and that it is the only remaining part of their once-extensive demesne that touches the Peconic Bay side of Long Island.

Comm'r of N.Y State Dep't of Transp. v. Polite, 67 Misc. 3d 1222(A) at *1 (N.Y. Sup. Ct. 2020).

[92] *Polite,* 67 Misc. 3d 1222(A), at *1.

[93] *Id.*

[94] Finn, *supra* note 7.

The legal battle over the monuments continued throughout 2021, and Kelly Dennis, also a member of the tribe's Council of Trustees, announced that the council had requested that the Supreme Court of New York in Suffolk County dismiss the lawsuit because the billboards are located on the tribe's sovereign land.[95] Dennis explained that "the billboards bring in much-needed revenue through advertisements at a time when many Shinnecock people are struggling with housing crises and food insecurity."[96] Dennis further argued that the Shinnecock Tribe has the right and the economic need to develop the land, stating, "you cannot continue with this kind of form of economic genocide against us."[97] Dennis also said:

> It is a history of injustice that continues to have an impact on the health and welfare of tribe's members. There have been many health disparities that have been exacerbated during the pandemic. We suffer from things like diabetes, hypertension asthma. We have severe mental health crises here. The outside has spent all this time hoping we'd implode and go away; they've tried to ignore us. Putting this monument out is saying "we are here we're still here and this is our land" it's a welcoming and it's a recognition.[98]

Bryan Polite, the Shinnecock Nation's chairman, explained, "This is not about driving Maseratis . . . . It's about providing resources to the nation and creating programs so people can work."[99] Polite has further stated that these billboards are "monument[s] to our overcoming adversity and saying that we're still here . . . . but also we need money for education, police department, playgrounds, social programs, so, it will have an immediate economic impact to the Nation."[100]

Beyond the economic necessity of the billboards, the Shinnecock Council of Trustees has also stated that they are:

> [M]uch more than just vehicles for generating desperately needed revenue. While the monuments are an important first step towards economic sovereignty for the Nation, the monuments also serve as a powerful reminder that the Shinnecock people still occupy their ancestral lands despite centuries of racial and economic oppression by the state. The DOT's latest threat

[95] *See* Desiree D'Iorio, *Shinnecock Council Asks a State Court to Dismiss a State Lawsuit Over Billboards*, WSHU PUBLIC RADIO, (Nov. 3, 2021, 9:21 AM), https://www.wshu.org/long-island-news/2021-11-03/shinnecock-council-asks-a-state-court-to-dismiss-a-state-lawsuit-over-billboards; *see also Polite*, 67 Misc. 3d 1222(A).

[96] *Id.*

[97] *Id.*

[98] Interview with Bryan Polite, *supra* note 1.

[99] Kilgannon, *supra* note 3.

[100] *A Monumental Dispute in the Hamptons*, *supra* note 12, at 02:57.

> serves as just one example of the mistreatment the Nation has suffered at the hands of the state.[101]

Chariman Polite further emphasized this notion, stating that "[y]es, there are advertisements on [the Monuments]. But for many of our people who feel like they've been forgotten, seeing our tribal seal [sixty] feet in the air, it's like we're visible now[.]"[102]

The local town government wrote to the Shinnecock Tribal Council, arguing that the signs were "an eyesore and could detract from the East End's bucolic quality of life."[103] Further, the local officials also alleged in the letter that the billboards may not comply with federal highway law in the context of setbacks from the roadway and fall zones necessary for designated evacuation routes.[104] The elected officials also argued that motorists may be distracted by the billboards and cause traffic accidents or that light pollution from the billboards may disturb nearby residents or wildlife.[105]

Southampton Town Supervisor Jay Schneiderman spoke out against the billboards, stating that they "violate the spirit of our local ordinances meant to protect the rural character of the town" and keep the area an attractive escape for New Yorkers.[106] Schneiderman asserted, "The summer crowd comes here to escape the metropolis, only to find this urban element at the gateway to the Hamptons."[107] Schneiderman was also quoted stating, "I've been trying to appeal to their conscience as good neighbors to voluntarily change direction and develop other economic engines."[108]

In response, the Shinnecock Nation argues that they do not recognize state or local government authority on their sovereign lands, as the parcels on which the billboards are constructed are "aboriginal parcels" entitled to the Shinnecock Nation along with their 980-acre reservation, and thus, they may "build what they want, armed simply with a building permit issued by the tribe's council of trustees."[109] As of December 2022, the Supreme Court of New York has agreed with the Shinnecock Nation, finding that the land belongs to the tribe and the state may not interfere unless "certain circumstances" apply, which requires a particularized inquiry.[110]

---

[101] Finn, *supra* note 7.
[102] Kilgannon, *supra* note 3.
[103] Finn, *supra* note 7.
[104] *Id.*
[105] *Id.*
[106] Kilgannon, *supra* note 3.
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] Comm'r of N.Y State Dep't of Transp. v. Polite, 67 Misc. 3d 1222(A) at *7 (N.Y. Sup. Ct. 2020).

## III. THE PROBLEM: A LACK OF PROTECTION FROM THE FEDERAL GOVERNMENT

The issue faced by the Shinnecock Nation regarding their billboards highlights an ongoing problem between the federal government, state governments, and indigenous tribes. Federally recognized tribes have the right to self-determination and self-government[111] and are entitled to a duty of care from the federal government,[112] yet they often face obstruction from state governments when they use their land in a way that offends local interests.[113] This problem is intensified due to consistent state infringement with tribes' use of their sovereign land, often through the judicial system.[114] Due to the very limited federal protection, indigenous tribes frequently find themselves in court defending various land uses that state or local governments contest.[115] It is the responsibility of the federal government to ensure the protection and expansion of tribal sovereignty and, based on examples such as the Shinnecock Nation's legal battle, it is evident that the government is failing in its duties.

### *A. Pattern of State Interference with Sovereign Tribal Land*

As illustrated by New York's lawsuit against the Shinnecock Nation in *Comm'r of N.Y. State Dep't of Transp. v. Polite*, while Indian affairs primarily fall under the jurisdiction of the federal government, states will not hesitate to take judicial action if they disagree with the tribe's use of their land.[116] The judicial history between states and indigenous tribes demonstrates a pattern of state infringement onto tribal sovereign rights, and a lack of protection of these rights by the federal government, despite the federal trust responsibility.[117]

In the case of *New York v. Shinnecock Indian Nation*, the Shinnecock Nation faced a similar issue to their billboard dispute.[118] Here, the Nation appealed a decision by the district court, which granted a permanent injunction to halt the development of a casino.[119] The Nation began the

[111] Mann, *supra* note 3.

[112] "[B]ecause Indian tribes had in essence surrendered their external sovereignty (as well as land, in many instances), in exchange, the federal government owed the tribs a certain responsibility to ensure that the federal government resolved matters affecting Indian country in the best interest of the tribes." Kronk, *supra* note 55, at 5.

[113] *See Polite*, 67 Misc. 3d 1222(A).

[114] *See id.*

[115] *See id*; *see also* N.Y. v. Shinnecock Indian Nation, 686 F.3d 133 (2d Cir. 2012); N.M. v. Mescalero Apache Tribe, 462 U.S. 324 (1983).

[116] *See Polite*, 67 Misc. 3d 1222(A).

[117] *See id.; Shinnecock Indian Nation*, 686 F.3d at 135; *Mescalero Apache Tribe*, 462 U.S. 324.

[118] *See Shinnecock Indian Nation*, 686 F.3d 133.

[119] *Id.* at 135.

construction of a casino on an eighty-acre plot of land known as Westwoods, which they argued was sovereign tribal territory.[120] The court prohibited the tribe from "developing a casino on a plot of land . . . . without complying with the laws of New York State and the Town of Southampton."[121] While the Second Circuit later vacated this decision, it based its opinion on subject matter jurisdiction and did not examine the merits of the appeal.[122]

In the case of *New Mexico v. Mescalero Apache Tribe*, the Supreme Court examined whether the state of New Mexico could regulate fishing and hunting on the Mescalero Apache Tribe's reservation.[123] Here, New Mexico contended that its hunting and fishing regulations were in "conflict with, and in some instances are more restrictive than, the tribal regulations" and, therefore, it may apply its regulations to hunting and fishing by nonmembers on the reservation.[124] The Tribe sued to prevent the New Mexico from regulating these activities.[125] Ultimately, while the Supreme Court held in favor of the Mescalero Apache Tribe, it also found that a "state may exercise its authority over activities of non-tribal members on 'Indian country' only under certain circumstances[,]" leaving open the possibility that state infringement onto tribal lands may be permitted in the future.[126] The Court reasoned that:

> Exercise of state authority which imposes additional burdens on a tribal enterprise must ordinarily be justified by functions or services performed by state in connection with the on-reservation activity . . . . a state's regulatory interest will be particularly substantial if state can point to off-reservation effects that necessitate state intervention.[127]

### *B. The Legal Fiction of Tribal Immunity*

In *Santa Clara Pueblo v. Martinez*, the Supreme Court held that "Indian tribes are distinct, independent political communities, retaining their original natural rights in matters of local self-government . . . . [a]lthough no longer possessed of full attributes of sovereignty, remain a separate people with power of regulating their internal and social relations."[128] The Court further found that Indian tribes have both immunity from lawsuits in federal court

[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] N.M. v. Mescalero Apache Tribe, 462 U.S. 324 (1983).
[124] *Id.*
[125] *Id.*
[126] Comm'r of N.Y State Dep't of Transp. v. Polite, 67 Misc. 3d 1222(A) at *7 (N.Y. Sup. Ct. 2020) (quoting *Mescalero Apache Tribe*, 462 U.S. at 330).
[127] *Mescalero Apache Tribe*, 462 U.S. at 336.
[128] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978).

and the authority to decide all internal legal and political questions.[129] The Court's holding in *Santa Clara Pueblo* demonstrates that, while the federal government did not intend to grant indigenous tribes complete sovereignty, the tribes were afforded a certain level of independence and self-governance—including in a court of law.[130]

Despite the Supreme Court's holding in *Santa Clara Pueblo*,[131] indigenous tribes rarely benefit from this ruling, as states often name tribal leaders in lawsuits to avoid the tribal immunity requirement. For example, in the case of *Comm'r of N.Y. State Dep't of Transp. v. Polite*, New York did not name the Shinnecock Nation as a defendant and instead named tribal leaders such as Bryan A. Polite.[132] The New York State court allowed this, reasoning that the tribal leaders failed to make the requisite showing that they are an "arm" of the tribe, and therefore entitled to immunity and that "[u]nless federal law provides differently, 'Indians going beyond reservation boundaries' are subject to any generally applicable state law.'"[133] The court even threatened to go even further, citing *Michigan v. Bay Mills Indian Community*, in which Justice Kagan stated that, "to the extent civil remedies proved inadequate, Michigan could resort to its criminal law, prosecuting anyone who maintains—or even frequents—an unlawful gambling establishment."[134]

The state court's allowance of plaintiff states to name tribal leaders as defendants in place of tribes violates the spirit of the law of *Santa Clara Pueblo* and serves to subject Native Americans to the same outcome if tribal immunity did not exist.[135] Thus, tribal immunity, as it currently stands, is nothing more than a mere legal fiction as state plaintiffs may simply name tribal leaders and achieve the same outcome.[136] This policy infringes on tribal sovereignty, as tribal immunity was established so tribes may "remain a 'separate people with power of regulating their internal and social relations.'"[137]

### *C. A Closer Examination: The Shinnecock Billboard Lawsuit*

In response to the Shinnecock Nation's billboards, the Commissioner of the New York State Department of Transportation and New York State

[129] *Id.* at 49, 55.

[130] *See id.*

[131] *Id.*

[132] *Polite*, 67 Misc. 3d 1222(A).

[133] *Id.* (citing Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95 (2005)).

[134] *Id.* (citing Michigan v. Bay Mills Indian Community, 572 US at 795-96 (2014)).

[135] *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

[136] *See Polite*, 67 Misc. 3d 1222(A).

[137] *Santa Clara Pueblo*, 436 U.S. at 56 (quoting United States v. Kagama, 118 U.S. 375, 381 (1886)).

("Plaintiffs") jointly filed suit in the Supreme Court of the State of New York in May 2019, seeking to enjoin construction and have the billboards removed from the plots of land adjacent to Sunrise Highway.[138] The Plaintiffs contended that the "billboards have been erected on non-reservation land adjoining a state-owned right-of-away . . . . without required permits and engineering and environmental approvals and are, in any event, too close to the adjoining roadway."[139] This presented the question of whether structures operating on land are subject to State regulation when they are in the right of way of a State highway and, if so, whether and how New York State can enforce those regulations through a judicial action brought in New York State Supreme Court.[140]

The court found that the land in question indisputably belongs to the Shinnecock Nation and that the Nation "has owned it for many decades, if not centuries, predating most, if not all, significant development in the area and that it is the only remaining part of their once-extensive demesne that touches the Peconic Bay side of Long Island."[141] Despite this, the Plaintiffs argued that the land was not, in fact, "aboriginal"—meaning "originating before systematic European colonization of the area began in the seventeenth century, and continuing thereafter without relinquishment"—and that, instead the Nation is "merely a fee owner of the property" and that the Shinnecock's reservation lands are thus not considered to be part of a recognized Indian reservation.[142]

In furtherance of this argument, the Plaintiffs referenced the case of *New York v. Shinnecock Indian Nation*, in which the Eastern District of New York held that the disputed land was not "aboriginal"[143] and that, "even if it were, the construction and operation of a gaming casino there by the Nation would have such 'disruptive consequences' upon 'neighboring landowners, the Town [of Southampton] and the greater Suffolk County community' as to implicate the bar of *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*."[144] However, the court noted that this decision was overturned on

[138] *Polite*, 67 Misc. 3d 1222(A), at *1.

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] "[O]riginating before systematic European colonization of the area began in the seventeenth century, and continuing thereafter without relinquishment." *Polite*, 67 Misc. 3d 1222(A), at *2. *See also* N.Y. v. Shinnecock Indian Nation, 686 F.3d 133 (2d Cir. 2012).

[144] *Polite*, 67 Misc. 3d 1222(A), at *2 (citing N.Y. v. Shinnecock Indian Nation, 523 F. Supp. 2d 185, 279 (E.D.N.Y. 2007) ("The 2005 decision of the United States Supreme Court in Sherrill set forth the legal framework under which a court must examine equitable doctrines in the context of an attempt by an Indian tribe to re-assert sovereignty over a parcel of land."). The Supreme Court in *City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.* held that:

appeal, and, therefore, the Plaintiff's assertion that "the Westwoods property is not aboriginal or sovereign lands . . . . [is] subject to dispute."[145] Further, the court pointed out that "it is undisputed that the Shinnecock Nation's ancestral domain encompassed essentially the entirety of what is now the Town of Southampton, and it has been established that the presence of the Nation in that domain has been continuous."[146]

Despite its finding that the land in question indisputably belongs to the Shinnecock Nation, the court engaged in an analysis similar to that of the District Court in *New York v. Shinnecock Indian Nation* and assessed the disruptive nature of the structures.[147] The court stated, "the electronic signs, however eye catching they may be . . . . pose none of the disruptive consequences that the federal District Court attributed to the previously proposed gaming venture and, unless constructed and operated without regard to accepted engineering standards, which appears not to be the case—pose no unacceptable safety risk."[148]

The court in *Shinnecock Indian Nation* denied the preliminary injunction without prejudice, finding that "[u]ltimately, the burden will be upon the State and Town plaintiffs to refute the defendants' contention that the Nation has sovereign control over the Westwoods property."[149] The court further found that, based on the record, it would be impossible to conclude that the plaintiffs would succeed in proving this contention.[150]

To conclude its decision, the court referenced the case of *New Mexico v. Mescalero Apache Tribe*, in which the Ninth Circuit held that "[a] state may exercise its authority over activities of non-tribal members on 'Indian country' only 'under certain circumstances[.]'"[151] In order to determine here whether the Shinnecock Nation's construction and maintenance of the billboards constitute these "certain circumstances," the issue necessitates "a particularized inquiry into the nature of the state, federal, and tribal interests at stake."[152] The *Mescalero Apache Tribe* court held that "[s]tate jurisdiction is preempted by the operation of federal law if it interferes or is incompatible

> [T]he distance from 1805 to the present day, the Oneidas' long delay in seeking equitable relief against New York or its local units, and developments in the city of Sherrill spanning several generations, evoke the doctrines of laches, acquiescence, and impossibility, and render inequitable the piecemeal shift in governance this suit seeks unilaterally to initiate.

544 U.S. 197, 221 (2005.)

145 *Polite*, 67 Misc. 3d 1222(A), at *6.

146 *Id.*

147 *Id.* (citing *Shinnecock Indian Nation*, 523 F. Supp. 2d at 188-89).

148 *Id.*

149 *Id.*

150 *Id.*

151 *Id.* (citing N.M. v. Mescalero Apache Tribe, 462 U.S. 324, 331 (1983)).

152 *Id.*

with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority."[153]

1. Sovereignty Issues within the Shinnecock Billboard Lawsuit

The New York State court's finding that the billboards pose no disruptive risk, while in favor of the Shinnecock Nation, highlights the underlying issue at the heart of *Comm'r of N.Y. State Dep't of Transp.* as well as the overarching relationship between the United States government and indigenous tribes.[154] The holding demonstrates that, although the Shinnecock Nation's billboards do not pose a "disruption," a state is well within its right to seek judicial remedies if it believes an indigenous tribe is using its own tribal land justifying the assertion of state authority.[155] The court's finding, as stipulated by *New Mexico v. Mescalero Apache Tribe*, emphasizes that when "certain circumstances" apply, state infringement may be permissible.[156]

In this instance, though not explicitly stated in the lawsuit, it is likely that the issue the New York State and local town government has with the billboards is based largely on aesthetics.[157] If the town takes issue with these large, electronic billboards and takes legal action simply because it does not like how they look, this is indicative of a much larger problem: state and local governments essentially give no weight to tribal sovereignty. This problem is exasperated by the fact that courts may allow for state infringement of tribal land use in "certain circumstances" based on an inquiry into the state, local, and tribal interests.[158] The mere allowance of such an inquiry inherently conflicts with the spirit of self-determination enacted in 1975.[159]

## *D. The "Spirit of the Law"*

Following the Nixon administration's implementation of the self-determination policy, the question arises as to just how much sovereignty the federal government affords indigenous tribes.[160] Nixon proposed a system that would considerably reduce federal control over Indian tribes by recognizing their authority to manage affairs on their own reservations.[161]

---

[153] *Id.*

[154] *See id.*

[155] *Id.* (citing *Mescalero Apache Tribe*, 462 U.S. at 331).

[156] *Mescalero Apache Tribe*, 462 U.S. at 331.

[157] Kilgannon, *supra* note 3.

[158] *Polite*, 67 Misc. 3d 1222(A), at *7 (citing *Mescalero Apache Tribe*, 462 U.S. at 331).

[159] "Native Americans could 'assume responsibility for . . . . the most important services provided for them by the federal government without risking termination.'" Gross, *supra* note 4, at 1197.

[160] Strommer & Osborne, *supra* note 5, at 17.

[161] Restatement of the Law of American Indians § 1 DD No 2 (2014).

However, the judicial history of states suing indigenous tribes, and federal courts permitting these suits, demonstrates a gray area in the law regarding how much sovereignty is truly afforded to the tribes. This gray area poses a serious threat to indigenous sovereignty and opens the floodgates for even more instances in which states pursue legal action against indigenous tribes for using their sovereign land in a way with which the state disagrees. Overall, this issue demonstrates a violation of the spirit of the law of Nixon's self-determination policy, as states asserting control over indigenous land use through the judicial system do not reflect the policy of reduced governmental control over indigenous tribes.[162]

### *E. Potential Future Issues*

In addition to their billboards, the Shinnecock Nation also seeks to generate revenue for the tribe by constructing and operating a casino on their tribal land.[163] While the Nation had initially hoped to build a casino closer to Manhattan, they now plan to start the venture on their own sovereign land, free from local zoning laws and regulations.[164] In response to these plans, nearby homeowners have formed a Hamptons Neighborhood Group, enacting a website with the motto: "Keep the Hamptons the Hamptons!"[165] This conflict sets the stage for future litigation mirroring that of *Comm'r of N.Y. State Dep't of Transp. v. Polite*.[166]

Following the legalization of recreational marijuana in New York, another potential problem that may arise in the future is the attempted state regulation of marijuana dispensaries, which will likely prove to be a particularly contentious issue within indigenous tribes.[167] Members of the St. Regis Mohawk Reservation in Franklin County, New York, have already erected marijuana dispensaries on tribal land.[168] While, thus far, there has been limited regulation from state officials, the New York government has started taking notice.[169] New York Governor Kathy Hochul, when addressing the need for regulation of marijuana, stated that "New York needed 'to make

[162] *See* Mann, *supra* note 3.

[163] Corey Kilganno, *Why the Shinnecock Tribe Is Clashing With the Hamptons' Elite*, N.Y. TIMES, Apr. 22, 2021, at A17, https://www.nytimes.com/2021/04/22/nyregion/casino-hamptons-shinnecock.html.

[164] *Id.* ("[B]ecause the reservation is sovereign land, free from government regulations, the planned Shinnecock Hamptons Casino cannot be blocked by local zoning laws and restrictions.")

[165] *Id.*

[166] *See* Comm'r of N.Y State Dep't of Transp. v. Polite, 67 Misc. 3d 1222(A) (N.Y. Sup. Ct. 2020).

[167] Jesse McKinley, *Selling Marijuana on Tribal Lands, a Legal Gray Area*, N.Y. TIMES, Sept. 27, 2021, at MB1, https://www.nytimes.com/2021/09/23/nyregion/new-york-marijuana-regulations.html.

[168] *Id.*

[169] *Id.*

up for lost time.'"[170] This indicates the strong possibility of potential regulation of tribal marijuana sales by the state of New York, which would raise sovereignty questions. This issue is particularly pertinent to the Shinnecock Nation, as Councilwoman Kelly Dennis remarked, "[W]e're also looking at cannabis and moving in that direction, there are all kinds of economic development projects we are pursuing."[171] Thus, the question remains whether the Shinnecock Nation will face another lawsuit by New York State in the future.

## IV. PROPOSAL: A MORE ROBUST APPROACH TO PRESERVING TRIBAL SOVEREIGNTY

As evidenced by the Shinnecock Nation's fight to utilize their own sovereign land, it is clear that the federal government must do more to protect the sovereignty of indigenous tribes. Given the federal trust responsibility, it is necessary for the federal government to protect tribal interests, and it is evident that the federal government must take greater action to prevent infringement by the states so tribes are not forced to consistently defend themselves in court.[172]

The federal and state governments should respect the sovereignty of tribes such as the Shinnecock Nation. Following federal recognition of the tribe by the Obama administration, the Shinnecock Nation was afforded sovereignty and the right to self-regulate.[173] Even if the billboards are not in accordance with standard highway and billboard regulations, these rules should not apply to the Shinnecock Nation as the land is their own sovereign territory.[174] The state governmental interference with the Shinnecock Nation's land use serves to demonstrate a more significant problem faced by tribes across the country.

Ultimately, the problem with the current federal policies toward indigenous tribes is that they do not provide adequate protection for tribal sovereignty.[175] While it is the federal government's purview to enact legislation and make treaties with indigenous tribes, state and local

---

[170] *Id.*

[171] Interview with Bryan Polite, *supra* note 1.

[172] Kronk, *supra* note 55, at 5.

[173] Lorinda Riley, *When A Tribal Entity Becomes A Nation: The Role of Politics in the Shifting Federal Recognition Regulations*, 39 AM. INDIAN L. REV. 451 (2015).

[174]

> Here, not only is it undisputed that the Nation owns the land in question… but there is no doubt that the Nation has owned it for many decades, if not centuries, predating most, if not all, significant development in the area and that it is the only remaining part of their once-extensive demesne that touches the Peconic Bay side of Long Island.

Comm'r of N.Y State Dep't of Transp. v. Polite, 67 Misc. 3d 1222(A) at *3 (N.Y. Sup. Ct. 2020)

[175] Kronk, *supra* note 55, at 4.

governments often successfully find remedies in the courts when they wish to interfere with tribal sovereignty.[176]

### *A. Legislative Remedies*

One potential remedy for the lack of federal protection afforded to indigenous tribes is new legislation. Congress should enact legislation that protects indigenous tribes' right to use their own land that reflects the spirit of self-determination that has been the policy towards tribes since the 1970's.[177] Currently, states can easily sue indigenous tribes in court when they oppose an action taken by the tribe.[178] If stricter protective measures were imposed through legislation, this would likely cause states to pause before filing a lawsuit against an indigenous tribe.

#### 1. True Protection of Tribal Immunity

An example of such legislation would be an act prohibiting litigants from naming tribal leaders in a lawsuit in place of the tribe itself. Despite the Court's holding in *Santa Clara Pueblo v. Martinez* that Indian tribes have immunity from lawsuits in federal court and have the authority to decide all internal legal and political questions, courts have since allowed states to name tribal leaders as defendants in place of the tribe itself.[179] While tribes are exempt from litigation, state and local governments essentially evade this

---

[176] *See Shinnecock Indian Nation*, 686 F.3d 133.

[177]

> The [Indian Self-Determination and Education Assistance] Act allowed for Indian tribes to have greater autonomy and to have the opportunity to assume the responsibility for programs and services administered to them on behalf of the Secretary of the Interior through contractual agreements. The Act assured that Indian tribes had paramount involvement in the direction of services provided by the Federal government in an attempt to target the delivery of such services to the needs and desires of the local communities.

*Self-Determination*, U.S. DEP'T INTERIOR, https://www.bia.gov/regional-offices/great-plains/self-determination.

[178] *See Polite*, 67 Misc. 3d 1222(A); *see also* N.M. v. Mescalero Apache Tribe, 462 U.S. 324, 331 (1983).

[179] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978);

> At this juncture, then, the immunity claims of the Tribal defendants, and their challenge to the court's subject matter jurisdiction, cannot be sustained. To the extent the commercial defendants' claims of immunity are derivative of the assertions of sovereign immunity by the Tribal defendants or share the same predicate, i.e., that they are agents acting on behalf of the Nation and share its sovereign immunity, their immunity claims fail for the same reasons those of the Tribal defendants fail. To the extent they claim that they are an "arm" of the Nation and share in its sovereign immunity on that basis, they have failed to make the requisite showing.

*Polite*, 67 Misc. 3d 1222(A), at *5.

requirement in lawsuits by naming tribal leaders[180] such as Bryan A. Polite, Launcelot A. Gumbs, Seneca Bowen, Daniel Collins Sr., Germain Smith, and Donald Williams Jr. of the Shinnecock Nation named by the New York State Department of Transportation in the case of *Comm'r of N.Y. State Dep't of Transp. v. Polite*.[181]

The fact that states may achieve essentially the same result of naming a tribe itself by naming tribal leaders in a lawsuit renders the ruling in *Santa Clara Pueblo v. Martinez*[182] essentially null and must be remedied. Legislation prohibiting litigants from naming tribal leaders in a lawsuit in place of the tribe itself is one potential remedy to this problem, one that would ultimately lead to greater protection of the sovereignty of indigenous tribes such as the Shinnecock Nation.

### *B. Remedy through Administrative Agency*

#### 1. Reorganization of the Bureau of Indian Affairs

The BIA is an example of an existing administrative agency designed to be dedicated to the protection of indigenous tribes and the facilitation of the relationship between the federal government and indigenous tribes.[183] The agency has many different divisions assigned to provide solutions to various issues faced by Native Americans, such as Child & Adult Protection, Housing Improvement Program, and a division for the Indian Child Welfare Act.[184] However, this agency does not have a proper remedy for state infringement of sovereignty even though it is dedicated to the relationship between the federal and tribal governments.[185] In fact, the BIA does not even offer resources for adequate legal counsel to Native Americans in need of assistance.[186]

Therefore, one potential solution would be to reorganize the BIA and structure it so that it incorporates a pathway to remedies for Indian Nations facing infringement by the states, whether judicially, administratively, or

[180] This was underscored by Bryan Polite, the Chairman of the Shinnecock Tribal Council. "This was something that we tried to get a dismissal on and the state tried to be cute. They initially sued us as individuals—not even in official capacity—they admit the tribe has sovereign immunity, but they claim they're not suing the tribe." – Bryan Polite, Chairman of the Shinnecock Tribal Council. Interview with Bryan Polite, *supra* note 1.

[181] *Polite*, 67 Misc. 3d 1222(A).

[182] *Santa Clara Pueblo*, 436 U.S. 49 (1978).

[183] OFFICE OF INDIAN SERVICES (BIA), https://www.bia.gov/bia/ois (last visited Dec. 29, 2021).

[184] *Human Services*, BIA, (visited Mar. 26, 2022, at 2:13 PM), https://www.bia.gov/bia.

[185] *See* BUREAU OF INDIAN AFF. (BIA), *supra* note 68.

[186] Gross, *supra* note 4, at 1230.

otherwise.[187] Chairman Polite of the Shinnecock Tribal Council stated that "historically, the BIA has been a hostile force to Native Americans, we feel there can be changes."[188]

At a minimum, to achieve this reorganization, the BIA may reimplement its previous policy of providing legal assistance to Native Americans seeking self-determination projects.[189] However, a stronger solution would be to create an arbitration component within the BIA to administratively handle disputes between states and indigenous tribes.[190] This component could be similar to the administrative "Tribal Claims" sector of the BIA, in which the staff serves as "negotiators in gaining the consent of the Tribal governments concerning the division of the funds."[191] Finally, the BIA would greatly benefit from additional indigenous representation, as the confirmation of Secretary Deb Holland to the BIA as well as other elevations of Native Americans to power, have worked to improve the relationship between the BIA and indigenous tribes.[192]

### 2. Creation of a New Administrative Agency

Another example of a protective measure designed to serve the interests of sovereign tribal nations is creating a new administrative agency specializing in adjudicating conflicts between states and indigenous tribes. The creation of a new administrative agency may be a prudent alternative to reorganizing the BIA, because the BIA has been subject to criticism from indigenous tribes who argue that the agency has failed to properly protect indigenous sovereignty.[193]

A new agency may implement a federally required administrative procedure that a state must take before filing suit against an indigenous tribe.

---

[187]

> [A]dministrative remedy is the non judicial remedy provided by an agency, board, commission or any other like organization. The administrative remedy must be exhausted before a court takes jurisdiction of the case. For instance, the U.S district courts will not consider a social security case unless all hearing, appeal and other remedies that is available before the social security administration is exhausted.

*Administrative Remedy Law and Legal Definition*, US LEGAL, https://definitions.uslegal.com/a/administrative-remedy/, (last visited Sept. 13, 2022).

[188] Interview with Bryan Polite, *supra* note 1.

[189] Gross, *supra* note 4, at 1230.

[190] Arbitration is a "dispute-resolution process in which the disputing parties choose one or more neutral third parties to make a final and binding decision resolving the dispute." These parties "may choose a third party directly by mutual agreement, or indirectly, such as by agreeing to have an arbitration organization select the third party." *Arbitration*, BLACK'S LAW DICTIONARY, (11th ed. 2019).

[191] *Division of Tribal Government Services*, U.S. DEPARTMENT OF THE INTERIOR, https://www.bia.gov/bia/ois/tgs.

[192] Interview with Bryan Polite, *supra* note 1.

[193] Mann, *supra* note 3.

For example, if New York State has a legal issue with the Shinnecock Nation, it shall be required to first file a complaint with the agency specializing in these issues. If the state disagrees with the agency's decision, then it may proceed to court to file a lawsuit. However, the agency's findings and a decision may carry weight in court. A remedy such as this would provide an additional layer of protection to indigenous tribes, as current methods—such as tribal immunity from lawsuits—are clearly failing.

While the Supreme Court's holding in *Santa Clara Pueblo v. Martinez* was meant to protect tribes from being named in federal lawsuits, this has not proven effective.[194] The ability of states to simply name tribal leaders in suits completely negates the purpose of the Court's prior holding. This violates the spirit of the law of the holding, as well as the federal policy of self-determination, allowing tribes to govern themselves. Therefore, the creation of an administrative agency, coupled with a requirement that states file administrative appeals against indigenous tribes, may prove to be a more effective way of preserving tribal sovereignty, as tribes may have access to better representation and more independence through this process.

## V. CONCLUSION

The legal struggle of the Shinnecock Nation to use their own sovereign land is a microcosm of the much larger issue: the federal government is not fulfilling its responsibility to ensure the protection of tribal sovereignty. Given the lack of protection from the federal government, states are encroaching on this sovereignty, often through judicial action, such as the case of *Comm'r of N.Y. State Dep't of Transp. v. Polite*. The onus is on the federal government to protect the interest of indigenous tribes, as it has a duty of care to do so based on the federal trust responsibility.[195] Therefore, the federal government should either enact new legislation to better protect the interest of indigenous tribes—and better reflect the spirit of self-determination—or take measures to either create a new administrative agency or reorganize the existing BIA, so it provides legal assistance and support to indigenous tribes, as well as contains more Native American

---

[194] Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978);

> At this juncture, then, the immunity claims of the Tribal defendants, and their challenge to the court's subject matter jurisdiction, cannot be sustained. To the extent the commercial defendants' claims of immunity are derivative of the assertions of sovereign immunity by the Tribal defendants or share the same predicate, i.e., that they are agents acting on behalf of the Nation and share its sovereign immunity, their immunity claims fail for the same reasons those of the Tribal defendants fail. To the extent they claim that they are an "arm" of the Nation and share in its sovereign immunity on that basis, they have failed to make the requisite showing.

*Polite*, 67 Misc. 3d 1222(A) at *6.

[195] Kronk, *supra* note 55, at 4.

representation. Germain Smith, a Councilman on the Shinnecock Tribal Council and a named defendant in New York's lawsuit against the Shinnecock Tribe, emphasizes, "We constantly have to prove our sovereignty. We've had enough."[196]

[196] Interview with Bryan Polite, *supra* note 1.