LAND, LEGACY, AND LAW: AMENDING CERCLA TO ACCOUNT FOR ENVIRONMENTAL CONTAMINATION OF TRIBAL CULTURAL RESOURCES

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"They made us many promises, more than I can remember But they kept but one—They promised to take our land. . .and they took it." [2]
– Chief Red Cloud, Oglala Lakota, Sioux Nation

"On limbs of slanted light
painted with my mind's skin color,
I step upon black braids,
oil-drenched, worming
from last month's orphaned mouth.

Winged with burning —
I ferry them
from my filmed eyes, wheezing.

Scalp blood in my footprints —
my buckskin pouch filling
with photographed sand.

No language but its rind
crackling in the past tense."[3]
– Sherwin Bitsui, Diné (Navajo) Nation, (2013)

[2] *Chief Red Cloud - Sioux*, FIRST PEOPLE, https://www.firstpeople.us/FP-Html-Wisdom/ChiefRedCloud.html (last visited Feb. 18, 2021).

[3] Sherwin Bitsui, *From "Dissolve"*, POETRY (2018), https://www.poetryfoundation.org/poetrymagazine/poems/146224/from-dissolve.

I. INTRODUCTION

Native Americans, American Indians, First Nations, Alaska Natives: there are a plethora of labels to categorize the descendants of the indigenous population of North America, whose ancestors inhabited what are now the United States of America and Canada prior to the European conquest and colonization of the North American continent. Today these communities are known by many names: Mohawk, Apache, Navajo, Comanche, Ute, Blackfeet, Crow, Cherokee, Leni-Lenape, and hundreds more, in a plethora of languages.[4] One commonality with all of these groups is a deep cultural and spiritual connection with the natural resources in their environment, with this relationship forming the basis for the wide variety of spiritual systems present in these diverse communities. For the peoples whose ancestors called this land home long before Europeans ever arrived, their relationship with this land and its resources is complex. As the expansion of European-American colonists and settlers abutted Native homelands, their often-divergent interests led to conflict.[5]

To establish dominion over the wealth that could be gleaned from the air, water, and earth of this country, the United States government viewed as a necessity the objective of extending the governance provided by the American system of laws over all the nations and communities populating the continent, often justifying it in explicitly racist and colonialist language.[6] The headlong rush for natural resource exploration and extraction that was the impetus for the march of colonization and settlement across America has been costly in terms of depletion of those resources, the spoliation of large swathes of land and water, and the human harms suffered by those living near to areas contaminated by extraction or industrial activities. Across the United States environmental contamination exists as a reminder of the effects of production and resource extraction on the surrounding environment. Environmental contamination has often received public attention. The outcry over the prevalence of contaminated Brownfield and Superfund sites in Newark, New Jersey,[7] the

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[4] *Federal and State Recognized Tribes*, NAT'L CONF. OF STATE LEGS., https://www.ncsl.org/legislators-staff/legislators/quad-caucus/list-of-federal-and-state-recognized-Tribes.aspx#federal (last updated Mar. 2020).

[5] Kollibri terre Sonnenblume, *A Century of Theft from Indians by the National Park Service*, THE ECOLOGIST (Mar. 29, 2016), https://theecologist.org/2016/mar/29/century-theft-indians-national-park-service.

[6] See State v. Foreman, 16 Tenn. 256 (1835) (Supporting the American conquest of the continental United States: (". . . it was more just the country should be peopled by Europeans, than continue the haunt of savage beasts. . .").

[7] Riley Dixon, Yoo Ra Kim, & Stephanie Alonso, *An Invisible Hazard: The Brownfield Sites of Newark's Ironbound*, ENV'T JUST IN THE IRONBOUND, https://www.ejintheironbound.com/brownfield-sites (last visited Feb. 19, 2021). (Detailing the ongoing efforts to catalogue contaminated sites in Newark, and the efforts of community activists to petition the New Jersey Attorney General to secure redress for environmental health harms).

Cuyahoga River in flames in Cleveland, Ohio,[8] or the Three Mile Island incident[9] are prominent examples. On Tribal lands there are longstanding environmental catastrophes that receive comparatively less notice, even when their effects on the impacted communities are just as much or more pronounced.[10]

Native American Tribes have been granted title to reservations across the United States, held in trust by the federal government for their benefit. Through this system the federal government purportedly acts as a ward of the interests of these Tribes, with Tribal communities considered "dependent nations" with sovereignty supposedly co-equal to the federal government, but the nature of that dependency is created through statutes and the rulings of American courts.[11] The trusteeship relationship between the federal government and the Native American peoples is ostensibly enforced for the benefit of the Tribes, as the government is nominally responsible for stewarding the lands granted to the Tribes for the Tribes' benefit.[12] However, Native Americans living on or near reservations have been subjected to a longstanding fundamental iniquity: following their conquest and assimilation under United States authority, the land under their control has been steadily eroded,[13] and they are forced to reckon with a legacy of environmental contamination stemming from exploitation of the natural resources found within that land.[14]

This note makes three claims: (1) that environmental contamination disproportionately affects those who live on Tribal lands; (2) that the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) must be amended to allow for recovery of damages for injuries to natural resources of cultural significance; (3) that the Federal government must renew its efforts to effectively work with Tribes to better regulate and protect the environment on Tribal lands.

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[8] Lorraine Boissoneault, *The Cuyahoga River Caught Fire at Least a Dozen Times, but No One Cared Until 1969*, SMITHSONIAN MAG. (June 19, 2019), https://www.smithsonianmag.com/history/cuyahoga-river-caught-fire-least-dozen-times-no-one-cared-until-1969-180972444/. (Discussing the instances where rampant environmental contamination on the Cuyahoga River resulted in it catching fire, and the resulting notoriety of the incidents in national media).

[9] Trip Jennings, Remembering the Largest Radioactive Spill in U.S. History, N.M. IN DEPTH (July 7, 2014), https://nmindepth.com/2014/07/07/remembering-the-largest-radioactive-spill-in-u-s-history/. (Discussing the Church Rock dam burst, which released 94 million gallons of radioactive waste

[10] *Id*. (Examining the long history of environmental contamination on the Navajo reservation, in particular comparing the 1979 Three Mile Island nuclear power incident with the dam burst at the Northeast Church Rock Mine three months later, which is the largest release of radioactive material in U.S. history).

[11] Worcester v. Georgia, 31 U.S. 515, 555 (1832).

[12] Jana L. Walker, Jennifer Bradley, & Timothy J. Humphrey, *A Closer Look at Environmental Justice in Indian Country*, 2 SEATTLE J. FOR SOC. JUST. 379, 382 (2002), https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1234&context=sjsj.

[13] DEP'T OF INTERIOR: OFF. OF NAT. RES. REVENUE DATA, NATIVE AMERICAN OWNERSHIP AND GOVERNANCE OF NATURAL RESOURCES, https://revenuedata.doi.gov/how-revenue-works/native-american-ownership-governance/#:~:text=In%201887%2C%20tribes%20held%20138,extended%20the%20trust%20period%20indefinitely (last visited Feb. 19, 2021).

[14] Walker, et al., *supra* note 10 at 389.

Part II of this Note will present background and context for the development of the legal relationship between the federal government and Tribal Nations; as well as an overview of environmental regulations and policy affecting contamination on Tribal land. Part III will examine the environmental conditions on Tribal land, particularly in regards to environmental contamination and environmental justice concerns, supporting the conclusion that individuals residing on or near Tribal lands are disproportionately affected by environmental contamination. Part IV will discuss how amending the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to allow for the recovery of damages to resources of cultural or spiritual significance is essential for protecting Tribal interests. Part V will conclude with a discussion of implications for the future of environmental protections for Tribal lands.

II. BACKGROUND INFORMATION

A. Treaties

In the course of the expansion of its governance from the Eastern seaboard to span the breadth of the continent, the United States of America signed numerous treaties with Tribes establishing diplomatic relations between the federal government and the Tribes and nations today known as Native Americans or American Indians.[15] The treaties are the earliest example of the codification of privileges afforded by the United States to the Tribes, as well as being a delineation of the lands on which they would be permitted to settle and govern as Tribal land.

Treaties typically followed similar formulas in their structure.[16] A typical example is a treaty between the United States and the "Yakima" Tribe of the Pacific Northwest, signed in 1855 and ratified in 1859. The treaty refers to a previous treaty signed with the "Omaha" Tribal conglomerate, illustrating that the form of this treaty draws from relatively similar language in terms of the geographic scope and the establishment of the relationship between the Tribe(s) and the United States.[17] The text of the treaty illustrates an early conception of the relationship established

[15] Treaties Between the United States and Native Americans, YALE L. SCH.: LILLIAN GOLDMAN L. LIBR., https://avalon.law.yale.edu/subject_menus/ntreaty.asp (last visited Mar. 26, 2021). (Collating a list of some of the numerous treaties signed between the federal government and Native American Tribes). See also, Sarah Pruitt, *Broken Treaties With American Tribes: Timeline*, HISTORY (Nov. 10, 2020), https://www.history.com/news/native-american-broken-treaties. ("some 368 treaties would define the relationship between the United States and Native Americans for centuries to come").

[16] Tribal Nations and the United States, NAT. CONG. OF AM. INDIANS 16 (2020), https://www.ncai.org/tribalnations/introduction/Tribal_Nations_and_the_United_States_An_Introduction-web-.pdf. (Describing how although treaties with Tribal Nations can vary in their terms and provisions, there are elements that are common to each, specifically resource rights and submitting to US authority and protection).

[17] FISH & WILDLIFE SERV., TREATY WITH THE YAKIMA, 1855 (1859), at 4.

between the federal government and the Tribes over whom it had established its authority.

The preamble outlines the parties to the treaty. It states that these Tribes and bands occupy lands that are designated as being part of the "Washington Territory."[18] This language implicitly establishes that these people were occupying territory which the United States, by right of conquest or otherwise, had control over, and the treaty legitimized their occupation of the land in question.

Article 1 designates the boundaries of the lands which that collection of Tribes were thereafter authorized to occupy. The treaty establishes the role of the federal government in determining what lands the Tribes could inhabit, and includes the provision that the Tribes "cede, relinquish, and convey. . .all their right, title, and interest in and to the lands and country occupied and claimed by them [prior to the enactment of the treaty]. . .."[19] The named Tribes, by signing, acknowledge that all subsequent rights to territory and self-governance hinge on the granting of such authority by the federal government, an arrangement predicated on the coercive military might of one of the signatories: the United States.

Article 2 reserves the land on which the Tribes will be permitted to settle and govern, outlining the specific tract's geographic boundaries.[20] One point to note is the importance of geography, namely rivers, in the way that this territory was demarcated: land is at the heart of the process, and it remains at the core of the ongoing relationship between the various Tribes and the federal government and several states.

Article 3 is of key importance, as it describes the uses to which the Tribes are allowed to put their new territory.

> The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated Tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.[21]

It allows federal and state authorities to run roads through Tribal lands, carrying with them the privilege of free travel to all citizens of the United States.

> . . .for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also

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18 FISH AND WILDLIFE SERV., *supra* note 16, at 1.

19 *Id.* at 1.

20 *Id*. at 2.

21 *Id*. at 2.

the right, in common with citizens of the United States, to travel upon all public highways.[22]

The language regarding the environmental rights of the Tribes, to utilize natural resources such as animals and nonliving resources such as water and the earth, has been the subject of much litigation over the 171 years since the treaty's ratification. This was the focus of Confederated Tribes & Bands of the Yakama Nation v. Airgas USA, LLC, which saw Tribal plaintiffs in court fighting for their treaty-enshrined rights to fish on the reservation, which were threatened by upstream industrial contamination.[23]

The final section of the treaty discussed here, Article 8 establishes the legal relationship between the newly ordained (through the treaty) Tribal nation and the federal government: "the aforesaid confederated Tribes and bands of Indians acknowledge their dependence upon the Government of the United States. . ." (emphasis added).[24] This kind of language marks the gist of the legal relationship between Tribes and the government: that of trustees for whom the government acts in benevolence and conservatorship of their interests and property.[25]

The form and substance of this treaty are similar to the hundreds of other treaties ratified between the conquerors, the United States, and the conquered, the Native Americans, for whom the text of those treaties would come to form the basis of their rights.[26] While the terms and provisions of the treaties can exhibit some variation, they are generally similar, and commonly include several key elements: a guarantee of peace; a provision addressing land boundaries; delineation of resource rights; Tribal recognition of US authority; a provision guaranteeing US protection.[27] For example, the treaty between the United States and the Cheyenne and Arapaho Tribes, while more complex, centered also on the allotting of land based on geographic features such as rivers, and also established that the land was granted by the United States in accordance with the Tribes' status as beneficiaries.[28] So too did the historic Treaty of Fort Laramie in 1868 between the United States and the Sioux nation, which "set apart" a reservation "for the absolute and undisturbed use" of the Tribal signatories.[29]

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[22] *Id*. at 2.

[23] Confederated Tribes & Bands of the Yakama Nation v. Airgas USA, LLC, No. 3:17-cv-00164-JR, 2019 U.S. Dist. LEXIS 142930 (USDC DOR Jan. 22, 2019). (Regarding the right of Tribes to utilize the natural resources of the rivers and the ability of the Tribes to litigate against polluters of those resources).

[24] FISH AND WILDLIFE SERV., *supra* note 16, at 4.

[25] Matthew Duchesne, *Tribal Trustees and the Use of Recovered Natural Resources Damages under CERCLA*, 48 NAT. RES. J. 353 (2008). See also: DEPT. OF INT., TRUSTEES AND TRUSTEESHIP (2020). (outlining in general terms the nature of the trusteeship relationship).

[26] NAT'L CONG. OF AM. INDIANS, *supra* note 15, at 16.

[27] *Id*. at 16.

[28] TREATY WITH THE CHEYENNE AND ARAPAHO (1865), https://avalon.law.yale.edu/19th_century/char65.asp.

[29] TRANSCRIPT OF TREATY OF FORT LARAMIE (1868), https://avalon.law.yale.edu/19th_century/char65.asp.

These treaties form the bedrock of the relationship between the federal government and these "domestic dependent nations," serving as the initial codification of the rights of the Tribes to own land, and granting some limited powers of regulation over people living on that land. The guarantees built into the treaties have developed, through court cases and statutes over the past two centuries, into the modern legal framework that governs interactions between the Tribes and the government which, nominally, is treaty-bound to act in their interests.

B. The Relationship Between the Federal Government and the Tribes

As previously discussed, the relationship of Tribes to the federal government has always been paternalistically described as dependence, with recognition of Tribal sovereignty hinging on statutory grants of authority and the broad plenary power of the US government.[30] The Supreme Court has held, since some of its earliest cases, that the same dependent nation status conferred on Tribes by the British (wherein Tribes acquiesced to British governance and protection without a surrender of their "national character") would be held over in the new American republic.[31] Chief Justice Marshall declared in Cherokee Nation v. State of Georgia that the Tribal Nations are not a foreign state, even though they occupy territory to which the United States asserts title "independent of their will," and that "their relations to the United States resemble that of a ward to his guardian."[32] Chief Justice Marshall also reinforced the longstanding denomination of domestic dependent nations, to encapsulate the relationship between the United States and these Tribal entities.[33] The standard established by the Supreme Court of the early nineteenth century was that the United States government owes a duty of responsibility for these domestic dependent nations, and this has subsequently been elaborated on by the Supreme Court and lower Federal Courts.[34]

While the Court affirmed and reaffirmed its belief in the "unquestionable, and heretofore an unquestioned right to the lands [the Tribes] occupy"[35] in cases such as

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[30] Walker, *supra* note 10 at 379.

[31] Worcester, 31 U.S. at 552-555.

[32] Cherokee Nation v. State of Georgia, 30 U.S. 1, 10 (1831).

[33] *Id*.

[34] See, *Id*. at 10. ("[the Tribes] may more correctly, perhaps, be denominated domestic dependent nations"); U.S. v. Kagama, 118 U.S. 375 (U.S. 1886) ("largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power"); Seminole Nation v. U.S., 316 U.S. 286, 297 (1942) ("[the Government] has charged itself with moral obligations of the highest responsibility and trust").

[35] Cherokee Nation, 30 U.S. at 10. See, e.g.,Worcester v. Georgia, 31 U.S. 515 (1832) (barring state law from Indian country as an unacceptable interference with federal-Tribal relations); Rice v. Olson, 324 U.S. 786, 789 (1945) (noting "the policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history");Williams v. Lee, 358 U.S. 217, 220 (1959) (barring on-reservation state action that "[ilnfringed on the right of reservation Indians to make their own laws and be ruled by them").

US v. Kagama (1886),[36] and Seminole Nation v. US (1942),[37] the federal government was taking steps that were overtly detrimental to Tribal ownership and stewardship of the lands they supposedly controlled. The General Allotment Act of 1887 parceled out millions of acres of reservation land to individual Native Americans, in an effort to break up reservations and transfer the lands into private ownership.[38] These allotments were held in trust by the United States for the beneficiary (the Tribes) for a specified time period, after which the trust status would be removed and the allottee (Tribal individuals) granted fee simple title to the land.[39] However, once they were no longer held in trust by the federal government, the lands became subject to state and local taxation, which resulted in a massive turnover of Native American land, because once the trust status was lifted, the fee holders could no longer afford to retain control of the land and sold it to (often) white settlers.[40] Land not parceled out to individual Native Americans was also declared "surplus" and the federal government gave it away to homesteaders migrating from the rapidly urbanizing East Coast.[41] The "Allotment Era" as it is now known was disastrous for Native American land ownership, with Tribal land ownership falling from 138 million acres in 1887, to 48 million acres in 1934.[42] The federal response to this crisis of dwindling Native American land ownership was to indefinitely extend the trust period on remaining Tribal allotments, allowing Tribe members to retain title to the land.[43] The Indian Reorganization Act of 1934 restored remaining "surplus" land to Tribal ownership, held in trust by the United States government.[44] Owing to this decision, the federal government, through the Department of the Interior (DOI), holds 56 million acres in trust for federally-recognized Tribes.[45]

The trust system encompasses more than simply the provision of land ownership rights, however. The federal government in this trust relationship has obligations to ensure that natural resources on Tribal lands are developed with the economic interests of the Tribal trustees in-mind.[46] State regulatory laws and licensing rules generally do not apply on reservations, apart from instances where

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[36] Kagama, 118 U.S. at 375.

[37] Seminole Nation, 316 U.S. at 297.

[38] U.S. DEP'T. OF INTERIOR: OFF. OF NAT. RES. REVENUE DATA, *supra* note 12.

[39] *Id*.

[40] *Id*.

[41] *Id*.

[42] *Id*.

[43] *Id*.

[44] U.S. DEP'T. OF INTERIOR: OFF. OF NAT. RES. REVENUE DATA, *supra* note 12.

[45] *US Reaches Mismanaged Money Settlement With 17 More Tribes,* NATIVE TIMES (Sep. 26, 2016) https://www.nativetimes.com/index.php/news/federal/13733-us-reaches-mismanaged-money-settlement-with-17-more-Tribes.

[46] Maura Grogan, Rebecca Morse & April Youpee-Roll, *Native American Lands and Natural Resource Development*, REVENUE WATCH INST., 10 (2011), https://resourcegovernance.org/sites/default/files/RWI_Native_American_Lands_2011.pdf.

they are expressly sanctioned by federal statute.[47] Additionally, the federal government is obliged to manage the revenues accrued from private development of resources on Tribal land through federally-licensed projects, as well as a general fiduciary duty to ensure that funds from these revenues are deposited into trust accounts and that DOI allocates them responsibly.[48] In the course of this management however, and in spite of a move towards greater self-determination for Tribal Nations, Tribes are barred from developing their own natural resources without federal approval.[49] In order to license natural resource projects on their land, without requiring approval from the Secretary of the Interior for each individual project, Tribes can enter into "tribal energy resource agreements" (TERAs), overseen by the Department of the Interior and the Bureau of Indian Affairs.[50] There have also been cases brought before the federal judiciary of mismanagement or misallocation of Tribal trust monies, in which the federal government has settled with Tribes for utilizing funds derived from natural resource leasing on Tribal lands for purposes not specifically for the benefit of the Tribes.[51]

In the landmark case Cobell v. Kempthorne, DOI was ordered by a federal judge to pay $455 million in restitution damages to the Tribal plaintiffs for funds that were redirected, skimmed, or outright taken from monies owed to Tribes and individual Tribe members.[52] Tribal Plaintiffs alleged that the federal government had misappropriated more than $100 billion in royalties owed to Tribes for leases of Tribal land for mineral, fossil fuel, timber, and grazing exploitation.[53] Both parties appealed the award,[54] and in 2009, thirteen years after the start of the case, the federal government offered a settlement to the plaintiffs for $1.4 billion, which the plaintiffs accepted.[55]

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[47] McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 170-71 (1973). See, e.g.,Worcester v. Georgia, 31 U.S. 515 (1832) (barring state law from Indian country as an unacceptable interference with federal-Tribal relations); Rice*,* 324 U.S. at 789. (noting "the policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history"); Williams, 358 U.S. at 220. (Barring on-reservation state action that "[ilnfringed on the right of reservation Indians to make their own laws and be ruled by them").

[48] NATIVE TIMES, *supra* note 44.

[49] U.S. DEP'T. OF INTERIOR: OFF. OF NAT. RES. REVENUE DATA, *supra* note 12.

[50] Press Release, Tara Sweeney, Assistant Secretary Sweeney Clears the Path for Tribes to Develop Energy Resources on Tribal Land (Dec. 23, 2019).

[51] NATIVE TIMES, *supra* note 44. (Describing the settlement award by the Obama administration with the plaintiffs).

[52] Cobell v. Kempthorne ("Cobell XXI"), 569 F.Supp.2d 223 (D.D.C.2008). See also, *Native American Trust Fund: Massive Mismanagement*, FRIENDS COMM. ON NAT. LEG., https://www.fcnl.org/updates/2016-09/native-american-trust-fund-massive-mismanagement (Sep. 29, 2016). (Describing the settlement negotiations).

[53] Cobell, 569 F.Supp.2d at 226. See also, James Warren, *A Victory for Native Americans?*, THE ATLANTIC (Jun. 7, 2010), https://www.theatlantic.com/national/archive/2010/06/a-victory-for-native-americans/57769/.

[54] Cobell v. Salazar, 679 F.3d 909 (C.A.D.C.,2012).

[55] *Id*. See also, FRIENDS COMM. ON NAT. LEG., *supra* note 51. (Describing the trial history and settlement).

Fundamentally, the trust relationship between the federal government and Tribal Nations is, pursuant to some of the earliest Supreme Court decisions,[56] one of responsibility on the part of the federal government for the wellbeing and prosperity of Tribal Nations. A key portion of that responsibility must be reckoning with the legacy environmental, health, and cultural impacts that have endured long past the completion or abandonment of the projects or land uses that have impacted Tribal lands..[57]

C. Natural Resources Damages and CERCLA

CERCLA is one of the pillars of American environmental law. It is a broad remedial statute with two major purposes: (1) to ensure that hazardous wastes that have been released or that threaten to be released into the environment are cleaned up promptly and effectively, and (2) to ensure that the parties responsible (in CERCLA lingo, "Potentially Responsible Parties," or "PRPs") for the contamination pay for cleaning it up.[58] CERCLA liability, which is often joint and several, is for (a) cleaning up the hazardous substance(s); and (b) damages for injury to, destruction of, or loss of natural resources.[59] Whereas damages corresponding to the cost of cleanup are used to reimburse whoever did the actual cleanup (usually a state or the federal government), natural resource damages (NRD) are paid to statutorily designated "trustees."[60] These can be the federal government, a state, or an Indian Tribe.[61] Section 107(f) prohibits federal and state authorities to use NRD for any purpose other than to assess the damages and to restore, rehabilitate, or acquire the equivalent of the injured natural resources.[62] Curiously, CERCLA does not place the same limitations on tribal trustees. The negative inference is that they may put recovered funds to any use they see fit.[63] This omission is probably a drafting error, as consideration was given to making the language regarding Tribes congruent with the requirements placed on federal and state trustees, but these revisions were never finalized in the text of the statute.[64]

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[56] Cherokee Nation, 30 U.S. at 1; and Worcester v. Georgia, 31 U.S. 515 (1832)

[57] Johnnye Lewis, Joseph Hoover & Debra MacKenzie, *Mining and Environmental Health Disparities in Native American Communities*, 4 CURRENT ENVTL. HEALTH REP. 130, 130-131 (2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5429369/.

[58] Metro. Water Reclamation Dist. v. N. Am. Galvanizing & Coatings, Inc., 473 F.3d 824, 827 (7th Cir. 2007).

[59] 42 U.S.C. §§ 9607(a), 9604(i).

[60] 42 U.S.C. § 9607(f)(1).

[61] 42 U.S.C. § 9607(f)(1).

[62] Duchesne, *supra* note 24.

[63] *Id*. at 358.

[64] *Id*. at 358.

CERCLA is rife with lengthy and complex provisions, for which clarity is often sought by regulators, advocates, litigants, and judicial actors.[65] Legal economics regarding NRD is still developing, as it was at the time that CERCLA and related statutes were promulgated.[66] Calculating NRD involves several interrelated disciplines, including environmental science, resource economics, and environmental law, and the arithmetic itself is an amalgamation of techniques and modes of inquiry.[67]

In determining NRD, the determination of damages must be based on the value of the direct flow of services from the use of the affected resource(s) to the public. Difficulty arises however, in ascribing a value to such resources, especially in light of concurrent usage by parties with possibly divergent interests, as well as the sovereignty concerns that affect all public natural resource governance.[68] Pursuant to their nature as common in ownership, open-access natural resources, and thus the damage to them, are indivisible; this necessitates the adding of the individual values to all users.[69]"[D]amage to private property—absent any government involvement, management or control—is not covered by the natural resource damage provisions of the statute."[70] NRD thus flow to the trustees of natural resources: in this case Tribal nations, for "natural resources belonging to, maintained by, controlled by, or appertaining to such tribe."[71]

The basic measure of NRD is lost market value, as the loss in use of a particular resource generally is measured based on what the economic value of that resource might be in a less-contaminated or uncontaminated state e.g.: fish in a river or estuary; water quality of an aquifer; clean air on a reservation.[72] NRD are calculated by examining the cost of restoring the injured resource(s), compensation for the loss of the use of the resource(s) from contamination to remediation, and the cost of assessing the extent of the damage.[73] The Department of the Interior defines the "use value" of a natural resource as: "the economic value of the resources to the

[65] Uniroyal Chem. Co. v. Deltech Corp., 160 F.3d 238,246 (5th Cir. 1998); see also Rhodes v. County of Darlington, 833 F. Supp. 1163,1174 (D.S.C. 1992) ("CERCLA is not a paradigm of clarity or precision. It has been criticized frequently for inartful drafting and numerous ambiguities attributable to its precipitous passage.") (quoting Artesian Water Co. v. New Castle County, 659 F. Supp. 1269,1277 (D. Del. 1987), aff'd, 851 F.2d 643, 648 (3rd Cir. 1988)); In re Acushnet River and New Bedford Harbor, 716 F. Supp. 676,681 n.6 (D. Mass 1989) ("Like many a court before it, this Court cannot forbear remarking on the difficulty of being left compassless on the trackless wastes of CERCLA.").

[66] Edward J. Yang, *Valuing Natural Resources Damages: Economics for CERCLA Lawyers*, ENVT'L. L. REP. (1984), https://elr.info/sites/default/files/articles/14.10311.htm.

[67] *Id*.

[68] *Id*.

[69] Yang, *supra* note 65.

[70] State of Ohio v. U.S. Dept. of the Int., 880 F.2d 432, 460 (D.C. Cir. 1989).

[71] 42 U.S.C. 9607(f)(1).

[72] *Id*.

[73] Sarah Peterman, *CERCLA's Unrecoverable Natural Resource Damages: Injuries to Cultural Resources and Services*, ECOLOGY L. Q. (Mar. 9, 2011), https://elq.typepad.com/currents/2011/03/currents38-03-peterman-2011-0301.html.

public attributable to the direct use of the services provided by the natural resources,"[74] and the "nonuse value" as: "the economic value the public derives from natural resources that is independent of any direct use of the services provided."[75] In State of Ohio v. U.S. Department of the Interior, the D.C. Circuit held that in "[i]n ascertaining the 'uses made of a resource,' a trustee may consider only 'committed uses.'[76] "Committed use" is defined as: "either: a current public use; or a planned public use of a natural resource for which there is a documented legal, administrative, budgetary, or financial commitment established before the discharge of oil or release of a hazardous substance is detected."[77] The Court acknowledged claims made by the petitioners that "for many natural resources, it will be difficult for trustees to document currently committed uses,"[78] before concluding that NRD apply "only to the calculation of diminution in use values during the period required to achieve restoration or replacement [of the natural resource.]"[79] However, the D.C. Circuit also held that "proof of a 'committed use' is not a prerequisite to recovery of restoration costs."[80] NRD can thus be difficult to determine in the first instance, and when the added impact of damage to a particular resource(s) that has cultural significance to a subset of users is accounted for, the calculations can verge on the arcane.

As Tribes push for increased sovereignty to lease their land for natural resource exploitation and economic benefit, damage to cultural resources, environmental contamination, and potentially adverse health effects for those living in surrounding areas can result. Recovery may not fully encompass the scope of injury to the natural resources in question,[81] particularly in the area of cultural or spiritual value. What is clear, however, is that nowhere in the statutory language of CERCLA § 107 or § 111 (governing liability and damages respectively) are "cultural resources" mentioned, nor are they included in the relatively broad definition of NRD.[82] CERCLA does not provide for recovery for damages to non-living or "cultural" natural resources.[83]

74 43 C.F.R. § 11.83(c)(i).
75 43 C.F.R. § 11.83(c)(ii).
76 State of Ohio v. U.S. Dept. of the Int., 880 F.2d at 461.
77 43 C.F.R. § 11.14(h).
78 State of Ohio v. U.S. Dept. of the Int., 880 F.2d at 461.
79 *Id*. at 462.
80 *Id*. at 462.
81 Yang, *supra* note 65.
82 Peterman, *supra* note 73.
83 *Id*.

III. CHALLENGES FACED BY TRIBES IN RECOVERING FOR INJURIES TO CULTURAL RESOURCES

A. Tribal Lands are Disproportionately Affected by Environmental Contamination

The prelude to the modern legal relationship between Tribes and the federal government is never far from the surface: the violent conquest of the land on which lived the ancestors of modern Native Americans echoes in the treatment of their descendants since. The United States of America is a highly-racialized society,[84] and while the diversity of the population is steadily increasing,[85] the impacts of institutionalized racism are still felt by marginalized communities across the country. This is especially true with regard to environmental issues, and particularly in the siting of facilities that contribute to pollution or other environmental harms, resulting in communities of color: Black, Latinx, Native American etc., being exposed to greater health and environmental risks than is the general population.[86] A broadening field of scholarship has opened with the aim of investigating the intersection of racial injustice, environmental issues, and environmental policymaking, and "environmental justice" has evolved as an alternative to environmental discrimination or environmental racism.[87]

Environmental hazards and contamination-producing facilities such as mines, fossil fuel-based power plants, and other environmental harms are predominantly sited in low-income and non-white communities, and indigenous habitats and spiritual grounds, of particular import to American Indian communities, are subject to contamination and degradation as a result of resource exploitation and a lack of institutional protections.[88] More than 160,000 abandoned mines are located in the Western United States, which are home to the majority of Tribal lands and

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[84] ROBERT D. BULLARD, CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS 7 (1st ed. 1999).

[85] Richard Fry & Kim Parker, *Early Benchmarks Show 'Post-Millennials' on Track to Be Most Diverse, Best-Educated Generation Yet*, PEW RES. CTR. (Nov. 15, 2018), https://www.pewsocialtrends.org/2018/11/15/early-benchmarks-show-post-millennials-on-track-to-be-most-diverse-best-educated-generation-yet/.

[86] BULLARD, *supra* note 81 at 7.

[87] Mathew N. O. Sadiku, Olaniyi D. Olaleye & Sarhan M. Musa, 6 *Environmental Justice: A Primer*, INT'L J. OF TREND IN RES. AND DEV. 5, 31 (2019), www.ijtrd.com.

[88] *Id.*

reservations.[89] Even in their abandoned state, these mines still pose a major environmental hazard to Tribal members living in their vicinity.

The Navajo Nation, one of the United States' largest federally recognized Tribes, inhabits 27,000 square miles stretching across New Mexico, Arizona, and Utah: an area larger than 10 states, and roughly the size of the State of West Virginia.[90] Present on the Navajo Reservation, and also in the vicinity of the Hopi Reservation, are a multitude of uranium mines from which more than 30 million tons of uranium ore were extracted from 1944 to 1986.[91] The abandoned mines, contaminated by the mining operations conducted in and around them, expose Tribe members on the reservation to uranium contamination in dust, soil, groundwater and surface water, as well as radioactive elements in building materials both in the mines and on the reservation.[92] In 1979, the Church Rock incident saw a dam burst release 94 million gallons of radioactive waste[93] and 1100 tons of uranium mine tailings[94] into the nearby Puerco River, subjecting downstream Tribal communities to the largest radioactive spill in United States history.[95] In 2014, the federal government reached a settlement with the defendant, Anadarko Petroleum Corp., for $5.15 billion for the remediation of the decades-old environmental contamination disaster site.[96] Of this settlement, $1 billion was set aside for the direct remediation of more than 500 abandoned uranium mines on Navajo lands.[97]

Federal environmental policy has long favored increased natural resource exploration, and this has often coincided with a reduction of previously-protected Tribal lands for the purpose of opening them to oil and mineral exploitation.[98]

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[89] Lewis, *supra* note 56, at 130-131. (Examining environmental health impacts of the siting of mining facilities on or near Native American reservations and Tribal trust lands).

[90] *History*, NAVAJO NATION GOVERNMENT, https://www.navajo-nsn.gov/history.htm (last visited Dec. 19, 2020). (Describing the geographical region inhabited by the Navajo Nation). (Describing the geographical region inhabited by the Navajo Nation).

[91] UNITED STATES ENV. PROT. AG., NAVAJO MINES: CLEANING UP ABANDONED URANIUM MINES (last visited Feb. 20, 2021), See also: *Navajo Nation: Cleaning Up Abandoned Uranium Mines*, U.S. ENVTL. PROTECTION AGENCY, https://www.epa.gov/navajo-nation-uranium-cleanup. (last visited Feb. 20, 2021).

[92] *$2 Billion in Funds Headed for Cleanups in Nevada and on the Navajo Nation from Historic Anadarko Settlement with U.S. EPA, States*, U.S. ENVTL. PROTECTION AGENCY, https://archive.epa.gov/epa/newsreleases/2-billion-funds-headed-cleanups-nevada-and-navajo-nation-historic-anadarko-settlement.html. (last visited Dec. 20, 2020).

[93] Jennings, *supra* note 8.

[94] Tommy Smith, *The Church Rock Uranium Mill Spill*, ENV'T AND SOC'Y PORTAL, http://www.environmentandsociety.org/tools/keywords/church-rock-uranium-mill-spill. (last visited Feb. 21, 2021).

[95] Jennings, *supra* note 8.

[96] Jennings, *supra* note 8.

[97] *Abandoned Mines Cleanup*, U.S. ENVTL. PROTECTION AGENCY, https://www.epa.gov/navajo-nation-uranium-cleanup/abandoned-mines-cleanup (last visited Feb. 20, 2021). See also: Jennings, *supra* note 8.

[98] Zak Podmore, *Oil and Gas Drilling Threaten Indigenous Cultural Sites*, SIERRA CLUB (Feb. 28, 2019), https://www.sierraclub.org/sierra/2019-2-march-april/protect/oil-and-gas-drilling-threaten-

Energy projects like oil and gas drilling, as well as mining, have the potential to not only adversely affect the health of Tribe members in the vicinity of the projects, but also destroy places of cultural significance to the Tribes. In 2017, the Trump administration reduced the Bears Ears National Monument by 85 percent, opening up more than 300,000 acres of previously protected land to oil and gas drilling operations.[99] This mass sell-off included many indigenous antiquities of particular cultural importance to Tribes in the area, the significance of which was the primary motivator in designating the site as a protected area in the first place.[100] In a marked reversal, the administration of President Joseph Biden restored protections to Bears Ears and other monuments,[101] illustrating how shifts in policy between individual presidential administrations can have dramatic impacts for Tribal lands.

Contaminated sites on Tribal lands represent the convergence of environmental racism and the dysfunction inherent in the federal-Tribe relationship. Tribes are dependent upon federal authorization for the leasing of tribal lands for natural resource exploitation. Communities affected by the siting of polluting facilities and adjacent to contaminated sites are those with the least political power to either prevent the creation of environmental hazards, nor receive coverage of the ways those environmental hazards affect them.[102] Inadequate community participation in decision-making processes is a key prerequisite for environmental injustices,[103] and that lack of participation in regards to Tribal communities has resulted in Tribal lands being leased out en masse by the federal government for natural resource exploitation.

Depending on when they were abandoned, many of these sites were operated by now-defunct companies, thus making it unlikely that a solvent PRP can be found from whom to seek damages for the remediation of environmental damage. Furthermore, CERCLA bars recovery for contamination which took place before 1980, meaning that many of the historically longstanding environmental problems on Tribal lands may be remediated through future federal programs, but they cannot be brought as causes of action under CERCLA.[104]

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indigenous-cultural-sites. (Discussing the impacts of the Trump administration's "energy dominance" regime in reducing the size of federally-protected lands for the purpose of oil, gas, and mineral exploration).

[99] *Id*.

[100] *Id*. (Describing how five Tribes petitioned the Obama administration to designate Bears Ears as a National Monument due to the cultural significance of archaeological sites in the area).

[101] THE WHITE HOUSE, FACT SHEET: PRESIDENT BIDEN RESTORES PROTECTIONS FOR THREE NATIONAL MONUMENTS AND RENEWS AMERICAN LEADERSHIP TO STEWARD LANDS, WATERS, AND CULTURAL RESOURCES, (Oct. 7, 2021).

[102] Sadiku, *supra* note 84 at 31.

[103] *Id*.

[104] 42 U.S.C. § 9607(f)(1).

B. Federal Policymakers and Jurists Have Repeatedly Subverted Tribal Sovereignty

Beyond the cruelty and brutality to which they were subjected during the conquest and expansion of American settlers across the continental United States, Native Americans have faced considerable bias and discrimination at the hands of judicial actors. The judicial record since the earliest days of the US is rife with instances of courts derogating Tribal actors on an explicitly racial basis. In 1835, the Tennessee Supreme Court defended the European conquest of North America in State v. Foreman:

> [T]he principle by which the country was taken possession of, was the only rule of action possible to be observed . . . it was more just the country should be peopled by Europeans, than continue the haunt of savage beasts, and of men yet more fierce and savage, who, 'if they might not be extirpated for their want of religion and just morals, they might be reclaimed for their errors' . . . [a] rule of which savages of the description have no just right to complain.[105]

This case, while a criminal matter, is still emblematic overall of the experience of Indians in American courts: the legal basis for their rights is often tenuous, and capriciously amended at the hands of courts on the state and federal level. In Tee-Hit-Ton Indians v. United States the United States Supreme Court ruled against Native plaintiffs in a Fifth Amendment takings case regarding land which the plaintiffs cited as being part of a previous treaty with their Tribe granting them ownership of the land at issue.[106] The Court, in a decision following closely on the heels of the landmark Brown v. Board of Education, held that the statutes cited by the plaintiffs "did not indicate any intention by Congress to grant to petitioner any permanent rights in the lands that they occupied by permission of Congress."[107] Thus, the legal entitlement of the Tribes to resources and land promised to them by treaty and an act of Congress years before was abrogated with a single opinion, leaving the natural resources previously under their protection subject to exploitation and degradation by non-Tribal persons with the federal government's approval.[108]

Additionally, legal ambiguity has often been the bane of Tribal members in state and federal courts. Before the twentieth-century expansion of Fourteenth Amendment jurisprudence, the Fourteenth Amendment and its protections were not even considered by judges as applying to Native Americans, with the question of which jurisdiction (state or federal) they were subject to often left in the hands of

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[105] State v. Foreman, 16 Tenn. 256 (1835).

[106] Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955).

[107] *Id.*

[108] *Id.*

whichever judges or justices heard the particular case.[109] The history of Tribal-American relations abounds with treaties broken, revised, and reinterpreted, often with the result being the reduction of the rights and privileges of the Natives in occupying and exercising control over lands they had previously inhabited and over which they were promised governance.[110]

Recently, as of the writing of this Note, the Supreme Court ruled in McGirt v. Oklahoma that fully half of the land in Oklahoma falls under Tribal jurisdiction, as per treaties penned more than a century ago.[111] This decision was a marked reversal for the state of Oklahoma, which sought to exert sovereignty over actions committed on land under Tribal jurisdiction. The majority held that because the reservations in question were established by act of Congress, any disestablishment of those reservations and the contingent Tribal jurisdiction, must also be pursuant to an act of Congress or other explicit expression of Congressional intent.[112] Following swiftly on the heels of this ruling however, was a decision by the Trump administration Environmental Protection Agency ("EPA") that would throw the weight of the ruling into question. On October 1, 2020, the office of the Administrator of EPA penned a letter to Oklahoma Governor J. Kevin Stitt that sought to reassure the state government of Oklahoma that it would not be subject to interference in siting oil and gas drilling facilities on Tribal lands, over the protests of the Tribes just recently deemed to have jurisdiction over those lands.[113] The letter referenced a section of the Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005: A Legacy for Users ("SAFETEA"):

> Notwithstanding any other provision of law, if the Administrator of the Environmental Protection Agency (referred to in this section as the "Administrator") determines that a regulatory program submitted by the State of Oklahoma for approval by the Administrator under a law administered by the Administrator meets applicable requirements of the law, and the Administrator approves the State to administer the State program under the law with respect to areas in the State that are not Indian country, on request of the State, the Administrator shall approve the State to administer the State program in the areas of the State that are

[109] State ex rel. Truman v. McKenney, 18 Nev. 182 (1883). (Addressing the complicated task of determining whether crimes committed on Tribal land fall under the jurisdiction of state or federal courts, with the court opting for the former).

[110] DeCoteau v. Dist. County Court for Tenth Judicial Dist., 420 U.S. 425 (1975). (Referencing past treaties with Tribes and legislative history to conclude that Tribal land claims had been terminated by subsequent acts of Congress in spite of the terms of the treaties).

[111] McGirt v. Oklahoma, 140 S. Ct. 2452, 207 L. Ed. 2d 985 (2020).

[112] *Id.*

[113] Jeff Turentine, *In Oklahoma, "Yet Another Broken Promise" to Native Americans*, NATURAL RESOURCE DEFENSE COUNCIL (Oct. 21, 2020), https://www.nrdc.org/stories/oklahoma-yet-another-broken-promise-native-americans.

in Indian country, without any further demonstration of authority by the State.[114] (Emphasis added).

The EPA Administrator's letter to the governor cited Section 10211(a) of SAFETEA as granting the state of Oklahoma power to promulgate and enforce environmental regulations on reservation land as it would on state land. EPA effectively contradicted the ruling by the Supreme Court in McGirt, and this kind of communication is emblematic of the ways that political agendas can warp the nature of the trust relationship in terms of natural resource policy. What was made abundantly clear to Tribal activists however, was the extent to which some state and federal policymakers would act to limit their sovereignty in favor of the interests of resource extraction companies.

A recent case has shed light on the ongoing quest by Tribal actors to vindicate historic treaty rights and protections. In 2021, the U.S. District Court of the District of Arizona ruled against a non-profit group representing Tribal members of the Apache nation, which was seeking to enjoin the Trump administration from the sale, for the purpose of a major copper mine project, of a tract of land on which stand cultural sites of great significance to the Apache.[115] The plaintiffs, Apache Stronghold argued that an 1852 treaty with various Apache Tribes established a trust relationship with the United States government from which originates the government's fiduciary duty to protect the Tribes' interests.[116] The District Court dismissed the case, asserting that the trust relationship between the federal government and Indian Tribes is not a trust in the common law usage, but is dependent upon statutory constructions to give it weight.[117] While the treaty itself does not explicitly mention a "trust responsibility" being created and incumbent upon the federal government, in Article 9 it stipulates that "the government of the United States shall at its earliest convenience designate, settle, and adjust their territorial boundaries, and pass and execute in their territory such laws as may be deemed conducive to the prosperity and happiness of said Indians."[118] In Article 10: ". . . the government of the United States will grant to said Indians such donations, presents, and implements, and adopt such other liberal and humane measures as said government may deem meet and proper."[119] And in Article 11: ". . . subject only to such modifications and amendments as may be adopted by the government of the United States . . . and that the government of the United States shall so legislate and

[114] U.S. ENVTL. PROTECTION AGENCY, EPA LETTER TO GOV. STITT (2020).

[115] Felicia Fonseca and Anita Snow, *Apache group sues over land swap for Arizona mine*, INDIAN COUNTRY TODAY (Jan. 12, 2021), https://indiancountrytoday.com/news/apache-group-sues-over-land-swap-for-arizona-mine-S-xbVmj5I0eB78I97vABPQ.

[116] Apache Stronghold, Plaintiffs v. United States of America et al., Defendants, No. CV-21-00050-PHX-SPL, 2021 WL 535525 at 3 (D. Ariz., 2021).

[117] *Id.* at 3.

[118] *Treaty with the Apache, JULY 1, 1852*, YALE L. LIBR. https://avalon.law.yale.edu/19th_century/apa1852.asp, (last visited: Feb. 20, 2021).

[119] *Id.*

act as to secure the permanent prosperity and happiness of said Indians."[120] These provisions, when read together, could be interpreted as establishing the kind of trust relationship that has been the cornerstone, and operating principle, of the federal-Tribe relationship on environmental regulatory matters. The court in this case, however, found differently, and the plaintiffs were left with no recourse to prevent the destruction of their sacred sites by a massive new copper mine.[121] As of this writing, no appeal has been filed.

C. Tribes Lack the Resources to Create Their Own Environmental Regulatory Agencies

Even if, or when, Tribes do have the necessary authority to regulate resource extraction projects on their lands, there is a marked lack of resources to effectively accomplish this. Tribes face considerable difficulty in remediating environmental contamination due to the general lack of resources for establishing regulatory agencies for that purpose.[122] There are 573 federally recognized Tribes dispersed throughout the United States.[123] Approximately 56.2 million acres are held in trust by the United States, which is divided by federal land grants amongst different Tribes into 326 distinct reservations.[124] Of the approximately 5.2 million individuals identifying as American Indian or Alaska Native, alone or in combination with other race(s), approximately 22 percent reside on reservations or Tribal trust lands.[125] The federal government has numerous agencies whose primary focuses extend to regulation of the environment, including EPA, DOI, and the Bureau of Land Management ("BLM"). Each state also has its own environmental regulatory body dedicated to the enforcement of state and federal environmental statutes. These entities typically work in tandem with one another, an exemplification of the cooperative federalism of the modern regulatory state.[126] Federal and state agencies also work with Tribal governments to regulate natural resources exploitation and to

[120] *Id*.

[121] Felicia Fonseca, *Court Rules Against Apaches in Bid to Halt Proposed Mine*, INDIAN COUNTRY TODAY (Feb. 12, 2021), https://indiancountrytoday.com/news/court-rules-against-apaches-in-bid-to-halt-proposed-mine-ezVyp6BG60WpcNcPcyZhIg.

[122] James M. Grijalva, The Tribal Sovereign as Citizen: Protecting Indian Country Health and Welfare Through
Federal Environmental Citizen Suits, 12 MICH. J. RACE & L. 33, 34 (2006).

[123] Indian Entities Recognized by and Eligible to Receive Services From the United States Bureau of Indian Affairs, 84 Fed. Reg. 1200 (February 1, 2019).

[124] FREQUENTLY ASKED QUESTIONS, WHAT IS A FEDERAL INDIAN RESERVATION?, https://www.bia.gov/frequently-asked-questions (last visited Oct. 22, 2020).

[125] U.S. CENSUS BUREAU, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010 (2012), at 12.

[126] Grijalva, *supra* note 120, at 35.

remediate environmental contamination on Tribal lands.[127] Several federal agencies, including DOI and EPA, are responsible for disbursing federal funds to Tribes for a variety of purposes. EPA's Environmental General Assistance Program (GAP), with the stated goal of helping Tribes craft their own environmental protection programs, distributes more than $63 million per year,[128] which, even when coupled with the billions of dollars of federal aid disbursed to Tribes by other Agencies, once divided do not provide Tribes with comparable funding to the States. The challenges facing Tribes vary by locality, but the immediacy of Tribal environmental and health risks is universal and exigent.[129]

Many Tribes are faced with a Faustian bargain in terms of how to utilize their land for their economic benefit. Tribes are not subject to state and local taxes, but they also cannot rely on a source of tax revenue themselves, and thus the land itself that once provided for their ancestors is where Tribes must turn to account for the income needed to account for their peoples' basic needs.[130] Tribal land encompasses approximately 2.3 per cent of the total land area of the United States, and there are currently more than 2.1 million acres already being exploited for the wealth of natural resources contained therein.[131] As previously stated, as these natural resources are increasingly being exploited, the likelihood of contamination of said natural resources increases as well.

D. Tribal Actors Cannot Recover Damages for Injuries to Cultural Resources

As previously stated, degradation or destruction of natural resources on Tribal lands carries with it injuries which are often more complex than in environmental suits brought by non-Tribal plaintiffs. Despite this, courts have consistently sought to limit the damages sought by Tribal plaintiffs.[132]

In Confederated Tribes and Bands of the Yakama Nation v. Airgas USA, LLC, the District Court of Oregon, following EPA's involvement in the case as an amicus curiae, denied the plaintiffs natural resource damages in a case where upstream water pollution threatened treaty-protected fishing and other water rights.[133] Courts have

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[127] *Environmental Justice for Tribes and Indigenous Peoples*, U.S. ENVTL. PROTECTION AGENCY, https://www.epa.gov/environmentaljustice/environmental-justice-Tribes-and-indigenous-peoples. (last visited Jan. 24, 2022).

[128] *Indian Environmental General Assistance Program (GAP)*, U.S. ENVTL. PROTECTION AGENCY, https://www.epa.gov/tribal/indian-environmental-general-assistance-program-gap#historical. (last updated Aug. 6, 2021).

[129] Grijalva, *supra* note 120, at 34.

[130] Savannah Maher, *Tribal Nations Exempt From Biden's Suspension Of New Federal Oil And Gas Leases*, WYO. PUB. MEDIA (Jan. 28, 2021), https://www.wyomingpublicmedia.org/post/tribal-nations-exempt-bidens-suspension-new-federal-oil-and-gas-leases#stream/0.

[131] Grogan, et al., *supra* note 45, at 6.

[132] Yakama Nation v. Airgas USA.

[133] Yakama Nation v. Airgas USA.

also refused to award noneconomic damages to Tribes impacted by environmental contamination,[134] even to compensate for the often difficult-to-quantify value and importance of these natural resources to Tribal spiritual practices.

In *Coeur D'Alene Tribe v. Asarco Inc.*, a federal district court judge ruled that "[c]ultural uses of water and soil by Tribe are not recoverable as natural resource damages."[135] Furthermore, the court declared that "[w]hile the Tribe may use certain natural resources in the exercise of their cultural activities, such use does not rise to the level of making a natural resource 'belong or be connected as a rightful part or attribute'."[136] Of the $1.4 billion claimed by the Tribe as damages for more than 100 years of mining in the vicinity of their reservation, $200 million was claimed for loss of tribal "cultural and spiritual values," owing to the destruction and contamination of their sacred sites.[137]

DOI has attempted to emphasize that NRD are recoverable for injuries to cultural resources: "although archaeological and cultural resources, as defined in other statutes, are not treated as 'natural' resources under CERCLA, the rule does allow trustee officials to include the loss of archaeological and other cultural services provided by a natural resource in a natural resource damage assessment,"[138] but the text of CERCLA does not lend itself to this interpretation, nor have federal jurists seen fit to interpret it this way.[139] In *Kennecott Utah Copper Corp. v. U.S. Dept. of Interior*, the petitioners challenged DOI regulations for NRD assessments, which purported to find within CERCLA authorization for plaintiffs to recover damages for environmental contamination of cultural or "archaeological" resources "[i]f an injury to the land causes a reduction in the level of service (archaeological research) that could be performed, trustee officials could recover damages for the lost services."[140] The Industry Petitioners sought review of this new DOI interpretation, stating that CERCLA's definition of "natural resources" did not include archaeological or cultural resources.[141] The D.C. Circuit found that this issue was not ripe for review, and declined to rule one way or another on the question of whether "recovery for injury to non-natural resources" was permitted.[142] The issue of whether NRD may be recovered under CERCLA for injuries to the cultural value of natural resources remains, as of yet, undecided.

[134] *In re* Exxon Valdez, 104 F.3d 1196 (9th Cir. 1997). (Ruling that the damages to be awarded were "purely economic" and not punitive; the district court instructed the jury that they "should not consider any damage to natural resources or the environment generally").

[135] Coeur D'Alene Tribe v. Asarco Inc., 280 F. Supp. 2d 1094, 1107 (D. Idaho 2003).

[136] *Id*. at 1117.

[137] Superfund Legislation: Hearing of the Commerce, Trade and Hazardous Materials Subcomm. of the H. Commerce Comm., 104th Cong. 451 (Comm. Print 1995), https://play.google.com/books/reader?id=fVE-p3bD5eMC&pg=GBS.PA402&hl=en.

[138] Natural Resource Damage Assessments, 59 FR 14262-01, at 14269.

[139] Peterman, *supra* note 73.

[140] Kennecott Utah Copper Corp. v. U.S. Dept. of Int., 88 F.3d 1191, 1222 (D.C. Cir. 1996).

[141] *Id*. at 1223.

[142] *Id*. at 1223.

As-written, CERCLA's definition of natural resources includes only: "land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by. . . any Indian tribe."[143] Whether cultural resources are considered "appertaining to" Tribal nations is still dependent on judicial interpretation.[144] For Tribes who still have to deal with the after-effects of decades or centuries of natural resource extraction projects (there are currently more than 160,000 abandoned mines on or near the majority of tribal land holdings in the Western United States),[145] the remediation of their sacred cultural resources is not something for which they can easily recover in court. The health impacts to the people who have lived there, and will continue to live there, are impossible to overstate,[146] and the losses to their cultural and spiritual practices may be beyond calculation.

IV. PROPOSAL

A. Amending the "Model of Legislative Clarity"

CERCLA is hardly a model of clarity when it comes to determining statutory scope and Congressional intent in the construction of certain provisions. As it stands, the statute itself is somewhat of a Gordian Knot of legislation, albeit without such an easy solution as in the apocryphal tale.[147] CERCLA remains the key federal statute for securing redress against actors who contaminate the environment on Tribal lands, but it is severely lacking by not allowing Tribal actors to recover for damages to cultural resources.

Amending CERCLA § 107(f)(1) to better encompass the full impacts environmental contamination on Tribal plaintiffs would allow them to recover damages for more than economic injuries. As it stands, plaintiffs may not recover for injuries to cultural resources as NRD,[148] thus preventing Tribal parties from recovery that is truly commensurate with the injuries they have suffered.[149] This is especially problematic for Tribal plaintiffs, for whom environmental contamination takes on a larger significance than natural resource damages in the current conception of them can encompass, or for which remedy can be provided. Expanding § 107(f)(1)

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[143] 42 USC § 9601(16).

[144] *Coeur D'Alene Tribe*, 280 F. Supp. 2d at 1117.

[145] Lewis, *supra* note 56, at 130-131.

[146] *Id.* at 130-131. (Examining environmental health impacts of the siting of mining facilities on or near Native American reservations and Tribal trust lands).

[147] *See* Gordian Knot, ENCYCLOPEDIA BRITANNICA (Jan. 2, 2018), https://www.britannica.com/topic/Gordian-knot.

[148] *Coeur D'Alene Tribe*, 280 F. Supp. 2d at 1107. (Stating: "[c]ultural uses of water and soil by Tribe are not recoverable as natural resource damages.").

[149] Peterman, *supra* note 73.

to allow for better accounting of noneconomic impacts of environmental contamination would benefit Tribal litigants in court, as recovery would no longer be barred for the injuries those plaintiffs suffer due to the effects of releases on sites of particular cultural importance. Additionally, expanding CERCLA's definition of NRD to include "non-living" or "cultural resources" would be a major boon to Tribal litigants who seek to recover damages for injuries to their sacred sites and other resources of particular spiritual or cultural value.

There was a point in time in which such amendments seemed possible, however. In 1995 Representative Elizabeth Furse (D-Ore) introduced an amendment to CERCLA in the Committee on Commerce's Subcommittee of Commerce, Trade, and Hazardous Materials, which sought to allow for the recovery of cultural damages to natural resources, or so-called "non-use values."[150] Representative Furse's amendment was defeated however,[151] and the Committee instead voted to prevent NRD's from being redefined to include damage to cultural and religious resources of "priceless" significance.[152] As of the writing of this Note, there have been no repeat attempts to legislatively amend CERCLA to broaden the definition of natural resources to include sites of cultural, spiritual, or archaeological importance to Tribal nations.

Expanding the definition of NRD to better account for the significance of the environment to Tribal spiritual beliefs and practices is essential to properly protect the rights of people living on Tribal lands. This will involve necessary changes to the way that damages are calculated to account for the specific and unique impact that natural resource degradation can have on the spiritual practices of Tribes in relation to specific sites or resources such as certain mesas, rivers, or general areas. Amending CERCLA's NRD provisions would allow for Tribal plaintiffs to seek damages for injuries to the natural resources that are integral to their culture and ways of life. Leaving it in the hands of the judiciary, who interpret CERCLA NRD's to only apply to economic damages,[153] means that tribes are unlikely to achieve proper restitution if they cannot properly allege an economic use for the resource(s) in question.

B. A Renewed Federal Commitment to Working with Tribes

On January 26, 2021 President Biden signed a Presidential memorandum indicating that his administration would be directing Executive agencies to increase

[150] Superfund Reauthorization: Hearings Before the Subcomm. on Commerce, Trade and Hazardous Materials of the Comm. on Commerce, *supra* note 135, at 451.

[151] Peterman, *supra* note 73.

[152] Superfund Reauthorization: Hearings Before the Subcomm. on Commerce, Trade and Hazardous Materials of the Comm. on Commerce, *supra* note 135, at 451.

[153] *Coeur D'Alene Tribe*, 280 F. Supp. 2d at 1094.

the level of their cooperation with Tribes.[154] The memorandum reiterated that the federal government "has made solemn promises to Tribal Nations for more than two centuries," and that his administration will would be committed "to make respect for Tribal sovereignty and self-governance, commit[ed] to fulfilling Federal trust and treaty responsibilities to Tribal Nations, and regular, meaningful, and robust consultation with Tribal Nations cornerstones of Federal Indian policy."[155] The memorandum reinforced a previous executive order from November 6, 2000 which reiterated the domestic dependent nation status of Tribal Nations, and affirmed commitments to recognition of their sovereignty.[156] Both executive orders state a commitment of the Biden administration to increasing communication and consultation with Tribal governments on policy determinations that will affect Tribal communications, with agencies directed to prepare and update a "detailed plan of [implementation]" in line with another executive order from November 5, 2009.[157]

Additionally, the Biden administration in December of 2020 announced its nomination of Representative Deb Haaland (D-NM1), a citizen of the Pueblo of Laguna Tribe of New Mexico, to the position of Secretary of the Interior, which, upon her confirmation makes her the first Native American to serve in a Cabinet position, and the first to serve as Secretary of the Interior.[158] Her confirmation hearing was originally scheduled for February 23, 2021.[159] On March 15, 2021, Haaland was confirmed as Secretary of the Interior, marking a historic turning point for DOI and its regulation of Tribal lands.[160] She oversees a federal agency with a vast amount of responsibility over public lands, natural resources, and tribal affairs. Her confirmation reinforces the Biden administration's messaging that it plans to increase its level of cooperation with Tribal authorities and communities, and many activists see her confirmation as a symbolic victory for those advocating on behalf of Tribal Nations.[161] Secretary Haaland's confirmation has seen her steering a

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[154] Jourdan Bennett-Begaye, *Joe Biden: 'Tribal sovereignty will be a cornerstone'*, INDIAN COUNTRY TODAY (Jan. 27, 2021), https://indiancountrytoday.com/news/joe-biden-tribal-sovereignty-will-be-a-cornerstone#:~:text=%E2%80%9CToday%20I'm%20directing%20the,engaging%20with%20Native%20American%20communities.%E2%80%9D&text=Tribal%20consultation%20is%20also%20crucial%20when%20it%.

[155] Memorandum for the Heads of Executive Departments and Agencies: Tribal Consultation and Strengthening Nation-to-Nation Relationships, 2021 DAILY COMP. PRES. Doc. 91 (Nov. 6, 2021).

[156] Exec. Order No. 13175, 65 Fed. Reg. 67249 (Nov. 6, 2000).

[157] *Id*.

[158] Liz Stark and Caroline Kelly, *Confirmation Hearing Scheduled for Biden's Interior Secretary Nominee*, CNN POL. (Feb. 16, 2021), https://www.cnn.com/2021/02/16/politics/deb-haaland-confirmation-hearing-interior-secretary-nominee/index.html.

[159] S. COMM. ON ENERGY AND NAT. RES., HEARING TO CONSIDER THE NOMINATION OF THE HONORABLE DEBRA HAALAND TO BE THE SECRETARY OF THE INTERIOR (2021).

[160] Nathan Scott, *Deb Haaland Confirmed as 1st Native American Interior Secretary*, NPR (Mar. 15, 2021), https://www.npr.org/2021/03/15/977558590/deb-haaland-confirmed-as-first-native-american-interior-secretary.

[161] Stark and Kelly, *supra* note 151.

renewed federal focus on Tribal issues across the United States, including the allocation of vast amounts of infrastructure spending to Tribal lands.[162]

A renewed federal commitment to ensuring the remediation of sites of cultural importance is important for the preservation of Indigenous cultures, but it cannot only come from the Executive Branch. Judicial interpretation of CERCLA's NRD provisions has so far not evolved to encompass a larger meaning to natural resources beyond the text of the statute, and federal agencies have been stymied by precedent and litigation in attempting to enforce broader definitions. The legislative history of CERCLA reveals that such an expansive conception of NRDs: to include the culturally significant, was not the intent of CERCLA's drafters, and efforts to amend the law have thus far not succeeded. An amendment to CERCLA would be the most effective means of ensuring a proper accounting for the true damages of environmental contamination.

V. CONCLUSION

Even in light of the preceding statements however, the future of natural resource exploitation and environmental contamination on Tribal lands is far from certain, and without robust changes to the relationship between the federal government and the Tribes about the siting of natural resource extraction and ongoing remediation of environmental contamination, it is likely that the Biden administration will remain "business as usual" for people living on Tribal lands. On January 27, 2021 the Biden administration announced a temporary suspension of new leasing and permitting for oil and gas development on public lands.[163] This suspension however, does not apply to Tribal lands, where some Tribal representatives are apprehensive about federal actions curtailing often-lucrative fossil fuel and mineral extraction projects, while others are concerned for the environmental implications of new leases.[164]

In conclusion, the future of Tribal lands is still very much dependent on the policy agendas of each passing presidential administration and the policy agendas they set for Executive Branch agencies. Without robust efforts to statutorily confront the shortcomings of the federal-Tribe relationship, it is likely that the issues of resource governance, protection of culturally-significant sites, and the health repercussions of environmental contamination will persist, as they have for hundreds of years. Federal regulation, coupled with a growing national visibility for Tribal issues, will set the stage for future controversies unless the federal government recognizes that when the United States of yesteryear enforced the capitulation of these Tribes, it placed responsibility on itself as well. Beyond words in statutes, or executive orders, or leases, or treaties, the legacy of the United States' relationship

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[162] Press release, U.S. Dep't. of the Int., Tribes to Receive $1.7 Billion from President Biden's Bipartisan Infrastructure Law to Fulfill Indian Water Rights Settlements (Feb. 22, 2022).

[163] Maher *supra* note 128.

[164] *Id.*

with the numerous Tribes will remain etched into the land long past the lives of any individual or government. For the United States to properly account for the vast iniquities it inflicted upon Tribal Nations, it must address the legacy of environmental contamination of Tribal cultural resources. In the words of Mary Brave Bird, a Lakota writer: "[t]he land is sacred. These words are at the core of your being. The land is our mother, the rivers our blood. Take our land away and we die. That is, the Indian in us dies."[165]

[165] MARY BRAVE BIRD & RICHARD ERDOES, OHITIKA WOMAN 220 (Grove Press, 1993).