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Land Back and Justice: Examining Indigenous Land and Water Rights in the United States

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Rollins College

Senior Honors Project Submitted in Partial Fulfillment of

Requirements of the Honors Degree Program

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Land and Labour Acknowledgements

In writing this paper, I acknowledge that Rollins College as well as the broader Central Florida region that it serves are located on the occupied ancestral lands of First Nations. Rollins College in Winter Park, FL resides on land cared for by the Ais, Apalachee, Calusa, Timucua, Tocobago, Miccosukee, and Seminole. I recognize the history of forced relocation by the United States government of many First Nations from their tribal homelands in the late eighteenth century and throughout the nineteenth century. The Indigenous peoples' connection to this land has been challenged by violence, disease, treaties, invading settlers, relocations, forced removals, reservation termination policies, and other colonial actions. However, throughout this turbulent history, this land has continued to hold great historical, spiritual, and personal significance for the original land stewards of this region. I thank the members of these Indigenous communities and sovereign nations in our region today for their continued service of the land and for innumerable contributions to the region.

I acknowledge that much of what we know of the United States & Rollins College today, including its culture, economic growth, and development, has been made possible by the labor of enslaved Africans, their descendants, and their ascendants who suffered the horror of the transatlantic trafficking of their people, chattel slavery, Jim Crow, and other harms that continue today. We are indebted to their labor and their sacrifice, and we must acknowledge the tremors of that violence throughout the generations and the resulting impact that can still be felt and witnessed today.

Land Back and Justice: Examining Indigenous Land and Water Rights in the U.S

Introduction

This paper evaluates U.S. policies regarding Indigenous land and water rights in the context of changing global climate conditions and a societal shift towards reparative justice models. Theories from the literature on Indigenous sovereignty and environmental protection at-large, as well as the literature on reparative justice and post-colonial theory, are combined with case studies of environmental personhood in Ecuador and New Zealand to examine how a policy model could be created for the United States that strengthens Indigenous rights. It is argued that this colonial capitalist process has resulted in oppressive policies that harm Indigenous populations and negatively impact the environment. Two overarching research questions are addressed to support this argument. First, how have previous and current U.S. policymaking efforts impacted both Indigenous groups and their ancestral environments? Secondly, how can a conception of environmental personhood be used as a possible policy framework for Land Back that addresses environmental protections while preserving Indigenous sovereignty in the U.S.?

In this paper, colonialism is broadly understood as ideological and/or material practices of exploitation and domination within social, cultural, economic, and ecological frameworks. Colonialism, in this paper, is further characterized by having philosophical commitments to notions of binarism, individualism, and consumerism which reveal capitalism's structure and function as neocolonial by nature. Most clearly, today's global climate crisis reveals such implicitly colonial assumptions and material consequences of Western capitalist knowledge which continue to harm human and non-human cultures globally. For this reason, research on, and subsequent collaboration with, non-Western and anti-colonial approaches to climate mitigation is vital to critiquing and transforming systems of social and ecological domination.

Holistically, Indigenous resistance offers a theoretical and physical space to actualize such transformations.

Indigenous knowledge has been historically colonized and delegitimated in North America since European markets extended their control across the Atlantic in the 15th century. Narratives of forced removal from ancestral lands, destruction of tribal economies, intergenerational trauma from genocidal histories, and continued exclusion from political recognition and thus governmental policy creation briefly portrays the deep oppression of Indigenous communities found across the United States. Nevertheless, Indigenous peoples ceaselessly express their fearless resistance and communalism as resistance movements grow in response to cultural and climate crises. Such movements like Land Back, as informed by Indigenous knowledge, offer a different perspective on environmental management to western capitalistic paradigms and can supplement discourse on the planet's most pressing issues.

This paper seeks to bridge the gap between Indigenous knowledge and policy, in doing so the Land Back movement is mentioned throughout as a policy ideal. Land Back is a continuous movement by Indigenous people in the United States and in Canada that seeks to re-establish Indigenous sovereignty—notably, the political and economic control of lands in what is now the United States and Canada to the peoples who have historically occupied them prior to colonization. I believe that Jeff Corntassel is succinct in defining Land Back when he says, "we can think of land back as the regeneration of Indigenous laws on Indigenous lands and waters. It is a call to liberate stolen lands and waters from current colonial encroachments and legal fictions." (Corntassel, 2021). Systems of land governance under our current state and federal governments not only exclude Indigenous peoples from policy-making apparatuses where choices about land and water use are made, they also fail to set limits for industrial activities and

development in pursuit of capital, driving wildlife decline and ecosystem degradation (Moore, 2016).

In this paper, “Land Back” as defined by Corntassel is understood as the end goal of the movement, the policies that this paper focuses on should be understood as a form of incrementalism whereby U.S. Indigenous groups have increased control over their ancestral lands and waters through the recognition of ancestral Indigenous lands and waters as persons and legal entities in their own rights along with boards to represent their interests being comprised of mainly members of the Indigenous groups to which they historically belonged.

There have been various versions of colonial governments giving greater control. This can be likened to the difference between land control in Hong Kong in 1997 and Te Urewera in New Zealand in 2014. In the case of Hong Kong, it had been a colony of the British Empire since 1841 until it was handed over to the People’s Republic of China on in 1997 (Carrol, 2007). This meant that the People’s Republic of China gained full and complete control over Hong Kong’s governance and administration, with this marking the land’s return to Chinese control. In this example there is a complete transfer of control and sovereignty to the original land’s owners with Hong Kong being separated from the British Empire while the case of Te Urewera in New Zealand is closer to how I believe Land Back would function in the U.S. with North American Indigenous groups. In the case of Te Urewera in New Zealand, Te Urewara is a forested area in New Zealand that was originally controlled by the Tūhoe until colonization by the British and was turned into a national park in 1954. However, in 2014 the New Zealand national government passed the *Te Urewera Act 2014* made significant changes to the framework for Te Urewera as Te Urewera is recognised in law as an identity and legal person in its own right with the Te Urewera Board being appointed to represent the legal personality of Te Urewera and to provide

governance over Te Urewera (New Zealand, 2014). This board is comprised of both Tūhoe and New Zealand government representatives.

In order to describe the lasting ecological and cultural impact of capital, scholars use the term "Capitalocene" to designate the geological epoch beginning "particularly between 1450 and 1750 when the greatest landscape revolution in human history occurred on both sides of the Atlantic" (Moore, 2016) and continuing through modern day, as systems of extraction, production, and consumption exponentially degrade our natural ecosystems. Understanding the historical context in which capitalism emerged and its consequent impacts on the planet reveals U.S. policies regarding Indigenous land and water rights as deeply and principally shaped by forces of global capital.

Philosophical Positions

A. Colonial Capitalism and the Capitalocene

As a philosophical framework, colonial capitalism rests on the fundamental premise that capitalism has historically emerged within the judicial-political framework of the "colonial empire" rather than the "nation-state" with this difference understood as the nation-state being an a voluntary, imagined political community with self-determination over a shared future while the colonial empire is a forced political community that imposes decisions on vassal states (Ince, 2018). It grasps capitalist relations as having developed in and through colonial networks of commodities, peoples, ideas, and practices, which formed a planetary web of value chains connecting multiple and heterogeneous sites of production across oceanic distances. This understanding of colonial capitalism can be paired with an understanding of the Capitalocene to recognize how this system of global capitalism has been paired with imperialism to prioritize capital accumulation for settler-colonial states at the expense of the environment. According to

professor Hans Baer, the Capitalocene, “identifies global capitalism as the elephant in the room when it comes to the ecological and climatic crisis and the need to transcend it with a more sustainable world system, although the parameters of an alternative are not explicitly defined” (Baer, 2017). A major corollary of the colonial perspective on capitalism is to underscore the constitutive role of extra-economic constraints, a form of coercion to work based on relations of direct rule and submission, in effecting capitalist social transformations. Within this picture, colonial land grabs, plantation slavery, and the forced deindustrialization of imperial dependencies configure as crucial moments in the global formation of capitalism. It is this extra-economic coercion in the form of colonial land grabs that this paper explores with further chapters focusing on how colonial capitalism has been damaging to the environment in North America.

B. Indigenous Knowledge

In response to Baer’s position, I believe that Indigenous Knowledge explicitly defines the parameters of an alternative, sustainable system. Indigenous Knowledge–also referred to as Traditional Knowledge or Traditional Ecological Knowledge–is “a body of observations, oral and written knowledge, innovations, practices, and beliefs that promote sustainability and the responsible stewardship of cultural and natural resources through relationships between humans and their landscapes” (Daniel, Wilhelm, Case-Scott, Goldman, & Hinzman, 2022). Indigenous knowledge cannot be separated from the people intimately connected to that knowledge. It applies to phenomena across biological, physical, social, cultural, and spiritual systems. Indigenous peoples have developed their knowledge systems over millennia and continue to do so based on evidence acquired through direct contact with the environment, long-term experiences, extensive observations, lessons, and skills.

This familial intimacy with nature enables the ability to detect often subtle, micro-changes and to base decisions on deep understanding of patterns and processes of change in the natural world of which people are a part. The information and summative historical and cultural ecology contained within Indigenous languages, practices, values, place names, songs, and stories hold data and knowledge that are relevant today.

As a framework that guides action, Indigenous Knowledge fundamentally assumes a spirit of anti-capitalism as the relationship between humans and the natural environment is defined through non-exploitative policy. As a result, Indigenous voices can bring intergenerational and ecological wisdom to Western climate discourse, challenging capitalist assumptions and effectively creating new policy frameworks. For this reason, this paper engages with interdisciplinary texts through the work of Western and Indigenous scholars and activists to provide readers with holistic representations of the transformative potential of the Land Back movement and how U.S. policy can aid in this transformation through conceptions of environmental personhood.

Personhood in this paper is understood through both a legal lens and an Indigenous one, a non-Western conception that does not limit personhood to solely human beings nor to corporate entities rather recognizing how various Indigenous groups relate to landscapes as kin and reflects the call for an expanded sense of responsibility to resolve Indigenous and planetary concerns (Iorns Magellans, 2019). Hence, it is claimed in this paper that rights-for-nature are implemented "in recognition of the inseparable connection between people and place" and are "an indigenous self-ownership model, which requires no human justification for environmental protection" (Iorns Magellanes, 2018).

These rights build on recent legal trends that aim to transcend the traditional boundaries within which classical environmental law has been construed. This trend, which includes, as some of its most prominent examples, the emergence of an Earth Jurisprudence or Wild Law, many constitutional, legislative and judicial decisions attributing right to nature (the ‘rights of Nature’ movement), the proposed crime of Ecocide, and the emergence of an ecological constitutionalism, has been described as the emergence of an ecological jurisprudence; that is, the emergence of a novel approach to legal theory that challenges pre-existing anthropocentric conceptions of humanity’s relationship with the environment. Environmental personhood and the rights of nature are explored further in this paper through case studies of Ecuador and New Zealand.

Differing Perspectives: Indigenous Knowledge and Settler-Colonialism

In order to create a policy framework geared towards Land Back and environmental protection, it is crucial to understand the importance of the environment to Indigenous peoples as well as how traditional Indigenous understandings of the relationship between humans and the environment differs from how the U.S. government at both the state and federal level has understood this relationship. In doing so, it is evident that Land Back policies must make use of Indigenous knowledge in their construction—blending Indigenous knowledge with American policy tools to create an optimal outcome.

This paper primarily reviews perspectives from three Indigenous groups in the United States: the Lakota, the Coast Salish, and the Blackfeet. These groups have been chosen due to the availability of literature examining their perspectives on the environment and their ancestral lands being spread across what is now the United States with the Lakota from the Dakotas, the Coast Salish from the Pacific Northwest, and the Blackfeet from Montana. It is not the intent of this paper to presume that the perspectives of each of these groups can be perfectly understood and condensed by an outsider to their cultures but an attempt at summation has been made none the less; I also caution readers to not presume that the perspective of these groups should be taken as representative of every Indigenous group across the United States as while there is some measure of shared understanding from cross-cultural exchange, every Indigenous group and sub-group has a unique perspective and knowledge of their relationship to the environment.

In order to assess how traditional Indigenous understandings of the relationship between humans and the environment differs from how the U.S. government at both the state and federal level has understood this relationship, it is also important to recognize the historical context that has shaped and continues to shape environmental policy creation across the U.S. In doing so, this

paper gives a broad overview of settler colonialism in the U.S. with a focus on how settler colonialism has impacted the natural environment.

Indigenous Perspectives on the Environment

Indigenous Perspectives on Water

The environment, particularly, land and water, play a powerful role in sustaining and supporting Indigenous communities in the U.S. Not only is water essential to life and considered—by some Indigenous groups—a sacred food in and of itself, but environmental water resources are necessary to maintain habitat for hunting and fishing (Greeley, 2017). The importance of water cannot be understated and is critical to how many Indigenous peoples create their dialogic selves, with water being a crucial component of Indigenous wisdom.

According to Winona LaDuke, Anishinaabekwe (Ojibwe) enrolled member of the Mississippi Band Anishinaabeg, "Traditional ecological knowledge is the culturally and spiritually based way in which Indigenous peoples relate to their ecosystems. This knowledge is founded on spiritual-cultural instructions from 'time immemorial' and on generations of careful observation within an ecosystem of continuous residence" (LaDuke, Traditional Knowledge and Environmental Futures, 1994). The ontological distinction drawn by Western thought between culture and environment is blurred here, as Indigenous wisdom is characterized by fluidity and dynamic relationships among human and non-human energies. From this fluidity Indigenous thinkers categorize the "self" as ecosystemic, encouraging nonexploitative social and ecological relations which is clear in the policies created by Indigenous groups to steward the environment with water sources seen not just as resources to extract but as beings to be cared for and who in turn will care for these Indigenous groups (LaPier, 2017).

The Lakota

The Lakota are one of the three prominent subcultures of the Sioux people. In the late 16th and early 17th centuries, Dakota-Lakota speakers lived in the upper Mississippi Region in what is now organized as the states of Minnesota, Wisconsin, Iowa, and the Dakotas (Altman, 2002). The Lakota have always had a close relationship with their water sources, particularly the Mississippi River with several creation myths centered around water (Altman, 2002). One Lakota creation myth incorporates water in a flood narrative with flooding a normal part of living near the Mississippi River and essential to agriculture:

> A long time ago, a really long time when the world was still freshly made, Unktehi the water monster fought the people and caused a great flood. . . . Everyone was killed, and all the blood jelled, making one big pool. The blood turned to pipestone and created the pipestone quarry, the grave of those ancient ones. That's why the pipe, made of that red rock, is so sacred to us. Its red bowl is the flesh and blood of our ancestors, its stem is the backbone of those people long dead, the smoke rising from it is their breath. (How the Sioux Came to Be, 1984)

In this version of the myth, the Lakota explain the origin of their sacred “pipestone quarry” stone: human blood and bone had combined with the flooding waters and hardened together to create the stone formation in the local quarries. It is that stone that the Lakota use to fashion their peace and community pipes which is an important part of Lakota cultural and religious practices.

The Coast Salish

The Coast Salish is a group of ethnically and linguistically related Indigenous peoples of the Pacific Northwest Coast, living in the Canadian province of British Columbia and the U.S.

states of Washington and Oregon (Hayman, James, Wedge, & Katzeek, 2017). Hayman and her colleagues discuss the intricate relationship that Coast Salish cultures have with water. The authors' conversations with Coast Salish elders reveal "a clear and resilient perception of water as a relative, facilitator, connector, educator, and transformer" (Hayman, James, Wedge, & Katzeek, 2017). Central to this worldview of water as sacred is the reality that Indigenous cultures emerge from and have been shaped by a specific place. The deep, sustained connection to specific waterways and geographies influences governance structures, laws, practices, and ceremonies that are appropriate for each specific place. Coast Salish communities engage in intricate ceremonies every year to honor the salmon and thank them for their return. This practice is also intertwined with the recognition, more generally, that water is valued and understood in the context of a reciprocal relationship. The deep connection to water is more complex and nuanced than simply understanding it as a provider of livelihood.

The Blackfeet

The Blackfeet Nation is a federally recognized tribe of Siksikaitsitapi people with an Indian reservation in Montana. The Blackfeet settled in the region around Montana beginning in the 17th century. Previously, they resided in an area of the woodlands north and west of the Great Lakes which is the root of much of their wisdom surrounding water (Nabokov, 2006). The Blackfeet believe in three separate realms of existence – the Earth, sky and water. The Blackfeet believe that humans, or "*Niitsitapi*," and Earth beings, or "*Ksahkomitapi*," lived in one realm; sky beings, or "*Spomitapi*," lived in another realm; and underwater beings, or "*Soyiitapi*," lived in yet another realm (LaPier, 2017). The Blackfeet viewed all three worlds as sacred because within them lived the divine.

The water world, in particular, was held in special regard. The Blackfeet believed that in addition to the divine beings, about which they learned from their stories, there were divine animals, such as the beaver. The divine beaver, who could talk to humans, taught the Blackfeet their most important religious ceremony. The Blackfeet needed this ceremony to reaffirm their relationships with the three separate realms of reality.

As Canadian anthropologist Rosalind Grace Morgan hypothesized in her dissertation “Beaver Ecology/Beaver Mythology,” the Blackfeet also sanctified the beaver because they understood the natural science and ecology of beaver behavior (Morgan, 1991). Morgan believed that the Blackfeet did not harm the beaver because beavers built dams on creeks and rivers (Morgan, 1991). Such dams could produce enough of a diversion to create a pond of fresh clean water that allowed an oasis of plant life to grow and wildlife to flourish. Beaver ponds provided the Blackfeet with water for daily life. The ponds also attracted animals, which meant the Blackfeet did not have to travel long distances to hunt nor did they need to travel for plants used for medicine or food.

Indigenous Perspectives on Land and Property

Property rights, supplemented by customs and traditions where appropriate, often produced the incentives that were needed to husband resources in what was frequently a hostile environment for Indigenous groups. Personal ethics and spiritual values were important, as they are in any society, but those ethics and values worked along with private and communal property rights, which strictly defined who could use resources and rewarded good stewardship to prevent the tragedy of the commons.

Virtually all Indigenous groups recognized the validity of personal property. Individual tribe members were not expected to "share" their horses, weapons, dwellings, and slaves among

all other members of the tribe. Indeed, many tribes, especially among the Plains Indians, developed complex economic and social rules and mores around "horse culture" in which ownership of the highest quality horses were a status symbol, and a means of attaining power and prestige within the tribe (Sutton, 1975).

Indigenous land tenure systems were historically varied but united in the manner in which Indigenous groups saw themselves as relating to the land. Land, as understood through Indigenous wisdom, was not something to be owned as in Western conceptions of land ownership as exemplified through Locke's Second Treatise which argued in support of individual property rights as natural rights following the argument the fruits of one's labor are one's own because one worked for it, but rather something or more so *someone* that you live and work with (Corntassel, 2021). Locke propagated the idea that property could also exist in a state of nature without any political decisions cementing its conception. Locke essentially believed that private property is a naturally occurring phenomenon and due to its existence within nature, it stands to further reason that to claim ownership over it is an inherent right. Furthermore, Locke did not adhere to the idea of universal consent; unlike common or collective property, which emphasizes democratic procedures, Lockesian private property defends the idea of unilateral appropriation. Additionally, it was important to Locke that land be used in a productive manner; considering that he did not believe that Indigenous or nomadic peoples could be regarded as owners in this capacity, one can assume that "productive" relates to industry.

It should be noted that, by definition, private property is exclusionary. This is harmful for multiple reasons. The dividing of land between individual actors for private control inevitably produces a barrier to accessing resources. Privatization of land often leads to the privatization of natural resources on said land thus turning them into commodities to be bought and sold. The

specific issue is that some within the proverbial "community," though this occurs on both a local and global scale, are not able to afford the commodification of these resources. The exclusivity of resources inherently produces inequality- some will be able to access these resources through a monetary exchange, while others will struggle. Furthermore, turning land into an exclusive entity, i.e. property, creates a distorted mainstream relationship to nature. The parceling up and division of land eclipses the idea that we can have a reciprocal relationship where the land takes care of us and we take care of the land. Instead, it becomes another object where its primary purpose is to extract natural resources and produce commodities.

The justification for exclusionary practices is that people are in a more advantageous position when resources are governed by a private entity. Under a private property framework, it is believed that resources can be utilized to satisfy a greater set of needs than under any alternative system, such as common or collective property, commonly referred to as the "Tragedy of the Commons" which is an idea proposed by Hardin (Hardin, 1968). However, the "Tragedy of the Commons" is arguably more of a personal projection on Hardin's part than it is an accurate reflection of reality as it operates on the basis that everyone is motivated by personal greed or self-interest. The problem with this position is that the privatization of resources under colonial capitalism has not been able to satisfy "the greater set of needs;" in fact, 72 percent of people currently do not have access to the resources they need (Wackernagel, et al., 2021). Additionally, the "Tragedy of the Commons" completely ignores the Indigenous knowledge which ensure that resources are respected *and* well-distributed to satisfy everyone's needs. Ultimately, if we operate under the supremacy of private property, how can everyone fulfill their right to life and security when marginalized cannot access the necessary resources to survive?

How can Indigenous peoples fulfill their right to life when their land has been divided for capitalist modes of production?

Lockesian private property is arguably another tool for colonial capitalism. Firstly, Locke's idea that land should be unilaterally appropriated is explicit support for colonialism. Not only does it undermine basic democratic governance over land, but it also violates the sovereignty of Indigenous peoples as it condones the violent seizure of land by settlers. This violence is not only wrought upon Indigenous peoples, but also on the land itself which is exemplified by contemporary ecological degradation. Secondly, Locke's concept of productivity is rooted in racism. Locke argued that land must be cultivated to be productive i.e. it had to conform to a sedentary agricultural standard to be legitimate; he voiced his doubts that Indigenous peoples could be regarded as owners since his definition of productivity is related to industry. Locke said that what transformed a person's relationship to land from non-ownership to ownership was his mixing his labor with it. This is the foundational relation, one that is created in the "state of nature" before the creation of political society via the famous "social contract." Indeed, the defense of this primordial relationship is the centerpiece of the contract between the sovereign and society. Productivity in Lockesian terms denigrates Indigenous ways of life as in advancing his theory that it was the mixing of one's labor with land that created private property, Locke saw Indigenous peoples as creatures who could not be considered property owners since they merely inhabited the land and forests but did not cultivate the soil. To Locke, in fact, an Indigenous person could be equated with "one of those wild savage beasts with whom men can have no society nor security" and who "therefore may be destroyed as a lion or a tiger" (Locke, 1980). Locke thus provided a potent ethical justification for colonial capitalism and land appropriation. However, it should be noted that something does not have to be productive to be

useful. The land is useful, not because of Western notions of productivity, but because it is the land: it is abundant in life, including human life.

For many Indigenous groups, the land is sentient and a person unto itself (How the Sioux Came to Be, 1984). It encompasses many life forms and spaces. It holds immense energy. From a Native perspective one cannot "own" land, yet one may live with the land. There are regenerative relationships to land based on generations of deep interconnectedness that have been taught through cosmologies, ceremonies, and languages. Indigenous peoples acknowledge that these on-going connections require responsibilities to the natural world. They provide offerings and prayers to the land for its healing. Traditional teachings instruct Indigenous groups to maintain deep respect for land, life, flora, and fauna— all humanity's relations.

In working with land instead of owning it, Indigenous groups divided up land usage based on different factors with a recognition that usage was meant to serve the group as a whole (LaDuke, Traditional Knowledge and Environmental Futures, 1994). Because agricultural land required investments and because boundaries could be easily marked, crop land was often privately used, usually by families or clans rather than individuals. For example, families among the Mahicans in the Northeast possessed hereditary rights to use well-defined tracts of garden land along the rivers. Europeans recognized this usage as ownership, and deeds of White settlers indicate that they usually approached lineage leaders to purchase this land. Prior to European contact, other Indigenous tribes recognized Mahican ownership of these lands by not trespassing (Wa'na'nee'chee & Freke, 1996).

In the Southeast, where Indigenous groups engaged in settled agriculture, private usage of land was common. According to historian Angie Debo, the Creek town is typical of the economic and social life of the populous tribes of the Southeast (Debo, 1941). Each family

gathered the produce of its own plot and placed it in its own storehouse. Each also contributed voluntarily to a public store which was kept in a large building in the field and was used under the direction of the town chief for public needs.

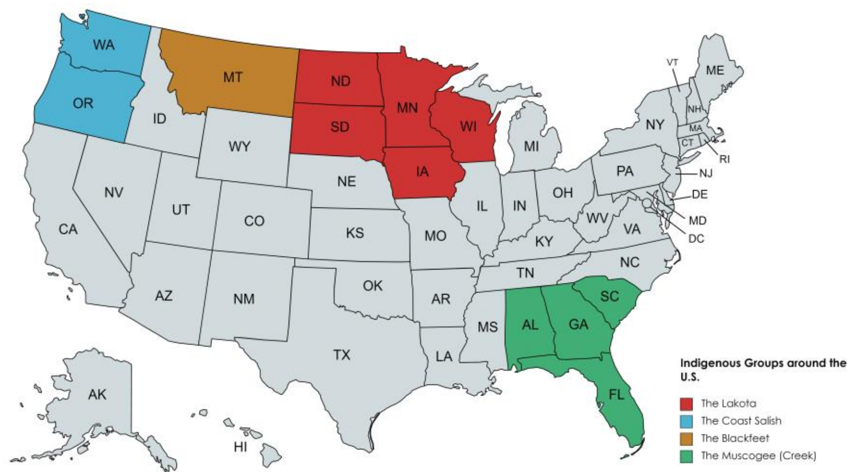

Figure 1- Map showing the historical and present locations of the Indigenous groups mentioned in Chapter 2

Settler Colonial Occupation in the United States and the Natural Environment

The continents today known as the Americas have undergone significant and relatively sudden ecological change within the last five hundred years. Specifically, these changes have coincided with the political and cultural changes that accompanied colonization of the North and South American continent by first Europeans and later American settlers. Among historians and anthropologists, these changes have been widely discussed as they relate to the effect on Indigenous communities and cultures across the continent (Tuck & Yang, 2012). Within the scientific community, however, much of the attention has been focused on habitat degradation, resource overexploitation, and invasive species and their effect on native ecosystems into which European and American settlers introduced them (Hobbs, et al., 2006).

Environmental historians have traced the changes to both the biotic and abiotic components—biotic components referring to all living organisms present in an ecosystem and abiotic components referring to all the non-living components like physical conditions and chemical agents in an ecosystem—of American ecosystems under different land use regimes, particularly those employed by Indigenous communities and European settlers (Cronon, 2003). They have documented the broad changes to ecosystems, from disruption of forest succession through deforestation related to agricultural and industrial development to the introduction of invasive species, both intentional and unintentional (Cook & Lesley, 2006) (Halverson, 2011). This historical analysis has also provided some complicated insight into the constantly changing nature of ecosystems and the ways that Indigenous communities did in fact alter and interact with their natural environment (Cronon, 2003). Many scholars of environmental history have argued against a simplistic and nostalgic view of ecosystem stasis and pristine condition pre-contact with European settlers (Cronon, 2003) (Fuller, Williamson, Barnes, & Dolman, 2016). Instead, they argue for a dynamic understanding of how ecosystems constantly shift in their biotic and abiotic components and how humans, like all species, have always interacted with their environments in an intentional way. They remind us that what may be different is the ways in which human populations and cultures conceptualize and choose to interact with the ecosystems to which they belong.

The work of environmental historians and invasion ecologists has made clear that there is a relationship between the colonization of the continent by European and later American settlers and the introduction of invasive species. It is well established that many invasive species that threaten native ecosystems were either intentionally introduced as part of the settler colonial project or accidentally through various vectors such as ballast water, on humans, or on imported

plants and animals (Mann, 2007). This introduces what Timothy Neale, a settler-scholar studying weed ecology in Australia, calls "a parallel or companionship" between settlers and weeds (Neale, 2017).

Another informative concept that has emerged within ecology itself is what researchers have termed biotic homogenization (Olden, Douglas, & Douglas, 2005). It is described as the replacement of native communities with "locally expanding and cosmopolitan, non-native ones" such as Kudzu in the Southern U.S. and causes a local, regional, and global homogenization of biological species pools as well as ecosystem types and interactions (Olden, Douglas, & Douglas, 2005). The theoretical framework of biotic homogenization is particularly important and indeed unique in that ecologists explicitly draw the connection between biotic and sociocultural homogenization that is described by social scientists. It brings to attention at once the connection between social and biotic factors of invasion and the impending harms of the reduction of biological and cultural diversity that we observe in an increasingly globalized world. I will attempt here to integrate the ecological framework of homogenization with a critique of settler colonialism and its homogenizing effects on the world.

There has already been significant study of the structures, processes, and impacts of settler colonialism within the fields of Indigenous and settler colonial studies. The interrogation of settler colonialism as a structure rather than an event provides theoretical frameworks and principles that are applicable to a potential ecology of invasion that understands, critiques, and challenges settler colonialism rather than ignores or reinforces it (Wolfe, 2006). One work in particular that has propelled forward an analysis of settler colonialism and decolonization, as a process of repatriating Indigenous land, is Eve Tuck and K. Wayne Yang's (2012) "Decolonization is Not a Metaphor." In it, the authors explain decolonization as the project of

undoing colonization via repatriation of land and restoration of Indigenous sovereignty. They also discuss how decolonization is made a metaphor, rendering it impotent and allowing settler colonialism to remain unchallenged.

"Decolonization is Not a Metaphor" contributes a number of useful theoretical frameworks, including a broad understanding of land as consisting of all biotic and abiotic components of the ecosystems inhabiting it (Tuck & Yang, 2012). This conceptualizing of land is actually not far removed from the understanding of the scope of the field of ecology. Ecology textbooks like Ecology & Field Ecology define the scope of ecology as the "total relationships of the animal both to its inorganic and organic environment" and the biosphere, "the biologically inhabited soil, air, and water," respectively (Smith & Smith, 2001) (Odum, 1966). It is interesting to note that most ecology textbooks recount the origin and meaning of the term, from the Greek root "oikos": the study of home. Tuck and Yang state that settler colonialism is unique in that "settlers come with the intention of making a new *home* on the land" (emphasis mine) and "insists on settler sovereignty over all things in their new domain" (Tuck & Yang, 2012). Whose home is being studied and how do populations claim a home? And how do they negate the claims of others? It is necessary to problematize settler scientists' conception of home in this way, as it is based on settler occupation and ownership of Indigenous land.

The centrality of land and its reframing as property in settler colonialism is accompanied by a particular form of violence that severs Indigenous people, plants, and animals from land. Both of these conceptions regarding land relate to the ecology of invasion, with introduced species both competing for access to abiotic and biotic resources of the ecosystem they enter as well as disrupting the native species' ability to survive in the environment in which they have

evolved. Tuck and Yang offer up a response to colonialism: decolonization, which, at its most basic, is a process of undoing colonialism.

U.S. Environmental History

There is limited information available to ecologists about the state of America's ecosystems prior to the arrival of European settlers. Indigenous peoples, meanwhile, have produced and passed down multiple millennia of ecological observation of their surrounding world. This Indigenous knowledge, consisting of intricate awareness of seasonal changes, biotic/abiotic interactions, migratory patterns as well as management techniques relating to forestry, fish and game populations, and agriculture, is contained within Indigenous cultural institutions and narrative. Because of its inaccessibility to settler scholars, often times purposely guarded to protect it from exploitation or misuse, environmental historians have had to rely heavily on the accounts of early European settlers (Cronon, 2003).

Cronon's (2003) Changes in the Land discusses the difficulty in piecing together an accurate picture of the state of ecosystems prior to European colonization both because of settler's misconceptions about the "untouched" nature of the forests and meadows that they encountered and because of their exaggeration of abundance of plants and animals that later resulted in observers such as Thoreau concluding that the previously pristine and abundant ecosystems that their predecessors had described were by then degraded (Cronon, 2003). The former is particularly important to understanding both the popular perception of the "new world" they encountered and the ideological and political principles that guided and justified colonization, particularly *terra nullius*. The early settler's mistaken assumption that the land was *terra nullis*, or "unused" by the Indigenous people they displaced, served as a major justification for the expropriation of Indigenous land.

Cronon (2003) goes on to explain that the landscape that the European settlers encountered was in fact profoundly and intentionally altered and managed by Indigenous communities. This included wide use of intentional forest fires, used to clear understories and ensure open hunting and foraging grounds, management of wild game populations and migration, and agriculture of various types. Not only did European settlers remain unaware of these actions, they lamented the loss of the wild pristineness of the very forests that they themselves were altering for their own agricultural and timber needs. This is reminiscent of what Rosaldo (1989) describes as “imperialist nostalgia,” where the people who studied the ecosystems developed a nostalgic feeling towards some distant and more pure past while being a part of the very structures that are causing their degradation.

Part of this process of degradation and change was due to the shifting relations to land, from the conception of usufruct land use held by many Indigenous communities to the recasting of land as private property by settlers (Cronon, 2003) (Tuck & Yang, 2012). The ceding of land to settlers has been shown to correspond with the loss of old growth forests, as seen in Figure 2.

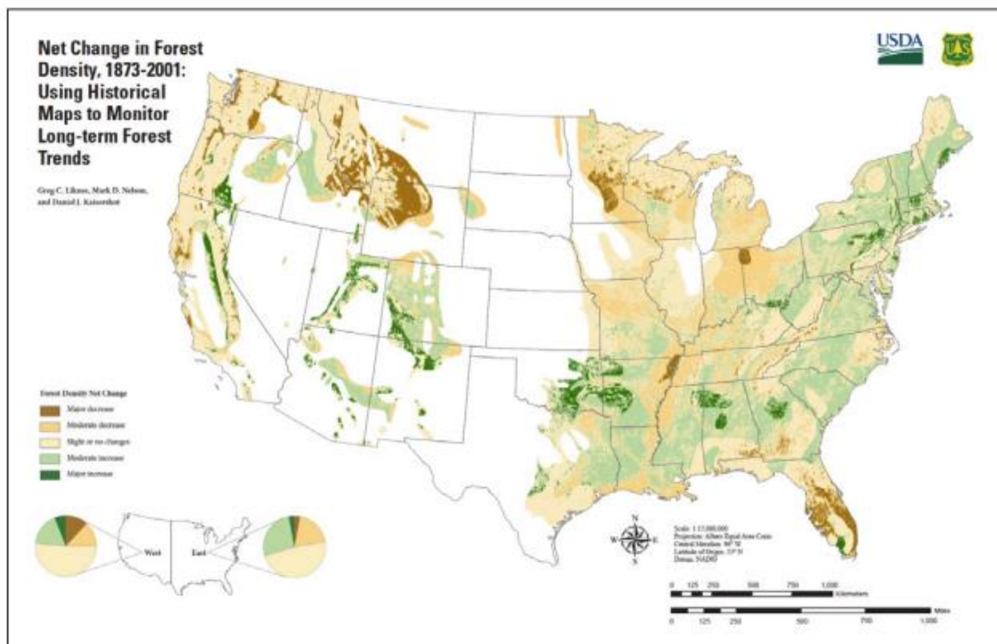

Figure 2- Map showing the correlation between the expropriation of Indigenous land and disappearance of old growth forests (Liknes, Nelson, & Kaisershot, 2013).

Settler conceptions of land were based both on the idea of property, with ownership of land granting total sovereignty over it and its plant and animal inhabitants, and permanence. Agricultural plots became delineated permanently, ensuring that topsoil and nutrients would be depleted with intensive cash crop cultivation in stark contrast to the cyclical process of clearing land and allowing it to lay fallow practiced by Indigenous communities (Cronon, 2003).

It is important to note here that change in ecosystems, in both biotic and abiotic components, is not inherently disruptive or degrading. Cronon acknowledges that Indigenous hunting, agricultural, and forestry practices were not always stable and sometimes overexploited natural resources. In fact, *Changes in the Land* stresses the fact that all human communities alter and manipulate their environments and that ecosystems are never static, which is an assertion increasingly supported by the scientific ecological literature (Hobbs, et al., 2006). Ecologists and anthropologists alike have pointed out that the conceptualization of static ecosystems and the privileging of equilibrium fails to acknowledge the dynamic nature of ecosystems and cultures. Cattelino (2017) reminds us that the static model arises from the same ideological tradition as structural functionalism in anthropology, which has similarly framed change within Indigenous cultures as resulting in "cultural loss, inauthenticity, and loss of sovereignty". This is also problematic because it collapses Indigenous peoples and nature, perpetuates what settler colonial scholars call the disappearing native trope that is central to settler colonialism, and limits Indigenous peoples and cultures to a static, bygone past (Cattelino, 2017) (Tuck & Yang, 2012).

Still, it is undeniable that the landscape of the American continent has changed dramatically and rapidly since the arrival of European settlers. Along with the coinciding development of the Industrial Revolution, which was directly funded by the extraction of

resources and exploitation of land as well as chattel slave labor, the colonization of the continent has resulted in global shifts in atmospheric temperature, deforestation, and the rapid extinction of many species (Drayton, 2005). Vitousek et al. (1997) estimate that carbon dioxide concentration in the atmosphere has increased by almost 30% since the Industrial revolution (Figure 3 shows that CO2 emissions nearly doubled), about 39-50% of Earth's land has been transformed or degraded by humanity, and that about a quarter of Earth's bird species have been pushed to extinction because of direct and indirect human action.

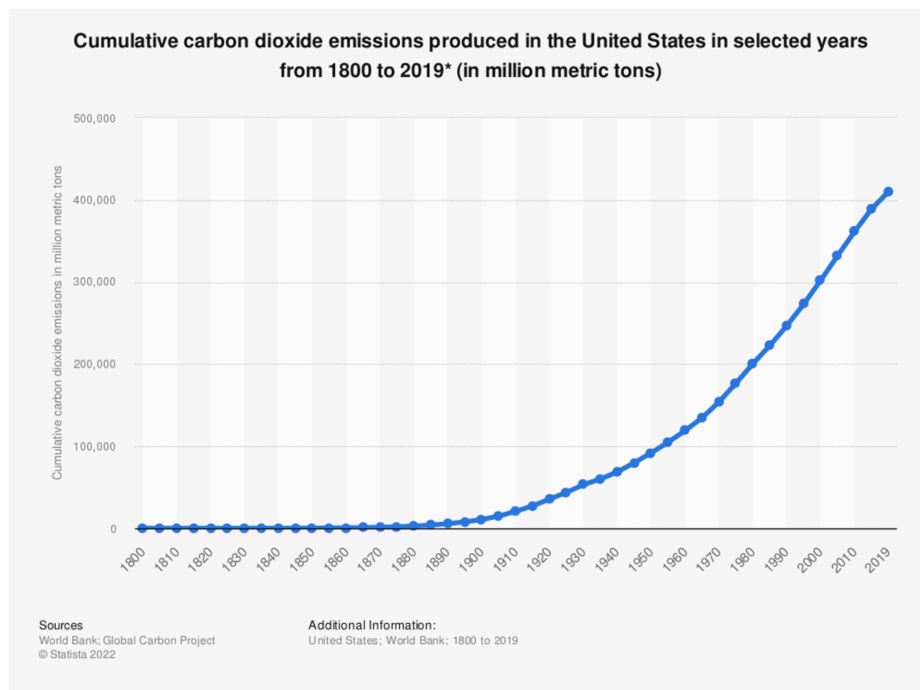

Figure 3- Chart showing the US CO2 emissions between 1800 and 2019 (Global Carbon Project, 2021).

Though these developments are not due solely to the colonization of the Americas, the connection between settler colonialism and the Industrial Revolution as well as the rise of global capitalism that has spread Western land use policies to a large portion of the world—which has resulted in the "Capitalocene"— has been made clear through historical analysis (Drayton, 2005). With interdisciplinary study of the links between settler colonialism and global ecological changes, it can be concluded that there is a causal, though complicated, relationship between the

spread of environmental policies guided by capital under settler colonialism and ecological degradation.

U.S. Policy: Indigenous Rights

In order to create a policy geared towards Land Back, it is essential to understand the historical and present nature of both Indigenous sovereignty and the rights that Indigenous groups have to their ancestral lands and waters. Policy affecting Indigenous sovereignty primarily occurs through federal processes, being enshrined in part through the U.S. Constitution while water and land policy occurs at both a federal and state level—although state policy has often taken precedence. This chapter is meant to illuminate the bounds of U.S. policy and offer perspective on what has been attempted before regarding policy geared towards Indigenous groups in the U.S.

In doing so, I examine the underpinnings of U.S. legal policy towards Indigenous groups through an understanding of the settler-colonial process. Given that the US settler colonial project's objective is to seize land and gain control of resources, Native Americans pose a unique problem to the United States: they possess desired capital-generating resources. In response to their land possession, the United States racialized Native Americans as savage to justify their elimination, whether through biological warfare or assimilation (Wolfe, 2006). In being deemed savage, the U.S. positions Indigenous peoples as incapable land stewards who must be saved (through missionary efforts, boarding schools, and other institutions) by the "civilized" White settlers, making a clear path for the United States' unfettered access to tribal nations' territories. By racializing Indigenous peoples as savage and justifying their land dispossession, the United States government ensured their disappearance and genocide. In this way, the "primary motive for elimination", and, in tandem, their racialization, "is not race … but access to territory" (Wolfe, 2006).

Indigenous Sovereignty

United States law has treated Indigenous peoples and their ancestral lands inconsistently over its history, sometimes stating policy goals of genocide, sometimes self-determination, sometimes trying to eliminate tribal governments (Deer, 2018). This leaves a complex string of contradictory laws that ultimately function to remove many functions of justice from Indigenous control (i.e., a weakening of tribal sovereignty) and place legal authority in the US courts. Undergirding all law governing Indigenous peoples and their ancestral lands is the concept of sovereign status or inherent sovereignty. Hannum (1998) usefully defines sovereignty in this context as constitutional or legal independence. Hannum emphasizes that while states exercising such sovereignty might delegate powers to other entities, a sovereign power is by definition under no legal authority beyond international law (Hannum, 1998). Further, despite the governmental boundaries that sovereignty implies, the United States has frequently enacted legislation that functions to remove authority and control from Native American tribes.

The previously described legal process of continued racialization of Indigenous peoples in the U.S. is itself undergirded by the same class of assumptions that maintain those processes. First, it presumes that the U.S. government has the right to regulate tribal sovereign nations, Indigenous ancestral lands, and the land titles held by sovereign tribal nations. Second, it presumes that the U.S. is going to follow laws it creates to regulate Indigenous lands without revision of the law itself. Third, it ignores the dehumanization of Indigenous peoples in the legal consciousness of the U.S. as a significant factor in legal decision-making. To exemplify how these presumptions have replicated to become increasingly insidious, we must go backwards in history to the original legal case in regulating the land rights of Indigenous peoples in the U.S.

Johnson v. M'Intosh is the first of the famed cases known as the Marshall Trilogy, three case opinions primarily authored by Chief Justice John Marshall that established the structure for Indigenous tribal sovereignty that remains in place today (Fletcher, 2014). Joined later by Cherokee Nation v. Georgia (1831) and Worcester v. Georgia (1832), Johnson v. M'Intosh established federal supremacy of US law over what was termed 'Indian affairs.' Notably, neither party in this case represented the tribal interest. Rather, the US created law governing the land rights of Indigenous people without their legally recognized presence at all. Both American parties in the case claimed they had valid land title from Indigenous groups, but the Supreme court ruled that Indigenous peoples could not sell their property to anyone except the United States government, thereby functionally limiting the ability of Indigenous tribes to control their own land.

In his critique of the outcome of M'Intosh scholar Robert Williams takes aim at the judicial project itself saying of Chief Justice Marshall "[h]is judicial task was merely to fill in the details and rationalize the fictions by which Europeans legitimated the denial of the Indians' rights in their acquisition of the Indians' America" (Williams Jr, 1992). This frames M'Intosh as less of a legal question and more of a legitimation of U.S. governmental authority over Indigenous commerce. When asking whether this framing is justified, we can look to the actual text of decisions in later cases, notably Cherokee v. Georgia (1832) where Chief Justice Marshall likens the relationship of the Cherokee Nation to the United States to a paternalistic authority saying, "the relationship of the tribes to the United States resembles that of a 'ward to its guardian'". We also know that the United States has only selectively upheld the laws, in the spirit in which they were made, concerning Indigenous lands and sovereignty. Notably, in Worcester v. Georgia (1832) the supreme court declared the Cherokee Nation was a sovereign power.

Of course, law divorced from context is law misunderstood. In the case of law involving Indigenous peoples, it would be unconscionable to ignore the dehumanization of Indigenous tribes and Indigenous peoples as part of legal decision-making. In Cherokee v. Georgia, Justice William Johnson justifies his decision writing “rules of nations" would regard "Indian tribes" as "nothing more than wandering hordes, held together only by ties of blood and habit, and having neither rules nor government beyond what is required in a savage state” (Cherokee Nation v. Georgia, 1831). This description and degradation of Indigenous tribes clearly articulates that bias against Indigenous persons was used as evidence for legal decision-making. Considering such legal decisions to be ‘good law’ in the present day with no interrogation of these motives serves to perpetuate past harms against Indigenous peoples while enshrining new harms into law using these cases as precedent with these harms clear in the laws and policies surrounding federal recognition for Indigenous groups.

Historically, most federally recognized tribes received federal recognition status through treaties, acts of Congress, presidential executive orders or other federal administrative actions, or federal court decisions. In 1975 a unanimous federal court elucidated an astounding principle on behalf of a NARF client. The court held that even though the Passamaquoddy Tribe of Maine had never entered into a treaty with the United States, and the Congress had never specifically mentioned the Passamaquoddy, the federal government has a trust relationship based on the federal Nonintercourse act with "any tribe of Indians," including the Passamaquoddy (Joint Tribal Council of Passamaquoddy Tribe v. Morton , 1975). This holding went directly against the Department of Interior's position that predicated the trust relationship as only owed to "recognized" tribes. Passamaquoddy sets forth the legal principle that Congress in 1790 by enacting the Nonintercourse act had generally recognized and assumed a trust responsibility to

all Indigenous groups. Specific acts of recognition, however, through treaty, executive order or acts of Congress, conceivably could later take place and did between particular tribes and the United States.

In 1978, the Bureau of Indian Affairs (BIA) promulgated administrative procedures for establishing that an American Indian group exists as an Indian tribe, in large part, as a reaction to the eastern land claims and U.S. v. Washington litigation 25 CFR Part 83. The BIA was also succumbing to recommendations from the AIPRC which called for Congressional standards for recognition purposes. At the time the Senate Select Committee on Indian Affairs had introduced S. 2375, in response to the AIPRC recommendation (Roessel, 1989). This legislation relied on the "Cohen criteria" and allowed for a prima facie showing of recognition based on a treaty, act of Congress, or executive order, thereby shifting the burden of proof to the government. S. 2375 was never acted upon because the Administration assured Congress it had developed its own standards and procedures, leaving legislation an unnecessary duplication (Roessel, 1989).

The 1978 regulations departed significantly from what had been prior Bureau practice. Between 1935 and 1974, the Bureau had been applying the "Cohen criteria" found in Felix Cohen's Handbook of Federal Indian Law (Roessel, 1989). During this time the Bureau was determining tribal existence in order to ascertain eligibility for government services under the Indian Reorganization Act. Tribal existence questions under study by the Solicitor's office were evaluated under the following: (a) that the group has had treaty relations with the United States; (b) that the group has been denominated a tribe by act of Congress or executive order; (c) that the group has been treated as having collective rights in tribal lands or funds, even though not expressly designated a tribe; (d) that the group has been treated as a tribe or band by other Indian

tribes; or (e) that the Indian group has exercised political authority over its members through a tribal council or other governmental forms (Roessel, 1989).

The 1978 regulations created policy governing the Federal Acknowledgment Process (FAP) to handle requests for federal recognition from Indian groups whose character and history varied widely in a uniform manner. These regulations – 25 C.F.R. Part 83 – were revised first in 1994 then later in 2022 (25 CFR Part 83, 2022). The regulations require a petitioner to meet seven criteria pursuant to 25 C.F.R 83.7. A petition must: (a) establish that a petitioning Indian group has been identified from historical times until the present on a substantially continuous basis as "American Indian" or "aboriginal;" (b) contain evidence that a substantial portion of the petitioning group inhabits a specific area or lives in an American Indian community with its members descendants of an Indian tribe which historically inhabited a specific area; (c) establish that a petitioning group has maintained tribal political influence or other authority over its members as an autonomous entity throughout history until the present; (d) provide the petitioning group's governing document, or in its absence, a description of membership criteria and governmental operations over its affairs and members; (e) provide a membership list consisting of members who are descended from a historical tribe or tribes; (f) establish that the petitioning group's members are not principally members of other North American Indian tribes; and, (g) show that the petitioning group has not been subject to a termination statute (25 CFR Part 83, 2022).

Additionally in 1994, Congress enacted Public Law 103-454, the Federally Recognized Indian Tribe List Act which formally established three ways in which an Indian group may become federally recognized (a) by the administrative procedures under 25 C.F.R. Part 83 (FAP), (b) by Act of Congress, or (c) by decision of a United States court (H.R.4180 - 103rd

Congress (1993-1994): An Act to clarify the status of the Tlingit and Haida, and for other purposes., 1994)

U.S. courts and Congress have been reluctant to recognize Indigenous groups which leaves FAP procedures as their only option, yet the criteria for recognition under FAP is arduous and unfeasible for many Indigenous groups. Too many Indigenous tribes across the United States lack federal recognition which hampers their access to resources, protection, and support regarding their land and water rights from the federal government. There are 574 tribes recognized by the United States federal government in the 48 contiguous states and Alaska; with this federal recognition comes tribal and individual access to funding and services provided by BIA (Bureau of Indian Affairs, 2021). In 2012, the Government Accountability Office (GAO) identified approximately 400 non-federally recognized tribes spread across the United States—almost equal to the number of federally recognized tribes (United States Government Accountability Office, 2012). The current system of federal recognition leaves many Indigenous groups without protection and without the ability to exercise control over their ancestral lands showing that this policy must be changed to protect Indigenous sovereignty and the environment.

Indigenous Land and Water Rights

Indigenous Land meets Federal Policy

The concept of Indigenous land tenure is a unique category in the American land experience. It is largely generated by White settler-colonial concepts and practices, but still exhibits some measure of Indigenous customs. It is founded in treaties, statutes, and case law and sustained via the trusteeship established for tribes, as based on constitutional provisions that mandate Indigenous administration to the federal government. Issues pertaining to land, territoriality, etc., derive from interpretations of treaties and other legal instruments and conflicts

arise because of differing interpretations of these legal means. States, civil divisions, and citizens often contest federal Indigenous law.

In what is known by the U.S. government as 'Indian Country', states and citizens also contest tribal claims for the protection of sacred places that lie within the public domain, on other public lands, or within private land holdings. Many of the conflicts relate to Indigenous ancestral territory. However, tribal and individual Indian utilization of lands within reservations also come under challenge such as tribal development of hazardous waste disposal sites (Prucha, 1977).

Elements of Indigenous land tenure properly begin with ancestral territory; however, the notion that all Indigenous communities held territory as political entities is incorrect. Small groups or bands, that hunted and/or gathered in small nuclear areas could be identified with ecological units that, at a later date under U. S. administration, came to be acknowledged as territories (Prucha, 1977). Once the land system was superimposed upon Indigenous communities, the reservation became the dominant land institution, even if at times called reserve, colony, rancheria or some other designation. Reservation conferred federal trustee responsibilities over the land either reserved by tribes or set aside for them out of the public domain. Reservations represent the survival, in most but not all cases, a part of original territory; the bulk of that land area became land cessions based usually on treaties.

Two kinds of land title now generally prevail owing to the foregoing events: original and recognized. Original title acknowledges tribal territoriality prior to and at contact, and is the more difficult to establish, for it requires reconstruction often by ethnologists and others, who turn to Indigenous informants, diaries, field journals of military and others such as religious personnel, etc. The recognized title can be readily sustained, even if some controversy prevails over the specifics of mapping native territory. Recognized title literally grows out of recognition

through treaties of land cession, statutes and other forms of negotiation between tribes and the US government. That is, it is part of the legal record.

Within reservations, land configuration can be profoundly complex for numerous reasons. In the latter decades of the 19th Century (mainly after 1870), the Indian Office undertook the allotment in severalty parcels or homesteads to Indigenous individuals, the acreage varying from 40 to 320 acres (Sutton, 1975). Almost universally, the ‘remaining’ tribal acreage, deemed surplus to Indigenous needs, was opened to non-Indigenous homesteaders seeking lands out of the public domain. Even if altruistic in its time and place, the allotment process proved disastrous by dynamically reducing total tribal acreage between the 1880s and 1930s (Sutton, 1975). But before the process could be halted and possibly reversed, heirship of these allotments, when intestate, fell under the prevailing law of descent in each state in which Indian lands may be found. Before long, many allotments had hundreds of undivided shares and fragments did reach ridiculous figures (e. g., 1/2000) (Sutton, 1975). Under the New Deal, after 1934, the government established the Indian Reorganization Act, which reined in on the allotment process, but did not effectively roll back the encumbered heirship problem. From that time on, varying efforts at land consolidation have been attempted with modest successes on some reservations. These consolidations have had in mind tribal buy-outs with the intent of incorporating such lands into a larger environmental plan for the reservation.

Other elements of the land system focus attention on litigation toward the recovery of land and/or its monetary value. In 1946, Congress enacted the Indian Claims Commission Act, which established the Indian Claims Commission (ICC) for reviewing tribal claims to lost lands by various means. A land claim normally would include the aboriginal claim area, which, in turn, normally embraced the entirety of recognized title lands acquired via treaties of land cession, etc.

(Prucha, 1977). Other claimable areas have identified sacred sites or sacred places. The ICC was never granted authority to restore land to the tribes. But under several special circumstances, Congress has passed legislation that did create some land restorations. Such lands may or may not be adjacent to existing reservations, yet they became part of the tribal territory in trust. Another form of land restoration has involved the acknowledgement of an Indigenous community and the establishment of a reservation either by Congressional grant of a portion of the public lands (e. g., within a national park or forest) or through a settlement act that awarded a tribe money in order to buy land (often out of original territory). In all cases, the lands would be placed in trust and function under the same settler-colonial laws that govern all of Indigenous land tenure.

Indigenous Waters and Governmental Control

As has been enumerated in this paper, the U.S. federal government has treaty obligations and trust responsibility to federally recognized Indigenous groups. Like other communities, Indigenous groups must have access to a clean, safe, and reliable supply of water in order for reservations to be a permanent and habitable homeland. Treaty rights thus include access to water and access to healthcare, among other rights. There is a legal, moral, and fiduciary responsibility of the federal government to protect Indigenous treaties, lands, and resources (Prucha, 1977). While these treaty and trust rights are legally binding, it is well-documented that the federal government has reneged on its responsibilities to adequately protect Tribal lands and waters and to provide adequate healthcare through Indian Health Service and other funding (US Commission on Civil Rights, 2018).

The continued violation of treaty and trust rights by the federal government are barriers to adequate water access in Indigenous controlled areas. As Mitchell (2019) points out, “The

protection of tribal sovereignty and treaty rights through the support of Indigenous activism and alliance building is necessary to ensure treaty trust responsibilities, which are critical to water-related environmental and social justice."

Beyond federal treaty and trust responsibilities, inequities in water quality and access have been facilitated by other laws and legal systems that reduce the access, quality, and infrastructure for water. First, federal law fails to provide adequate protection for Indigenous water. The Clean Water Act and the Safe Drinking Water Act established federal water quality standards. Today, these laws are intended to support Indigenous self-governance and thereby protect Indigenous environmental values by allowing Tribes to directly administer federal water protection programs (Environmental Protection Agency). However, the Environmental Protection Agency (EPA)—the federal agency responsible for enforcing federal clean water and safe drinking water standards—has only approved two Tribal programs since 2016 (Pueblo of Laguna and Swinomish Indian Tribal Community) and only 15% of eligible Tribes have water quality standards needed for EPA approval (Grijelva, 2020). As has been discussed previously, Indigenous groups have a strong connection to their land and environment. Threats to environmental quality are threats to Indigenous culture and tradition. For example, according to Grijalva (2020), "water pollution permits that do not account for Indigenous cultural uses of water risk environmental injustice in a manner reminiscent of early colonial attempts at assimilation".

Second, federal laws also allow for resource extraction that threaten Indigenous water sources. So called 'Indian country' and neighboring lands are rich in natural resources, but the development of resources in adjacent areas off Indigenous lands can threaten Indigenous water supplies, especially in instances of inadequate Indigenous consultation (US Senate Committee on

Indian Affairs, 2015). In 2015, the Gold King Mine—located approximately 100 miles outside the Navajo Nation near Silverton, Colorado—spilled 3 million gallons of wastewater that spread to and contaminated the San Juan River, a water source of the Navajo Nation (US Senate Committee on Indian Affairs, 2015). Mitigation efforts continue today. The Dakota Access Pipeline across the Great Plains also brought these issues to national attention. In litigation against the Army Corps of Engineers for its approval of permits for the project, the Standing Rock Sioux Tribe asserted a right to spiritually pure water and argued that construction of the pipeline will irrevocably damage usability for spiritual purposes (Standing Rock Sioux Tribe v. United States Army Corps of Engineers, 2020). While the future of the project remains uncertain pending litigation, several leaks in the pipeline since it began operations in 2017 reinforce the Tribe's concerns and the need to protect human health and the environment when engaging in natural resource development.

Finally, Indigenous groups have legally recognized and protected reserved water rights that are sufficient to fulfill the purposes of their reservation (e.g., domestic, agricultural, hunting, fishing). These water rights are quantified through either litigation or settlements. In the event of competing water claims across multiple users, the federal government has facilitated legal settlements in which Indigenous groups waive claims against the federal government in exchange for funding to build infrastructure which can deliver clean water (Democratic Staff of the House Committee on Natural Resources, 2016). In many ways, this is an unfair exchange for Indigenous groups to have to cede their water rights in order to receive infrastructure support that the federal government is already obligated to provide. States have also attempted to condition Indigenous water settlements on waiver of other rights. While water settlements can be a potential option to obtain water access by including infrastructure projects, potable water is

needed now for the survival of Indigenous communities and should not be held hostage to political maneuvering.

The American legal framework governing Indigenous rights, including land and water rights, in what the federal government terms 'Indian country' is based on racism, colonization, and genocide. Early federal reports have documented insufficient water access in Indian country. The 1928 Meriam Report documented both lack of access to clean water and lack of sanitation facilities for waste disposal in Indian country (Meriam, 1928). Nearly a century later, the US Commission on Civil Rights chronicles many of the same water access issues in its 2018 report, Broken Promises: Continuing Federal Funding Shortfall for Native Americans (US Commission on Civil Rights, 2018). The federal government should provide water and land access to Indigenous groups. Holding the government responsible in these areas is essential to bridging the gap in existing inequities and the government *does* have a responsibility—to repair the harm they have caused and continue to cause to Indigenous groups and their ancestral lands, with this responsibility being explored in the next chapter.

Rights and Personhood

The responsibilities of government regarding Indigenous groups and the environment is recognized through multiple claims. As the previous chapter demonstrated, the federal government has a responsibility to protect recognized Indigenous groups in the U.S. under a constitutional basis that has been consistently reified by various courts and Congress. This responsibility should also extend to non-recognized Indigenous groups and the environment as well based on an international human rights framework and an environmental rights framework. In making this claim, this paper takes the position that the United States has a positive duty to both the Indigenous groups within its borders and the environment itself. This duty towards the environment builds off the conception of the environment as having a form of personhood based on Indigenous knowledge, which should be respected and protected in the legal system—a new environmental jurisprudence for the U.S. legal system. Various conceptions of personhood are explored in this chapter with environmental personhood and nature rights being looked at through case studies in Ecuador and New Zealand.

The Right to Environmental Protection

Although international law contains no express protections for Indigenous peoples' interests in the environment, Indigenous claims could fit within several categories of protection that are mentioned in human rights and other instruments covering rights to property, environmental protection, subsistence, cultural preservation, racial discrimination, and self-determination. Various agreements therefore could be the basis under international law for Indigenous peoples to claim protections for water and other natural resources. A body of international human rights law as applied to the rights of Indigenous peoples has emerged over the last seventy-five years. In 1948 the Organization of American States General Assembly took

the first step in accepting Article 39 of the Inter-American Charter of Social Guaranties. The Charter required American states to take "'necessary measures' to protect indigenous peoples' lives and property, 'defending them from extermination, sheltering them from oppression and exploitation."' (Organization of American States General Assembly, 2002) Since this regional recognition of Indigenous rights in 1948, various multilateral and bilateral agreements have been adopted in an effort to protect indigenous peoples' rights.

One of the most important accords is International Labour Organisation Convention No. 169 on Indigenous and Tribal Peoples of 1989 (I.L.O. No. 169) (International Labour Organisation, 1989). The basic theme of I.L.O. No. 169 is embodied in the Convention's preamble which recognizes, "the aspirations of [indigenous] peoples to exercise control over their own institutions, ways of life and economic development and to... develop their identities, languages and religions, within the framework of the States in which they live." (International Labour Organisation, 1989). Professor James Anaya explains that upon this premise, "[t]he Convention includes extensive provisions advancing indigenous cultural integrity, land and resource rights, and nondiscrimination in social welfare spheres; in addition, it generally enjoins states to respect indigenous peoples' aspirations in all decisions affecting them" (Anaya, 1991).

Several other international conventions primarily relating to human rights or, more recently, to environmental protection, are potential sources of Indigenous rights relating to land and resources, environmental quality, subsistence, culture, racial discrimination, and self-determination or participation in decision making. Some international tribunals charged with carrying out international agreements and domestic courts of some countries have upheld the application of these international laws to protect various interests of Indigenous peoples.

Besides formal, binding agreements, a variety of norms that could apply to Indigenous environmental rights have been accepted by nations around the globe. For instance, "Agenda 21" adopted at the 1992 United Nations Conference on Environment and Development in Rio de Janeiro, provides a set of standards for countries in their use and conservation of natural resources. Nearly all the nations of the world have accepted these standards. One standard requires the full participation of the public, especially water-user groups and indigenous people and their communities (United Nations, 1992).

But not all the sources of rights discussed in this paper have been widely adopted by countries of the world. Some are merely draft documents that have not yet been presented to the United Nations or other international organizations for their consideration. Nevertheless, they remain helpful sources in attempting to find the norms that should guide international conduct toward indigenous peoples. Article 38 of the Statute of the International Court of Justice states that custom is among the primary sources of international law:

> Article 38.(1) The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law (United Nations, 1945).

Customary international law, included in paragraph b, exists where there is a general consensus among states concerning legal practices and norms in a particular field. If a common understanding exists, states may expect other states to act in conformity with the general consensus. It is arguable that such a consensus presently exists concerning the rights of Indigenous peoples:

> [I]t is evident that indigenous peoples have achieved a substantial level of international concern for their interests, and there is a substantial movement toward a convergence of international opinion on the content of indigenous peoples' rights, including rights over lands and natural resources. Developments toward consensus about the content of indigenous rights simultaneously give rise to expectations that the rights will be upheld, regardless of any formal act of assent to the articulated norm (Anaya, 1991).

Based largely on the content of international human rights conventions and customs apart from domestic laws, John Alan Cohan argues that "the international community now regards indigenous peoples as having environmental *rights* that rise to the status of international norms" and that "because indigenous peoples' way of life and very existence depends on their relationship with the land, their human rights are inextricable from environmental rights." (Cohan, 2002) These environmental rights can include "the right of indigenous peoples to control their land and other natural resources... to maintain their traditional way of life.” (Cohan, 2002)

Because Indigenous populations are usually inextricably tied to their lands for sustenance, cultural identity, and spirituality, their demands for the recognition of Indigenous land rights are frequently closely linked to demands for human rights protections (Torres, 1991).

As previously mentioned several international environmental agreements also mention Indigenous rights to land and resources.

When speaking of Indigenous land rights, it is important to establish the premise that land rights of Indigenous peoples are not limited to ownership rights. They extend to traditional use and occupancy of lands and resources. The American Convention on Human Rights (IACHR) also recognizes that Indigenous peoples' rights to land and resources do not derive from formal state recognition, but from traditional use and occupation (American Convention on Human Rights, "Pact of San Jose", 1969). This understanding is based in large part upon the realization that "'[c]ertain indigenous peoples maintain special ties with their traditional lands, and a close dependence upon the natural resources provided therein-respect for which is essential to their physical and cultural survival.'" (Torres, 1991) MacKay observes that:

> According to the IACHR, indigenous peoples' property rights, including ownership, derive from their own forms of land tenure, traditional occupation, and use, and exist absent formal recognition by the state. This is consistent with aboriginal title jurisprudence in most common law states and with international instruments in general. The IACHR has related territorial rights on a number of occasions to cultural integrity, thereby recognizing the fundamental connection between indigenous land tenure and resource security and the right to practice, develop, and transmit culture free from unwarranted interference. In 1997, for instance, the IACHR stated that: "For many indigenous cultures, continued utilization of traditional collective systems for the control and use of territory are essential to their survival, as well as to their individual and collective well-being. Control over the land refers to both its capacity for providing the

> resources which sustain life, and to 'the geographical space necessary for the cultural and social reproduction of the group.'" (MacKay, 2002)

Human rights agreements include strong protections for Indigenous land rights. Article 13 of I.L.O. No. 169 provides that Indigenous and tribal peoples are to enjoy full human rights that, in turn, include rights to use land. The land rights provisions of I.L.O. No. 169 are framed by Article 13 that refers to lands or territories that "they occupy or otherwise use." (International Labour Organisation, 1989) It goes on to say that "[t]he use of the term 'lands' in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use." (International Labour Organisation, 1989) Article 14 states that the possessory rights of Indigenous peoples established by use and occupancy must be protected:

> 1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities ....
>
> 2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession. (International Labour Organisation, 1989)

The recognized rights include the right of Indigenous peoples "to participate in the use, management and conservation of these resources." (International Labour Organisation, 1989) Finally, the Convention requires states to provide penalties for unauthorized intrusion upon or use of Indigenous lands. The Convention only binds signatory states but its impact may extend

farther. It can be argued that, in addition to creating treaty obligations among ratifying states, Convention No. 169 should be viewed as reflecting a still developing body of customary international law (Anaya, 1991). According to this approach, whether or not a particular country has signed Convention No. 169 is immaterial-it may be bound by customary international law's recognition of Indigenous peoples' property rights in natural resources that they have traditionally used.

Three kinds of international agreements or norms potentially protect Indigenous rights to environmental quality relating to use and control of water. First, the right to environmental protection is implicit in international instruments specifically acknowledging Indigenous land rights such as those discussed in the preceding section. Second, environmental rights can be derived from human rights guarantees. Because the way of life and the very existence of Indigenous peoples usually depend on their relationship with the land, their human rights are inextricable from environmental rights. Thus, human rights instruments that are silent on the subject may be sources of rights to environmental protection that would extend to both land and water resources. Finally, the emergence of international law directly protecting the environment has special significance for Indigenous peoples. When these protections are considered together it is reasonable to conclude that the international community has accepted norms that provide support for the rights of Indigenous people to protect, use, and manage their environmental resources.

Although international agreements regarding Indigenous rights are not binding on the U.S. and many realists in international politics would argue that the United States is not beholden to international law, I would disagree with this view. Harold Hongju Koh has contributed enormously to this debate. More than twenty-five years ago, he articulated what is now a

foundational theory about the efficacy of international law. The theory, in essence, is that states are habituated to comply with international law through a complex transnational legal process. Once a state engages with international law, disparate actors within and outside of government can invoke it to foster “institutional interaction whereby global norms are not just debated and interpreted, but ultimately internalized by domestic legal systems” (Koh, 1997). Internalized norms operate as domestic law; they establish “default patterns of international law observant behavior,” which are “routinized and sticky” and thus difficult to deviate from without sustained effort” (Koh, 1997). So, the reason that international law is effective is that the transnational legal process pushes states toward obeying its mandates and thereby achieving its prescribed outcomes. Various U.S. leaders have publicly recognized this fact with Condoleezza Rice, former U.S. Secretary of State stating that “[the United States] will be a strong voice for international legal norms, for living up to our treaty obligations, to recognizing that American's moral authority in international politics also rests on our ability to defend international laws and treaties” (Bellinger, 2007).

There are many international agreements regarding Indigenous land and water rights with two of the most prominent being the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and the American Declaration on the Rights of Indigenous Peoples (ADRIP) passed by the Organization of American States (OAS). Both of these declarations provide robust frameworks for recognizing the rights that Indigenous peoples have to the lands, territories, and resources that they have traditionally occupied and used. The U.S. while not legally endorsing these agreements has agreed to support them, with the view of the federal government being that they carry moral force (United States Agency on International Development, 2023). In this way, the U.S. recognizes that the principles that undergird these agreements are important and in fact

critical to a nation that has positioned itself as a moral leader in international affairs. I would argue that while the U.S. has not ratified UNDRIP and ADRIP as nations like New Zealand or Ecuador have, it has a moral responsibility to uphold these agreements' principles by offering a Land Back process and recognizing the rights of Indigenous communities.

Environmental Personhood

Legal personhood has long been seen as a promising tool for protecting nature—a belated idea given the now seemingly unexceptional nature of corporate personhood in protecting corporate rights. Far from being the settled doctrine that its long tenure might have it appear to be, however, corporate personhood is mercurial; it seems an endlessly adaptable concept. How might we come to understand the environment as a similarly flexible rights-holder in a way that is robustly protective of environmental interests? This paper argues that, as an example of how we came to see a non-human entity as a rights holder, corporate personhood may be a useful tool in moving toward understanding the environment as a rights holder.

Legal personhood is not binary; it is not a yes-or-no proposition. The differentiation of legal rights and responsibilities starts, not ends, at the question of whether something may or may not be considered a person in the meaning of a statute (Walt & Schwartzman, 2016). The real issue here is what, given the legal personhood of corporations or the environment, that means for how much that legal, practical, rhetorical entity—that category-for-legal-convenience—should be allowed to claim the rights of other shades of personhood. There is, after all, no such thing as a plain-old person; it is law that defines the categories of persons (Gordon, 2019).

The development of a concept of corporate personhood in American law was anything but inevitable. Although we are familiar now with "the idea of a corporation having 'its' own

rights, and being a 'person' and 'citizen' for so many statutory and constitutional purposes," the idea was perhaps as unsettling to contemporary jurists as that of environmental personhood might sound today (Stone, 1972). Just as "[t]hroughout legal history, each successive extension of rights to some new entity has been . . . a bit unthinkable," so too does their contingency become practically unthinkable after they are normalized (Stone, 1972). Before environmental personhood becomes unremarkable, and thus unremarked-upon, we would do well to consider some of the contingencies in the development of the personhood concept as applied to corporations.

Even among the very few jurisdictions that have developed concepts of environmental personhood, conceptions of that "personhood" are diverse. In 2014, Te Urewera, formerly a New Zealand national park, was declared to be a legal entity. The act making this designation transformed the land from government owned national park to freehold land owned by itself (New Zealand, 2014). The country's Whanganui River followed suit in 2017. Years prior to the movement in New Zealand law, Ecuador proclaimed under its constitution the rights of nature "to exist, persist, maintain and regenerate its vital cycles" (Republic of Ecuador, 2008). Nature here, instead of being named as a legal person directly, instead is given these rights by analogy to "persons and people" (Republic of Ecuador, 2008). In the United States, a number of local governing bodies created ordinances recognizing the rights of nature.

Ecuador

In 2008, after a national referendum, Ecuador changed its constitution to reflect rights for nature as a way to focus on buen vivir (the good life)—it was the first country ever to do so. In Ecuador, regard for the rights of nature coincided with a rise in political power for indigenous groups (Gordon, 2019). The influence of Indigenous peoples' worldviews was apparent in the

central importance in Ecuador of Pachamama— "nature" in the languages of the indigenous Quichua and Aimara groups. Under the Ecuadorian constitution, Pachamama has rights "to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution" (Republic of Ecuador, 2008). Every person and every community has the right to advocate on its behalf. Pachamama here escapes direct personification. Instead, it is the bearer of rights as "nature," as distinct from "persons, people, communities and nationalities" and "natural and judicial persons.

According to Alberto Acosta (2010), the President of Ecuador's Constitutional Assembly, the significance of incorporating buen vivir into the Constitution lies in its reorientation of the country's development model. Title VII stipulates that buen vivir must be the foundation of a new development model "that is environmentally balanced and respectful of cultural diversity, conserves biodiversity and the natural regeneration capacity of ecosystems" (Republic of Ecuador, 2008) This led some legal scholars and activists to argue that rights of nature are transversal, and thus must take precedence over property rights or financial interests.

While this issue is not explicitly resolved in the Ecuadorian Constitution, the notion that the rights of nature are transversal and therefore take precedent over property rights is gradually being established through the creation of judicial precedent (Kauffamn & Martin, 2017). For example, in a lawsuit over whether shrimp farmers could be expelled from fragile mangrove ecosystems, Ecuador's Constitutional Court ruled in 2015 that rights of nature are transversal, and thus rights of nature affect all other rights, including property rights. The Court acknowledged that this reflects "a biocentric vision that prioritizes Nature in contrast to the classic anthropocentric conception in which the human being is the center and measure of all

things, and where Nature was considered a mere provider of resources" (Sentencia No. 166-15-SEP-CC, 2015).

New Zealand

In New Zealand, as in Ecuador, rights of nature became a reality due in large part to the influence of indigenous ways of seeing the relationship between human beings and the world (Gordon, 2019). For a Maori tribe (iwi), sub-tribe (hapu), or extended family group (whanau), a particular river or mountain might be an ancestor (tupuna) (Gordon, 2019). This genealogy—or whakapapa—is crucial to Maori worldviews. In 2014, the bill based on the agreement between the government and a Maori tribe regarding the personification of Te Urewera became law, bringing into being New Zealand's first environmental legal person. The status of the Whanganui River soon followed suit.

The Tūhoe were among several iwi that never signed the Treaty of Waitangi, and they had long advocated for Maori sovereignty. During the 20th Century, the Tūhoe lost control over much of their ancestral home, the forest known as Te Urewera. In 1954, the Crown established Te Urewera National Park, one of New Zealand's largest national parks, comprising most of Tūhoe ancestral land. On June 4, 2013, Tūhoe representatives and the Crown government signed a Deed of Settlement, fully settling all Tūhoe historical claims regarding Te Urewera. Tūhoe negotiations proceeded more quickly than those with the Whanganui Iwi. The settlement terms were incorporated into national law in July 2014 through Parliament's passing of the Tūhoe Claims Settlement Act and the Te Urewera Act.

The Tūhoe Claims Settlement Act provides a historical apology and financial and cultural redress to the Tūhoe (Jones, 2014). The Te Urewera Act recognizes the Tūhoe's genealogical ties to the forest and the Maori view of the forest as a living spiritual being, named Te Urewera. It

also grants Te Urewera legal personhood status with “all the rights, powers, duties, and liabilities of a legal person” (New Zealand, 2014). As a legal person, Te Urewera is not owned by anyone, and was removed from New Zealand’s national park system. Importantly, from a rights of nature perspective, the Act recognizes Te Urewera’s intrinsic value and created a Te Urewera board, comprised of six Tūhoe and three Crown members, to serve as guardians of Te Urewera’s interests.

These new global legal developments arrive alongside what appears to be a wholesale re-evaluation of the place of human interests in relation to nature. New Zealand’s Te Urewera Act is seen to be novel for its changes to the very nature of property ownership. It is an indisputable rejection of an anthropocentric rights regime for protecting nature as property. In the end, our capacity to imagine a politics capable of encompassing things and places far outside of human lives or business interests has more to do with how well legal personhood will protect the environment than does any deployment of legal arguments for environmental personhood—just as has been the case in the development of the doctrine of corporate personhood in American law.

Corporate Personhood ushers in Environmental Personhood

The current movement toward protecting the environment by means of legal personhood makes sense partly as a result of and a reaction to the seemingly unremarkable status of corporate personhood in protecting corporate rights. But a right, we are reminded, “is not, as the layman may think, some strange substance that one either has or has not” (Stone, 1972). The status of corporate personhood as a vector for asserting corporate rights has shifted over time and changes to political climates. At times, those wishing to avoid regulation of corporations have argued vociferously for the rights of corporations as persons. At other times, these interests have been

best served by the avoidance of any such status. But these switches are not merely questions of ontology, of whether or not the corporation is a person. The uses to which this personhood is put matter more.

The modern doctrine of corporate personhood sprung originally from contract and property concerns for shareholders, but the doctrine was developed over time “without a coherent explanation or consistent approach[,]” eventually becoming the incoherent, inconsistent wildebeest we know today (Walt & Schwartzman, 2016). Of course, discourses of corporate personality have always varied over time and space; corporate personhood as a metaphor has a particularly long tenure, dating back to ancient Roman law (Walt & Schwartzman, 2016). The corporation as a legal person distinct from the individuals involved with it developed during the Middle Ages. This corporation was a “person” in the sense that it had the ability to sue, to face liability, and to own property. Thus at common law, the corporation was personified in a mostly metaphorical sense—a sense that differed in important ways from the way that the doctrine of corporate personhood has come to develop in modern law.

From this poetic and pragmatic usage, however, the corporation was made in American law not merely a legal entity analogized to a person, but an actual person for the purposes of certain constitutional issues. A number of theories of the corporate form have been mobilized, sometimes coexisting in time or even in single cases. A broad outline of the parameters of these theories would identify a concession or artificial entity theory wherein the state was the grantor of corporate power, rendering the corporation a state invention; a contract theory wherein the corporation, rather than being an invention of the state, was the contractual coming together of people sharing natural economic interests; and a real entity theory wherein the corporation was its own creature with its own interests.

What is outstanding about the legal regimes outlined above is their decentering of human needs and interests. A homocentric view long tended to jam environmental protection arguments into particular shapes—an environmental measure might be justified based on, say, allowing more people to experience wilderness, or protecting the food chain for human consumption (Stone, 1972). Over time, the focus of legal and scholarly attention to the protection of nature has moved from being entirely focused on human interests in exploiting nature, to protecting nature for future human generations, to conceptions that allow for nature to be protected as intrinsically valuable. In contrast with previous anthropocentric views, often tied closely to utilitarian arguments, environmental personhood has gained currency contemporaneously with scholarly reevaluation of the place of human interests in relation to nature—a reevaluation that gives new life to Christopher Stone's 1972 argument that trees should have standing to litigate their own interests.

In doing so, society begins to recognize what Indigenous wisdom has always known: that the environment is an entity in and of itself. The legal system must shift to respect it as such, and policy must be created to recognize this fact. Environmental personhood allows for various parts of nature to become embodied in this way and granted personhood in the same manner that corporations in the U.S. have been granted personhood. Environmental personhood simply recognizes that nature has interests distinct from human beings and a functional society, an *equitable* society must recognize the interests of all persons. The following chapter examines how environmental personhood can be implemented in the U.S. through policy apparatus with an analysis of how selected factors would influence said implementation.

Policy Creation and Analysis

Having reviewed the literature on Indigenous land and water rights as well as investigated case studies of environmental personhood in New Zealand and Ecuador, this chapter seeks to analyze what policy measure would be best suited for usage in the U.S. to achieve movement towards Land Back. The policy measure selected is a combination of the New Zealand and Ecuador models which uses a version of the environmental personhood systems implemented in New Zealand and Ecuador, having both a focus on Indigenous land control and the rights of the environment.

The Combined New Zealand and Ecuador Model

The combined New Zealand and Ecuador model or what I call the Turtle Island Model (henceforth referred to in this paper as TIM) is one focused on three areas: green legislation, green constitutions, and BIA policy alterations. The New Zealand model uses green legislation such as the Te Urewara Act that grants Te Urewera national park the status of a legal person that is represented by a board comprised of members of the Tūhoe nation and appointees by the New Zealand Minister of the Environment. The Ecuador model uses constitutional changes, creating a green constitution that introduces basic rights for the ecosystem as a rights holder independent of any human interest and sees nature a collective subject of public interest. TIM would use both green legislation and constitutional amendments on a state level to increase Indigenous sovereignty and protect the environment combined with BIA policy alterations to increase the number of Indigenous persons allowing for greater political power.

By focusing on changing state constitutions, it allows for nuance with individual Indigenous groups and their relationships to the environment while also sidestepping Congressional gridlock and polarization that has prevented previous national constitutional

amendments. The passage of a green amendment generally gives residents, and in some cases organizations, standing in a court of law to challenge activities with potential environmental impacts before execution. Without such standing, communities often need to wait and be able to prove harm after the fact. The language of green amendments thus shifts the burden of proof to those who would create pollution. This means, in theory, that rather than communities needing to prove harm after the fact, people or entities that might cause or have caused pollution have to prove that they are not in violation of the rights and responsibilities outlined in the constitutional amendment. Green legislation that focuses on the rights of nature would operate on both a state and federal level as state level legislation accounts for the control that individual states have over both their environmental policy and ability to enact policy for federally unrecognized Indigenous groups while federal legislation accounts for the control that the federal government has over issues involving recognized Indigenous groups as they are quasi-sovereign nations.

BIA policy alterations would streamline the current Federal Acknowledgment Process (FAP) as the current process has seven distinct criteria that limit the ability of Indigenous groups to petition for federal recognition. One criteria that serves as a major blocking mechanism for interested Indigenous groups is the requirement that "the petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900" with this criteria ignoring the historical nature of displacement and efforts by the United States government to decrease the amount of people willing to identify as Indigenous (H.R.4180 - 103rd Congress (1993-1994): An Act to clarify the status of the Tlingit and Haida, and for other purposes., 1994). By changing the criteria necessary for approval under FAP then the process becomes more accessible to interested Indigenous groups. The current FAP is also seen as informationally opaque by many stakeholders with little easily accessible information on how the process functions (United States

Government Accountability Office, 2012). By adopting a streamlined and transparent process for granting extensions of time or adopting changes in the schedule for a Proposed Finding or Final Determination then petitioners for federal recognition would have more access to the process, likely resulting in increased federal recognition for Indigenous groups. This increased number of federally recognized Indigenous groups would result in increased political power through an expanded voting bloc, allowing Indigenous groups to exert more power on state and federal representatives.

When examining the feasibility of TIM, it is important to note that environmental protection has become increasingly important to citizens across the U.S. with an almost consistent majority of those surveyed over the last 36 years prioritizing environmental protection over economic growth (Gallup, 2022) (see Figure 4). This places pressure on politicians at both a state and federal level to enact policies focused on environmental protection to ensure that they continue receive the support necessary for election with multiple interest groups across political spectrums advocating for green legislation. However, there is a deep political divide between Americans regarding support for environmental protection with Democrats consistently regarding environmental protection as a higher policy concern than Republicans, although both parties are more likely to rate protecting the environment a top policy priority than in the past (Gallup, 2022).

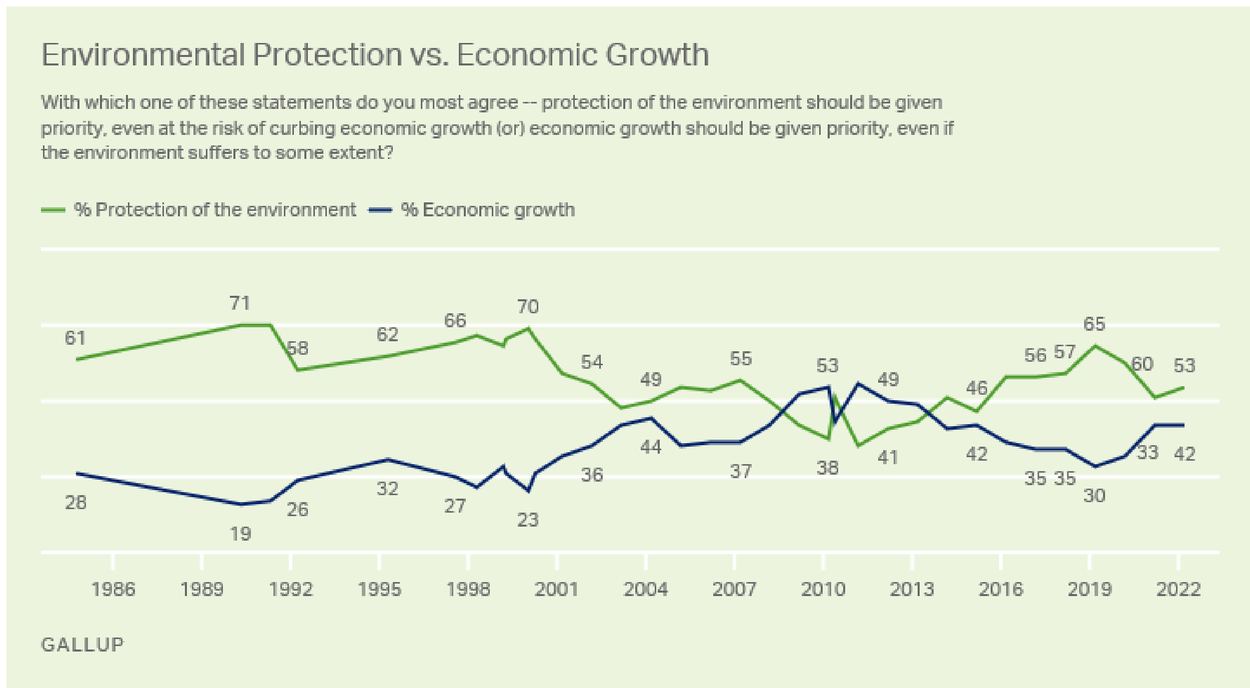

Figure 4- Chart showing the responses to poll asking preference for environmental protection or economic growth (Gallup, 2022).

Environmental personhood has already been achieved in some ways in the U.S. and TIM would expand environmental personhood beyond its few fringe cases. In February 2019, citizens of Toledo, Ohio, recognized Lake Erie's rights. They passed the Lake Erie Bill of Rights (LEBOR), a municipal law that gave the lake legal rights. This law provided the means for the city or any resident of the city to sue polluters on behalf of the lake. The LEBOR got international attention. It is an example of the emerging "rights of nature" or "environmental personhood" movement, in which entities of nature (i.e. lakes and rivers) get legal personhood, which enables them to be better protect from pollution and other harms. The fight began after a toxic algae bloom shut down the city's water supply for three days in 2014. The blooms were largely caused by agricultural runoff of manure and fertilizer, a source of water pollution that was unregulated in Ohio. The initiative for LEBOR was approved with nearly 11,000 resident signatures, and was at first blocked from the ballot by a Board of Elections members (Pallota, 2020). Toledoans for Safe Water (TSW) wanted to fill the gap between the values held by the

Toledo community and the realities of local environmental policy. According to a lawsuit TSW filed in the Ohio Supreme Court the Board of Elections members abused their authority by removing a citizen-approved initiative from the ballot. The Board of Elections convened a second vote to decide whether or not the proposal may be included on the ballot for the special elections in February 2019, even though the TSW ultimately lost the court case. The board affirmed the public's right to vote on the initiative to advance LEBOR to the special election. In this way LEBOR was included in the city charter. TSW is a perfect example of the drive and enthusiasm needed to start an activist initiative and promote change at any political level.

The Lake Erie Bill of Rights was the first in US law based on fundamental rights passed with the intention of defending an entire interdependent environment. The language of the safeguards recognizes that the lake is more than just a body of water and encompasses the lake, its tributaries, and the numerous species it sustains. The structure and substance of the text offer plenty of material for analysis. LEBOR may serve as the foundation for future proposals or legislation of a similar nature. The three-page document opens with six declarative value statements, then seven substantive parts that list the rights of the ecosystem and describe how to enforce those rights. The language and structure of the preamble of the US Constitution are referenced in the opening phrase of each of the values declarations on the first page: "We the people of the City of Toledo" what should underline the importance of the document as well as the will of the local community.

It is not just green legislation as in the case of LEBOR but also green constitutional amendments that are becoming more common in the United States. Currently, there are seven states that have constitutionally based environmental protection: Hawaii, Illinois, Montana, Massachusetts, New York, Pennsylvania, and Rhode Island. Of these seven, three have adopted

environmental rights in their Bill of Rights, which are Montana, New York, and Pennsylvania while the other four states have constitutional provisions regarding environmental protections, although not in their Bill of Rights. Pennsylvania and Montana were the first two states to adopt such green amendments into their constitutions in 1971 and 1972 respectively. In the decades that followed, however, court precedents in Pennsylvania and Montana significantly impeded the potential impact of their respective amendments. As a result, few green amendments were proposed or seriously considered in the following decades. However, more recent court cases have overturned the original case law and created new precedents and reaffirmed the environmental rights offered by green amendments. Consequently, over the past decade or so, green amendment legislation has been introduced in eleven other states, including Oregon, New Jersey, Kentucky, and Maine.

Conclusion

As Martin Luther King, Jr., said, “Morality cannot be legislated, but behavior can be regulated. Judicial decrees may not change the heart, but they can restrain the heartless” (King, 2007) The proposal of the “rights of nature”, was developed to use legislation to help restore the balance in our Earth system. The final aim is to build an Earth society and this requires much more than a change in legal structures, but rather a change in society that comes from welcoming and uplifting Indigenous knowledge. The aim of the Rights of Mother Earth movement is to create Earth governance systems at all levels – an Earth democracy that takes into account not only humans but also nature, and which connects the particular to the universal, the diverse to the common, and the local to the global; a living democracy that grows like a tree, from the bottom up (Shiva, 2010). According to Shiva, the challenge of this proposal is how to strengthen and spread these diverse experiences of local governance and to imagine the forms that Earth

democracy will have at the national, regional and global levels. In this sense, the Rights of Mother Earth are an invitation to think and act in a non-anthropocentric world. In a world where we respect the personhood of nonhuman entities people would be transferred from “homo economicus” to “homo naturalis”.

Despite the tentative openings achieved in the system of subjective legal protection through class actions, and the greening of the laws, we still currently can see existing gaps in law enforcement, in the area of environmental protection. Collective actions are limited to the enforcement of simple law and the fundamental and human rights of animals and nature cannot be enforced through this mechanism. One way to close this gap is to grant autonomous rights to nature through the concept of environmental personhood, which recognizes legal rights of non-human legal entities. The concept seems to be very promising, although there have been backlashes (LEBOR) and the need to further elaborate the concept and its implementation is obvious. Until now there simply have not been enough cases in which it was implemented what make it hard to evaluate its efficiency.

As previously expressed, Indigenous groups under American law today would be able regain control of their historic lands and waters through the legal conception of environmental personhood which recognizes the personhood of natural environments in a way that respects legal doctrine while acknowledging the relationship that Indigenous peoples have to land. In addition, environmental personhood under the policy expressed in this paper creates a method for collective property that operates within the framework of the American legal system and recognizes that Indigenous groups first possessed this land and water while moving past the ahistorical narrative used by Locke who did not acknowledge the labor of these groups in managing their natural resources—which is key in the Lockesian idea of property.

As American society progresses and begins to realize the necessary task of confronting the truth regarding injustices done to Indigenous individuals, the Land Back movement becomes more and more salient. To truly engage in reparative justice is to give Indigenous groups control of their land and waters. Although TIM does not do this fully, it does work as a step forward in the movement by recognizing the personhood inherent in nature as has always been apparent in Indigenous wisdom and giving Indigenous groups the ability to protect their most important environments through legal representation. Land Back requires all of us to reckon with our place in a system that perpetuates Indigenous suffering and grapple with the knowledge that true justice may require a complete systemic overhaul rather than partial justice as enacted through American policy.

Positionality

Considering the subject matter of this paper, I find it both appropriate and necessary to share my positionality to be transparent regarding what inspired my thoughts and biases during the writing process. I am 22-year-old Black Caribbean man, raised in The Bahamas and now living in the United States with ancestry that includes the Taíno—an Indigenous people of what is now the Caribbean—and the Black Seminoles—a people of mixed Native American and African heritage. As a researcher, I bring the experience of both my cultural heritage and my professional development to my work. I acknowledge the privilege I have in being able to access certain resources, and I strive to be aware of my own biases and recognize how these may shape my research.

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Figures

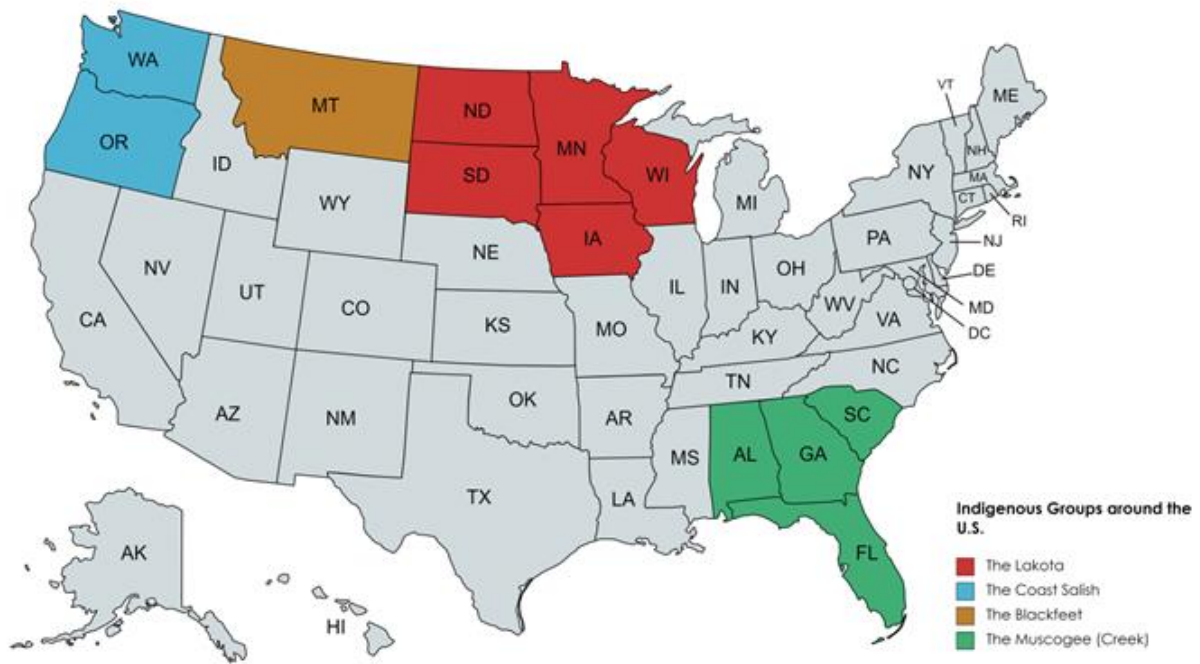

Figure 1. Map showing the historical and present locations of the Indigenous groups mentioned in Chapter 2.

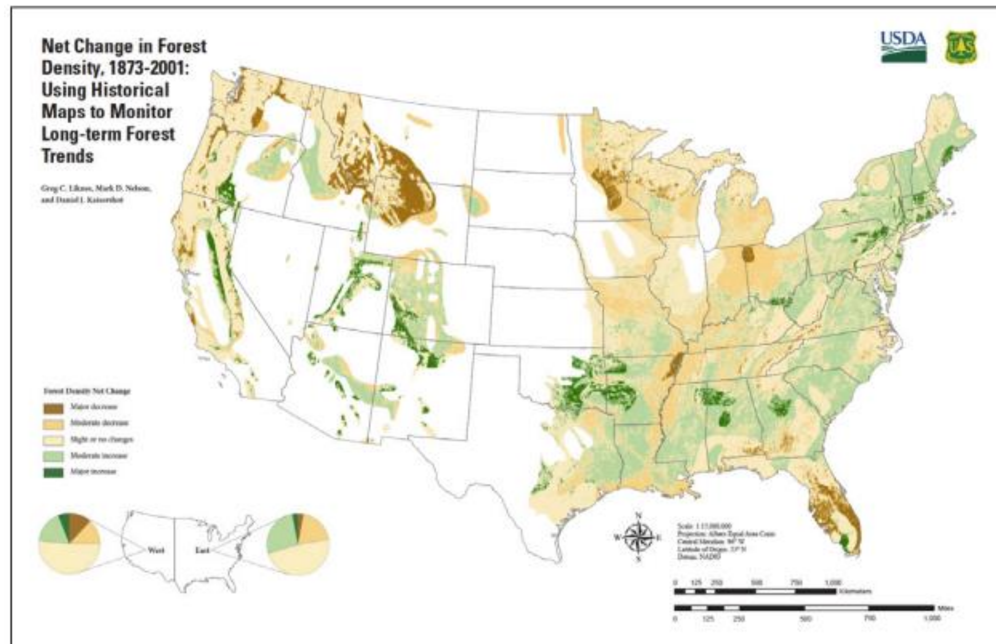

Figure 2. Map showing the correlation between the expropriation of Indigenous land and disappearance of old growth forests (Liknes, Nelson, & Kaisershot, 2013). Net change in forest density since 1873. Classes are based on density categories defined in an 1873 woodland density map by William H. Brewer. Change classes are labeled as follows: an increase or decrease of four or five density categories is a major change, a difference of two or three density categories is a moderate change, and a difference in zero or one category is slight or no change. The pie charts on the inset map indicate the relative proportions of the change categories for the western and eastern United States.

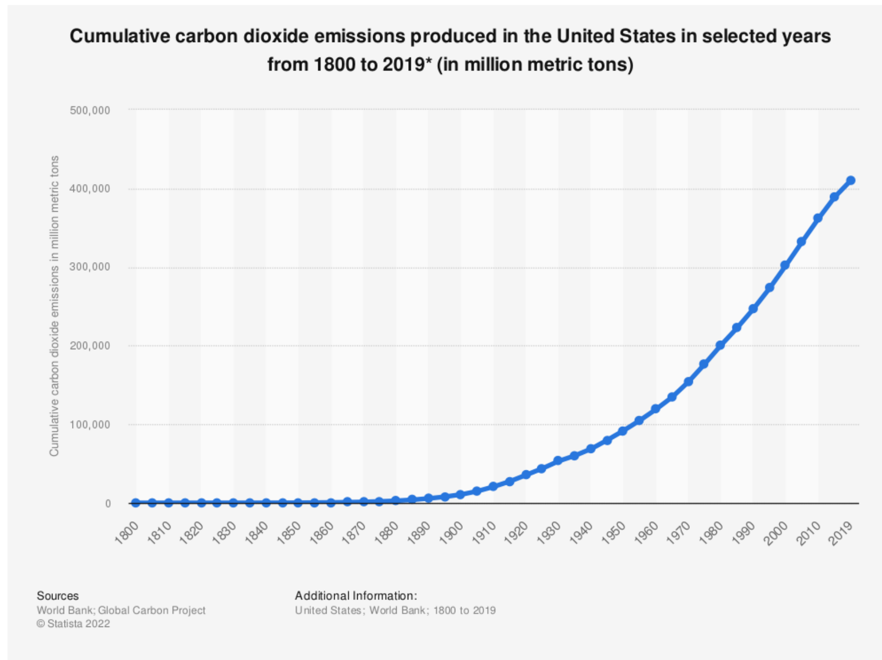

Figure 3. Chart showing the US CO2 emissions between 1800 and 2019 (Global Carbon Project, 2021) As of 2019, the U.S. had emitted a cumulative total of 410.2 billion metric tons of carbon dioxide from fossil fuels and cement production. The U.S. was still in its infancy when the industrial revolution first started in Europe, and by 1800 it had emitted just 250,000 metric tons carbon dioxide. In comparison, countries in Europe - mainly the United Kingdom - had already released millions of tons of carbon dioxide into the atmosphere from industrial activities. However, the U.S. would soon catch up and become a major global power. Once the industrial revolution had reached the U.S., its economy shifted from agricultural to industrial, which saw emissions soar.

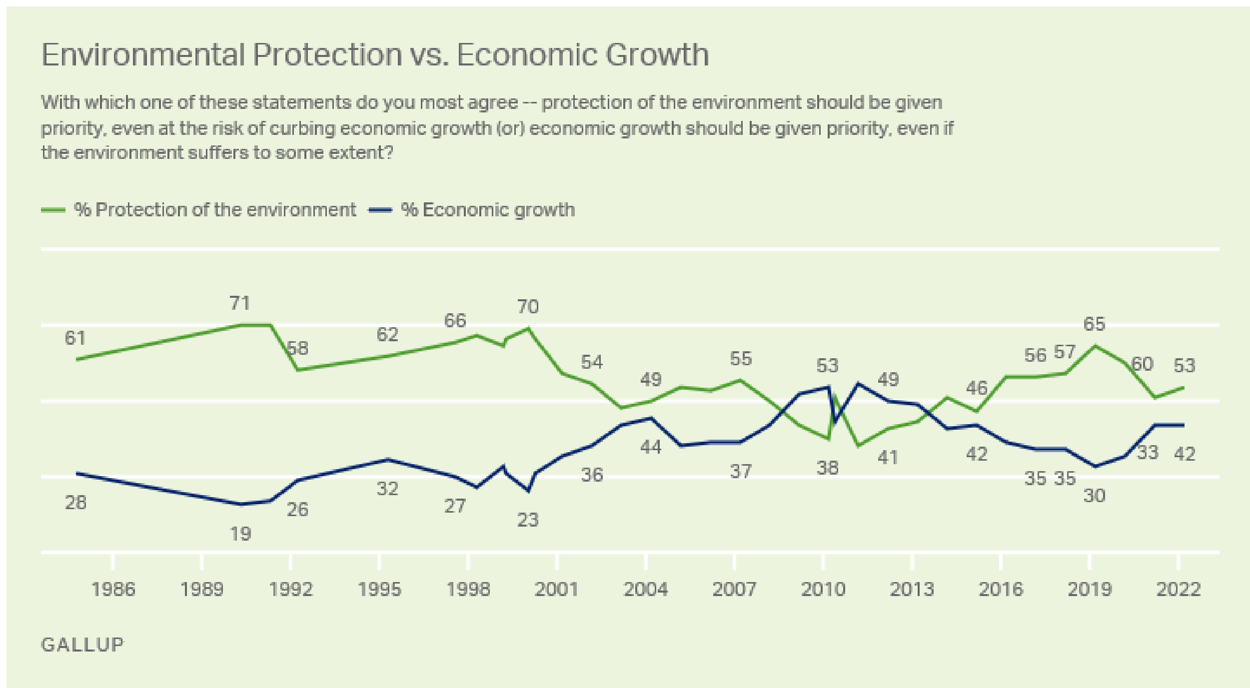

Figure 4. Chart showing the responses to poll asking preference for environmental protection or economic growth (Gallup, 2022) Respondents were asked "With which of these statements do you most agree -- protection of the environment should be given priority, even at the risk of curbing economic growth (or) economic growth should be given priority, even if the environment suffers to some extent?" The analysis in this report is based on telephone interviews conducted January 8-13, 2020, among a national sample of 1,504 adults, 18 years of age or older, living in all 50 U.S. states and the District of Columbia (301 respondents were interviewed on a landline telephone, and 1,203 were interviewed on a cellphone, including 839 who had no landline telephone).