PERSONALIZING POLLUTION AND LANDSCAPE DESTRUCTION: HOW NATIVE AMERICAN AND INTERNATIONAL PERSPECTIVES SHOULD BE INTEGRATED INTO FEDERAL ENVIRONMENTAL POLICY

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I. INTRODUCTION

> *Every part of this soil is sacred in the estimation of my people. Every hillside, every valley, every plain and grove, has been hallowed by some sad or happy event in days long vanished. Even the rocks, which seem to be dumb and dead as they swelter in the sun along the silent shore, thrill with memories of stirring events connected with lives of my people, and the very dust upon which you now stand responds more lovingly to their footsteps than to yours, because it is rich with the blood of our ancestors and our bare feet are conscious of the sympathetic touch.*

—Chief Seattle to Seattle governor in 1854[1]

Land use and environmental policy in the United States are rooted in property law. Landscapes, specific places, and the activities carried out on them evoke values of ownership and freedom. For Native Americans, that freedom has spiritual implications: land and nature have "sacred primacy."[2] With the arrival of Europeans and the creation of the United States, their relationship with the land was forced into Western terms of titles and ownership.[3] The result was decades of taking Native American lands that undermined indigenous communities' self-sufficiency and freedom.[4] The federal encroachment of Native American land has not stopped; today it takes the form of approval for private

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[1] Henry A. Smith, *Chief Seattle's 1854 Oration, Authentic Text of Chief Seattle's Treaty Oration 1854,* SEATTLE SUNDAY STAR, Oct. 29, 1887.

[2] Jill Norgren & Serena Nanda, *American Cultural Pluralism and Law* 3 (2006).

[3] Chief Justice Marshall said in *Worcester v. Georgia* that Native Americans were "independent political communities" with natural rights to the land. *Id.* at 7 (citing Worcester v. Georgia, 31 U.S. 515, 559 (1832)).

[4] *See id.* at 20-34.

construction projects that disturb Native American burial grounds and other culturally significant land. Garnering significant public attention, the Corps of Engineers granted an easement in early February 2017 to Dakota Access, LLC, to build an underground oil pipeline known as the Dakota Access Pipeline (DAPL).[5] Prior to this grant and before the new executive administration took office, the Standing Rock Sioux Tribe and other native peoples opposed the construction project because it would upset their burial grounds and pollute an important water supply.[6] The Tribe sought a preliminary injunction against the Corps' permitting ability, asserting a failure to evaluate the land under the National Historic Preservation Act and that construction would cause irreparable harm.[7] The D.C. District Court denied the tribe's request.[8]

This note will examine current federal environmental laws and policy with application in the context of private development that affects tribal lands, e.g. Dakota Access Pipeline construction in areas of importance to the Standing Rock Sioux Tribe. Part II first identifies primary environmental laws and the historical context that led to the gradual creation of criminal sanctions for their violations. It identifies key laws and their weaknesses and inconsistencies. Part III explores the approaches international organizations take to address the negative environmental impact of private entity conduct. Included in this part is an analysis of the Native American perspective on tribal land and the Native American people's relation to it. Developing policies in the international community demonstrate movement toward similar ideas of the Native Americans. A particular examination of the International Criminal Court's recent decision to prosecute environmental misconduct as a crime against humanity serves as a reference for potential changes in American federal policy. Part IV discusses federal environmental policy failures to accommodate Native American values and the tenets that could be imported from the international community to resolve both weaknesses in the

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[5] Dakota Access Pipeline Facts, *Energy Transfer Announces Receipt of Easement from Army Corps of Engineers on Land Adjacent to Lake Oahe* (Feb. 8, 2017), https://daplpipelinefacts.com/energy-transfer-announces-receipt-easement-army-corps-engineers-land-adjacent-lake-oahe/.

[6] Statement Regarding the Dakota Access Pipeline, U.S. Army Corps of Engineers (Nov. 14, 2016), http://www.usace.army.mil/Media/News-Releases/News-Release-Article-View/Article/1003593/statement-regarding-the-dakota-access-pipeline/.

[7] *See* Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, 205 F. Supp. 3d 4, 7–8 (D.D.C. 2016).

[8] *Id.* at 36.

federal laws and the injuries they inflict on Native American people. Without changes to federal standards and more aggressive prosecution, tribal lands will face further destruction by private business interests and tribal culture will continue to erode. Through adoption of changes and a new perspective of the connection between society and the environment, native tribes will be better able to protect their sacred lands. Coupled with more serious prosecution of actors that destroy land and resources, an environmental policy informed by this alternative perspective will deter others.

II. UNDERSTANDING THE EXTENT OF DAMAGE DONE TO PUBLIC WELFARE BY POLLUTION AND ENVIRONMENTAL CRIMES

Rather than shape environmental policy with a cohesive framework of principles and values, Congress created individual environmental laws in response to immediate tangible issues.[9] The first significant environmental law was the Rivers and Harbors Appropriation Act of 1899.[10] It aimed to ensure federal waters remained navigable for the sake of commerce by requiring permits to release waste into them.[11] Scholars have noted that the Rivers and Harbors Act was incapable of addressing the intricacies of an industrial economy.[12] For decades, environmental laws were strictly civil statutes capable only of imposing civil damages or injunctions.[13] It was not until the latter half of the twentieth century that Congress began to incorporate criminal sanctions into the laws, mostly at the misdemeanor level.[14] The Clean Air Act was

[9] *See* Rivers and Harbors Appropriation Act of 1899, 30 Stat. 1121 (codified as amended in scattered sections of 33 U.S.C.); National Historic Preservation Act of 1966, 54 U.S.C.S. § 100101 (2017); The National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321- 4370f (2017); The Toxic Substances Act of 1973, 15 U.S.C. §§ 2601-2671 (2017); The Clean Air Act Amendments of 1977, 91 Stat. 685 (codified as amended in scattered sections of 42 U.S.C.); The Clean Water Act of 1977, 33 U.S.C. §§ 1251–1376 (2017) discussed *infra*.

[10] 33 U.S.C.S. § 407 (2017).

[11] *See id*.

[12] *See*, *e.g.*, Raymond W. Mushal, *Environmental Criminal Prosecution: Essential Tool or Government Overreaching?: Up from the Sewers: A Perspective on the Evolution of the Federal Environmental Crimes Program*, 2009 UTAH L. REV. 1103, 1104–05 (2009).

[13] *Id.* at 1105.

[14] *Id.*

the first to do this.[15] The relevant environmental statutes include the National Historic Preservation Act of 1966,[16] the National Environmental Policy Act of 1969,[17] the Toxic Substances Act of 1973,[18] the Clean Air Act Amendments of 1977,[19] and the Clean Water Act of 1977.[20]

The National Historic Preservation Act, though not always identified as an environmental law, named the nation's heritage and culture as its motivations for creating a National Register of places with historical significance and encouraging the protection and restoration of those sites.[21] Private entities and individuals apply for permits under this Act to restore, develop, or preserve land deemed culturally and historically significant.[22] According to Robin Elizabeth Datel, a researcher in the Department of Environmental Design at University of California, Davis, although rooted in patriotism and respect, the National Historic Preservation Act today enables identity of place and conservation of unique

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[15] *Id*. at 1105–06. 42 USC §§ 1857–1857c-9 (transferred via 1977 amendments) stated that:

Any person who **knowingly** violates any requirement or prohibition of an applicable implementation plan . . . shall, upon conviction, be punished by a fine pursuant to Title 18 or by imprisonment not to exceed 5 years, or both. . . . Any person who knowingly--(A) makes any false material statement, representation, or certification in, or omits material information from, or **knowingly** alters, conceals, or fails to file or maintain any notice, application, record, report, plan, or other document required pursuant to this chapter to be either filed or maintained (whether with respect to the requirements imposed by the Administrator or by a State); (B) fails to notify or report as required under this chapter; or (C) falsifies, tampers with, renders inaccurate, or fails to install any monitoring device or method required to be maintained or followed under this chapter shall, upon conviction, be punished by a fine pursuant to Title 18 or by imprisonment for not more than 2 years, or both. . . . Any person who **knowingly** fails to pay any fee owed the United States . . . shall, upon conviction, be punished by a fine pursuant to Title 18 or by imprisonment for not more than 1 year, or both . . . Any person who **negligently** releases into the ambient air any hazardous air pollutant . . . or any extremely hazardous substance . . . **and** who at the time **negligently** places another person in imminent danger of death or serious bodily injury shall, upon conviction, be punished by a fine under Title 18 or by imprisonment for not more than 1 year, or both. 42 U.S.C.A. § 7413(c) (emphases added).

[16] Pub. L. 89-665 (codified as amended at 54 U.S.C. 300101 *et seq*.).

[17] Pub. L. No. 91–190 (codified as amended in scattered sections of 42 U.S.C.).

[18] Pub. L. No. 94–469 (codified as 15 U.S.C.§§ 2601–92 (2000)).

[19] Pub. L. No. 95–95 (1977) (codified as amended in scattered sections of 42 U.S.C.).

[20] Pub. L. No. 95–217 (1977) (codified at 33 U.S.C.§§1294–97, 1281(a) (2000)).

[21] 54 U.S.C.S. § 300101 (2017).

[22] *Id*.

landscapes reflective of a diverse culture.[23] Unlike some of the more well-known aforementioned laws, this one does not expressly impose criminal liability or address potential injuries.[24] The National Historic Preservation Act closely links the importance of places to the endurance of society and its culture; it is forward-looking in its goals.

A few years later the National Environmental Policy Act (NEPA) passed:

> [t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts to prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation.[25]

NEPA acknowledged the importance of "environmental quality" to the nation.[26] It conferred upon society and the government an affirmative responsibility "as trustee of the environment," noting the importance of national heritage and the diversity associated with it.[27] Part of the responsibility assigned to the federal government was, in the pursuit of preservation and environmental quality, to address unresolved conflicts about natural resources.[28] NEPA prioritized "productive harmony" with the environment in the interest of the general welfare and its healthful existence.[29] The breadth of this obligation reached "wildlife preservation, parklands, land use, and population growth, as well as pollution."[30] The act

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[23] Robin E. Datel, *Preservation and a Sense of Orientation for American Cities* 75 NO. 2 GEOGRAPHICAL REVIEW 125 (Apr. 1985). Datel identified common qualities of historically significant sites in three metropolitan cities and noted that preservation sometimes contradicted its purpose by displacing people whose connection to a location was more social and experiential than aesthetic.

[24] *See* Pub. L. No. 89-665 (1966).

[25] Pub. L. No. 91–190 (1970).

[26] 42 U.S.C.A. § 4331(a).

[27] *Id.* at §4331(b)(1), (b)(4).

[28] 42 U.S.C.A. § 4332.

[29] *Supra* note 26, at (a), (b).

[30] Gerhard Peters & John T. Wooley, *38 – Special Message to the Congress on Environmental Quality*, AM. PRESIDENCY PROJECT, http://wwww.presidency.ucsb.edu/ws/?pid=2757. President Nixon called for ingenuity and new philosophies in order to address damage done to American land and resources. He stated that "by ignoring environmental costs we have given an

established the Environmental Protection Agency (EPA), tasked with developing, implementing, and enforcing a national environmental policy.[31]

Congress passed the Toxic Substances Control Act of 1977 (TSCA) to regulate chemical substances posing unreasonable risk of injury to either people's health or the environment.[32] It proscribed both noncompliance with rules regarding the manufacture, distribution, use, and disposal of substances and using such substances for commercial purposes with knowledge that any of the aforementioned processes violated the compliance rules.[33] Civil violations incurred a penalty of up to $25,000, to be assessed by an administrator.[34] Criminal sanctions imposed a penalty of up to $25,000 per day of violation, imprisonment, or both.[35] The Act incorporated the standard of a knowing or willful mental state accompanying noncompliance.[36] Although the prohibition against use of a noncompliant substance included a knowledge standard, the government could charge a commercial use violation merely with a civil penalty.[37]

The Clean Air Act Amendments of 1977 (CAA) aimed to protect the public health and welfare.[38] In the context of the CAA, this meant addressing pollution and the negative effects it has on various aspects of society from transportation to breathing air to agricultural crops.[39] Air quality was the environmental quality at stake here, and Congress intended to promote reasonable actions to address of that interest.[40]

Through the Clean Water Act (CWA), the federal government assumed responsibility for the quality of water.[41] Passed in 1977, this Act aims to restore and preserve the nation's

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economic advantage to the careless polluter over his more conscientious rival."

[31] *See* 42 U.S.C.A. § 4321.

[32] Pub. L. No. 94-469, 90 Stat. 2003 Section 2(2), (3) (1976) (codified at 15 U.S.C. § 2601(a)(2)-(3)).

[33] 15 U.S.C.A. § 2614(2).

[34] 15 U.S.C.A. § 2615(a)(1).

[35] *Id*. at (a), (b)(1).

[36] 15 U.S.C.A § 2614 (defining a violation as failure to comply with rules or orders and as using a substance in commerce with knowledge, or reason to know, that the substance was manufactured, distributed, used, etc.).

[37] *Id*. at (2).

[38] 42 U.S.C.A. § 7401(a)(2) (West 2017).

[39] *Id*.

[40] *Id*. at (c).

[41] Clean Water Act of 1977, Pub. L. No. 95–217, 91 Stat. 1566 (1977) (as codified at 33 U.S.C. §§ 1251–1387).

waters.[42] The EPA administers this Act, establishes water quality standards, issues permits for dredging, filling, etc., that affect bodies of water, and enforces through fines and sometimes criminal charges.[43] Criminal charges under this act are for willful or negligent violations and knowing false statements.[44]

Similar to the Toxic Substances Control Act, the Resource Conservation and Recovery Act (RCRA) aims to regulate the lifetime of hazardous waste.[45] RCRA uses an endangerment provision, which imposes a fine of up to $1,000,000 and imprisonment for up to fifteen years for environmental crimes that threaten human life or health.[46]

On top of civil standards for compliance and penalties for less extreme breaches, criminal sanctions were generally reserved for violations that caused egregious harm.[47] The shift in severity of consequences for environmental misconduct earned criticism for overreaching and over-criminalizing.[48] The concept that suddenly both environmental damage and noncompliance in recordkeeping were considered serious enough to constitute crimes met resistance.[49] The introduction of these sanctions rendered illegal conduct that was acceptable prior to 1970.[50] The statutory language was broad and thus unclear about what constituted criminal violations.[51] Not only was it unclear, but it also shifted a lot of commercial activity under federal jurisdiction.[52] Furthermore, the

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[42] *Id.* § 101.

[43] *See id.* § 309.

[44] *Id.*

[45] *See* 42 U.S.C. §§ 6901–6987 (1982 & Supp. V 1987); Eva M. Fromm, *Commanding Respect: Criminal Sanctions for Environmental Crimes*, 21 ST. MARY'S L.J. 821, 822 (1990).

[46] Mushal, *supra* note 12, at 1111.

[47] Robert W. Adler &Charles Lord, *Environmental Crimes: Raising the Stakes*, 59 GEO. WASH. L. REV. 781, 792 (1991) (citing EPA, CRIMINAL ENFORCEMENT PRIORITIES 2 (1982)). Even in the 1980s the Environmental Protection Agency, responsible for federal environmental enforcement along with the Department of Justice, prioritized prosecution of the "most serious forms of environmental misconduct."

[48] Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 709 (2005).

[49] David M. Uhlmann, *Environmental Crime Comes of Age: The Evolution of Criminal Enforcement in the Environmental Regulatory Scheme*, 2009 UTAH L. REV. 1223, 1230-31 (2009). Critics perceived federal criminal laws related to the environment as barring a prohibited wrong rather than conduct that was morally or socially wrong.

[50] *Id.* at 1229.

[51] *Id.* at 1232.

[52] *Id.*

creation of consequences for environmental crimes has often been reactionary to environmental injury or a sort of afterthought to the substantial civil portion of environmental laws.[53] The incorporation of environmental crimes was thus gradual, ramping up in the 1980s from occasionally tacked on charges to become an active pursuit.[54] The EPA set out goals to create an "expectation of prosecution" for environmental violations, impose "severe punishment" where necessary, and "assure the integrity" of the agency.[55]

The argument that pollution and environmental destruction are innately wrong exists,[56] but the American environmental policy has contradicted this idea with its piecemeal development, a vague threshold for criminal guilt, and various motivations. To compound confusion of federal policy on environmental crimes, the government tends to pursue only popular or severe violators with varying consequences.[57] For instance, Exxon Valdez spilled millions of gallons of oil when one its tankers ran aground in 1989.[58] The spill had lasting effect on the regional wildlife, both land and aquatic, which had negative commercial implications.[59] Instead of criminal charges, Exxon Valdez was charged and found liable for negligently spilling oil.[60] In contrast, a man named John Pozsgai filled in wetlands that were part of his property in violation of the Clean Water Act in *United States v. Pozsgai* in the same year.[61] Pozsgai's sentence included three years of jail and a hefty fine.[62] Although he had intentionally violated the Clean Water Act after several warnings, the environmental impact of Pozsgai's crime was less than that inflicted by the negligence of Exxon Valdez.[63] Robert Adler, an attorney with the Natural Resources Defense Council,

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[53] Frédéric Mégret, Ph.D., *The Problem of an International Criminal Law of the Environment*, 36 COLUM. J. ENVTL. L. 195, 200-01 (2011).

[54]Mushal, *supra* note 12.

[55] CONSENSUS WORK GROUP, EPA, MANAGEMENT REVIEW OF EPA'S CRIMINAL ENFORCEMENT PROGRAM 5, 7 (1986).

[56] Uhlmann, *surpra note 49*, at 1230.

[57] *See* Mushal, *supra* note 12; David M. Uhlmann, *Environmental Crime Comes of Age: The Evolution of Criminal Enforcement in the Environmental Regulatory Scheme*, 2009 UTAH L. REV. 1223 (2009).

[58] *See* Robert W. Adler, *Introduction: Environmental Criminal Prosecution: Essential Tool or Government Overreaching?*, 2009 UTAH L. REV. 1097 (2009).

[59] *See* Elizabeth Wiese, *Damage of Exxon Valdez Endures*, USA TODAY, Feb. 1, 2007, at A1.

[60] *See* Adler, *surpa* note 58 at 1098.

[61] *See* United States v. Pozsgai, NO. CR. 88-00450 (E.D. Pa. July 13, 1989), *aff'd mem*., 897 F.2d 524 (3d Cir.), cert. denied, 111 S. Ct. 48 (1990).

[62] *See* Adler, Lord, *supra* note 47, at 785 (1991). The fine was $202,000.

[63] *See id*. at 786.

Inc., pointed out a couple years after the cases were decided that Exxon Valdez did not mean to release millions of gallons of oil, but it did deliberately refrain from preventing and preparing for the possibility of a spill like the one that occurred.[64]

Other case law concerning environmental violations reflects a similar emphasis on more severely prosecuting direct, deliberate individual conduct than corporate entities that generally ignore environmental laws and regulations.[65] A case in the 1970s garnered public attention when Allied Chemical Corporation disposed of pesticide into a public sewer, causing contamination that rendered fish from a connected river inedible and water treatment processes ineffective.[66] The company pled no contest to water pollution charges, established a non-profit to research and address the effects of the pesticide, and paid a $5 million fine.[67] Recent cases illustrate a continuing occupation with environmental crimes that are severe incidents and viscerally reprehensible. In 2001, Allen Elias received a seventeen-year sentence for, among other things, instructing employees to clean solids containing cyanide out of a tank without safety equipment.[68] In 2009, two Salvagno relatives received over 200 months' incarceration each after violating several environmental laws by improperly removing asbestos from hundreds of buildings.[69]

Just the few cases mentioned above reveal the difficulties of federal environmental policy. David M. Uhlmann, a professor who worked for the United States Department of Justice for seventeen years and served as Chief of the Environmental Crimes Section for seven, has noted "the absence of a meaningful basis for determining what makes an environmental case criminal."[70] He compared environmental crimes to white-collar crimes: both are sophisticated, involve regulated businesses, and can be hard to legislate against.[71] Several scholars have attempted the exercise of outlining what the

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[64] Adler, Lord, *supra* note 47, at 786.

[65] *See* discussion *infra*.

[66] *See* United States v. Allied Chem. Corp., 420 F. Supp. 122 (E.D. Va. 1976).

[67] *See* James D. Curran, *Probation for Corporations under the Sentencing Reform Act,* 26 SANTA CLARA L. REV. 785, 793 (1986).

[68] *See* Uhlmann, *supra* note 49, at 1246-1247 (citing United States v. Elias, 269 F.3d 1003, 1007 (9th Cir.), *as modified* (Dec. 21, 2001), *supp.,* 27 F. App'x 750 (9th Cir. 2001)).

[69] *See id.,* at 1246-1247 (2009) (*citing* United States v. Salvagno, No. 06-4202-cr(L), 2009 WL 2634655, at *1 (2d Cir. Aug. 29, 2009) *and* United States v. Salvagno, No. 06-4201-cr(L), 2009 WL 2634647, at *1 (2d Cir. Aug. 28, 2009) (sentencing Alexander Salvagno and Raul Salvagno)).

[70] *Id.* at 1225.

[71] *See id.* at 1233.

elements of environmental crimes should be and the reasoning for them.[72] There is debate over what mental state and injury are required to establish criminal conduct with respect to the environment and enforcement against those crimes.[73] In 2009 Raymond Mushal, senior counsel in the environmental crimes section of the United States Department of Justice, explained how the felony standard of a "knowing" mental state in the context of environmental violations developed during the latter half of the 1900s.[74] He described courts that grappled with what knowledge a prosecutor must prove to establish an offense—knowledge of the law, of a permitting structure, of the potential hazardous effect of a material, or simply of the violation.[75] Mushal attributed clarification of the "knowing" requirement to a firearms case heard by the Supreme Court in 1998.[76] There the court held a defendant must have knowledge of the facts of his conduct, not the illegality of it.[77] Only in cases where there is danger of convicting individuals who engaged in activity that appears innocent on its face should courts require proof that a defendant knew of the law he violated.[78]

Beginning in the 1980s the federal government also prosecuted knowing endangerment cases.[79] The knowledge necessary to establish guilt for this category of charges was knowledge of putting someone in "imminent danger of death or

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[72] *See* Mushal, *supra* note 12, at 1114-17.

[73] Adler, *supra* note 58, at 1099-1102. Adler asserts the uncertainty about these fundamental elements create challenges with appropriate sentencing and enforcement.

[74] *See* Mushal, *supra* note 12, at 1117 (2009).

[75] *See id.* at 1114–17. Courts first addressed the knowledge requirement in a series of hazardous waste cases. Mushal said these were relatively simple to assign culpability for knowing the clear inherent danger of hazardous waste and improperly disposing of it. However, later water pollution cases muddied this explanation because the materials at issue were not always inherently dangerous and the severity of their negative effect depended on the methods and location of their disposal. Some courts required evidence the defendant had knowledge of the conduct that violated an environmental statute. In *United States v. Wilson*, the Fourth Circuit held that the prosecution did not have to demonstrate a defendant knew about a permitting structure or that discharged excavated material illegally, but it did need to show he knew he was dumping into a protected wetland. 133 F.3d 251, 264 (4th Cir. 1997).

[76] Mushal, *supra* note 12, at 1117 (citing Bryan v. United States, 524 U.S. 184 (1998)).

[77] Bryan, 524 U.S. at 192–93.

[78] *Id.* at 193–94.

[79] Uhlmann, *supra* note 49, at 1224 (2009).

serious bodily injury" by virtue of a violation.[80] Such charges focus on—and dole out more severe consequences for—the risk of harm caused by defendant conduct.[81] As mentioned earlier, however, the government tends to prosecute only attention-grabbing or egregious violations. "Polluters as Perpetrators of Person Crimes," a 2009 article in the Journal of Environmental Law and Litigation suggesting that states should prosecute offenders whose pollution causes serious bodily injury or death, asserts federal enforcement is inadequate at addressing human harm, particularly human harm caused by environmental harm.[82] The author, Sarah Gibson, asserts that when possible prosecutors charging violators of environmental statutes should include person crimes such as homicide, reckless endangerment, and culpable negligence.[83]

Uhlmann also posed the question of what legal remedy best serves environmental policy.[84] As discussed, the federal government can pursue one or more of multiple civil or criminal penalties. But environmental policy generally lacks enforcement power.[85] Civil penalties often grant "no enduring protection."[86] Duties of care and fair notice pose concerns.[87] The disjointed development of economic

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[80] *Id*. at n.5 (2009) (*citing* 33 U.S.C. § 1319(c)(3)(A); 42 U.S.C. § 6928(e) (2006)).

[81] *See id.*

[82] *See* Sarah Gibson, *Polluters As Perpetrators of Person Crimes: Charging Homicide, Assault, and Reckless Endangerment in the Face of Environmental Crime*, 25 J. ENVTL. L. & LITIG. 511, 532 (2010).

[83] *See id.* at 532–35, 540, 544–50. Gibson's article is restricted to discussion of state statutes; she addresses both the Model Penal Code and common law in her analyses. In the necessary exploration of causation, she assesses the various cause-in-fact tests, as well as the difficulty of demonstrating proximate causation due to the likely argument that intervening causes were unforeseeable and broke the causal chain. Reiterating her focus on harm caused, Gibson notes that specific acts do not define person crimes and therefore offer a possibly worthwhile avenue for prosecutors of environmental offenders. The United States Code defines involuntary manslaughter as the unlawful killing of a person without malice "[i]n the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner…of a lawful act which might produce death." § 112(a). An assault that causes severe bodily injury is punishable with up to ten years imprisonment. §113(a)(6).

[84] Uhlmann, *supra* note 49, at 1225 (2009).

[85] Adler & Lord, *supra* note 47.

[86] *See* Wood & Welcker, *Tribes as Trustees Again (Part I: The Emerging Tribal Role in the Conservation Trust Movement*, 32 Harv. Envtl. L. Rev. 373, 390 (2008).

[87] *See* Mégret, *supra* note 53, at 222-25. The distinction between legal and illegal damage is problematic because it might be an issue of degree in some cases, of permission in others, and weighing of costs and benefits. Environmental harm often accumulates, which requires a broader scope of responsibility in order to hold anyone criminally liable, raising concerns of fairness and over-criminalization.

crimes resulted in varying levels of offense, indicating some offenses carried more weight "regardless of the comparative realities."[88] One civil case tackled injury caused over time by Asarco, Inc., which discarded of waste byproducts from mining ore—with mixed results. The United States sought damages from Asarco, which had complied with regulations as they developed over the years, for the impact of its waste disposal on vegetation and drinking water over the span of a hundred years.[89] Judge Lodge of the Idaho District Court, found Asarco liable for natural resources damage under the Clean Water Act, determined the government had exaggerated "the alleged injury," and, in a footnote, mentioned that the court had decided against granting an injunction due to the many jobs related to the mine.[90] This case demonstrates the limited protection ensured by civil penalties for environmental violations and a lack of essential covenants of restraint.[91]

Criminal penalties can be equally ineffective: influence in a jurisdiction where environmental crimes are prosecuted might come from the agents of offending entities.[92] The influence of high-power entities makes it less likely that the federal government in that district would bring charges against them.[93] Indeed, from the creation of criminal provisions in environmental statutes, profit-seeking commercial businesses and the people who run them have been at odds with pollution regulation.[94] Criminal provisions might not have much deterrent force because of *United States v. Booker*, which gave judges and prosecutors more discretion to deviate from the recommended sentencing guidelines, [95] and due to the limited types of cases prosecuted. Offering his perspective of federal environmental crimes, Mushal lamented that not all courts understand the extent of damage done to public welfare by pollution

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[88] *See* Mushal, *supra* note 12, at 1110 (2009).

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

[90] *Id.* at 1101, n.1.

[91] Wood & Welcker, *supra* note 86, at 390–91.

[92] *See* Mégret, *supra* note 53, at XXX. In the international context, Megret asserts that these people are heads of state and high-level leaders. This concept easily transfers to an American context with corporate influencers.

[93] *See id.*

[94] *See*, *e.g.*, Mushal, *supra* note 12, at 1113 (2009). Mushal offers the example of private parties that seek to fill wetlands in order to use the land for profit as being at odds with pollution regulations.

[95] *See* Mushal, *supra* note 12, at 1118-19 (2009); 543 U.S. 220 (2005). *Booker* struck down the mandatory sentencing range dictated by the Federal Sentencing Guidelines. Mushal posits that people in districts where judges now deliver lesser sentences for environmental crimes than the recommendation in the Federal Sentencing Guidelines are more willing to violate environmental laws.

and environmental crimes.[96]

III. ENVIRONMENTAL POLICY: NATIVE AMERICAN VS. FEDERALIST

Not all environmental policies are reactionary and couched in cost-benefit structures of permitting and fines. The international community is growing more aware of the harm caused by environmental destruction and is increasingly concerned with preventive measures. Native Americans have always valued preservation of nature and preventing harm to the environmental through responsible caretaking.

Native American views about interacting with the environment contrast starkly with federal environmental policy. Indigenous conceptions of land are more co-dependent than the federal government's occupation with regulatory violations fines and allocation of resources. Concepts of identity are rooted in the land.[97] Further, Native Americans follow a spiritual mandate to care for the land,[98] because the land itself is sacred.[99] This duty protects the land, Native Americans, and their future descendants.[100] According to "Tribes as Trustees Again (Part I): The Emerging Tribal Role in the Conservation Trust Movement," using and caring for land are religious activities that reaffirm a reciprocal relationship.[101] These activities include burial places, ceremonies, songs, and stories.[102] Sacred burial sites are scattered throughout the nation.[103] These cemeteries, their rituals, and the items buried with individuals ensure the serenity of the bodies' spirits.[104] Disturbing a burial site both disturbs the spirit and is inauspicious

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[96] *See id.,* at 1116; U.S. Geological Survey, Lake Roosevelt/Upper Columbia River: Project Summaries, http://wa.water.usgs.gov/projects/roosevelt/summary.htm (last visited Feb. 18, 2017) (on file with the Harvard Environmental Law Review) (analyzing the biological impairment caused by toxic metals from mining and industry in Lake Roosevelt to native species).

[97] Wood, Welcker, *supra* note 86, at 375 (2008).

[98] *Id.*

[99] Christopher A. Amato, *Digging Sacred Ground: Burial Site Disturbances and the Loss of New York's Native American Heritage*, 27 Colum. J. Envtl. L. 1, 7 (2002).

[100] *Id.*

[101] Wood & Welcker, *supra* note 86, at 381.

[102] *Id.* at 381.

[103] *See* Amato, *supra* note 99, at 4–6 (describing the historical presence of indigenous tribes in New York, both federally recognized and not acknowledged, and the existence of their cemeteries).

[104] *Id.* at 6–7.

for those who are still living.[105] The Native American perspective is that people are part of a whole and are thus accountable to the sustainability of that larger system.[106] Origin stories among indigenous peoples usually reflect the importance of balance and honoring spiritual laws that guide mutual subsistence.[107] Native American tribes have carried out their responsibilities to the land of their origin for many decades; e.g. by carrying out controlled burns on prairies, cultivating gardens, or tending to plants that yield materials used by tribes. [108] This practice has been described as "affirmative manipulation" of natural conditions.[109] Decision-making in indigenous communities with regard to environmental actions is often communal, taking into consideration the comments of everyone.[110] According to Jeanette Wolfley, a law professor whose scholarship has focused on Native American tribes and the law, "[t]raditionally, tribal decisions were not taken lightly in Indian societies but were carefully deliberated, sometimes for days or weeks, by kinship-clan groups, elders, spiritual leaders, and tribal leaders."[111] Customs impart the concept of fairness and integrity for all.[112] The communal practice of self-determination and guardianship of the land are integral to tribal sovereignty and identity.[113] It goes beyond scheduling hearings to solicit community input actively.[114] Tribal self-direction works differently for each group; it often emphasizes direct communications, holistic formulations of tribe objectives and values, and provision of

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[105] *Id.* at 7. Most Native American tribes have experienced the disturbance of their sacred burial sites. *See also* Jack F. Trope Walter R., *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 39 (1992).

[106] Wood, Welcker, *supra* note 86, at 383 (2008). Wood and Welcker describe the Native American conception of the environment as systems thinking, an approach that looks for patterns and strives toward cohesive function of the whole.

[107] *See id.* at 383 (2008) (*quoting* Thomas Banyaca, an elder of the Hopi Nation, in an address to the United Nations General Assembly on December 11, 1992).

[108] *See* Wood, Welcker, *supra* note 86, at 384 (2008) (*citing* Charles Wilkinson, Messages from Frank's Landing: A Story of Salmon, Treaties, and the Indian Way 22-23 (2000); Winona LaDuke, Recovering the Sacred: The Power of Naming and Claiming 207–08 (2005)).

[109] Wood, Welcker, *supra* note 86, at 384 (2008).

[110] Jeanette Wolfley, *Tribal Environmental Programs: Providing Meaningful Involvement and Fair Treatment*, 29 J. ENVTL. L. & LITIG. 389, 411 (2014).

[111] *Id.* at 403–04.

[112] *Id.*at 402–04.

[113] *See id*. at 409; Wood & Welcker, *supra* note 106, at 375.

[114] Wofley, *supra* note 110, at 432.

information to encourage meaningful participation.[115] In judicial contexts, the Navajo Supreme Court carries out due process as a form of dispute resolution.[116] Peacemaking, or restorative justice, is a non-adversarial process of parties confronting each other, openly engaging to reach understanding, and coming to resolution and mutual respect.[117]

The indigenous traditions of land maintenance have been likened to the western concept of a trust,[118] specifically the public trust doctrine.[119] Briefly, the public trust doctrine acknowledges a public concern for certain resources that tend to connect or unify the country.[120] It thus instills responsibility in the government for safeguarding those resources.[121] This involves sustainability, yield, and distribution to the people who benefit from them.[122] "Tribes as Trustees Again" posits that non-Native Americans and the federal government have difficulty acknowledging indigenous approaches to environmental responsibility and their similarity to the public trust doctrine because their methods of governing are part and parcel of indigenous spirituality.[123] Beyond their tribal communities, sacred lands do not receive the reverence Native Americans afford them. While, for example, the federal government is supposed to recognize the rights of indigenous people as "prior and superior," Native Americans are more often treated as an ethnic group rather than political sovereign.[124] The United State has

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[115] *See id.*, at 432–37 (2014). Wolfley describes multiple structures used by specific Native American groups to promote fair treatment and meaningful participation in decision-making in environmental actions.

[116] *Id.* at 411 (citing Begay v. Navajo Nation, 6 Navajo Rptr. 20, 24-25 (Navajo 1988)).

[117] *See* Navajo Courts, The Peacemaking Program of the Navajo Nation, Hózhóji Naat'aah (Diné Traditional Peacemaking),

http://www.navajocourts.org/indexpeacemaking.htm (last visited Feb. 18, 2017).

[118] "A 'trustee' is a federal, state or Indian tribal official who, in accordance with 42 U.S.C. § 9607(f)(2), is designated to 'act on behalf of the public as [a] trustee[] for natural resources.'" Coeur D'Alene Tribe v. Asarco Inc., 280 F. Supp. 2d 1094, 1115 (D. Idaho 2003).

[119] *See* Wood & Welcker, *supra* note 86, at 386.

[120] *See* Charles F. Wilkinson, *The Headwaters of the Public Trust: Some of the Traditional Doctrine*, 19 ENVTL. L. 425, 428–39 (1989).

[121] *See id.*, at 471–72. Wilkinson concludes that the public trust protects an interest in natural resources greater than aggregate private interests and that it acknowledges a sacredness in the relationship between society and the land.

[122] *See* Mary Christina Wood, *Restoring the Abundant Trust: Tribal Litigation in Pacific Northwest Salmon Recovery*, 36 ENVTL. L. REP. 10163, 10164 (2006).

[123] *See* Wood & Welcker, *supra* note 86, at 386.

[124] *See* Rebecca Tsosie, *Keynote Address: Indigenous Peoples and Global Climate*

claimed a trust relationship that compels protection of Native American rights,[125] but the very Native American's whose rights deserve protection typically do not receive it[126] and lack a means of formally asserting their environmental interests.[127] Rebecca Tsosie, Executive Director of the Indian Legal Program at the Sandra Day O'Connor College of Law at Arizona State University, says that indigenous peoples often turn to nongovernmental organizations in order to assert their interests and that they are rarely satisfied.[128] Because the impact of environmental conditions outside of tribal control is substantial, Native Americans have made efforts to engage in their management.[129] Some have proposed land restoration projects, which typically take substantial funds, congressional cooperation, and a lot of time.[130] Conservation trusts have become more viable in recent years though, since Congress created tax incentives for conservation contributions and the Land Trust Alliance began offering educational and technical support to land trustees.[131] The latter is a positive sign for indigenous people, whose environmental interests "have not yet been widely included in the vision of America's land trust movement."[132]

The federal government's policy toward Native American tribes has claimed to be deferential in its general principles but is oppressive in practice. In establishing treaties with Native Americans, the government acknowledged that indigenous peoples possessed sovereignty that pre-existed the United States.[133] Thus, courts reviewing claims brought under treaties are supposed to interpret them the way that Native Americans would interpret

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Change: Intercultural Models of Climate Equity, 25 J. ENVTL. L. & LITIG. 7, 9–10 (2010).

[125] Peter Capossela, *Impacts of the Army Corps of Engineers' Pick-Sloan Program on the Indian Tribes of the Missouri River Basin*, 30 J. ENVTL. L. & LITIG. 143, 194–95 (2015).

[126] Wood, Welcker, *supra* note 86, at 388 (2008) (citing Mary Christina Wood, *The Indian Trust Responsibility: Protecting Tribal Lands and Resources through Claims of Injunctive Relief against Federal Agencies*, 39 TULSA L. REV. 355, 356-59 (2003)).

[127] Tsosie, *supra* note 124, at 11–12.

[128] *Id.*

[129] Wood & Welcker, *supra* note 86, at 375. Wood and Welcker say "[t]ribes often use litigation to protect resources, but the effort is protracted and the outcome uncertain."

[130] *Id.* at 393–94. Even if Native American groups receive approval for their projects, they might have little actual influence over the management of the land.

[131] *Id.* at 395–98.

[132] *Id.* at 398.

[133] *Id.* at 387.

them and consider their implied rights.[134] Nonetheless, the government has taken indigenous lands, forced relocations,[135] disturbed sacred burial grounds,[136] and altered landscapes in ways that have negatively affected Native American communities long-term.[137] The federal government has expected Native Americans to adjust to federal policies.[138] It has projected its own Anglo-American values onto American Indian peoples.[139] It has allocated assistance when requested but only if it was cost-effective to do so.[140] As Tsosie remarked in her keynote address at the 2010 symposium "Advocating for an Environment of Equality: Legal and Ethical Duties in a Changing Climate," "[t]here is no law that protects Native people from the destruction of indigenous lands…that results from climate change."[141] To illustrate her point, she described the flooded lands and ruined economies of Native Americans in Alaska.[142]

The activities of the United States Army Corps of Engineers (the Corps) illustrate the contentious relationship between indigenous peoples and the federal government. The Flood Control Act of 1944 gave the Corps authorization to build and operate dams in response to disastrous flooding of the Missouri River and the projects were dubbed the "Pick-Sloan Plan."[143] Peter Capossela, a natural resources and federal Indian lawyer, recently wrote an extensive article examining the Corps' breach of authority and its destructive effect on tribal reservations in the area.[144] The Corps has trustee duties to preserve the Native American waters; yet its work caused erosion that in turn displaced bodies and tribal items

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[134] Wood & Welcker, *supra* note 86, at 387 (2008) (citing Winters v. United States, 207 U.S. 563 (1908); Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 200 (1999)).

[135] *See* Julie Maldonado et al., *Climate Change and Indigenous Peoples in the United States: Impacts, Experiences and Action* 603 (2013).

[136] *See* Amato, *supra* note 99.

[137] *See infra* n.167.

[138] Tsosie, *supra* note 124, at 15.

[139] *See* Michael S. Houdyshell, *Environmental Injustice: The Need for A New Vision of Indian Environmental Justice*, 10 GREAT PLAINS NAT. RESOURCES J. 1, 6 (2006) (quoting Robert A. Williams, Jr., *Large Binocular Telescopes, Red Squirrel Piñatas, and Apache Sacred Mountains: Decolonizing Environmental Law in a Multicultural World*, 96 W. VA. L. REV. 1133, 1153 (1994)).

[140] *Id*. at 10-11.

[141] *Id.* at 10.

[142] *Id.*

[143] Capossela, *supra* note 125, at 144–45 (citing § 9, 58 Stat. at 891).

[144] *Id*.

from their sacred burial sites.[145] Other tribal spaces were designated to become the reservoirs of the dams.[146] Building the dams caused flooding in thousands of acres of tribal land,[147] forcing numerous native communities to relocate.[148] The Corps was responsible for creating infrastructure in the areas to which Native Americans were relocated but did not follow through on that obligation.[149] Furthermore, the new sites were barren and unfit for the tribes' traditional way of life.[150] They could no longer fish, hunt, and farm in their tradition.[151] It also meant these religious people had to relocate their ancestors' graves.[152]

Invoking the authority of the Flood Control Act, the Corps has decided how much surplus water exists, made surplus water contracts in recent years with non-tribal entities, and ignored the water rights held by Native Americans who use the reservoir water.[153] Capossela asserts that the Corps' action is a Fifth Amendment taking.[154] Since the 1960s, the Corps has asserted reaching authority to manage the reservoirs, often to the detriment of tribal land. In the late 1980s, the Corps found support in Justice White, who stated the dominant function of the reservoirs was "flood control and navigation."[155] Now supported in its prioritization of navigation,[156] the Corps has continued manipulating water flow and caused levels in the reservoirs used by Native Americans to fall.[157]

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[145] *Id.* at 216.

[146] Id. at 157 (citing Mni Sose Intertribal Water Rights Coalition, *Testimony to the Western Water Policy Review Commission* (Mar. 26, 1996)).

[147] S. REP. NO. 111-357, at 2 (2010).

[148] *See* Capossela, *supra* note 125, at 145.

[149] Crow Creek Infrastructure Trust Fund Development Act, *Joint Hearing Before the S. Comm. on Indian Affairs and the Subcomm. on Native American and Insular Affairs of the H. Comm. on Res.,* 104th Cong. 66 ("Our community was never rebuilt", statement of Ambrose McBride, Tribal Elder, Crow Creek Indian Reservation), *available at*: http://babel.hathitrust.org/cgi/pt?id=pur1.32754066677075;view=1up;seq=60.

[150] Capossela, *supra* note 125, at 145 (citing Raymond Cross, *Sovereign Bargains, Indian Takings, and the Preservation of Indian Country in the Twenty-First Century*, 40 ARIZ. L. REV. 425, 484-87 (1998)).

[151] *See* S. REP. NO. 111-357, at 3 (2010).

[152] Capossela, *supra* note 125, at 158 (*citing* Michael L. Lawson, Dammed Indians: The Pick-Sloan Plan and the Missouri River Sioux, 1944-1980, at 57-58 (1982)).

[153] *See id.* at 209–11.

[154] *Id.* at 211.

[155] *Id.* at 182 (citing ETSI Pipeline Project v. Missouri, 484 U.S. 495, 499 (1988)).

[156] *Id.* at 184 (citing South Dakota v. Ubbelohde, 330 F.3d 1014, 1020 (8th Cir. 2003)).

[157] Capossela, *supra* note 125, at 184.

In a 2003 decision, the Eighth Circuit ignored an amendment to the Flood Control Act that prioritized agricultural and industrial use over navigation water use[158] when it affirmed summary judgment in favor of the Corps noting that agency had balanced water use interests.[159] Three tribes intervened in the case but were found not to have suffered adequate injury-in-fact caused by the Corps' practices to establish standing.[160] The tribal nations claimed the fluctuation of water levels hindered their economic and traditional activities.[161] The Corps practices negatively affected the native pallid sturgeon, an endangered species, and other fish.[162] "[T]he Corps of Engineers ignores the detrimental impact of the impoundment and management of the Missouri River stream flows on the Tribes' ability to put their water to beneficial use."[163] For one tribe, buildup of silt caused by the Corps' operations blocked intake for the reservation water system.[164]

The trampling of water rights, disturbance of religious graves, and past and present treatment of native lands smack of unfairness. Indeed, environmental injustice has been used to describe the damaging and unwanted consequences of intrusive environmental policy since the 1980s.[165] In its definition of environmental justice, the EPA says that fair treatment of all people under environmental policy "means that no group of people, including a racial, ethnic, or socioeconomic group, should bear a

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[158] *See* Flood Control Act of 1944, Pub. L. No. 78-534, § 1(b), 58 Stat. 887 (codified in scattered sections of 16, 33, and 43 U.S.C.).

[159] Capossela, *supra* note 125, at 186–88 (citing In re Operation of the Mo. River Sys. Litig., 421 F.3d 618, 630 (8th Cir. 2005)).

[160] *Id.* at 188 (citing In re Operation of the Mo. River Sys. Litig., 421 F.3d at 637).

[161] *See id.* at 187–88.

[162] In re Operation of the Missouri River Sys. Litig., 363 F. Supp. 2d 1145, 1169-70 (D. Minn. 2004), *aff'd in part, vacated in part sub nom*. In re Operation of Missouri River Sys. Litig., 421 F.3d 618 (8th Cir. 2005).

[163] Capossela, *supra* note 125, at 197–98.

[164] *Id.* at 197 (citing *Water Problems on the Standing Rock Indian Reservation, Hearing Before the S. Comm. on Indian Affairs*, 108th Cong. 1-4 (2004)).

[165] *See* Noël Wise, *To Debate or to Rectify Environmental Injustice: A Review of Faces of Environmental Racism*, 30 ECOLOGY L.Q. 353 (2003). Wise discerns that poor and ethnic minority peoples disproportionately experience the burdens of environmental decisions that cause increased pollution, reduced job opportunities, exposure to toxic substances, etc. The EPA has used the term since at the 1990s. *See* National Environmental Policy Act; Proposed Revision of Policies and Procedures, Food and Drug Administration, HHS, Docket No. FDA-1996-N-0027 (1996). *See also* National Environmental Policy Act; *Proposed Revision of Policies and Procedures, Food and Drug Administration*, HHS, Docket No. FDA-1996-N-0027 (1996).

disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal program[s] and policies."[166] In 1987 the United Church of Christ linked environmental injustice to places more heavily populated by racial minorities.[167] For instance, minority groups reportedly eat contaminated fish more often than white groups due to the fact that agencies set caps on pollution in fish based on the eating habits of white, male sport fishers.[168] Enforcement was also found to be less robust in primarily white areas.[169] Charles McDermott, Director of Government Affairs at WMX Technologies, Incorporated, in the early 1990s, observed that people's perception of unfairness was exacerbated by a lack of communication about industrial standards and progress from the government.[170] McDermott contrasted environmental racism's racially discriminatory siting of unwanted dumping and containment, whether intentional or unintentional, with environmental equity's purposeful balancing in determining where to locate these operations.[171] Further complicating the

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[166] Wise, *supra* note 165, at 354 (quoting EPA, Environmental Justice: Material Available on the EPA Website, at http://www.epa.gov/compliance/environmentaljustice/index.html).

[167] *See* "Toxic Wastes and Race in the United States: A National Report of the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites," Commission for Racial Justice, United Church of Christ, New York: Public Data Access, Inc. (1987). Its executive summary states:

> Racial and ethnic communities have and continue to be beset by poverty, unemployment and problems related to poor housing, education, and health. These communities cannot afford the luxury of being primarily concerned about the quality of their environment when confronted by a plethora of pressing problems related to their day-to-day survival. Within this context, racial and ethnic communities become particularly vulnerable to those who advocate the siting of a hazardous waste facility as an avenue for employment and economic development.

Id. at xii.

[168] Tseming Yang, *Melding Civil Rights and Environmentalism: Finding Environmental Justice's Place in Environmental Regulation*, 26 HARV. ENVTL. L. REV. 1, 14 (2002) (citing Patrick West et al., *Minorities and Toxic Fish Consumption: Implications for Point Discharge Policy in Michigan,* ENVIRONMENTAL JUSTICE: ISSUES, POLICIES, AND SOLUTIONS 124 (Bunyon Bryant ed., 1995)).

[169] *Id.* at 6 (citing Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law, A Special Investigation*, Nat'l L.J., Sept. 21, 1992, at S2). The authors of the 1992 report found that fines for violations of environmental statutes were significantly lower in non-white areas.

[170] Charles J. McDermott, *Balancing the Scales of Environmental Justice*, 21 FORDHAM URB. L.J. 689, 694 (1994).

[171] *Id.*

tension between ethnic populations and the entities that carry out environmentally undesirable operations is the fact that different activities must conform to different standards.[172] Newer regulations that were intended to hold private entities to higher, healthier environmental standards have in some cases resulted in facilities that continue to operate indefinitely under former standards, rather than better ones.[173] Recall the discussion above about courts' confusion regarding the "knowing" requirement for environmental crimes and the conflict over the inherent danger of substances versus their dangerous consequences depending on how they were used.[174] These complexities of environmental regulation and their disproportionate impact on politically weaker groups contradicts the federal government's role as trustee. Instead, they support an economic understanding of the nation's environmental system: that regulations are necessary to avoid the tragedy of the commons.[175] That is, where resources are limited and freely accessible, self-interested actors will deplete those resources in order to have full advantage of them over others.[176]

Meanwhile, movement at the international level indicates a slowly moving shift away from the economic preoccupation of environmental policy. In 2007, the General Assembly of the United Nations adopted the Declaration on the Rights of Indigenous Peoples (the Declaration).[177] Tsosie attended a conference where indigenous representatives called the document a piece of "transformative thought."[178] According to Tsosie, the document was twenty-five years in the making and the United States voted against it.[179] Among other acknowledgments, the Declaration says practices promoting the superiority of any group is racist and socially unjust.[180] It calls for respect of spiritual traditions, particularly with respect to land.[181] Recognizing the significance of self-determination, the Declaration asserts that indigenous rights

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[172] *Id.* at 691–92 (noting that the Resource Conservation and Recovery Act of 1976, 43 U.S.C. §§6901-92 (1992) regulates waste managers and the Clear Air Act, 42 U.S.C. §§ 7401-7671 (1990) regulates industrial generators).

[173] *See id.* at 696 (1994).

[174] *See* Curran, s*upra* n.67.

[175] *See* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

[176] *See id.*

[177] Declaration on the Rights of Indigenous Peoples, G.A. RES. 61/295, U.N. DOC. A/61/L.67 (Sept. 13, 2007).

[178] *See* Tsosie, *supra* note 124, at 8.

[179] *See id.*

[180] S*upra* note 177, at Annex, ¶ 4.

[181] *Id.*

are integral to cooperative relationships among governments.[182] Emphasizing the importance of the varied histories and traditions of indigenous communities, it instructs the UN and its members to be considerate of those differences.[183] This section specifically states indigenous peoples "shall not be subjected to any act of genocide or any other act of violence."[184] It goes on to hold state governments responsible for rectifying actions that "deprive them of their integrity as distinct peoples" or "dispossess[] them of their lands."[185] Tsosie endorsed the document for its recognition that land is bound up in indigenous identity.[186] The Declaration was consistent with the 1992 United Nations Framework Convention on Climate Change, which cited the goal of safeguarding the climate for future generations.[187] Small states that signed the Convention cautioned that larger participating states remained responsible for their far more substantial contribution of greenhouse gas emissions, despite the cooperative nature of the Convention.[188]

Like the United States, international environmental law did not start with criminal guilt and used civil legal approaches to regulate.[189] Law professor Frederic Megret describes these approaches as soft, geared toward prevention and regulation.[190] And, like the United States, several treaties from the 1970s through the 1990s incorporated criminal legislation meant to be carried out domestically.[191] Megret notes that international environmental criminal law also lacks an agreed upon criminological theory.[192]

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[182] *Id.* at 3.

[183] *See id.* at 4.

[184] *Id.* at Article 15–17. Though federal criminal law might be loath to find acts of violence in enduring environmental misconduct, this assertion at least laid a piece of groundwork toward conceptualizing it as such.

[185] Declaration on the Rights of Indigenous Peoples, G.A. RES. 61/295, *supra* note 177, Article 5-17.

[186] *See* Tsosie, *supra* 124, at 13–14.

[187] *See United Nations Framework Convention on Climate Change,* Status of Ratification, NEW YORK, May 9, 1992. The Convention obligated participants to mitigate the effects of greenhouse gases and created an affirmative commitment to reduce them.

[188] *See* Timo Koivurova, *International Legal Avenues to Address the Plight of Victims of Climate Change: Problems and Prospects*, 22 J. ENVTL. L. & LITIG. 267, 269 (2007).

[189] Mégret, *supra* note 53, at 219 (2011).

[190] *Id.*

[191] *Id.* (citing Rene Provost, INTERNATIONAL CRIMINAL ENVIRONMENTAL LAW, IN THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF IAN BROWNLIE, 439, 452 (Guy S. Goodwin-Gill & Stefan Talmon eds., Oxford Univ. Press, 1999)).

[192] *Id.* at 201.

However, struggles to identify the mental states necessary to establish crimes seem to be solved under the International Criminal Court's framework.[193] The International Criminal Court (ICC) is an international tribunal established with the support of the United Nations in the late 1990s, whose founding treaty, called the Rome Statute, grants the ICC jurisdiction over four main crimes: genocide, crimes against humanity (large scale attacks against any civilian population), war crimes, and crimes of aggression (use of armed force by a state against the sovereignty, integrity, or independence of another state).[194] Article 7 of the Rome Statute defines a crime against humanity as acts that are a "systemic attack" against a civilian population.[195] Such an attack includes forcible relocation, severe deprivation of physical liberty, and "[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."[196] Under Article 7, forcible relocation displaces people from an area where they are legally allowed to be by means of "coercive acts."[197] Official capacity has relevance to guilt or innocence under the Rome Statute.[198] A crime against humanity involves the mental state of "knowing."[199] In a discussion about the ICC standards for the mental elements of crimes against humanity, Dr. Mohammed Saif-Alden Wattad explains that the tribunal utilizes "conditional intent" and knowledge of consequences.[200] The understanding the required mental state reaches the actor that is aware of but indifferent to normal consequences of environmental action.[201]

Very recently, the ICC announced it would assist states that wished to pursue charges of illegal exploitation of natural resources, arms trafficking, human trafficking, terrorism, financial crimes,

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[193] *See* Mohammed Saif-Alden Wattad, *The Rome Statute & Captain Planet: What Lies Between "Crimes Against Humanity' and the "Natural Environment?'*, 19 FORDHAM ENVTL. L. REV. 265, 276–77 (2009).

[194] *See* International Criminal Court, https://www.icc-cpi.int (follow "About" hyperlink), (last visited Feb. 19, 2017).

[195] Rome Statute of the International Criminal Court UN Doc. A/CONF.183/9, Article 7.1 (1998), https://www.icc-cpi.int/resource-library#coreICCtexts.

[196] *Id.* at Article 7.1–2.

[197] *Id.* at Article 7.2(d).

[198] *Id.* at Article 27.

[199] *Id.* at Article 7.1 (1998).

[200] Wattad, *supra* note 193, at 276–77.

[201] *Id.* at 277 (citing George P. Fletcher, Rethinking Criminal Law 445 (Oxford University Press, 2000)).

land grabbing or the destruction of the environment.[202] Wattad describes these crimes as occurring vastly and over time, causing damage to the ozone and polluting the seas.[203] He criticizes international law for limiting environmental crimes to certain conduct without clear reason and using a policy of waiting to respond to misconduct and criminalize it.[204] He also notes that these crimes tend to address severe acts that shock the conscience.[205] This is one characteristic of international crimes that Wattad identifies. The other qualities of international criminal law he points out are that they prosecute anyone or thing regardless of their station; the mental state simply requires that a defendant meant to do something and was indifferent to its consequences; and that international crimes focus on outrageous conduct moreso than extreme harm.[206] It is not yet evident how forceful prosecution of environmental crimes applying these characteristics will be. It echoes certain questions discussed earlier of offender influence over states and how harm should be addressed. Wattad says widespread environmental crimes happen over time, but neither he nor the ICC has indicated how long such action must go on in order to amount to outrageous conduct.

IV. ENVIRONMENTAL AND CULTURAL DEGRADATION

In 1994 Mcdermott wrote that "[e]nvironmental decision-makers [had] not looked through the lens of fairness in the social justice context."[207] Although that appears to be changing at the international level, it still rings true in the United States where yet again the U.S. Army Corps of Engineers has approved construction plans to build the Dakota Access Pipeline, an oil pipeline, across an aquifer of the Missouri River where the Standing Rock Sioux Tribe asserts a spill would be dangerous.[208] Mcdermott says the federal government must begin taking into consideration the cumulative

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[202] ICC Prosecutor, Fatou Bensouda, publishes comprehensive Policy Paper on Case Selection and Prioritisation, International Criminal Court 5 (Sep. 5, 2016), https://www.icc-cpi.int/Pages/item.aspx?name=pr1238.

[203] Wattad, *supra* note 193, at 282 (2009).

[204] *Id.* at 267-68.

[205] *Id.* at 268.

[206] *Id.*

[207] Mcdermott, *supra* note 170, at 705.

[208] *See* Federal Violations, Camp of the Sacred Stones, available at http://sacredstonecamp.org/federal-violations/ (last visited Oct. 8, 2016).

effects of environmental misconduct for prosecution to be meaningful.[209] Tsosie also urges a refocusing—away from short-term economics.[210] According to her, "ethical inquiry must be much broader."[211] There should be more to environmental policy than the immediate patching of problems and maximum utility of resources.[212] Such a shift in thinking as advocated by Tsosie and Mcdermott would hopefully lead to greater consideration of long-term implications for environmental development and standards, specifically with regard to the less politically powerful people affected. Mcdermott says the awareness of racial imbalance itself has stimulated people to push for environmental equity.[213] Evidence of this increasing awareness can be found in growth of the conservative trust movement amongst non-Native Americans.[214] It takes the form of private property mechanisms to protect land like farms, forests, wildlife habitats, etc.[215] A land trust makes the manager responsible for caring for the land in perpetuity.[216] Alternatively, an easement instills in the owner of an easement the power to enforce regulations and terms.[217] These more successful moves to preserve environmental integrity resemble the cooperative guardianship quality of the National Historic Preservation Act and NEPA discussed at the beginning of this paper, though perhaps they operate with greater urgency and a primary focus on preservation for preservation's sake.

Where federal environmental policy seems to falter is amidst the somewhat incoherent regulatory legislation that fails to take account of significant harms, differing values embedded in the land, and a longer term macro view. Tsosie comments that she is trying to identify an "intercultural model of climate equity" to address

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[209] *See* Mcdermott, *supra* note 170, at 705 (1994). The article cites Congressional sessions to suggest this shift had started in the mid-1990s.

[210] Tsosie, *supra* note 124, at 8 (2010).

[211] *Id*. at 17.

[212] *See id.* Tsosie goes so far as to say the United States has a responsibility to affirmatively adopt a different environmental policy with respect to Native Americans as an example to the international community because it has acknowledged the political sovereignty of its indigenous people unlike other nations. *Id.* at 13.

[213] Mcdermott, *supra* note 170, at 689.

[214] Wood & Welcker, *supra* note 86, at 376.

[215] *Id.* at 395-96.

[216] *Id.* at 396.

[217] *Id.* at 397. An easement under the Uniform Conservation Easement Act enables conservation easements for retaining natural values, safeguarding agricultural, forest, and open space for use, or preservation.

these ignored forces.[218] Native Americans and the international community are already ahead of the federal government and American society. To varying degrees, both understand the inextricable connection between the land and human beings. For Native American peoples especially the land is an extension of their identity. Just as the National Historic Preservation Act enables identity of place, to indigenous Americans "[s]pecific landscapes reaffirm an interconnected worldview."[219] The adoption of a proactive philosophy of environmental preservation should acknowledge the identities associated with the land and create standards that enable cultural groups to make cognizable claims of harm.[220] This would be a positive step toward reducing environmental racism, creating acceptance for cultural land values that are not mainstream, and ultimately granting greater freedom to minority groups through their cultural identity.[221]

What non-federal policies have in common is this extension of cultural identity into protection of the environment. The ICC made this extension when it recognized environmental misconduct as a crime against humanity. The harm to the environment is harm

[218] Tsosie, *supra* note 124, at 11.

[219] Wood & Welcker, *supra* note 86, at 381; *see also* 54 U.S.C.S. §300101, n.16.

[220] *See* Tsosie, at 11. Tsosie asked, "Does anyone have an idea of what it costs to move an entire village?" She reported that the projection in 2010 was $400 million. She followed up by saying, "it is generally much less expensive to relocate individuals and families to urban centers, enabling them to secure jobs, than it is to remove an entire village and relocate it to a site where the community can continue to live a land-based, subsistence way of life. Without any legal cause of action to secure damages for the destruction of the village and traditional lifeways, it is likely that climate refugees across the world will be treated as victims without specific rights."

[221] *See* Tseming Yang, *Melding Civil Rights and Environmentalism: Finding Environmental Justice's Place in Environmental Regulation*, 26 HARV. ENVTL. L. REV. 1, 16 (2002). "[The Supreme Court's] scrutiny of state-sponsored intentional discrimination has led to a structural distrust of state and local governments regarding the protection of racial minorities that finds no equivalent in the cooperative partnership between the federal government and states in environmental regulation. This distrust should not come as a surprise in light of the long history of exploitation and victimization of racial minorities, during periods of time when management of environmental issues, including land and natural resource use, was in fact largely controlled by state and local governments."

[221] *See* Wolfley, *supra* note 110, at 406.

[221] *See* Wattad, *supra* note 193, at n.90.

to humanity because it is part of our identity. Wolfley described the necessity of land to Native American identity—the basis of economy, a homeland for future generations, the site of ancestry and tradition—and that necessity exists for all people, internationally and nationally.[222] This concept that elevates environmental harm to a level of responsibility that reaches criminal guilt is consistent with the ICC's decision. Wattad likens the indifference of corporations for the damages they cause environmentally to criminal negligence.[223] Such knowing disregard for environmental health, and thereby also for American citizens, should be the basis for federal prosecution. This would notify potential offenders of the standard to which they will be held and would not only serve as deterrence but also as stimulus for better methods of disposal and land use. An environmental policy that first incorporates Native American concepts of community consensus, land trusteeship, and identity and then establishes liability for damage caused to the environmental is vital to fairness and the survival of, not just Native American heritage, but American heritage. Federal environmental policy must be robust and rooted in an understanding that the environment must be treated humanely. The necessary shift in conceptualizing environmental policy generates a feasible framework for environmental crimes and punishment. Without such a comprehensive policy, the risk of further environmental and cultural degradation will only increase.