Multiple Sovereigns and Transient Resources:

Contested Ecosystems and Expanding Tribal Jurisdiction in the Great Lakes Region

A Dissertation

SUBMITTED TO THE FACULTY OF
THE UNIVERSITY OF MINNESOTA

BY

Laura M. Matson

IN PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR THE DEGREE OF DOCTOR OF PHILOSOPHY

Dr. Bruce Braun &
Dr. George Henderson

October 2018

© Laura M. Matson 2018

Acknowledgements

It seems appropriate to begin this dissertation with Acknowledgements, because it this dissertation was produced by each of these people—their guidance, feedback, ideas, edits, interviews, and support. At its root, this is a dissertation about how communities—and their laws—are shaped, negotiated, and philosophically rooted. I would not have been able to produce this work, or any of the logistical, empirical, or intellectual efforts that went into it, without the many people who contributed.

First, I must thank my PhD Committee. Co-advisers Bruce Braun and George Henderson were instrumental in shepherding my intellectual development and have consistently encouraged me to push the limits of my thinking on many of the issues I explore in this dissertation. I am tremendously grateful for their support, guidance, and generosity throughout this process. Throughout law school and my PhD study, John Borrows has steadfastly been one of my most influential mentors. I first studied with John in a Tribal Courts class at the University of Minnesota Law School in the fall of 2011; that course lit a fire that set me on the path that I am on today. I am also indebted to the entire Borrows family for their kindness and hospitality. Though we did not get to know each other until later in my studies, David Wilkins's prolific and important scholarship influenced my intellectual trajectory from the very beginning of my PhD research. He has become an important mentor and I am very grateful for his intellectual provocations, steady support, and guidance. Kate Derickson has been a mentor and friend throughout this process. I have repeatedly relied on her experience and feedback as I have navigated graduate school, and particularly, have learned a lot from her methodological

and ethical commitments to the communities where she conducts her research. I look forward to continuing the conversation with this exceptional group of scholars.

Throughout my studies, I have been influenced and supported by a number of other academic mentors. These mentors include: Robert Williams, Jr., whose generosity and humor is infectious, and who has remained an important touchstone for me; Fionnuala Ní Aoláin, who has provided a shining example of the kind of person, teacher, and scholar I hope to be; and Steven Manson and Lorena Muñoz, who each in their own way taught me how to teach, engage students, and gave me incredible pedagogical opportunities. In addition, my cohort from the Social Science Research Council's Dissertation Proposal Development Fellowship—helmed by Chandra Lekha Sriram and Amy Ross—have been an influential and supportive intellectual community; thanks to Samar Al-Bulushi, Jian Ming Chris Chang, Evelyn Galindo, Alexa Hagerty, Christoph Hanssmann, Grégoire Hervouet-Zeiber, Austin Kocher, Jaimie Morse, J. Sebastian Page, Justin Perez, and Azita Ranjbar.

I have also had a number of non-academic guides on this journey. Though there are too many to name, I would like to explicitly thank Ann McCammon Soltis, Philomena Kebec, Jim Zorn, Mic Isham, Esteban Chiriboga, Jon Gilbert, John Coleman, Peter David, Lisa David, Melonee Montano, members of the Voigt Task Force, and the entire staff of the Great Lakes Indian Fish and Wildlife Commission; Reginald DeFoe, Tom Howes, Nancy Schuldt, Rick Gitar, Kari Hedin, the Fond du Lac Tribal Council, Karen Diver, Margaret Watkins, Seth Moore, Wallace Storbakken, Leslie Harper, Curt Goodsky, Conrad St. John, and Darren Vogt; Winona LaDuke, and Tara Houska; Robert Morales, Rosanne Daniels, Renée Racette, and everyone at the Hul'qumi'num Treaty

Group. In their own ways, each of these people and groups has pushed me to consider and engage with different perspectives on the issue of tribal jurisdiction and Indigenous ecological approaches. I'd also like to thank Catherine Neuschler, Ed Swain, Alex Klass, Danielle Meinhardt, and Barbara Wester for their insights on the complex regulatory processes I delve into in this dissertation.

My more recent mentors and colleagues include the incredible Kawe Gidaa-Naanaagadawendaamin Manoomin Grand Challenges Research Team: Mark Bellcourt, Diana Dalbotten, Mae Davenport, Michael Dockry, McKaylee Duquain, Erik Kojola, Dan Larkin, Amy Myrbo, Gene-Hua Crystal Ng, Patrick O'Hara, Cara Santelli, Josh Torgeson, Gabriele Menomin, Riley Howes, Lilah White, LeAnn Charwood, Susannah Howard and our many tribal collaborators. My post-doctoral fellowship with this collaborative team has given me the fantastic opportunity to develop, expand, and enrich the relationships and roots planted during my dissertation research.

My intellectual community includes the dedicated graduate students with whom I've had the pleasure of studying at the University of Minnesota, including but not limited to: Kai Bosworth, Jay Bowman, Laura Cesafsky, Anindita Chatterjee, Charmaine Chua, Spencer Cox, Jacqui Daigneault, Jessica Finlay, Tia-Simone Gardner, Anya Kaplan-Seem, Jessi Lehman, Aaron Mallory, Sara Nelson, Lisa Santosa, Liz Schneider, Mike Simpson, Sophie Strosberg, Kevin Van Meter, and Hillary Waters. A special thanks is in order for the thoughtful and generous members of my writing groups: Aaron Eddens, Evan Taparata, Karen Bauer, Erik Kojola, and Julie Santella. Thanks also to Sara Braun, Glen Powell, Cathy Dziuk, and all of the people who make the Department of Geography, Environment & Society function. The community that I developed at Sarah

Lawrence College provided the foundations for all of my subsequent intellectual engagements, notably Cameron Afzal, Emma Borges-Scott, Autumn Brown, Mary Dillard, Katie Gillespie, Gwenda-lin Grewal, Jonathan Grinspan, Nehemiah Luckett, Annie Novak, Mary Porter, Karen Rader, Kasturi Ray, Eli Rosenblatt, Leah Rudick, Samuel B. Stein, Corey Walker, Melanie Weiss, and Cascade Wilhelm.

My deepest gratitude to Melinda Kernik in the University of Minnesota's John R. Borchert Map Library for producing the map of the ceded territories in Chapter 2 and the proposed pipeline route maps in Chapter 4. Thank you also to Nancy Schuldt, who allowed me to use the two images in Chapter 6, and Crystal Ng, who contributed the image in Chapter 3. I would be remiss if I did not acknowledge the patient, professional, and friendly staff at Anelace Coffee in Minneapolis, where I spent many hours writing and revising this dissertation.

This project was made possible with generous financial support and mentorship from the Social Science Research Council, University of Minnesota's Inter-Disciplinary Doctoral Fellowship and Doctoral Dissertation Fellowship, Grand Challenges Initiative, Institute for Advanced Study, Water Resources Center, River Life program, and the Philanthropic Education Organization.

Most importantly, this project was possible because of the love and support of my family: Mike, Juna, Baby, my parents, siblings, aunts and uncles, and grandparents. This Dissertation is dedicated to my Grandparents—Gale and MaryAnn Matson, Don and Marilyn McRae, and Paul Raadt—and those who came before; and to my children—Juna and Baby Matson Curren—and those who will come after.

Abstract

In the past sixty-odd years, Indigenous nations and tribal groups have increasingly expanded their authority and advanced their communities' interests in the realm of environmental protection. *Multiple Sovereigns and Transient Resources: Contested Ecosystems and Expanding Tribal Jurisdiction in the Great Lakes Region* seeks to understand some of the ways in which tribes and inter-tribal groups in the Lake Superior region have extended their influence over, engagement with, and impacts on environmental management and resource regulation. In particular, this dissertation investigates how tribes have mobilized jurisdictional authority to demand a seat at the table in regulatory discussions that impact their reservations and the treaty-ceded territories in the region. In so doing, this dissertation builds an empirical record of some of the strategies and mechanisms that tribes have used to advance their environmental interests in practical terms. This empirical record forms the basis of a more sustained critical engagement with the concept of jurisdiction.

Intervening in legal geography, political ecology, and Indigenous legal scholarship, this dissertation argues that contests over environmental jurisdiction are not just disputes about static administrative units within fixed governmental hierarchies, but also enroll the authority to interpret and define the law and its normative orders. Through interviews, participant observation, archival review, and doctrinal legal analysis, I demonstrate how jurisdiction is practiced and produced through the day to day acts of permitting, rule-making, enforcing regulatory standards, litigating conflicts, building infrastructures, degrading and restoring habitats, and negotiating between governmental entities. Tracing the jurisdictional expansions of the Indigenous "third sovereign"

illuminates the particular ontologies that ground state and federal environmental regulatory practices, but also provides a set of alternatives for thinking about resource protection in an integrated, dynamic, and co-dependent ecosystem.

TABLE OF CONTENTS

ACKNOWLEDGEMENTS i
LIST OF FIGURES ix

CHAPTER 1. INTRODUCTION 1

PART I. A SENSE OF PLACE 4
PART II. INTERVENTIONS 12
An Empirical Record of Jurisdictional Practice 12
Towards a Theory of Jurisdiction 15
Jurisdiction and Jurisgenesis 25
PART III. RESEARCH DESIGN & METHODS 31
A Note on Terminology 35
PART IV. CHAPTER GUIDE 38

CHAPTER 2. "*A RESERVATION OF THOSE NOT GRANTED*": TREATY-MAKING AND TREATY RIGHTS LITIGATION IN THE UPPER GREAT LAKES REGION 41

PART I. TREATIES AS CONTRACTS / TREATIES AS CORNERSTONE 47
Interpreting Treaty Rights 58
PART II. ANISHINAABE TREATY RIGHTS IN THE COURTS 63
The Lac Courte Oreilles Cases 67
The Mille Lacs Cases 81
Shifting the Jurisdictional Landscape 88
PART III. THE CARTOGRAPHY OF CONSTRUALS 93
Disrupting the Hierarchy of Law in the Mille Lacs & LCO Cases 94
"During the Pleasure of the President": Interpretations of Abrogation 96
"The minute you start to write…it…you limit it" 99
PART IV. TREATIES TAKE ON NEW LIFE 105

CHAPTER 3. "REGULATORY ONTOLOGIES": WILD RICE, SULFATE & SCIENTIFIC LEGITIMACY 107

PART I. THE SULFATE STANDARD REVISITED 112
PART II. THE POLITICS OF SCIENCE AND THE SCIENCE OF POLITICS 120
Discourses of 'scientific legitimacy' 127
Enrolling 'tribal science' in the debate 131
PART III. GROUNDING "REGULATORY ONTOLOGIES" 135
"Beneficial Uses" 137
Designating Wild Rice Waters & the Temporalities of Degradation 142
The Contamination Equation: Incorporating Ecosystemic Complexity 146
An Alternative Ontology 148

PART IV. REGULATORY ONTOLOGIES, INCOMMENSURABILITY, & JURISDICTIONAL PRACTICE 151
Incommensurability in a Complex Jurisdictional Landscape 153
PART V. POSTSCRIPT 155

CHAPTER 4. PIPELINE PROBLEMS: MATERIALITY, TEMPORALITY, AND ASSESSING IMPACTS IN THE CEDED TERRTIORIES 161

PART I. PIPELINE HISTORIES & PIPELINE FUTURES IN THE CEDED TERRITORIES 164
Jurisdictional Wormholes in the Regulatory Framework 170
The Kalamazoo River Spill 175
Replacing and Rerouting: Shifting Pipeline Infrastructures 179
PART II. MATERIALITY, EMERGENT EMERGENCY, & THE TEMPORAL CHALLENGE 190
Materiality: Pipeline Infrastructures and the "New Crude" 192
"Emergent Emergency": Politics of Urgency in Pipeline Disputes 197
PART III. TERRITORY TERRAFORMED: TRACING CUMULATIVE IMPACTS 207
Defining Scope, Limiting Impacts 210
Rethinking Cumulative Impacts & Accountability 216
PART IV. JURISDICTION'S DANCE 218

CHAPTER 5. HEALING A THOUSAND CUTS: STEMMING THE TIDE OF RESOURCE DEGRADATION IN INDIAN COUNTRY 223

PART I. A SPECULATIVE TURN 226
PART II. ESTABLISHING A "DUTY NOT TO DEGRADE" 230
PART III. ENFORCING TRIBAL WATER QUALITY STANDARDS 234
PART IV. PUSHING THE LIMITS OF THE "WINTERS DOCTRINE" 243
Water Quantity: Applying Winters in Riparian States 244
Beyond Agrarianism: The 'Purposes' of Water Use 246
Groundwater: Aguq Caliente Band of Cahuilla Indians 248
Could Winters Provide a Framework for Protecting Water Quality? 252
Tribal Jurisdiction over Water Resources 254
PART V. ANISHINAABE LAW, TRIBAL LEGAL SYSTEMS, AND BEYOND 261

CHAPTER 6. CONCLUSION 271

BIBLIOGRAPHY 285

List of Figures

FIGURE 1: CLAN LEADERS OF THE LAKE SUPERIOR CHIPPEWA BANDS TRAVELING TO WASHINGTON D.C. TO DELIVER A PETITION TO PRESIDENT FILLMORE, 1849 11

FIGURE 2: CEDED TERRITORIES MAP[1] 47

FIGURE 3: SULFATE INTERACTIONS IN AQUATIC ECOSYSTEMS 128

FIGURE 4: LAKEHEAD SYSTEM MAP.. 167

FIGURE 5: LINE 3 AND SANDPIPER ROUTE MAP[2] 184

FIGURE 6: AERIAL IMAGE OF LINE 5 208

FIGURE 7: HEALTH IMPACTS ASSESSMENT PATHWAY 1 275

FIGURE 8: HEALTH IMPACTS ASSESSMENT PATHWAY 2 275

---

[1] Figure created by Melinda Kernik, John R. Borchert Map Library at the University of Minnesota. Treaty Boundaries derived from: Great Lakes Indian Fish & Wildlife Commission. *Ceded Territory Boundary GIS Version 2_1, Polygon 2015.* <https://data.glifwc.org/download.public/index.php> (Aug. 26, 2018) and U.S. Forest Service. *Tribal Lands Ceded to the United States*. <https://umn.maps.arcgis.com/home/item.html?id=f7f06a7c1d934892a95ad91dfafb5252> (Aug. 26, 2018). The layer is based on "Indian Land Cessions in the United States," compiled by Charles C. Royce and published as the second part of the two-part Eighteenth Annual Report of the Bureau of American Ethnology to the Secretary of the Smithsonian Institution, 1896-1897]. Contemporary Reservation boundaries are derived from: US Census Bureau. *American Indian/Alaska Native Areas/Hawaiian Home Lands Shapefile* (cartographic boundary file cb_2017_us_aiannh_500k.zip). <https://www.census.gov/geo/maps-data/data/cbf/cbf_aiannh.html> (Aug. 29, 2018). Basemap Boundary Files include: State Boundaries: US Census Bureau. *2017 TIGER/Line Shapefiles: States (and equivalent)* (cartographic boundary file tl_2017_us_state). <https://www.census.gov/cgi-bin/geo/shapefiles/index.php> (Aug. 30, 2018); Great Lakes: Michigan DNR Open Data. *Great Lakes*. <https://gis-michigan.opendata.arcgis.com/datasets/6031c4fb8cac48649f2e0a98999d1248_0> (Aug. 30, 2018).

[2] Figure created by Melinda Kernik, John R. Borchert Map Library at the University of Minnesota. Data sources include: Pipelines: Line 3: Andrew Levi. *Line 3 Viewer v1.0*. <http://umn.maps.arcgis.com/home/item.html?id=93b05993a6b74435a274029e4a6b5366> (Aug. 29, 2018); Sandpiper: Minnesota Department of Commerce. *Sandpiper Alternative Routes Summary Report*. Basemap layers include: Minnesota Natural Resources Department. Wild Rice Lakes Identified by DNR Wildlife https://gisdata.mn.gov/dataset/biota-wild-rice-lakes-dnr-wld (Aug. 31 2018); Contemporary Reservations:US Census Bureau. *American Indian/Alaska Native Areas/Hawaiian Home Lands Shapefile* (cartographic boundary file cb_2017_us_aiannh_500k.zip). <https://www.census.gov/geo/maps-data/data/cbf/cbf_aiannh.html> (Aug. 29, 2018).

CHAPTER 1

INTRODUCTION

> Territorial jurisdiction is nothing less than the map of the law's interaction with society.
> –Richard Thompson Ford (1999: 929)

> We continue to occupy a physical and jurisprudential world that is made up of intermixed layers of ancient and recent origin. . . . To look just on the surface, and to survive, is to misunderstand your place on the ground which you stand. To scale its heights—to learn its lessons—one must be alive to the underlying structures that support the visible and not-so-visible world around you . . .
> –John Borrows (2012: 72).

In October 2017, the White Earth Nation hosted a Symposium entitled *Nibi miinawaa Manoomin*, the Anishinaabeg words for water and wild rice. This was the fifth biennial symposium of its kind, bringing together members of Minnesota tribes with representatives from the University of Minnesota and its College of Food, Agricultural, and Natural Resource Sciences, along with certain state officials, to address matters of importance for water and wild rice in the region. The theme of the 2017 conference was *Gaa wiijigaabawitaadiwaad*, or Accountable Relationships, gesturing to a history of tense interactions between the tribes, the university, and the state around wild rice and water protection. The two-day conference reflected that tension, as tribal members repeated their frustrations at being brought to the table *after* major resource decisions had been made, or being invited to listening sessions, and then finding that their perspectives and knowledge were sidelined or buried in official documents. Presentations by

university officials about a new wild rice breeding research position and by a Minnesota Pollution Control Agency official about the state's efforts to revise its sulfate water quality standard for wild rice protection were met with anger and exasperation by Indigenous attendees.

One of the recurring themes was tribal members' frustration with the state and university officials' inability or reluctance to think about the water and the wild rice as something that held value beyond its utilitarian benefits for humans. A Tribal Historic Preservation Officer attempted to explain the importance of wild rice in different terms: "Think of wild rice as a child. That child needs to be nurtured properly. It needs a particular water level and a particular set of nutrients to be nurtured." In this one statement, this person contested the University and state officials' utilitarian and economic approach to resources and articulated a fundamentally different relationship to the rice, premised on care, accountability, and respect.

The encounters that occurred throughout the two days of the *Nibi miinawaa Manoomin* Symposium were significant for a number of reasons. First, they demonstrated the deep relevance of past encounters for present relationships. While State and University officials have expressed an eagerness to 'move forward,' and develop positive partnerships with tribes, they are often inattentive to the past and ongoing harms that Indigenous communities have experienced at the hands of these institutions. Indigenous participants at *Nibi miinawaa Manoomin* and the dozens of hearings, meetings, and task force sessions I've attended while conducting this research, demand attention to these

harms and frequently tap a deep well of historical knowledge in articulating their positions.

Second, this event and similar efforts to establish common ground between tribes, states, and other established sociopolitical institutions reflect the recognition among State and other authorities that there is a strategic necessity to coordinating and cooperating with tribal entities. All of the reasons for this strategic shift are beyond the scope of this dissertation (and much more adeptly handled by other scholars),[3] but it is, at the very least, a reflection of the increased sociopolitical power that tribal groups have cultivated in the past sixty-odd years. While this dissertation does not aim to tell the whole story of tribal sovereignty in the modern era, I do seek to understand some of the ways in which tribes and inter-tribal groups in the Lake Superior region have expanded their influence over, engagement with, and impacts on environmental management and resource regulation. I do this by investigating how tribes have mobilized jurisdictional authority to demand a seat at the table in regulatory discussions that impact their reservations and the treaty-ceded territories in the region. In so doing, I build an empirical record of some of the strategies and mechanisms that tribes have used to assert their authority in practical terms. This empirical record forms the basis of a more sustained critical engagement with the concept of jurisdiction.

Finally, and crucially, it is important to recognize that the Band member who urged State and University officials at the *Nibi miinawaa Manoomin* symposium to think

[3] For much more thorough analyses of contemporary tribal sovereignty, *see e.g.* Deloria & Lytle 1984; Wilkins & Lomawaima 2001; Wilkins & Stark 2001; Wilkinson 2005.

of Manoomin as a child was not just making a metaphorical statement. Rather, she was engaging in an act of translation, trying to breach the philosophical divide between 'Manoomin as use-value' and 'Manoomin as relative.' Her simple provocation carries deep undercurrents of some of the more fundamental questions about the philosophical and ontological foundations through which our interactions with the non-human world are mediated. Throughout this dissertation, as I chart the ways in which tribes have asserted their jurisdiction in various regulatory processes, I also attend to the impacts of tribal jurisdiction—what tribal interventions reveal about state and federal approaches to resource protection, and what tribal approaches to the natural world might offer in the way of an alternative present and possible futures.

Part I. A Sense of Place

I grew up spending the summers along the western shore of Lake Superior, and later, in the north woods of present-day Wisconsin. In those places, water is the organizing principle—people live on and from the waters of Lake Superior and the thousands of acres of ancillary freshwater lakes, rivers, shallow aquifers, and complex groundwater systems that have been carved out of the region's unique geologic landscape. The water is the cornerstone of regional identities and lifeways.

Along the western edge of Lake Superior, arching north from Duluth, Minnesota into the southern tip of Ontario lies a vast geologic formation known as the Duluth Complex. Formed by the Midcontinent Rift, the Duluth Complex is composed of layers

of intrusive rock formations, laced with large, low-grade, disseminated nickel, copper, and platinum group concentrations. You can see traces of these geologic processes through the dramatic natural landscapes of the Lake Superior shoreline, as well as the taconite and iron ore mines, refineries, and infrastructures that have dotted the region in various forms since the late 1800s. There is evidence of smaller-scale Indigenous copper mining at Isle Royale in Lake Superior 6,500 years ago, but not until the 1860s, when ore mining became a driving force in the economic and political expansion of the growing settler nation, did mining so drastically shape the physical landscape around Lake Superior.[4]

Though less visible from the ground, an aerial view shows the marks of another extractive enterprise: the region's positioning between the Canadian oil shale deposits and U.S. refineries and its proximity to North Dakota's Bakken oil fields make this a common thoroughfare for oil and natural gas pipelines, which are marked by clearcut rights-of-way, traversing the landscape like county roads.

Overlaying and intertwined with this region's complex web of water, minerals, plant and animal lives, is another complex web of legal and political networks that interact with, shape, draw upon, and vest meaning in these landscapes. The American Indian nations that have lived in or migrated to this region relied upon complex systems of observation and interaction with the non-human world in order to survive in a dynamic and often harsh environment; the trade routes that connected different tribes with each

[4] Pompeani et al. 2015.

other and with the European fur trade became the arteries of commerce as the burgeoning United States expanded into Indigenous territories; and as the process of settler colonial expansion dispossessed Indigenous communities, establishing—and then eating away at—reservation lands, the reservations themselves bore the scars of federal policies that cut the landscape into pieces, in a conscious effort to disrupt the historical flows of Indigenous people, animals, and ecosystems.

Indigenous communities have relied upon the water since their arrival in the region. The Anishinaabe migration narrative highlights the centrality of this relationship: Prophecy directed Anishinaabe people to journey until they reached the place "where food grows on water"; when they reached the Great Lakes, waterfowl guided people to the wild rice stands and showed them that the plant was edible.[5] They found the Manoomin (wild rice) that they were seeking; the Manoomin and the Nibi (water) formed the cornerstones of the ecosystems upon which they lived, connecting people to place, and forming the basis of the normative orders of accountability—laws—for Anishinaabe societies.[6] When they encountered U.S. officials—Indian agents, prospectors, and treaty negotiators—they were encountering a legal structure built on different philosophical and ontological commitments than their own. These encounters are ongoing.

---

[5] Whyte 2018a, at 137.

[6] *Id.* With regard to treatment of plant names, Robin Wall Kimmerer writes, "Capitalization conveys a certain distinction, the elevated position of humans and their creations in the hierarchy of beings…This seemingly trivial grammatical rulemaking in fact expresses deeply held assumptions about human exceptionalism, that we are somehow different and indeed better than the other species who surround us….I break with those grammatical blinders to write freely of Maple, Heron, and Wally when I mean a person, human or not; and of maple, heron, and human when I mean a category or concept." Kimmerer 2013, at 385.

Today, there are seven Anishinaabe tribes in the place now known as Minnesota: Bois Forte Band of Chippewa, Fond du Lac Band of Lake Superior Chippewa, Grand Portage Band of Lake Superior Chippewa, Leech Lake Band of Ojibwe, Mille Lacs Band of Ojibwe, Red Lake Nation, and White Earth Nation. All but Red Lake are members of the Confederated Minnesota Chippewa Tribe (MCT).[7] The Anishinaabe Bands of present-day Wisconsin include the Bad River Band of Lake Superior Chippewa Indians,

[7] The Red Lake Band declined to join the MCT in 1934, in order to maintain its hereditary chief tradition instead of an elected government. In the 1950s, the Red Lake constitution was re-written to include a process for electing tribal leaders. Red Lake similarly lobbied to be excluded from state criminal jurisdiction under Public Law 280, and is thus the only Minnesota tribe that is not subjected to state jurisdiction in certain criminal matters. Because of Red Lake's unique political history and relative isolation among the Anishinaabe of the Upper Midwest, they are not discussed as much in this dissertation, except where their jurisdictional advocacy is particularly relevant. The MCT Constitution was established in 1934 as a result of the Indian Reorganization Act, though each Band maintains an independent political structure. As a result of treaty-making, dispossession, and the deleterious effects of U.S. land and governance policies on American Indian communities, the great diversity of Anishinaabe Bands that retain lineages in contemporary tribal communities have been consolidated into the tribal governance structures of the Bands discussed above. For instance, the 1855 Treaty was signed with the Mississippi, Pillager, and Winnibigoshish Bands. As a result of the treaty, some families of the Pillager and Winnibigoshish Bands were settled on three different reservations, Cass Lake, Lake Winnibigoshish, and Leech Lake. These three reservations were later subsumed into the Leech Lake Band. Pillagers living west of Leech Lake later moved to the White Earth Reservation. The Mississippi Chippewa included those who lived in or near the basin of the Mississippi River. The 1855 treaty established six distinct reservations at Gull Lake, Mille Lacs Lake, Pokegama Lake, Rabbit Lake, Sandy Lake, and Rice Lake (though the Rice Lake reservation was never established). A number of the Mississippi Bands aided the Dakota during the Dakota War of 1862 and were thus punished by removal. Those who had remained neutral in the conflict, notably Sandy Lake and Mille Lacs Bands, were protected. They later merged to form the Mille Lacs Band of Chippewa Indians, the current governmental entity for those historic band configurations. Over the course of various resettlement agreements and the U.S. government's concerted effort to consolidate as many Anishinaabe as possible in the western part of the state, a number of Mississippi Anishinaabe ended up at Leech Lake and White Earth. *See* History of the Mille Lacs Band of Ojibwe, Available at: https://www.millelacsband.com/about/our-history/historical-timeline [Last accessed Aug. 3, 2018]; History of the White Earth Nation, Available at: http://www.whiteearth.com/history.html [Last accessed Aug. 3, 2018]; History of the Leech Lake Band of Ojibwe, Available at: http://www.llojibwe.org/drm/subnav/llbohistory.html [Last accessed Aug. 3, 2018].

Lac Courte Oreilles Band of Lake Superior Chippewa Indians, Lac du Flambeau Band of Lake Superior Chippewa Indians, Red Cliff Band of Lake Superior Chippewa Indians, Sokaogon Chippewa Community, and the St. Croix Chippewa Community (as well as six non-Ojibwe Indian Nations). Twelve Anishinaabe Bands (including Ojibwe, Odawa and Potawatomi) reside in present-day Michigan, three of which—Bay Mills, Keweenaw Bay, Lac Vieux Desert—are parties to the treaties and live within the ceded territories I discuss here. The distillation of these distinct political entities and their particular geographic footprints across the region is the result of communities' consolidation through treaty-making, dispossession, and the deleterious effects of U.S. land and governance policies on American Indian communities.

In addition to their individual political structures, the Bands in this region have developed strong inter-tribal networks and treaty oversight bodies to protect their environmental and jurisdictional interests.[8] These networks have established coordinated mechanisms for political and legal advocacy, have coordinated data collection and

[8] Prominent inter-tribal networks in the region include: MCT, discussed below, which is a federation of all Minnesota Anishinaabe Bands, except Red Lake; the Great Lakes Indian Fish and Wildlife Commission (GLIFWC), which represents 11 tribes' treaty rights across Minnesota, Michigan, and Wisconsin in the 1837, 1842, and 1854 ceded territories; the Great Lakes Inter-Tribal Council (GLITC), an inter-tribal coalition that developed in Wisconsin in the early 1960s in response to the U.S. government's attempts to terminate the Menominee Tribe's federally-recognized status. It was incorporated in 1965 and serves as an inter-tribal advocacy and support organization for Wisconsin tribes; The 1854 Treaty Authority, established in 1988 as the inter-tribal organization that manages the treaty rights of the Grand Portage and Bois Forte Bands in the ceded territories; the 1855 Treaty Authority, an inter-tribal oversight body representing East Lake, Leech Lake, Mille Lacs, Sandy Lake, and White Earth Bands; the Chippewa Ottawa Resource Council (CORA), the inter-tribal management body for the 1836 Treaty fishery and inland resource matters. Its members include Bay Mills Indian Community, Grand Traverse Band of Ottawa and Chippewa Indians, Little River Band of Ottawa Indians, and Sault Ste. Marie Tribe of Chippewa Indians.

information-gathering across the ceded territories, and have supported tribal self-determination. These networks have also been central to the tribes' successes in asserting their jurisdictional authority in recent years. These Bands, with support from intertribal organizations, have been particularly active and successful in litigating their treaty rights in U.S. federal courts. These treaty rights cases, discussed in greater detail in Chapter 2, have shaped the jurisdictional landscape by recognizing Tribes' sovereignty in relation to the States and mandating that tribal mechanisms of managing and protecting resources be incorporated into resource management regimes in the ceded territories.

This region is also home to the largest and last-existing healthy communities of naturally occurring Manoomin (wild rice in English, psiŋ in Dakota, *Zizania palustris* and *Z. aquatica* in binomial Latin).[9] As noted above, Manoomin is central to the Ashinaabe migration narrative, spiritual practice, and cultural tradition.[10] Manoomin is also sensitive to water level changes, contaminants, invasive and aggressive perennial plant species, climate change, and shifts in animal activities. As a cornerstone of aquatic ecosystems in the region, it is increasingly referred to by tribal members as the "canary in the coal mine" for ecosystemic health and the survival of Great Lakes Indigenous communities.[11] Due to its vulnerabilities to sulfate, Manoomin has become a flashpoint in

[9] Myrbo et al. 2017.
[10] Andow et al. 2009, at 2; Whyte, Kyle Powys 2018b.
[11] This metaphor is particularly resonant given Felix Cohen's use of the metaphor in his argument that treatment of American Indian tribes was an indicator of the broader health of the American democracy. Cohen, comparing the Indians to the role of the Jews in Germany argued: "Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith." Cohen 1953, at 390.

political wrangling over the state's water quality standards and mining permits, discussed in Chapter 3. Concerns about clear-cutting, invasive species impacts, and water quality have also brought Manoomin into the conversation about pipeline re-routing and replacements, which I address in Chapter 4. Tribal concerns about the vulnerabilities and long-term viability of Manoomin are also rooted in an understanding that Manoomin, and the water in which it grows, is a living being with a unique spirit.[12] Manoomin provides food, medicine, marks the passage of time in accordance with its growth cycles, and inspires relationships of accountability and responsibility. At the *Nibi miinawaa Manoomin* symposium, Potawatomi philosopher Kyle Whyte argued that Manoomin provided an example of accountability for the Anishinaabe to learn from—the humans relied upon the ducks to lead them to the Manoomin, and when they arrived, it was already providing nutritional value, maintaining ecosystems, helping to filter and clean the water.[13] Thus, the Anishinaabe discovered an entire system of responsibility and reciprocity that preceded them—it was their ethical obligation to determine how they fit into this system, and how to be accountable to the non-humans they relied upon. Anishinaabe elders and scholars have noted that much of the social practice and legal structure of Anishinaabe communities was devoted to protecting Manoomin:[14] "what serves the rice is law; what harms the rice is illegal."[15]

---

[12] Andow et al. 2009, at 2.
[13] Whyte, Kyle Powys. 2017b..
[14] Andow et al. 2009, at 2–3. Katanski 2017.
[15] Vennum 1988, at 177. Citing a quote from an Anishinaabe elder printed the work of anthropologist Eva Lips (Lips 1956). Lips conducted ethnographic field work on the Nett Lake Reservation in Minnesota in the summer and fall of 1947. Sarah Wiley Krotz similarly reflects on

In the broadest sense, I have written this dissertation about the ways in which the law, broadly defined, functions as a site of encounter—between the settler state and American Indian nations, between humans and non-humans, and between disparate and often incommensurable ontological and philosophical positions. More specifically, it is about the tools and mechanisms that tribes use to assert their sovereignty against the states and federal authorities in the United States. An increasingly important tool area of focus is the assertion of jurisdiction—the means by which authority is organized, and how it shapes the legal and physical landscape.

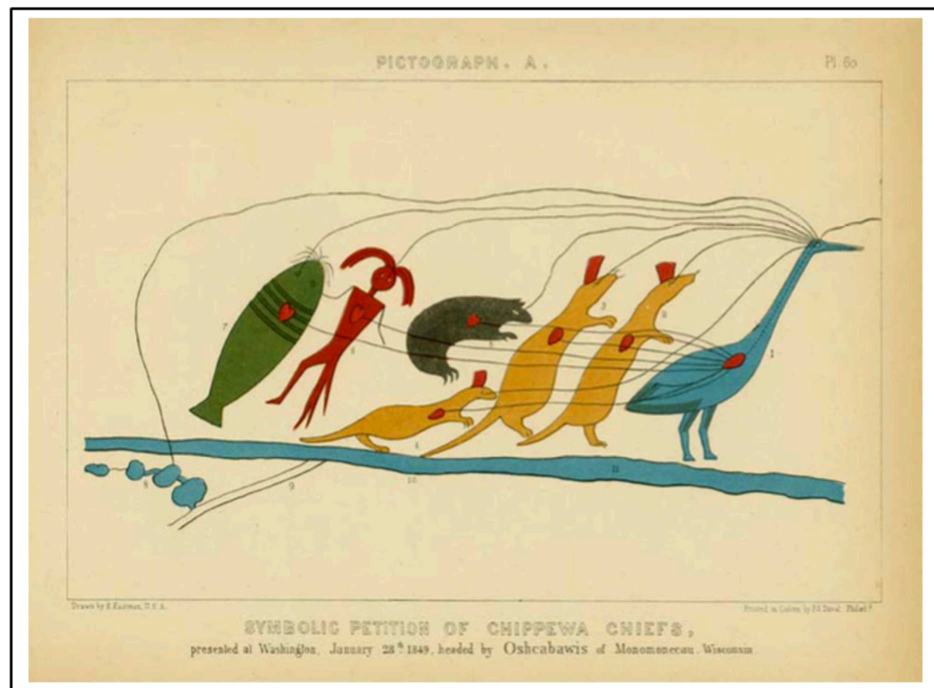

Figure 1. This image depicts the clan leaders of the Lake Superior Chippewa bands travelling to Washington D.C. to deliver a petition to President Fillmore in

---

a billboard erected in Ontario in 2016 which read "Anishinaabe manoomin inaakonigewin gosha", which translates to "wild rice is Anishinaabe law." Krotz 2017, at 13 (citing Carleton 2016).

Part II. Interventions

<u>An Empirical Record of Jurisdictional Practice</u>

The first intervention this Dissertation makes is empirical and methodological. Even within the loci of federal and state policies and court systems, my research conceptualizes Indigenous nations as institutional structures with deep temporal and philosophical roots that negotiate and shape policy in their own interests, while simultaneously attending to the often-unbalanced power dynamics evident in settler colonial/Indigenous relationships.[16] Further, my research expands upon the ways in which different environmental ontologies become expressions of tribal agency and sovereignty through resource policy, and investigates what these diverse approaches signify for understanding human/non-human ecosystems, and for the expansion of Indigenous jurisdiction in the U.S. Legal scholar Charles Wilkinson reminds us that, while the current legal structure is often insufficient to fulfill the desires of Indian peoples and their nations, all progress in indigenous sovereignty efforts can be credited to "the tribes' surprising ability to influence their own destiny in the courts and Congress—an ability the tribes are determined to preserve and enhance in the future."[17]

A number of scholars have made important contributions to our understandings of Indigenous resistance to settler-colonial governmentality in social science and humanities literature.[18] Significant scholarly work has also focused on how state and federal

---

[16] Deloria & Lytle 1984; Williams 1997, 1987.
[17] Wilkinson 2005, at 242.
[18] *See e.g.* Alfred 2009, 2005; Coulthard 2014, 2007; McCreary 2014; McCreary & Milligan 2013; Nichols 2013; Povinelli 2002; Simpson, A. 2014; Smith, A. 2012; Turner 2006.

jurisdiction has been mobilized against Indigenous communities,[19] and conversely, on how Indigenous groups have utilized existing and emerging legal frameworks to contest structural oppressions.[20] Other important contributions have illuminated Indigenous governance and sovereignty efforts in the modern era.[21] However, outside of the realm of doctrinal legal analysis, there has been relatively little study of Indigenous and tribal participation in—and impacts on—discrete regulatory processes in the U.S.[22] Indeed, as I'll discuss in more detail in Chapter 3, regulatory processes and functions in general are often understudied, though they provide rich opportunities to understand the particular tools and systems through which political power is mobilized and political priorities actualized.[23]

Even where the shadows of federal policies have clearly shaped the circumstances of the Anishinaabe Bands that I discuss these in these pages—for instance, through the allotment patchwork of reservations,[24] structures of tribal governments and

[19] Bruyneel 2007; Chang 2010; Ford, L. 2010; Pasternak 2017; Rifkin 2009.
[20] *See e.g.* Benson 2012; Borrows 2011; Chang 2010; Deer & Jacobson 2013; Gunn 2007; Mills 2017; Turner 2006; Wilkins 2013.
[21] *See e.g.* Deloria & Lytle 1984; Getches 1988; Wilkins & Lomawaima 2001; Wilkins & Stark 2001; Wilkinson 2005.
[22] One notable contribution to the Geographic literature is Ryan Holifield's analysis of the Leech Lake Band of Ojibwe's efforts to shape federal agencies' approaches to health impact and risk assessments at the St. Regis Superfund site (Holifield 2012). Examples within the realm of legal doctrinal analysis include: Anderson 2015; Chandler 1994; Kahn 2012; Maccabee 2015; Owley 2004; Royster 2012.
[23] Turem & Ballestero 2014.
[24] The Dawes Act of 1887, also known as the General Allotment Act, divided tribal lands, many of which where held in common by tribes, and carved out individual allotments for specific community members. Remaining lands were sold off to non-Indigenous settlers in many states. The Allotment policies have left many reservation lands fragmented, which has implications for tribes' civil and criminal jurisdiction over non-members residing on private property within reservation territory. 25 U.S.C. ch. 9 § 331 et seq.

membership,[25] casino revenues[26]—it is important to displace the idea that the federal government is the sole, or even primary, actor shaping this area of the law. Robert Williams, Jr., has repeatedly pointed out the great irony that many non-Indian scholars of this body of law have failed to include Indians in the story: "The emphasis of most scholars who have written on the role of law in the relations between Indians and European-derived peoples focuses almost exclusively on the story of 'the white man's Indian law'"—a narrative that can be traced neatly back to Western legal traditions and moral philosophy.[27] Williams argues that there is an important need to engage with the "legal visions American Indian peoples have developed in response to the white man's Indian law" in order to disrupt the pervasive narrative of settler colonial law as a force of salvation for American Indian communities.[28]

Tribes in the U.S. have often been referred to as the "third sovereign," reflecting their independent sovereign status, but also their relationship to federal and State authorities in the constitutional, legal, and territorial space of the nation.[29] The existence of tribal sovereigns complicates staid notions of the scales of federalism, and disrupts assumptions about federalism's nested hierarchy, in which power is distributed from the

[25] As discussed above, The Wheeler-Howard Act, or Indian Reorganization Act, established expectations for organization of tribal governments and BIA oversight. The IRA tri-partite framework for structuring tribal governments persists in many Bands today. 48 Stat. 984 (June 18, 1934).
[26] The Indian Gaming Regulatory Act was passed by Congress and signed into law by President Ronald Reagan in 1988. 25 U.S.C. §§ 2701 – 21 (2006).
[27] Williams 1997, at 6.
[28] Williams 1997, at 6–7.
[29] Bruyneel 2010; Fletcher 2010; Getches 1988; Silvern 1999; Wilkinson 1987.

federal to the local. In reality, the federal government's relationship to American Indian tribes, rooted in treaty-making and its attendant recognitions of sovereignty, federal legislation, and the trust responsibility, often trumps its relationship to the states in matters of contention between State and Tribe. While the treaties (and the trust relationship that emerged) are legal agreements between the federal government and tribal nations, the following chapters demonstrate the ways in which these documents have also held states to recognize tribal authorities and adapt to certain treaty-reserved rights and obligations. Thus, analyses of jurisdiction, environmental protection, and management that occurs in treaty ceded territories cannot be complete without attention to the third sovereign as well. Further, as I'll discuss in more detail below, studying the ways in which third sovereigns function as jurisdictional actors opens space to understand the ways in which they have and could shape the structure and philosophical commitments of the law more broadly.[30]

Towards a Theory of Jurisdiction

My second intervention is more theoretical in nature. Jurisdiction is a concept that is deeply engrained in the processes of lawmaking and governance. It stems from the Latin *iuris*, 'law' and *dicere*, 'to speak'—quite literally the power to speak the law. This power is complex—it enrolls modes of interpretation, assertions of authority, the development of legal subjects and subjectivities. It is also deeply spatial. While

[30] Borrows 2012, 2011, 2002; Turner 2006; Williams 1997.

jurisdiction signals the power to speak for the law, it also gestures to the limits of this speech. Thus, contests over jurisdictional bounds are not just contests over administrative units, but over the very authority to interpret, define and shape the legal frameworks of a society. Assertions of tribal jurisdiction are unique in that they lay bare the racialized political subjectivities, practices of boundary-making, environmental ontologies, and liberal anxieties that are always swirling around the question of who speaks for the law and how.

Jurisdiction is territorial, and scalar, but it also exceeds geographic markers and scales, mediating relationships between subjects and spaces, and animating foundational legal and political contestations.[31] Jurisdiction exists because there are multiple entities that claim authority over a particular space, group, or idea—it is enrolled as a mechanism for resolving conflicts of authority, but it is also often the subject of contestations. Jurisdiction produces space, but it is not bound to territory.[32] Jurisdiction is a particular mechanism by which "geographies of power" are enacted, and associated spatial configurations are formed.[33]

Despite this rich ground for critical analysis, jurisdiction remains a concept that is often taken for granted as an administrative technicality and is thus relatively undertheorized in geographic and other critical scholarship.[34] There are a few notable

[31] Ford, R.T. 1997, 1999; Pasternak 2014, 2017; Valverde 2009.
[32] Valverde 2009, at 154–55.
[33] Delaney 1998, at 5.
[34] The notable exceptions are the work of Richard Thompson Ford, Shiri Pasternak, and Mariana Valverde, discussed in greater detail below.

exceptions, which I draw on in this dissertation. The first is legal scholar Richard Thompson Ford, who authored perhaps the most robust historically-rooted theory of jurisdiction in legal geography literature, in which he argues for an understanding of territorial jurisdiction as produced by and productive of political and social identities. Jurisdiction, while a spatial demarcation, is not only territorial, though territory and cartography form a primary cornerstone of Ford's theory. As noted above, the linguistic origins of jurisdiction gesture to a much broader set of concerns: who is entitled to speak for the law, who is bound by this speech, and what are the subjective and territorial bounds of the law. Ford argues that jurisdiction "is also a discourse, a way of speaking and understanding the social world…it is simultaneously a material technology, a built environment and a discursive intervention."[35] Drawing on Ford, in this Dissertation I think about jurisdiction as a series of practices, speech acts, and interventions.

My second influence, Mariana Valverde's theorization of jurisdiction, builds on critical geographic scholarship that conceptualizes scale, in Neil Smith's words, as "an active progenitor of social processes,"[36] which situate and contain social contestations, while also being produced and shaped by them.[37] While Valverde and Ford share with theorists of scale a similar interest in understanding how social processes and power move and consolidate through concepts that have previously been viewed as simple or static, Valverde develops the idea that jurisdiction transcends scale, and thus studying

---

[35] Ford, R.T. 1999, at 855.
[36] Smith, N. 1992, at 66.
[37] Delaney & Leitner 1997.

jurisdiction allows for an analysis of how the “various modes and rationalities of governance …coexist in every political-legal ‘interlegality’”, despite the fact that legal knowledges appear “as always already distinguished by scale.”[38] Jurisdiction, for Valverde, is what structures and organizes legal governance. But because jurisdiction produces legal speech and knowledge at and beyond scale and continuously exercises power, it tends to “naturalize the simultaneous operation of quite different, even contradictory, rationalities of legal governance”.[39] Particularly useful for my project, Valverde argues that a failure to think scale critically obscures the ways in which rights and protections established at one scale might be made invisible at other scales.[40] By illuminating what are too often invisible processes of jurisdiction, I argue that we can better understand the fundamental questions of how forms of governmentality are enacted and resisted.

While Ford and Valverde’s work are both very important to the ways in which I understand jurisdiction, my work argues that viewing jurisdiction through the lens of the third sovereign provides necessary, dynamic, and often over-looked perspectives into how jurisdiction functions, is contested, and critically, how jurisdiction *expands*, in both practical and conceptual terms. David Delaney argues that the imaginary of federalism produces “two conceptually distinct “states” or “jurisdictions” that occupy the same segment of the physical world”.[41] The existence of a third group of sovereigns

---

[38] Valverde 2009, at 139.
[39] Valverde 2009, at 142.
[40] Valverde 2009, at 142, citing Santos 1987.
[41] Delaney 1998, at 57.

complicates federalisms' spatial presence, provides empirical teeth for thinking through Valverde's arguments about jurisdiction transcending scale, and introduces a new constellation of power dynamics that must be interrogated. Thinking about jurisdiction as a site of encounter also provides a fertile ground for understanding the complex legal geographies of reservations and ceded territories, and the concerns that animate public sentiment in jurisdictional disputes between Indigenous nations and states.[42]

In my attention to tribal jurisdictional practice, I am traveling on a similar path as Canadian scholar Shiri Pasternak,[43] my third influence, who is also concerned with how Indigenous nations complicate or illuminate the nuances of jurisdiction as practice. Pasternak writes that jurisdiction is a particularly useful "approach to understanding how authority is established, exercised, and contested in settler colonies,"[44] and a means to understand the gaps between the state's assertion of sovereignty and that of Indigenous nations. She argues that jurisdiction is not synonymous with sovereignty, but "the apparatus through which sovereignty is rendered meaningful".[45] In both Pasternak's and my analysis, jurisdiction functions as a site of confrontation, providing "a view into how

---

[42] Wilkins and Lomawaima write: ""Non-native citizens' confusion or disquiet over Indian reserved rights might stem from the lack of a definitive answer to the question: what, exactly, are the parameters of tribal powers and rights? Uncertainty over the scope of tribal powers can be summed up in the following, more legally precise question: do Indian tribes reserve all those powers and rights that they have not expressly surrendered, or do they exercise only those rights that have been expressly delegated to them by acts of Congress?" Wilkins & Lomawaima 2001, at 119.

[43] This idea of "fellow travelers on a common path," came from a conversation I had with John Borrows last spring about Pasternak's work and my own. I appreciated his description.

[44] Pasternak 2017, at 3.

[45] Pasternak 2017, at 3.

legal orders meet across epistemological difference and overlap on the ground," and offering "a coherent vocabulary within which to express these spatial encounters where sovereignty discourses fall short."[46]

There are also significant differences in the ways that each of our projects unfold around the concept of jurisdiction—how it is used, and to what ends. Many of these distinctions stem from the disparate historiographic trajectories of Indian policy in the U.S. and Canada, and in the particular historical and contemporary circumstances of the Indigenous nations with which we interact. There are many connective tissues in the settler colonial experiences of the two nations—expansion through territorial acquisition, property disaggregation, resource extraction and commodification, concerted attempts to destroy Indigenous lifeways through law, policy, and assimilation pressures, and the production of naturalized settler hierarchies.[47] Both Canadian and U.S. settler colonialisms have manifested over time in ways that fundamentally undermine Indigenous sovereignty, livelihoods, and cultural heritage. And in both contexts, Indigenous nations have mobilized considerable resistance to settler colonial governmentality and concentrations of authority. But in Canada and the U.S., both the State and Indigenous nations have pursued their aims using different strategies and different tools.

In this Dissertation, I explore the ways in which Anishinaabe Bands in the Upper Lake Superior region have been able to leverage the treaties that they signed with the

[46] Pasternak 2017, at 7.
[47] Alfred 2005; Coulthard 2014; Hixson 2013; Knopf 2007; Veracini 2011; Wolfe 2006.

federal government in order assert their jurisdiction over the ceded territories and to limit the states' jurisdiction over tribal members. While treaties were the primary legal agents of Anishinaabe dispossession from their traditional territories, the treaties also established a record of an agreement between sovereigns that held the federal government (and through the subsequent litigation, the states as well) to particular obligations. The treaties have been central to the Great Lakes Bands' articulations of sovereignty and their successful legal arguments establishing their jurisdictional authority in the ceded territories. In contrast, Pasternak's research partners, the Algonquins of Barriere Lake, did not negotiate land cession treaties with the Crown, and thus live on unceded land where they maintained a customary legal system until 2010, when their traditional government was forcibly restructured by the government of Canada.[48] With regard to the Algonquins of Barriere Lake, the Canadian federal government is aligned with the province of Quebec to, according to Pasternak, "eradicate the inherent jurisdiction of the Barriere Lake Algonquins" through "extreme exercises of power."[49] The lack of treaty between Canada and the Algonquins of Barriere Lake is important to Pasternak's engagement with jurisdiction, which, she writes,

> is the apparatus through which sovereignty is rendered meaningful, because it is through jurisdiction that settler sovereignty organizes and manages authority. In the settler colonies in particular, sovereignty is asserted against the legal and political authority of Indigenous peoples over their lands

[48] Pasternak 2017, at 4. The treaties are essential jurisdictional footholds against the States' attempts to preserve their own territorial sovereignty and have bound the States, through subsequent federal court decisions, to accept the Tribes' authority to intervene in the management of treaty resources in the ceded territories.
[49] Pasternak 2017, at 64, 190.

> and nations; in the absence of legal agreement, a perpetual struggle over jurisdiction defines the terrain.[50]

In the case of the Anishinaabe of the Lake Superior region of the U.S., treaties have been the means through which the Bands have compelled the states to recognize their jurisdictional interests in the ceded territories; though even in the presence of these legal agreements, jurisdictional conflicts are ongoing. Yet these jurisdictional conflicts take different forms than the struggles that Pasternak outlines, and are often fought on the stage of day-to-day regulatory decision-making.

Further, in Pasternak's analysis, the scales of jurisdictional authority are much more centralized, with federal and provincial power neatly aligned to reject and disrupt Indigenous jurisdictional claims. Indeed, the Canadian approach to Aboriginal relations has relied heavily on federal parliamentary policy; a 1927 amendment to Canada's *Indian Act* barred First Nations' access to the courts, attorneys, or fundraising for legal purposes, and sanctioned attorneys who attempted to bring claims on a First Nation's behalf.[51] As I demonstrate in the following chapters, the U.S.'s relationship to tribal nations has been much more fragmented—the various branches of the U.S. government are frequently at odds with each other when it comes to Indigenous rights and jurisdiction, and many contestations between tribes, states, and the federal government have been litigated through the courts.[52] The U.S. Congress, Executive, and Courts have made scores of

[50] Pasternak 2017, at 3.
[51] Mathias & Yabsley 1991, at 35–36.
[52] While the Courts, Congress, and Executive have made decisions in equal measure that have harmed Indigenous nations, the various branches have historically struck some semblance of balance—when Congress has made decisions damaging to tribal communities, the Courts have

decisions that have deeply damaged Indigenous communities, to be sure, but the fragmentation of the system has created a number of openings for the tribes to intervene and assert their interests, with varying outcomes.

These differences matter, as we each run our theorizations of jurisdiction through the empirical mill of these distinct contestations between Indigenous Nations and the State. Pasternak and I are both concerned with how the State attempts—unsuccessfully—to perfect its jurisdictional authority against Indigenous Nations, how Indigenous Nations use the language and strategies of jurisdiction to contest that authority, and "how relations of settler and Indigenous law come to spatially intertwine and overlap."[53] And yet, the mechanisms of both authorization and resistance are different, lending different insights for how jurisdiction functions—and what it reveals—in each space. As Deloria writes, "[a]s long as we emphasize the generalities, we do violence to the rights of Indians as they are articulated specifically in the history of the tribe with the federal government."[54]

often issued decisions that mitigated the impacts for tribes. See e.g. *Menominee Tribe of Indians v. U.S.*, 391 U.S. 404 (1968), in which the Supreme Court found that the Menominee Tribe's treaty rights survived the Termination Act of 1954 and the establishment of Public Law 280. The *Menominee* case and others increased the barriers for the federal government to terminate tribal status, and slowed the zeal for enforcing the destructive policy. When the Courts have released strings of precedent that undermined tribes, Congress has occasionally stepped in. For example, In 1990, the Supreme Court held that an Indian tribe had no criminal jurisdiction to try an Indian who was not a member of that tribe (*Duro v. Reina*, 495 U.S. 676 (1990)). In 1991, Congress amended a section of the Indian Civil Rights Act to reflect that inherent tribal sovereignty and self-government included the authority to "exercise criminal jurisdiction over all Indians." This amendment came to be known as the "Duro fix" (25 U.S.C. § 1301).

[53] Pasternak 2017, at 26.

[54] Deloria 1996, at 963.

One question that Pasternak raises that resonated with me throughout the course of my research was whether focusing on jurisdiction privileges settler forms of legality and undermines Indigenous modes of thinking about law and power.[55] Pasternak explains how she came to realize through her fieldwork that jurisdiction was a central concern for the Algonquin and a host of other Indigenous land rights activists in Canada. My field work experience similarly suggested that jurisdiction was a concept with many roots and was not described as an inherently Western concept by the Anishinaabe people and tribal staff with whom I interacted. In a Tribal Courts class that I took with John Borrows in law school, and later in a talk I attended by Kyle Powys Whyte, both scholars described Anishinaabe practices of families laying claim to certain sugar bushes or hunting grounds as a means of establishing expectations around harvesting and defraying potential conflicts over resources. These are forms of jurisdictional practice—delineating and spatializing authority to establish obligations, responsibilities, and expectations. Jurisdiction is a useful conceptual tool precisely because it is not beholden to particular philosophies of territory, sovereignty, or political authority. It merely recognizes that different entities often claim power in the same physical and conceptual spaces, and that those claims create contestations. Jurisdiction includes the practices through which an entity claims authority as well as the mechanisms through which competing authority claims are addressed. Jurisdiction's power is derived through constant relational practices of multiple sovereigns existing, overlapping, and pushing back against each other.

---

[55] Pasternak 2017, at 9.

Jurisdiction & Jurisgenesis

The third intervention this Dissertation makes is to provide an empirical and theoretical foothold to understanding the relationship between *jurisdiction* and *jurisgenesis*. In 1982, legal scholar Robert Cover developed the concept of *jurisgenesis* to explore the articulation of "conflicting narratives and principles" and critique the Supreme Court's approach to decision-making.[56] Cover introduces jurisgenesis as a means to look beyond the intent or impacts of law-making to understand law's contingent relationships with the sociocultural medium in which it exists, and to account for the ways in which legal meaning is created and embedded through the legal system as well as other collective or social processes. A jurisgenerative approach to law also has practical implications—it provides a framework for thinking about the ways in which law is produced and implemented in formal and informal settings and encourages attention to the "social value of institutions in conflict with one another".[57]

In recent years, a number of Indigenous legal scholars have used Cover's jurisgenesis concept to explain the ways in which tribal governments assert sovereignty, create law, and challenge state and federal legal authority.[58] A jurisgenerative approach enables an understanding of law through the diverse ontologies of tribal nations, the nested hierarchies of American federalism, and the iterative negotiations and tensions

[56] Cover focuses explicitly on the decision in the case *Bob Jones University v. United States*, 103 S. Ct. 2017 (1983). This case dealt with the question of whether the First Amendment prohibited the IRS from revoking tax-exempt status from a religious university due to university policies that undermined the public policy aims of eradicating racial discrimination. Cover 1982.
[57] Cover 1982, at 682.
[58] Borrows 2002, 2012; Fletcher 2006, 2010, 2011; Million 2013.

between them.[59] Jurisgenesis recognizes that law and legal institutions are inseparable from the narratives and discourses that "locate [law] and give it meaning."[60] Thus, jurisgenesis provides a useful conceptual framework for understanding how different foundational understandings of human/environment relations give state/tribal resource policies meaning, shape the relationship between tribal, state, and federal authorities, and reveal law to be a relational and dynamic social process. But it is also aspirational: through jurisgenesis Cover conceptualizes law as "a bridge in normative space,"[61] "connecting the world that is with worlds that might be."[62] In this way, it is also a useful tool for thinking about how different understandings of law intersect and overlap, and how these divergent philosophical formations and practices feed into potential legal futures.

Recent work around climate change, and human-planetary impacts by Geographers, Anthropologists, and other critical Humanities and Social Science scholars has ignited discussion of 'futurity' more broadly, often related to the constraints and possibilities for life in the Anthropocene[63] and the limits of thinking worlds beyond the focus-point of human society.[64] This scholarship has also renewed interest in ontology, a critical pursuit which has provided fertile ground for thinking more fundamentally about

[59] Borrows 2002, 2012; Deloria & Wilkins 2011; Williams, Jr. 1987, 1990, 2012.
[60] Cover 1982, at 4.
[61] Cover 1985, at 181.
[62] Berman 2007, at 308.
[63] Steffen et al. 2011; Szerszynski 2012.
[64] Braun 2005; Clark 2011; Clark & Yusoff 2014; Colebrook 2014; Häkli 2017; Latour 2005; Steffen et al. 2011; Szerszynski 2012; Yusoff 2013.

materiality, metaphysical meaning, relationships of relationality and reciprocity, emergence, and the conditions that define or create life.[65] This "ontological turn" has also been widely critiqued as reproducing colonial erasures,[66] vacating politics, history, and experience,[67] and situating whiteness-as-default.[68] Zoe Todd argues that many of the insights developed in recent scholarship regarding the agency and sentience of non/more-than-humans owes a tremendous unpaid and unacknowledged debt to thousands of years' worth of Indigenous thinkers. Todd argues that this is more than just a problem of uncredited ideas; the conditions that erase Indigenous contributions to critical ontology-thinking also undermine physical self-determination and the intellectual presence of Indigenous peoples within academic and decision-making institutions in general.[69] Scholar Sarah Hunt rightly points out that "western ontological possibilities are bounded in ways that limit their ability to fully account for Indigenous worldviews."[70]

Much of what I talk about in the pages to follow may be more accurately described as epistemology: the ways in which regulatory actors and resource managers procure information, negotiate what counts as knowledge, and make decisions about how knowledge of non-human resources should be abstracted into policy. But this Dissertation also wrestles with some of the more fundamental ontological questions about how these

[65] Braun 2006; Holbraad & Pedersen 2017.
[66] Howitt & Suchet-Pearson; Hunt 2013; Todd 2016
[67] Fanon 1952.
[68] Thompson 2017.
[69] Todd 2016.
[70] Hunt 2013, at 1. Hunt also suggests that even the term ontology fails to access that which animated Indigenous ways-of-knowing and categories of being; she suggests that stories, art, and metaphor as much more apt vehicles for conveying Indigenous knowledge. *Id.*

practices or theories about things like ‘resource,’ ‘science,’ ‘knowledge,’ ‘harm’ are rooted in foundational understandings of the constitution of the world and the relationality of human ‘being’ to non-human ‘being’ on a changing planet.

My interest in onto-epistemology in this Dissertation is as a way to think through how non-Indigenous worldviews become embedded in understandings of non-human agents and codified in policies that then reproduce certain ways of interacting with the natural world. Attention to ontology and epistemology allows us to understand how different ways of doing things—rooted in different understandings of human/non-human relationships, for instance—may produce radically different futures. Ontology, like law, is a way of thinking about how worldviews and practices might conflict, intersect, and be woven into claims to authority.

Through my attention to law and regulation, I create a bit of a paradox for myself. I center the human so that I can think about how to disrupt the impacts of a human-led hierarchy, and elevate alternative futures through policy.[71] However, by thinking through the jurisgenerative potential of Anishinaabe legal activism, I also intend to suggest the disruptive and generative possibilities of a law that draws from more-than-human sources.[72]

My interest in ontology here is not to reproduce arguments for cultural relativism or to develop a generalizing theory about ontology vis-á-vis law, but to think specifically

---

[71] As Robin Wall Kimmerer writes, “Indigenous ways of understanding recognize the personhood of all beings as equally important, not in a hierarchy but a circle.” Kimmerer 2013, at 385.
[72] Borrows 2012.

about the ontological conflicts that are currently playing out in the realm of environmental regulation *because of* tribal engagement in these politico-legal processes. Ontology becomes a passageway for thinking about the impacts of tribal jurisdictional expansion in the region, and the anchor for understanding the jurisgenerative potential of these concrete jurisdictional practices. Thinking about ontology is also the catalyst for thinking about how incommensurability can be named and reckoned with in law, and in settler societies more broadly.[73]

A focus on jurisgenesis and ontology also reveals what has *already been* generated in the legal system, and how we often fail to recognize the structural influence of Indigenous thought in this realm. John Borrows argues that, while the Canadian and U.S. politico-legal systems cast themselves as direct descendants of British common law, Lockeian property values, and objective courts, they are also heavily indebted Indigenous systems of laws and modes of governance.[74] He writes, "the law has often layered itself over pre-existing Indigenous legal landscapes, concealing this previous presence. Despite numerous attempts to extinguish these laws, Indigenous legal order continues to bubble through the cracks of its overlying cover."[75] Borrows' refusal of a "politics of purity" in the context of North American settler colonial law carves out space to understand the impacts of Indigenous philosophies and practices on the emergence of federal law and in Indigenous nations' contemporary efforts to shape the law in particular ways. This refusal

[73] Snelgrove et al. 2014
[74] Borrows 2011, 2002.
[75] Borrows 2010, at 68–69.

of purity enables openings for what Bruce Braun describes as, "turning the terms and tools of colonial power against itself."[76]

Cover's theory of jurisgenesis understands jurisdiction as a fundamental tool of legal power. Cover argues that law, and the office of the judiciary, generally tends toward the jurispathic—asserting "that *this one* is law" to destroy the rest.[77] This jurispathic power is enabled through jurisdiction, or "the judge's elaboration of the institutional privilege of force." Thus, the basic texts of jurisdiction often "are the apologies for the state itself and for its violence - the ideology of social contract or the rationalizations of the welfare state."[78] In this context, assertions of tribal jurisdiction—and/or tribal challenges to State or federal jurisdiction—have the added force of challenging the jurispathic activities of the State and advancing different forms of law.

Finally, jurisgenesis creates a space for articulating legal visions and alternative futures. Much of the work that this Dissertation does is to illuminate the ways in which jurisdiction is asserted and practiced, and to think through how tribal jurisdictional practices create space for jurisgenesis. And of course, jurisdictional expansion—particularly that which occurs in response to state and federal policy-making and litigation—is not itself reflective of the wide scope of "legal visions" that Anishinaabe communities hold. Anishinaabe law is much more complex and multi-faceted than what is revealed in the encounters described this dissertation, and the "diversity of thought"

---

[76] Braun 2002, at 25.
[77] Cover 1972, at 53.
[78] Cover 1982, at 54.

within these legal visions are better left to Anishinaabe writers and communities.[79] Nevertheless, the aspirational aspects of jurisgenesis—and the jurisdictional shifts that create space for jurisgenesis—enables us to envision different legal possibilities and socioecological futures.

Part III. Research Design & Methods

The field-based portions of this research were conducted over the course of 18 months, though my interest in some of the cases and policy issues that follow was ignited much earlier, in a Tribal Courts Seminar taught by John Borrows at the University of Minnesota Law School in the Fall of 2011. In that course, John encouraged me to write about the U.S. Supreme Court case *Minnesota v. Mille Lacs Band of Chippewa Indians* and to think about the role of GLIFWC in supporting treaty rights in the region. Given my disciplinary positioning between law and Geography, my methodological approach draws from multiple sources.

It is important to note that the events and circumstances discussed in this dissertation are just snapshots of particular mobilizations of tribal jurisdictional authority in particular times and places. There are so many other important examples that are not within the scope of this document, but that I hope to address in future writing. The events

[79] Simpson, L. 2012. Scholars such as John Borrows, Lindsay Keegitah Borrows, Jill Doerfler, Leanne Simpson, Niigaanwewidam James Sinclair, Heidi Kiiwetinepinesiik Stark, and Kyle Powys Whyte, among others, have begun to thoughtfully render and articulate these unique legal visions, and there are undoubtedly many future generations of Indigenous thinkers who will continue to develop this body of work.

that I highlight here are largely a product of developments that were occurring at the time of my research and writing. This gave me an important real-time perspective on the details and mechanics of these processes and tribal interventions. While I was not privy to the strategies of treaty rights litigation, I had the immense good fortune to be able to attend many meetings of the Voigt Task Force arm of the Great Lakes Indian Fish and Wildlife Committee between fall 2016 and the present. Observing those meetings gave me a window into the ongoing process of treaty rights negotiations between GLIFWC member tribes and the states of Minnesota, Wisconsin, and Michigan, and demonstrated how alive the treaties are in the contemporary jurisdictional negotiations between tribes and the states. I attended the administrative and evidentiary hearings, respectively, for the sulfate standard and Line 3 regulatory processes, and was able to observe meetings about these proposals across the state. In the case of the sulfate standard, I interviewed MPCA staff after the Administrative Law Judge's ruling on the proposed standard, and I interacted with state and tribal attorneys, industry representatives, water protectors, and environmentalists as Enbridge made its case for replacing and rerouting Line 3. The final chapter—which looks less at particular events, and more at emerging theories about how to more comprehensively address resource degradation in the ceded territories—came out of conversations and interviews with GLIFWC policy analysts, consultants, an EPA attorney, tribal policy makers, and tribal activists wrestling with how to legally challenge the Dakota Access pipeline. In short, each of the events that feature as chapters in this dissertation became chapters because of my good fortune in having access to the people,

documents, and ideas that were generating tribal involvement—and not because the events that I feature here are any more influential or emblematic than other tribal jurisdictional victories in this region and beyond.

My field methods primarily drew from the qualitative social sciences, and included interviews, participant observation, and place-based engagement with participants. During this time, I was based in Minneapolis, Minnesota, and regularly travelled to reservations in present-day Northern Minnesota and Wisconsin, attended public regulatory hearings in the Twin Cities and greater Minnesota, and travelled to ceremonies and memorials. Between August 2016 and March 2018, I traversed the 1837, 1842, 1854, and 1855 ceded territories, and visited the Fond du Lac, Leech Lake, White Earth, Mille Lacs, St. Croix, Bad River, Red Cliff, and Lac du Flambeau reservations, in addition to State agency offices and administrative forums.

Participant observation was one of my most important methods for understanding the perspectives of various actors, including tribal resource managers and political leaders, state and federal agency staff, state politicians, and Indigenous and non-Indigenous community members. Meetings of the Voigt Task Force provided important insights into the perspectives of tribal governments on the philosophical and practical tasks of co-managing resources between multiple Bands and the States of Minnesota, Wisconsin, and Michigan in the 1837, 1842, and 1854 ceded territories. During the course of field work, I attended fourteen full-day meetings of the Task Force at Reservations across the region. Upon invitation from GLIFWC staff and Voigt Task

Force members, I participated in the 2017 Sandy Lake Memorial at Sandy Lake near MacGregor, Minnesota, a full day event honoring those who perished at that site in 1850 (discussed in Chapter 2). Upon invitation from tribal contacts, I attended numerous other meetings, including those between tribal resource managers and environmental representatives, tribal elected leaders and Minnesota legislators, and inter-tribal organizations and state and federal agencies. I observed three administrative hearings for Line 3 in St. Paul, Minnesota, as well as public hearings for the sulfate standard rule-making, two in St. Paul and one at the Fond du Lac Tribal College in Cloquet, Minnesota, and attended the last meeting of the MPCA's Wild Rice Standards Study Advisory Committee. I also observed an EPA hearing on the St. Regis Superfund site on the Leech Lake Reservation.

Semi-structured interviews provided essential windows into historical dynamics, the development of tribal resource management and relationships with State agencies, various groups' decision-making processes, and the underlying ecosystemic concerns and analysis that animated tribal interventions. I conducted 28 semi-structured interviews. This included fourteen semi-structured interviews with tribal resource managers, nine with resource managers and policy analysts who worked for inter-tribal groups in the ceded territories, and five with state and federal agency representatives who had worked directly with tribes on the issues discussed below.

Analysis of documents and hearing transcripts that were filed pursuant to the administrative regulatory processes for the sulfate standard rule-making and Line 3

permitting were invaluable sources of information, illuminating the positions of State agencies and industry interests on a number of issues, and providing a strong record of tribal input and engagement in these processes. To construct a clear record of treaty litigation in Chapter 2 and to understand the possibilities of existing precedent in Chapter 4, I pored over numerous legal documents, including various court decisions, party filings, and amicus briefs. In addition, I relied on the archives of the Minnesota Historical Society, as well as digital archives for a number of Bands and counties to piece together historical trajectories, and utilized legal repositories, including the Tribal Court Clearinghouse, to access case filings and lesser-known tribal court decisions. Doctrinal analysis of caselaw makes up a significant part of Chapters 2 and 5, and analysis of the administrative record is central to Chapters 3 and 4.

A Note on Terminology

Anishinaabe refers to the members of the alliance that made up the Council of Three Fires—the Ojibwe (Chippewa), Ottawa (Odawa), and the Potawatomi (Bodéwadmi). These three tribal groups share a similar dialect, and each settled in the Great Lakes region of North America.[80] While the Bands that I deal with in this dissertation are Ojibwe, I often use a combination of the terms in various contexts.

[80] Chantal Norrgard points out that the term Anishinaabe is also used to refer to the Ottawas and Potawatomis who share a similar dialect and political alliances with the Anishinaabe/Ojibwe who settled in the Great Lakes. The term in my usage refers to the Anishinaabe Bands and their constituencies that I name in the text, though in reference to Anishinaabe value systems, I recognize that the term may cast a wider net. Norrgard 2014, at 15. *See also* Whyte 2013.

Ojibwe has been the prevalent term for many years, and Chippewa is used in a majority of historical documents and treaties. Accordingly, both of those terms are frequently used in the titles of the Bands throughout Northern Minnesota, Wisconsin, and Michigan, and southern Ontario. I also frequently use Anishinaabe because that is the word that many of the people I have gotten to know during this dissertation research use to describe themselves and their communities. Chippewa and Ojibwe are used when appropriate, but I will often use Anishinaabe to convey that the Bands and political entities are made up of people and values that precede the contemporary political structures.

Because of the contemporary organizational structure of the MCT—an umbrella tribe confederated by independent and autonomous entities—I often use the term Band in this dissertation. This term refers specifically to the individual Bands I discuss, as well as a general term for organized Indigenous groups that do not operate specifically under the term tribe or First Nation. I use tribe to refer to federally recognized tribes and those that use that term to refer to their organizational or political structure. I also use tribe or tribal to describe Indigenous governmental entities in relation to state and federal governmental entities. In the Minnesota context, I often use tribe to refer to the Minnesota Chippewa Tribe, and Band to refer to the discrete autonomous groups that are members. In Wisconsin and Michigan, while there is not a singular overarching Chippewa Tribe, as in Minnesota, the Bands also have their own ways of referring to themselves—including as Bands, Communities, Nations, or Indians. Unless I am using the title of a specific group, I often use band or tribe generically. I also use the term *tribal nation* to recognize the

distinct sociocultural frameworks, sovereign claims, political structures, and scale of decisional autonomy of tribes in the U.S.,[81] and to reflect that Indigenous difference in the U.S. is not merely racial, but political.[82] Because there is a fair amount of slippage between terms and lack of consensus among Bands as to how these terms should be used, there may be terminological overlap here as well.

Finally, I often use the term *resource* as shorthand for the fish, water, plants, furbearing animals, moose, elk, air, and other entities upon which communities depend. I use this word in part because it is the simplest way to gesture to complex ecosystems that include many species, and because most of the Bands that I have worked with in this dissertation use the term themselves (most have Resource Management divisions and refer to staffers in those divisions as 'Resource Managers'). However, I also wanted to acknowledge that this term is contested, and in a Western context, fails to capture the agency or relationality of these various non-human species. For Anishinaabe people, all non-human entities have spirits and agency, and are related to humans in relationships of reciprocity and accountability.[83] As I use the term resource throughout this dissertation, I intend it with respect and acknowledgement of these species as agentive, relational, and dynamic.

---

[81] David Wilkins argues that a nation is more than a political designation, but is also a socio-cultural group that shares common ideologies, institutions, and customs: "a prerequisite of nationhood is an awareness or belief that one's own group is unique in a most vital sense; therefore, the essence of a nation is not tangible but psychological, a matter of attitude rather than of fact." Wilkins & Stark 2001, at 338. Quoted in Stark 2012, at 123.
[82] Berger 2009.
[83] Borrows 2011; Erdrich 2003; Kimmerer 2013; Whyte 2013.

Part IV. Chapter Guide

Chapter 2 focuses on the development of treaty rights litigation in the 1837, 1842, and 1854 treaty areas. This chapter discusses how the treaties linked tribal land cession to ongoing rights to hunt, fish, gather, and live off of the ceded lands. This chapter provides a foundation for the remainder of the dissertation, charting the legal and jurisdictional relationships between the States and the Bands in the region, and setting the stakes of the resource management debates illuminated in Chapters 3, 4, and 5.

Chapter 3 analyzes the Bands' engagements with the State of Minnesota's fraught administrative rule-making process to reassess the state water quality standard for sulfate, a compound that is a common byproduct of metallic mining and municipal water treatment and has been associated with harms to Manoomin. In this chapter, I chart various Tribes' impacts on and engagement with the process and argue that their contributions have revealed particular regulatory ontologies, contradictions, and priorities in environmental protection policy and practice.

In Chapter 4, I look at tribal interventions into the permitting and regulatory processes for Enbridge pipelines throughout the ceded territories. I track the development of pipeline infrastructure and policy alongside concurrent federal Indian policies and develop a record of tribal advocacy around pipeline permitting. I look at how tribal interventions have emphasized material conditions of pipeline replacement and rerouting, cast doubt on State analyses of potential impacts, and upended the politics of economic urgency that has motivated much of the permitting process.

While the preceding chapters focused on the culmination of specific events (treaty rights litigation, sulfate standard rule-making, and pipeline permitting), Chapter 5 looks at Tribal efforts to address the more incremental and abstract threats to tribal resources. Understanding tribes' efforts to stave off "death by a thousand cuts" in the ceded territories demands a more speculative approach to various legal strategies, theories, and mechanisms that could stem the tide of resource degradation throughout the region. Chapter 6 concludes the dissertation by returning to the question of envisioning alternative futures through jurisdictional and jurisgenerative practices. It summarizes key developments from the preceding chapters, addresses the limits and possibilities of this research, and suggests paths for future thought.

CHAPTER 2

"A reservation of those not granted": Treaty-Making and Treaty Rights Litigation in the Upper Great Lakes Region

> We wish to hold onto a tree where we get our living, & to reserve the streams where we drink the waters that give us life.
> - Anishinaabe Chief Magegawbaw (LaTrappe), speaking at the 1837 Treaty Council[84]

> The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of right from them – a reservation of those not granted.
> - *U.S. v. Winans*, 198 U.S. 371 (1905), at 381.

On July 20, 1837, representatives from Anishinaabe (Chippewa) and Dakota (Sioux) bands traveled to the place where the Minnesota and Mississippi Rivers converge. There, nestled into oak savanna prairie on the outskirts of Fort Snelling, they gathered at the St. Peters Agency, a U.S.-Indian Agency which had been established near the military outpost in 1820. Henry Dodge, U.S. treaty commissioner and governor of the Wisconsin Territory, was eager to assemble the band leaders, fur traders, and other government officials to negotiate the terms of a vast cession of land. The western

[84] Verplanck Van Antwerp, Secretary of the 1837 Treaty Council recorded Magegawbaw's statement, and included a personal aside: "….this of course is nonsense—but is given literally as rendered by the Intrepeters [sic], who are unfit to act in that capacity. I presume it to mean that the Indians wish to reserve the privilege of hunting and fishing on the lands and making sugar from the Maple." Reprinted in Satz, & Apfelbeck 1996, at 18.

Anishinaabe bands (from present-day Minnesota) were the first to arrive, and though Dodge sought to gain their commitments to his treaty terms, Leech Lake Leader of the Pillager Band, Eshkebogecoshe (known to the Americans as Flat Mouth), insisted that an agreement could not be reached until leaders from the eastern (present-day Wisconsin) bands were present.[85] For five days, they waited until Ke-che-waish-ke (Chief Buffalo) arrived from La Pointe along with other eastern leaders.[86]

This was not the first time that Anishinaabe leaders had gathered with U.S. representatives to negotiate U.S. rights to territory. In 1819, large tracts of the lower peninsula of present-day Michigan were ceded at the Treaty of Saginaw and in 1826, a treaty negotiated at Fond du Lac granted the U.S. subterranean mining rights in Anishinaabe territory.[87] The steady westward expansion of the burgeoning U.S. had only increased the appetite for land and resources. However, while the 1826 negotiations granted the U.S. rights to search for and extract copper and other precious metals and minerals, the treaty was explicit that that grant to the U.S. "does not affect the title of the land nor the existing jurisdiction over it."[88]

---

[85] Satz & Apfelback 1996, at 17 (citing the personal journals of Vineyard 1838, at 962; Van Antwerp 1837, at 0550).
[86] Satz & Apfelback 1996, at 17.
[87] Treaty of Saginaw, 1819 (7 Stat. 203).
[88] Treaty of Fond du Lac (7. Stat. 290), Art. 3. The 1826 treaty came right on the heels of a separate agreement, negotiated in 1825, which established a boundary between the Anshinaabe and Lakota Bands across present-day Minnesota (7 Stat., 272). The 1825 Treaty did not include any cession of territory, but the U.S. was eager to extend the influence of that treaty to enable mineral exploration in the region. *See also* Keller 1986.

The land at issue in 1837—which stretched across much of present-day west-central Wisconsin and east-central Minnesota, was coveted by the U.S. for its rich timber resources, potential agricultural uses, and anticipated copper deposits.[89] Westward settler expansion and the prohibitive cost of transporting lumber stocks from the established U.S. territories to the east heightened demand for cheap timber resources. The cession was also desirable for a number of private actors—fur traders in the region saw the cession as opportunity to recover debts claimed against Anishinaabe trading partners, and enterprising individuals in the region had started to lay plans for developing private infrastructures for the mining industry.[90] Treaty-making was the only legal mechanism to acquire the land, as the Nonintercourse Act (passed in various iterations between 1790 and 1834) prohibited the alienation or conveyance of land from any Indian nation or tribe unless it was "made by treaty or convention."[91] Despite the value of the land to U.S. negotiators, Dodge strategically insisted that it was barren of game and of little agricultural value.[92] Anishinaabe leaders, including Bagone-giizhig (Hole in the Day) and LaTrappe, objected to Dodge's characterization, citing the abundant resources upon which the Anishinaabe survived, and made clear that any treaty must preserve their communities' ability to live from the ceded lands.[93]

[89] Satz & Apfelback 1996, at 13–31.
[90] Satz & Apfelback 1996, at 15-17 (citing Harris 1836, 1837a; Dodge 1836).
[91] 25 U.S.C. § 177.
[92] Satz & Apfelback 1996, at 18 (citing Van Antwerp 1837, 0556-557)).
[93] Satz & Apfelback 1996, at 20.

During the treaty negotiations on July 28, 1837, Eshkebogecoshe (Flat Mouth) spoke on behalf of the Anishinaabe:

> My father. Your children are willing to let you have their lands, but they wish to reserve the privilege of making sugar from the trees, and getting their living from the Lakes and Rivers, as they have done heretofore, and of remaining in this Country…You know we can not live, deprived of our Lakes and Rivers; There is some game on the lands yet; & for that reason also, we wish to remain upon them, to get a living.[94]

Eshkebogecoshe (Flat Mouth)'s demand that the Anishinaabe retain the right to live in and from the ceded territories was also reflected in prior statements by Ma-ghe-ga-bo, another Anishinaabe representative to the Treaty Negotiations,[95] and became codified in the 1837 treaty. Article 5 reads: "The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied [sic] to the Indians, during the pleasure of the President of the United States."[96] In 1842, Anishinaabe leaders again convened with U.S. negotiators, this time to discuss a cession along the southern shore of Lake Superior, which would give the U.S. undisturbed access to minerals that had been discovered after the signing of the 1826 treaty. Again, the Bands reserved the rights to hunt, "with the other usual privileges of occupancy."[97]

---

[94] 1837 Treaty Journal, at 145.
[95] 1837 Treaty Journal, at 142.
[96] 1837 Treaty with the Chippewa (7. Stat. 536), Art. 5.
[97] Article II of the Treaty with the Chippewa, 1842 reads: "The Indians stipulate for the right of hunting on the ceded territory, with the other usual privileges of occupancy, until required to remove by the President of the United States, and that the laws of the United States shall be continued in force, in respect to their trade and intercourse with the whites, until otherwise ordered by Congress."

In this chapter, I analyze the histories and contemporary impacts of a few key treaties between Anishinaabe Bands and the U.S. government and the resurgence of treaty interpretation in contemporary courts. In particular, I focus on two series of federal court cases: *Minnesota v. Mille Lacs Band of Chippewa Indians*[98] and *Lac Courte Oreilles v. Wisconsin* (LCO or Voigt Decisions)[99]. While many cases have addressed the question of treaty rights over time, the holdings in these two series of cases provide the most comprehensive interpretation of the scope and nature of both the substantive and regulatory aspects of the rights reserved in the 1837, 1842, and 1854 treaties. Through analysis of the Courts' interpretations of treaty rights in these two cases (and some of the decisions that preceded them), I highlight the ways in which treaties—as originally envisioned by negotiators, and in their new lives through jurisprudence—have created particular types of jurisdictional relationships between states, the federal government, and the bands that animate contestations over resource protection throughout the region today. Through this analysis, I argue that treaties occupy a particular space of tension in the foundational relationship between tribes and the United States—on the one hand, they serve as the primary legal agreements that enabled the territorial expansion of the United States and upon which the Trust relationship was established; on the other hand, from their inception there were disagreements and differing interpretations about the scope, impact, and obligations that arose from the treaty deliberations and final documents. In short, there was always disagreement about the agreement. As I will discuss below, the

[98] 526 U.S. 172 (1999).
[99] 700 F.2d 341 (7th Cir. 1983).

historical record suggests that Indigenous and American treaty negotiators approached the proceedings with very different expectations, understandings, and desired outcomes. These early tensions are woven into the complex dynamics of ongoing multi-jurisdictional conflicts that have been litigated on the basis of these agreements. While the conflicts may never be resolved, these legal reckonings with "treaty rights" have expanded the scope of tribal jurisdiction in the ceded territories, which in turn has opened up jurisgenerative possibilities for Bands to influence the legal and regulatory processes that mediate governmental approaches to non-human natures.

A subsidiary goal of this chapter is to foreground the ways in which Anishinaabe bands shaped the treaty process, and have since shaped the law, by strategically bringing cases and defending treaty rights through legal forums. Treaty history is complex, and treaty documents themselves are charged with unequal power dynamics, problems of interpretation, and unforeseen consequences. I will begin by addressing some formative pieces of Indian law scholarship and case law that have focused on treaty-interpretations and treaty histories. In Section II, I will discuss the circumstances that led up to the *Voigt* and *Mille Lacs* cases and will analyze the ways in which the holdings produced the shifting jurisdictional relationships that exist at present between Anishinaabe Bands and the states of Minnesota and Wisconsin. Finally, I will look at how these cases, and the treaty relationships that preceded them, contribute to a theoretical engagement with contested and dynamic jurisdiction.

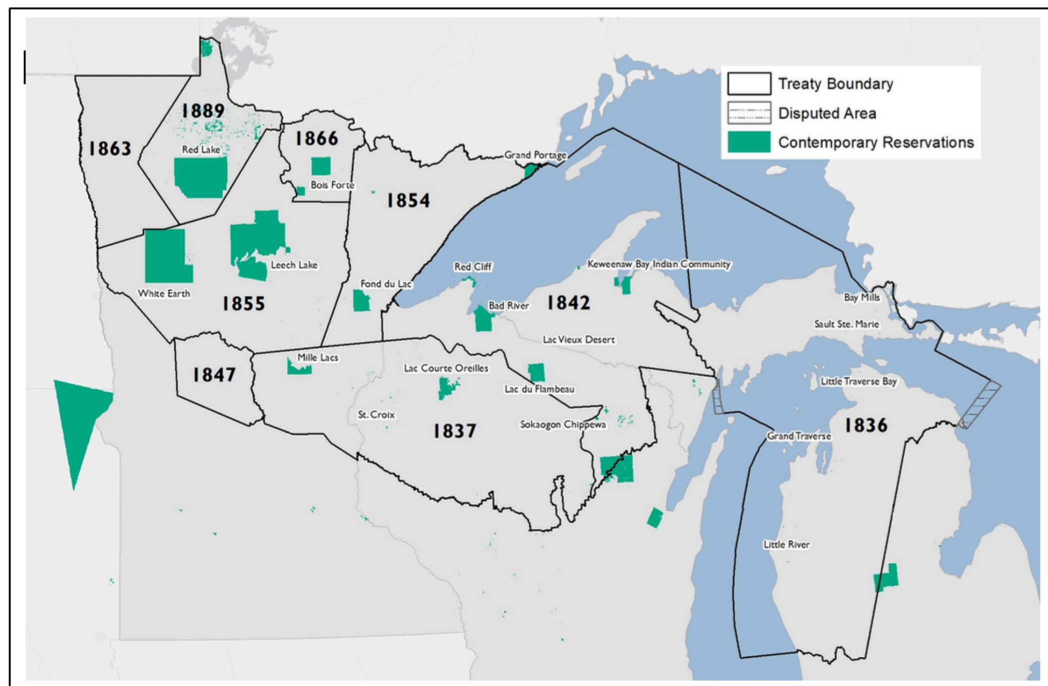

Figure 2: Map of the Ceded Territories. Created by Melinda Kernik, 2018

Part I. Treaties as Contracts / Treaties as Cornerstone

Treaties established the cornerstone of the relationship between the Bands and the U.S. federal government, with consequences for the existing and newly-minted states in the Union. But they also recognized the various Indigenous tribes as entities with which the government could enter into diplomatic relationships. In its simplest form, the treaty, according to Vine Deloria, Jr., is "the means whereby two sovereign entities exchange rights, responsibilities, and powers, and in the case of American Indians, tracts of land with ownership and political control passing as well."[100] But the cession of land and ownership carried with it countervailing responsibilities by the U.S. to meet certain

[100] Deloria 1996, at 971.

obligations to the tribes and reserved to the tribes certain rights within the ceded territories.

Treaties, and the circumstances surrounding their negotiation, also provide some of our clearest insights into the fraught and dynamic encounter between American Indians and settlers in the burgeoning United States. Through the trajectory of subsequent treaty-processes we can observe the precipitous shifts in the relationship between Anishinaabe bands and the federal government during the tense and politically volatile time in the years after the 1842 treaty was signed.

In the fall of 1848, a delegation of Anishinaabe leaders, increasingly concerned about settlement, unpaid annuities from prior treaties, and territorial pressures on their communities, travelled to Washington to address Congress and visit President James K. Polk and other cabinet officials. They were reportedly assured by the President and Congress that they would be well treated by the U.S. as long as the Anishinaabe maintained friendly relations.[101] That year, Polk declined to run for reelection, and on November 7, 1848, Zachary Taylor won the election. Less than a year after taking office—and just five months shy of his death—on February 6, 1850, President Taylor issued an Executive Order, specifically addressing the Chippewa Treaty of 1837:

> The privileges granted temporarily to the Chippewa Indians of the Mississippi by the Fifth Article of the Treaty made with them on the 29th of July 1837, "of hunting, fishing and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded" by that treaty to the United States…are hereby revoked; and all of the said

[101] Satz & Apfelback 1996, at 50–52.

> Indians remaining on the lands ceded as aforesaid, are required to remove to their unceded lands.[102]

The Order, designed to push the Anishinaabe further west to free up land for resource extraction and settlement in present day Minnesota shocked the Anishinaabe people and many non-Native residents of the region.[103] Shortly thereafter, to exert pressure on Anishinaabe leadership, the federal government decided to shift the location of annuities and provisions payments from Madeline Island in Lake Superior to Sandy Lake, in a more isolated area of present-day central Minnesota. The annuities were to be paid in the fall, but the Taylor administration's intention was to delay the Bands at Sandy Lake through the winter, thus wearing down opposition to relocation. Up to 3,000 Anishinaabe people travelled to Sandy Lake in late October 1850 and waited several weeks for a government agent, who informed them that the payments and provisions had not been delivered.[104] A small portion of the expected annuities arrived in December 1850, but much of the food was spoiled. As starvation spread through the winter camp, so did dysentery and measles. Many of those who returned to their homes that winter made the journey while ill and malnourished. According to reports by Anishinaabe leaders, Indian Agents, and missionaries in the region, between 170 and 200 people died at Sandy

[102] *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 179 (1999).
[103] Clifton 1987, at 21; Satz & Apfelback 1996, at 54–55.
[104] As Clifton notes, the real number of how many traveled is unknown, and the 3,000 reported by Sub-Agent Watrous (who coordinated the removal efforts on the ground) to his superiors may have been exaggerated. Many Bands, wary of the hazards of such a long edge-of-winter journey, ignored the order to bring their families and instead sent a significantly smaller delegation mainly made up of men. In order to save room to return home with goods and annuities, many packed light and thus did not have with them the requisite materials to set up adequate shelters to weather the winter in place. Clifton 1987, at 22–25.

Lake and another 230 passed on during their return journey. An estimated twelve per cent of the Anishinaabe population—including many able-bodied adults and young men—was lost at Sandy Lake. [105] In 1851, a delegation of Anishinaabe leaders led by Kechewaishke traveled to Washington and negotiated with then-president Millard Fillmore to cancel the removal orders.

The 1854 and 1855 treaties came on the heels of the Sandy Lake Tragedy, which devastated the Anishinaabe Bands. The shifts in the Bands' bargaining positions with federal government can be discerned from the shifts in treaty language from 1842 to 1855. While the 1854 treaty maintained the reservation of hunting and fishing rights to the Bands, the Anishinaabe ceded vast territory along the western shores of Lake Superior, including important spiritual, political, and communal gathering places. The U.S. government was interested in mining copper that ran across the western shore of the lake and through the treaty acquired nearly 2 million acres of land in exchange for yearly payments to the Bands of less than $20,000, divided between cash, goods, agricultural supplies, education materials, and delineated reservations.[106] The Treaty of LaPointe in 1854 was a success in that Kechewaishke and other Anishinaabe representatives negotiated to retain their reservations and stay in their traditional territories. However, the U.S. government continued to push assimilation and chip away at tribal practices of holding reservation lands in common throughout future treaty-making and policy efforts.

---

[105] Clifton 1987, at 25.

[106] Treaty with the Chippewa, 1854, Article 11: "And such of them as reside in the territory hereby ceded, shall have the right to hunt and fish therein, until otherwise ordered by the President."

U.S. officials used the 1855 treaty as a way to push more of the Anishinaabe population onto consolidated reservations in the central and western portions of Minnesota; the treaty created the Leech Lake and Mille Lacs reservations and encouraged agricultural assimilation. By 1855, the treaty's limitations on annuities reflected the heightened bargaining power of U.S. negotiators, as well as the government's turn toward placing assimilative provisions directly in the treaty language. Article 5 of the treaty provides that the President may withhold annuities or payments he deems to be wasted or improperly used, and further reads:

> If, at any time, before the said annuities in money and goods of either of the Indian parties to this convention shall expire, the interests and welfare of the Indians shall, in the opinion of the President, require a different arrangement, he shall have the power to cause the said annuities, instead of being paid over and distributed to the Indians, to be expended or applied to such purposes or objects as may be best calculated to promote their improvement and civilization.[107]

All told, between 1785 and 1871, the U.S. government signed over forty treaties with Anishinaabe Bands.[108] By the 1860s, the treaty cessions had further diminished

---

[107] 1855 Treaty with the Chippewa (Mississippi, Pillager, Winnibigoshish Bands) (10 Stat., 1165), Art. 5.

[108] For a more thorough review of Anishinaabe Treaty history in Minnesota, *see* Erlinder 2010. Treaties signed in 1785 (7 Stat. 16) and 1789 (7. Stat. 28) were never carried into effect due to ongoing conflicts with and between treaty signatories. 1825 Treaty with the Sioux and Chippewa...Tribes (7 Stat., 272) (established boundary between Lakota and Anishinaabe territory in present day Minnesota); 1826 Treaty with the Chippewa (7 Stat. 290) (established U.S.'s right to engage in mining operations in Anishinaabe territory); 1837 Treaty with the Chippewa (7. Stat. 536) (ceded Anishinaabe and Dakota territory in present-day Wisconsin and Minnesota); explicitly retained Anishinaabe usufructuary rights in ceded territory and remainder of Minnesota not effected); 1842 Treaty with the (Wisconsin) Chippewa (7 Stat., 591) (ceded Anishinaabe lands in present-day Wisconsin; retained Anishinaabe usufructuary rights in territory); 1847 Treaty with the Chippewa (Pillager Band at Leech Lake) (ceded Anishinaabe territory west of Mississippi River for establishment of Wisconsin Winnebago (Ho-Chunk) and Menominee

Anishinaabe territories. While the heyday of treaty-making ended with a legislative act in 1871, the agreements recorded in these documents gave rise to the physical and legal landscapes that continue to shape U.S. and American Indian claims to sovereignty.[109]

The documents that came out of these negotiations are imperfect, to be sure. First, the treaty negotiations themselves often relied upon translations of diverse and nuanced understandings of complex concepts like sovereignty, territory, and social/environmental relationships. In addition, many of the accounts that we have of treaty negotiations between the U.S. and American Indian bands are largely from the journals, letters, and reflections of U.S. treaty-negotiators. While Dodge's journals provide useful insights into

---

Reservations (never established); usufructuary rights undisturbed); 1854 Treaty with the Chippewa (Mississippi and Lake Superior Bands) (ceded present-day northern Wisconsin and northeastern Minnesota; usufructuary rights were retained, confirmed by *LCO/Voigt* decision, *Lac Courte Oreilles Band of Chippewa Indians v. Wisconsin*, 700 F.2d 341 (7th Cir. 1983)); 1855 Treaty with the Chippewa (Mississippi, Pillager, Winnibigoshish Bands) (10 Stat., 1165) (ceded territory in present-day north central Minnesota west of 1854 Treaty border); 1863 Treaty with the Chippewa of the Mississippi and the Pillager and Lake Winnibigoshish Bands (12 Stat. 1249) (ceded reservations established by 1855 Treaty, but no other territory); 1863 Treaty with the Chippewa—Red Lake and Pembina Bands (13 Stats., 667) (ceded territory on western border of present-day Minnesota along Red River to present-day Minnesota-Canada border); 1864 Modification of 1863 Treaty with Mississippi, Pillager, Winnibigoshish Bands (13 Stat. 693); 1864 Modification of 1863 Treaty with Red Lake and Pembina Bands (13 Stat. 689); 1866 Treaty with the Mississippi Band (16 Stat. 719) (ceded territory at present-day Minnesota-Canada border west of 1854 Treaty border); 1867 Treaty (ceded Leech Lake territory for purpose of establishing White Earth reservation within 1855 ceded territory).

[109] Legal scholar Frank Pommersheim argues that the 1871 statute was not so much a referendum on the federal/American Indian treaty-making relationship, as an internal fight between the U.S. Senate (which was alone empowered to ratify treaties) and the House of Representatives (which was obligated to appropriate funds to meet federal commitments incurred in treaties, without the power to ratify or reject the treaty language). So, while the statute reads: "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent, nation, tribe, or power with whom the United States may contract by treaty…" it preserves the U.S.'s capacity to continue to negotiate bilateral agreements with tribes, and also explicitly maintains any existing ratified treaties made with tribes. Pommersheim 2009, at 64–65.

the treaty negotiation process, it cannot be ignored that these accounts come from the very person who reasoned, at the conclusion of the 1837 treaty negotiation, that the treaty would "attach" the Anishinaabe to the United States, and that in this relationship, the Indians could be "easily controlled by their agents."[110] Treaties are legal documents, insofar as they produce relationships that are meant to legally bind both parties to a particular set of agreements; but also in the sense that they create what Delaney refers to as, "*renderings* of social reality in the terms received from and recognizable through legal discourse….The resulting narratives are all strategic interpretations crafted not only to persuade or to justify or to shape someone's understanding of some state of affairs but also to make something happen. They are deliberate interventions into chains of events. They are, from our perspective, part of the events that they describe."[111] Thus the language of the treaties must also be understood in the context of a broader U.S. strategy to eliminate threats posed by Indigenous groups, and eventually, to assimilate band members into settler cultural and property arrangements.

Second, the terms of negotiation and impact of the document were not always equally clear to all parties. Heidi Kiiwetinepinesiik Stark highlights that the ceremony, council, and negotiations would all have been considered treaty to Anishinaabe participants, with the final written document as a final and formal iteration.[112] This is

---

[110] Satz & Apfelback 1996, at 21.
[111] Delaney 1998, at 23.
[112] Stark, Heidi Kiiwetinepinesiik (2010). "Respect, Responsibility, and Renewal: The Foundations of Anshinaabe Treaty Making with the United States and Canada." *American Indian Culture and Research Journal* 34(2): 145–164.

evidenced by the exchange of gifts, ceremonial pipe-smoking, and long-form deliberations that characterized treaty councils in the Great Lakes region and beyond.[113] This more expansive understanding of the treaty as a process is also mediated by what Stark characterizes as an expectation by Anishinaabe leaders that the agreements or understanding between parties included all of what was discussed in the proceedings, and not just the final written document, which "rarely represented the vast expressions of indigenous sovereignty, nationhood, and land tenure articulated within the council."[114]

Finally, as the U.S. gained a territorial, military, and economic foothold through its westward expansion, one can observe a marked shift in the tenor of treaty language. Early treaties, mainly functioning as trade or peace agreements, recognize that hostilities from Indigenous nations posed significant vulnerabilities to the fledgling settler nation. Treaties in the early to mid-1800s reflect the U.S.'s desire to acquire territory, but tend to contain more acquiescence to Indigenous nations, in the form of annuity payments and promises of long-term access to resources in the ceded territories. By the mid to late-1800s, U.S. treaties contained a number of provisions aimed at the forceful assimilation of Indigenous peoples to agricultural economies, with clearly divided land bases, and economic centers. Treaties paved the way for large-scale alienation of Indigenous territories, and Bands were left with little recourse when the U.S. failed to meet its countervailing obligations.[115]

[113] Stark 2010, at 148–49. Williams 1997, at 40–61.
[114] Stark 2010, at 149.
[115] Janke 1982.

As legal scholar Robert Williams, Jr. argues, treaties are rich resources for understanding the political prerogatives, fears, and interests of tribes and U.S. government representatives at key moments in American history. Treaties must be understood as complex and historically contingent documents. And yet, only accounting for treaties as colonial tools of dispossession undermines the influence of Indigenous negotiation methods, expectations, and social norms on the treaty-making process. According to Williams, treaties must be understood as an engagement between colonial law and American Indian visions of law, marked by cycles of confrontation and accommodation over time.[116] The treaties that the U.S. government signed with Anishinaabe bands document this confrontation and accommodation, mediated through two very different legal traditions, and provide important insights into negotiations over the legal, social, and political interactions between tribes and the government. Indeed, Deloria and Raymond DeMallie argue that evidence of Indigenous diplomacy and negotiated agreements extends "as far back as we can trace".[117] Prior to and after the establishment of the U.S., treaties were forms of jurisdictional practice—establishing claims to particular territories, negotiating terms of engagement, and recognizing each party as a viable negotiating partner.

Williams draws upon the work of legal scholar Robert M. Cover to think about treaties as creating "a multi-cultural *nomos*—a normative universe of different

[116] Williams 1997, at 7.
[117] Deloria & DeMallie 1999, at 6.

peoples"[118] who are connected by what Cover describes as "the force of interpretive commitments, some small and private, others immense and public".[119] Indeed, both Williams and Stark argue the treaties were the source of vital connections, relationships between nations. While U.S. negotiators may have thought of the treaty document as the finalization of the terms of an agreement, Stark argues that, for Anishinaabe, the relationship of trust established by treaty "did not end with the completion of a written document; it merely began with it. However, it was the responsibility of all parties involved to maintain the relationships established through treaty making. The sustainability of these agreements was dependent upon each nation adhering to the principles of respect, responsibility, and renewal."[120]

Throughout the hundred years of treaty-making between Indigenous nations and representatives of the colonial—and later U.S.—governments, Bands also adapted to changing conditions and developed mechanisms to address power imbalances. Stark highlights one example, in which the United Nation of Ojibwe, Ottawa, and Potawatomi—recognizing that the written treaties did not always reflect the agreements made over the course of negotiations—recorded the treaty discussions independently, and later appealed directly to the President with their written record and a formal response to address what they felt were misrepresentations by treaty commissioners.[121]

[118] Williams 1997, at 51.
[119] Cover 1982, at 7.
[120] Stark 2010, at 156.
[121] Stark 2010, at 149–150.

It is valuable to think through the contributions that Indigenous custom and expectations played in establishing treaty councils, in part because these procedures—the rules of negotiation and terms of engagement—are the foundations of legal structures. Understanding the treaties as a convergence of Indigenous and U.S. legal systems enables a more nuanced understanding of the process of treaty-making, but also provides (through the translation of scholars such as Stark, Williams, and others) a more thorough accounting of how the Bands interpreted the treaties. As we will see, this question of different interpretation animates a number of the foundational legal questions that arise in contemporary litigation around treaty rights. Observing the changes in treaty language as the power dynamics shifted in favor of the U.S. over time also suggests that the treaties, by making possible the territorial expansion of the U.S., helped to fulfill settlers' jurisgenerative aspirations. While I focus in the following chapters on the jurisgenerative potential of tribal jurisdictional expansion, it is also important to reflect on how existing legal processes and powers were constituted. Settler legality was not a foregone conclusion—rather it was constructed and constituted through the encounters that gave rise to treaty negotiations—and the treaties themselves. Settler legal systems were jurisgenerative, built on the philosophical foundations of English common law, but also always constituted by, and bearing the imprints of, the negotiations, conflicts, and encounters with pre-existing Indigenous forms of legality.[122]

[122] Borrows 2010, at 68–69.

The treaties continue to impact legal and physical landscapes in the present by animating critical questions about how tribal sovereignty, U.S. federalism, and state resource conservation regimes can continue to coexist, and to what ends. These questions are often litigated through courts, and in court documents treaty texts take on an additional layer of complexity. Through this litigation, the federal court system—a material manifestation of settler legality—has also become a site where treaties have been used to generate and demand new jurisdictional formations. In this way, treaties can take on new life in legal jurisprudence.

Interpreting Treaty Rights

Legal scholar Frank Pommersheim notes that the two most significant legal issues that arise around treaties are "the status of treaties in the federal hierarchy of law and the appropriate standard for treaty interpretation, including treaty abrogation."[123] Both of these problems were anticipated by the authors of *The Federalist Papers*: Alexander Hamilton argued that if the treaties signed by the U.S. were to have any force, they "must be considered as part of the law of the land. Their true import, as far as respects individuals, must, like all other laws, be ascertained by judicial determinations. To produce uniformity in these determinations, they ought to be submitted, in the last resort,

[123] Pommersheim 2009, at 65–66. Pommersheim notes that, the "constitutional "supremacy" of treaties is only true vis-à-vis state law. The Supremacy Clause itself does not address the question of any hierarchy of federal law. Within the hierarchy of federal law, treaties are generally regarded as the equivalent of federal statutes enacted by Congress." *Id.*

to one SUPREME TRIBUNAL."[124] In Paper No. 64, John Jay decries the insistence among states that the treaties should be subject to repeal at will. In responding to this "error," Jay suggests that "[t]hese gentlemen would do well to reflect that a treaty is only another name for a bargain, and that it would be impossible to find a nation who would make any bargain with us, which should be binding on them *absolutely*, but on us only so long and so far as we may think proper to be bound by it."[125]

While Hamilton and Jay were concerned with the legitimacy of the fledgling nation in its interactions with other recognized nations, their statements also speak to their belief that such agreements, negotiated at the federal level, should have some longevity that was not subject to the contrary interests of states. The Indian treaties—negotiated with political entities that were eventually included within the territorial boundaries of what became the United (and individual) States—create interesting problems for a federalist structure that otherwise nests authority (albeit often contested) with a constitutional grant of federal supremacy over state law.[126] In this way, the tribes act as 'third sovereigns'[127] within the jurisdictional space of the United States, and the treaties that they signed with the U.S. government are, in many cases, the most effective

[124] Hamilton 2006, at 138 (emphasis in original). Quote reprinted in Deloria & Wilkins 2011 at 127.
[125] Jay 2006, at 421 (emphasis in original). Quote reprinted in Deloria & Wilkins 2011, at 127.
[126] Article VI, Paragraph 2 of the U.S. Constitution, often referred to as the Supremacy Clause reads, "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."
[127] Bruyneel 2007; Silvern 1999.

tools they have for litigating, maintaining, and perhaps expanding, the rights that they enjoyed as sovereigns prior to, and reserved in, the treaty negotiations.

Nevertheless, the American court system, since its establishment, has struggled to reconcile the existence of sovereigns that engage with, but are not subsumed by, the structural hierarchy of U.S. federalism. Chief Justice John Marshall's characterization of American Indian tribes in *Cherokee v. Georgia* as "domestic dependent nations" provided a particular way of thinking through the existential anxiety produced by a (U.S.) sovereign claiming dominion, while acknowledging—through its treaty-making practices and refusal to accept itself as an uncomplicated "conqueror"—that it claimed a territory that was already occupied by organized polities (tribal nations) that considered themselves sovereigns not beholden to the emerging settler state.[128] This anxiety is latent in the treaty rights cases.

Throughout treaty rights litigation, a few common threads have emerged, and are often characterized as "Canons of Construction" in the realm of Indian law. First, treaties must be construed as the Indians understood them, reflecting the power imbalances

[128] *Cherokee Nation v. Georgia*, 31 U.S. 1, 30 (1831). The full quote reads: "The Indians are acknowledged to have an unquestionable, and heretofore an unquestioned, right to the lands they occupy until that right shall be extinguished by a voluntary cession to our Government. It may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases; meanwhile, they are in a state of pupilage. Their relations to the United States resemble that of a ward to his guardian. They look to our Government for protection, rely upon its kindness and its power, appeal to it for relief to their wants, and address the President as their Great Father." *Id.*

between tribes and the federal government, as well as the fact that the treaties were translated and codified in English and American Indian negotiators relied on interpreters to convey meaning.[129] Second, ambiguous words or phrases are to be resolved in favor of the tribes, particularly in circumstances when one inference favors the government and another favors the tribes.[130] And third, treaties must be liberally interpreted in favor of the Indians.[131]

The cases that establish these canons have never been overturned, and so they remain binding legal precedent. Nevertheless, the body of U.S. law and jurisprudence that relates to tribes (often referred to as Federal Indian Law) is rife with contradictions, oversights, and abuses, and subsequent cases have frequently ignored or undermined these canons. As Pommersheim argues, treaty doctrine "is extremely pliable—at times so pliable that it is better described not as doctrine, but as chimera totally at the service of national objectives."[132] Perhaps the most notable, and consequential example, is advanced in the 1905 Supreme Court decision in the case of *United States v. Winans*. In

---

[129] *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 528 (1832) (McLean, J., concurring); *Jones v. Meehan*, 175 U.S. 1 (1899); *Choctaw Nation v. United States*, 119 U.S. 1 (1886); *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970); *Choctaw Nation v. United States*, 318 U.S. 423 (1943); *Tulee v. Washington*, 315 U.S. 681 (1942); *United States v. Shoshone Tribe*, 304 U.S. 111 (1938). *See also* Wilkinson & Volkman 1975, at 617.
[130] *Arizona v. California*, 373 U.S. 546 (1963); *Alaska Pacific Fishers v. United States*, 248 U.S. 78 (1918); *Winters v. United States*, 207 U.S. 564 (1908). *See also* Wilkinson and Volkman (1975), 617.
[131] *Choctaw Nation v. United States*, 318 U.S. 423 (1943). The Sixth Circuit Court of Appeals also held that these same principles are to be applied to interpreting acts of Congress that aim to extinguish treaty rights. *United States v. Michican*, 653 F.2d 277 (6th Cir., 1981). *See also* Wilkinson & Volkman 1975, at 617.
[132] Pommersheim 2009, at 69.

the majority opinion, Justice Joseph McKenna wrote that the treaty signed between the U.S. Government and the Yakima (Yakama) Band did not amount to a grant of rights *from* the U.S. *to* the Indians, but rather the treaties were a grant of rights (in the cases of the treaties discussed above, the rights of territory, timber, and minerals) *to* the U.S. *from* the Bands. Thus, the Indians retained all rights of sovereignty not specifically relinquished or impinged in the treaty.[133] While no court has ever overturned *Winans*, a great number have conveniently ignored this language, and have instead advanced an interpretation of treaties as *granting* particular rights to Bands.

This question of "reserved rights" illustrates what Wilkins and Lomawaima call "the apparent schizophrenia" that exists across the U.S. government, lawmakers, and the public with regard to tribal nations:

> On the one hand, reserved lands—reservations—are taken for granted as a "fact" of Indian-U.S. relations. On the other hand, reserved rights are seen as "special rights" that set Indians apart from non-Indian citizens in ways that many Americans feel are inappropriate, even unconstitutional.[134]

Not surprisingly then, the most frequent area of contemporary treaty litigation focuses on reserved usufructuary rights. A great number of bands—including across the upper Midwest, Pacific Northwest, Southwest, and Southeast—who ceded territories to the U.S. maintained their rights to live off of the ceded land. However, a number of the

[133] *U.S. v. Winans*, 198 U.S. 371 (1905), at 381.
[134] Wilkins & Lomawaima 2001, at 117–118.

most prominent treaty rights cases have occurred in the upper Midwest and Pacific Northwest.[135]

Part II. Anishinaabe Treaty Rights in the Courts

In the 1960s, bolstered by the successes of the Civil Rights Movement and the leadership of activists in the Indian Rights Movement, Indigenous communities began to more assertively practice their treaty rights in order to contest state regulation and publicly assert their sovereignty. Nearly a century of predatory federal policies, designed to consolidate tribal lands and assimilate American Indian peoples had left many Indigenous communities degraded and their reservation territories fragmented.[136] Charles Wilkinson writes:

> When the numbers of salmon or lake trout or elk declined, the user groups and the states pointed their fingers at the tribes. State wardens then cracked down on Indian fishing or hunting in the name of conservation. Later, when these issues went to court, judges found that Indians had not caused the species declines or wasted fish or game. Invariably, large-scale harvests by non-

[135] Wilkinson 2005, at 152–153.

[136] *See e.g.* General Allotment Act (or Dawes Act), Feb. 8, 1887 (24 Stat. 388, ch. 119, 25 U.S.C.A. 331), Acts of Forty-ninth Congress-Second Session, 1887; Curtis Act, June 28, 1898 (30 Stat. 495), Acts of Fifty-fifth Congress-Second Session, 1898; Burke Act, May 8, 1906 (34 Stat. 182), Acts of Fifty-ninth Congress-First Session, 1906; Nelson Act, Jan. 14, 1889, (25 Stat. 642), Acts of Fiftieth Congress-Second Session, 1889; Indian Citizenship Act (or Snyder Act), June 2, 1924 (43 Stat. 253), Acts of Sixty-eighth Congress-First Session, 1924; etc. In the 1950s, Congressional policies that terminated the federal recognition of tribes across the country were passed using arguments about individual liberty, and the oppressive control of the BIA over reservation life, but also served communist era fears about collective land holdings. The emancipatory logics of individualism in the Senate report failed to recognize the vulnerability of indigenous peoples that would result, despite widespread resistance to termination by tribes. Orfield, Gary. 1966. *A Study of the Termination Policy*. Reprinted in Senate Comm. on Labor and Public Welfare, 91st Cong., 1st Sess., The Education of American Indians, Vol. 4 (Comm. Reprint 1970), at 674.

> Indian and habitat degradation resulting from development caused the shortages.[137]

Within a few years, questions about the scope and impact of treaty rights in the modern era were bubbling across the region. In 1959, the Bad River Tribal Council declared a state of "cold war" against the Wisconsin Department of Conservation, a protest of the state's decision to arrest Anishinaabe hunters and fishers in the course of exercising their treaty rights.[138] This declaration contested the State's authority to regulate treaty rights, asserted the Band's jurisdiction over its members within the ceded territories, and denied state conservation officials any access to tribal and restricted lands within the boundaries of the reservation.[139] Wilkinson argues that for state DNRs the Indigenous treaty-rights harvesters were convenient scapegoats. In 1965, William Jondreau, a tribal council member from the L'Anse Reservation in Michigan, was arrested by a Michigan Department of Conservation officer for fishing without a state license from Keweenaw Bay on Lake Superior. His case traveled to the Supreme Court of Michigan, which overturned the lower courts and held that Mr. Jondreau was protected by the Treaty of 1854, and thus was not subject to state regulation.[140] In 1972, the Supreme Court of Wisconsin decided a similar case, in which members of the Bad River and Red Cliff bands were charged by the state with unlawfully gill netting and fishing

---

[137] Wilkinson 2005, at 151.
[138] Norrgard 2014, at 1.
[139] Bad River Tribal Council, "A Declaration of War," November 10, 1969, WHSA; Satz & Apfelback 1996, at 89–90.
[140] *People v. Jondreau*, 185 N.W.2d 375 (Mich. 1971).

without a license in Lake Superior.[141] The Court similarly found that the Treaty of 1854 extended into Lake Superior.[142] These early cases set off a wave of litigation dealing with the contours of the rights reserved under the Anishinaabe treaties that continues to the present day.[143]

As these cases moved through the courts, Band members across the region were emboldened to exercise their treaty rights and resist state regulation. Outside of the courts, contention seethed between Anishinaabe treaty fishermen and their non-Indigenous neighbors. As the courts increasingly upheld the Bands' treaty rights, non-Indigenous anglers began to respond with violence against Band members exercising their treaty rights on lakes throughout Wisconsin, Michigan, and Minnesota.[144] Tribal

[141] The L'Anse Reservation is the primary land base and together with the Ontonagon Band makes up the Keweenaw Bay Indian Community.
[142] *Wisconsin v. Gurnoe*, 192 N.W.2d 892 (Wis. 1972). The Wisconsin Supreme Court did not outright reject the State's ability to regulate Band members, but found that the State must demonstrate that the State must demonstrate that regulations against the Chippewa were reasonable and necessary to prevent a substantial depletion of the fish supply. *Id.* at 410. Further, the Court held that, in order to be protected by treaty rights, the "methods of gathering such fish must also reasonably conform to the aboriginal methods and should not be extended to modern methods not intended by the 1854 treaty." *Id.* at 411. This was later overturned by *Lac Courte Oreilles Band v. Voigt*, 653 F.Supp. 1420 (W.D. Wis. 1987) [*LCO III*].
[143] *Michigan v. LeBlanc*, 223 N.W.2d 305 (Mich. App. 1974); *Michigan v. LeBlanc*, 248 N.W.2d 199 (Mich. 1976); *Wisconsin v. Peterson*, 297 N.W.2d 52 (Wis. App. 1980); *Wisconsin v. Whitebird*, 329 N.W.2d 218 (Wis. Appl 1982); *Wisconsin v. Lemiuex*, 327 N.W.2d 669 (Wis. 1983); *Wisconsin v. Baker*, 698 F.2d 1323 (7th Cir. 1983); *Attorney General v. Hermes*, 339 N.W.2d 545 (Mich. App. 1983); *Wisconsin v. Newago*, 397 N.W.2d 107 (Wis. App. 1986); *Wisoncsin v. Big John*, 409 N.W.2d 455 (Wis. App. 1987); *Bigelow v. Michigan Dep't of Natural Resources*, 727 F.Supp. 346 (W.D. Mich. 1989); *U.S. v. Bresette*, 761 F.Supp. 658 (D. Minn. 1991); *Sokaogon Chippewa Community v. Exxon Corporation*, 805 F.Supp. 680 (E.D. Wis. 1992); *Sokaogon Chippewa Community v. Exxon Corporation*, 2 F.3d 219 (7th Cir. 1993); *Grand Traverse Band v. Michigan Dep't of Natural Resources*, 141 F.3d 635 (6th Cir. 1998).
[144] For a detailed ethnographic account of the circumstances surrounding the treaty rights cases in Wisconsin, *see* Nesper 2002.

leaders deployed a multi-pronged strategy, including ongoing litigation, negotiations with State agencies, and efforts to educate the public about their treaty rights in the face of mounting hostility.

In the following section, I will analyze the arguments advanced by the Bands, the federal government, and the states of Minnesota and Wisconsin in a key series of cases,[145] which culminated in the *Lac Courte Oreilles* decisions (also known as the *Voigt* decisions)[146], and *Minnesota v. Mille Lacs Band*, decided by the U.S. Supreme Court.[147] These cases built on the treaty-rights recognitions of prior courts and charted a course

[145] While a number of other treaty rights cases preceded these, the *Voigt* and *Mille Lacs* series of cases became watershed cases for the recognition of continuing off-reservation treaty rights, and established particular jurisdictional relationships between the states and the bands. For earlier cases, see *State v. Gurnoe*, 192 N.W.2d 892 (1972) (holding that the 1854 treaty protected the rights of tribal members to fish in Lake Superior without being subject to state regulations, despite the fact that the treaty did not explicitly reserve that geographic right; because Lake Superior was a traditional Anishinaabe fishing ground, the court reasoned that the Indians would have assumed that the right extended beyond the waters of the reservation to include Lake Superior).

[146] *Lac Courte Oreilles Band v. Voigt, U.S. v. Bouchard*, 464 F.Supp. 1316 (W.D. Wis. 1978); *Lac Courte Oreilles Band v. Voigt*, 700 F2d 341 (7th Cir. 1983) [LCO 1]; *Lac Courte Oreilles Band v. Wisconsin*, 760 F2d 177 (7th Cir. 1985) [LCO II]; *Lac Courte Oreilles Band v. Wisconsin*, 653 F.Supp. 1420 (W.D. Wis. 1987) [LCO III] ["Doyle Decision"]; *Lac Courte Oreilles Band v. Wisconsin*, 668 F. Supp. 1233 (W.D. Wis. 1987) [LCO IV]; *Lac Courte Oreilles Band v. Wisconsin*, 686 F. Supp. 226 (W.D. Wis. 1988) [LCO V]; *Lac Courte Oreilles Band v. Wisconsin*, 707 F. Supp. 1034 (W.D. Wis. 1989) [LCO VI]; *Lac Courte Oreilles Band v. Wisconsin*, 740 F.Supp. 1400 (W.D. Wis. 1990) [LCO VII]; *Lac Courte Oreilles Band v. Wisconsin*, 749 F.Supp. 913 (W.D. Wis. 1990) [LCO VIII]; *Lac Courte Oreilles Band v. Wisconsin*, 758 F.Supp. 1262 (W.D. Wis. 1991) [LCO IX]; *Lac Courte Oreilles Band v. Wisconsin*, 775 F.Supp. 321 (W.D. Wis. 1991) [LCO X].

[147] *Mille Lacs Band v. Minnesota Dep't of Natural Resources*, 853 F.Supp. 1118 (D. Minn. 1994), *Mille Lacs Band v. Minnesota Dep't of Natural Resources*, 861 F.Supp. 784 (D. Minn. 1994); *Mille Lacs Band v. Minnesota*, 864 F.Supp. 102 (D. Minn. 1994); *Mille Lacs Band v. Minnesota*, 48 F.3d 373 (8th Cir. Minn. 1995); *Fond du Lac v. Carlson*, 68 F.3d 253 (8th Cir. Minn. 1995); *Fond du Lac v. Carlson*, Case No. 5-92-159 (D. Minn. March 18, 1996) (unpublished opinion); *Mille Lacs Band v. Minnesota*, Case No. 3-94-1226 (D. Minn. March 29, 1996) (unpublished opinion); *Mille Lacs Band v. Minnesota*, 952 F.Supp. 1362 (D. Minn. 1997); *Mille Lacs Band v. Minnesota*, 124 F.3d 904 (8th Cir. 1997); *Minnesota v. Mille Lacs*, 526 U.S. 172 (U.S. 1999).

through the complex regulatory details of multi-jurisdictional resource management in the ceded territories. In particular, these cases were significant because of how deeply they waded into the complex jurisdictional questions of state/tribal cooperation and co-management of resources in the regulatory sphere.

The Lac Courte Oreilles Cases

In 1978, the federal court for the Western District of Wisconsin consolidated three cases—criminal and civil—which each required a determination on the continuing existence and limits of treaty rights in the state. *United States v. Bouchard* was a criminal case in which the U.S. charged that Jerome Bouchard, a non-Native resident of Wisconsin, willfully trespassed on the Kagagon Slough, a navigable waterway within the boundaries of the Bad River Band of Lake Superior Chippewa's reservation, along the southern shore of Lake Superior.[148] Bouchard, for his part, argued that the waterway became the property of the State of Wisconsin in 1848, when it was admitted to the Union. The U.S. cited the 1842 and 1854 treaties, arguing that these documents granted the Bad River Band exclusive use of the waterway and prevented the State from claiming

[148] At the conclusion of the 1854 Treaty negotiations, in a letter to the Office of Indian Affairs, Treaty Commissioner Henry C. Gilbert characterized the Kagagon Sloughs portion of the Bad River Reservation as "swamp and valueless, except as it gives them access to the Lake for fishing purposes." (*Lac Courte Oreilles Band v. Voigt, U.S. v. Bouchard*, 464 F. Supp. 1316 (W.D. Wis. 1978), at 1331–1332). Historian E.J. Danziger, Jr., in an analysis of the 1854 Treaty, argued rather that the sloughs included "twelve square miles of wild rice fields alive with fish and nesting waterfowl." Danziger, E.J., Jr. (1973). "The Would Not Be Moved." *Minnesota History* (Spring): 179, quoted in *Lac Courte Oreilles Band v. Voigt, U.S. v. Bouchard*, 464 F. Supp. 1316 (W.D. Wis. 1978), at 1332.

title.[149] *United States v. Ben Ruby and Sons* was a civil action by the U.S. against the State of Wisconsin, and a number of private parties, who claimed an interest in land that the U.S. alleged was held in trust for the Lac Courte Oreilles Band of Lake Superior Chippewa (LCO Band) as a result of the 1837, 1842, and 1854 treaties and an 1873 executive action.[150] The third case, *Lac Courte Oreilles Band of Lake Superior Chippewa v. Voigt*, was a civil case brought by the Band, as a result of the State's prosecution of a LCO Band member (and threatened prosecution of others) for harvesting treaty resources without a state permit. The LCO Band contended that their 1837 and 1842 treaty rights precluded state regulation or control of the hunting, fishing, or gathering rights of Indians in the treaty-ceded territories.[151]

In his collective analysis of these three cases, Judge James E. Doyle made four key holdings, three of which were not favorable to the Bands, and a fourth that formed a basis for the decisions in a number of future cases upholding treaty rights. First, Judge Doyle held that, by signing the 1837 Treaty, the Anishinaabe knew that they were relinquishing their "aboriginal right of occupancy," retaining only the right of "permissive occupation."[152] Second, that by signing the 1854 treaty, the Bands' rights of

[149] *Lac Courte Oreilles Band v. Voigt, U.S. v. Bouchard*, 464 F. Supp. 1316 (W.D. Wis. 1978), at 1321, 1333–1342.
[150] *Lac Courte Oreilles Band v. Voigt, U.S. v. Bouchard*, 464 F. Supp. 1316 (W.D. Wis. 1978), at 1321, 1343–1357. The Lac Courte Oreilles Band was not a party to the action in *U.S. v. Ben Ruby and Sons*, but submitted an amicus brief in support of the United States.
[151] *Lac Courte Oreilles Band v. Voigt, U.S. v. Bouchard*, 464 F. Supp. 1316 (W.D. Wis. 1978), at 1321, 1357–1361.
[152] *Lac Courte Oreilles Band v. Voigt, U.S. v. Bouchard*, 464 F. Supp. 1316 (W.D. Wis. 1978), at 1348.

permissive occupation in the 1837 and 1842 treaties were extinguished, except for the portions that were included in the reservations established by treaty.[153] Third, Judge Doyle interpreted the 1854 treaty, which does not explicitly mention the off-reservation hunting, fishing, and gathering rights that were protected in the 1837 and 1842 treaties, as an extinguishment of those rights in non-reservation ceded territories.[154] Judge Doyle suggests that, had the Bands been claiming a right to "fish in a particular body of water adjacent to their reservation, or to gather maple sap in a forest bordering their reservation" that the rights may have been sustained,[155] but since they were claiming broad hunting, fishing, and gathering rights across the ceded territories, those treaty rights were abrogated because they were not explicitly mentioned in the 1854 treaty.[156] Finally, Judge Doyle found that the Removal Order of 1850 (and any actual removal of Anishinaabe peoples pursuant to that order) was invalid because it was not authorized by either the 1837 or 1842 treaties and was thus beyond the scope of the President's power.[157]

The Lac Courte Oreilles Band appealed the district court decision, and on January 25, 1983, the Seventh Circuit Court of Appeals decided the appeal, reversing Judge

[153] *Lac Courte Oreilles Band v. Voigt, U.S. v. Bouchard*, 464 F. Supp. 1316 (W.D. Wis. 1978), at 1352.
[154] *Lac Courte Oreilles Band v. Voigt, U.S. v. Bouchard*, 464 F. Supp. 1316 (W.D. Wis. 1978), at 1359.
[155] *State v. Gurnoe* (192 N.W.2d 892 (1972).
[156] This is inconsistent with the principle established in *U.S. v. Winans*: "the treaty was not a grant of rights to the Indians, but a grant of right from them—a reservation of those not granted." (198 U.S. 371, 381).
[157] *Lac Courte Oreilles Band v. Voigt, U.S. v. Bouchard*, 464 F. Supp. 1316 (W.D. Wis. 1978), at 1350, 1358–1359.

Doyle's district court order, in part. The decision, written by Judge James Pell, cited *Winans* to hold that a treaty-right need not be dependent either on aboriginal title—which the court concluded could be extinguished at any time and in any way by the United States—or a permanent right to occupy the land, as in a fee simple property holding.[158] Treaty rights, rather, could be exercised even in the absence of a permanent occupancy right, and could only be abrogated through specific and explicit means. Judge Pell found that the President's removal order was neither authorized by prior treaties nor by the behavior of the Anishinaabe, and was thus invalid.[159] This determination—like many others in Indian law—was based not a question of equity or a legally defensible relationship between the Bands and the federal government, but on the constitutional

[158] *Lac Courte Oreilles Band v. Voigt*, 700 F.2d 341 (7th Cir. 1983), at ¶ 81 [hereinafter *LCO I*].
[159] Much of the debate regarding abrogation hinged on the language in Article 5 of the 1837 treaty, which established that the tribes may enjoy their usufructuary treaty rights "during the pleasure of the President of the United States"; and Article 11 of 1842, which states that the rights would endure until the Anishinaabe were "required to remove by the President of the United States." The court considered two questions that emerged from this qualifying language: first, whether the fact that these usufructuary rights were contemplated in the treaty language as non-permanent meant that the treaties themselves could be abrogated through less explicit means than permanent treaty-rights; and second, what the qualifying language actually meant in the context of these two treaties. The Court considered in-turn whether the rights reserved in the 1837 and 1842 treaties were extinguished by the 1850 Removal Order or the 1854 treaty, and in both cases found that they were not. The court, relying upon the canon of construing treaties as Indian negotiators would have understood them, used Judge Doyle's analysis of comments and writings by Anishinaabe and other 1837 and 1842 treaty council participants to conclude that the Anishinaabe understood these provisions of the treaty to be contingent upon their behavior towards white settlers, and not a full grant of discretion to the Executive to abrogate their negotiated rights at any time. The Appeals Court thus considered, based on the historical record, that the treaties themselves only provided for removal in cases where the Anishinaabe harassed or otherwise mistreated white settlers. Finding no evidence of conduct by Anishinaabe against white settlers that would have justified removal, Judge Pell concluded that the 1850 Removal Order was not authorized by either of these prior treaties, and thus exceeded the President's power and was invalid. (*LCO I*, at ¶¶ 101–121).

division of power between the Executive and the Legislative branches. The Appeals Court noted that a treaty was essentially a contract between two sovereigns,[160] through which the U.S. government promised a property interest in land to the Anishinaabe. According to the court, this interest and the legally enforceable rights it entailed, was anticipated in the language of the treaty to last for a specified period of time, or until specific events occurred. Judge Pell writes:

> If harassment of white settlers occurred, the Executive could extinguish the Indians' rights without the Government incurring liability. If the Chippewas' rights were abrogated for any other reason, however, the Government would potentially be subject to a claim for compensation. An act of Congress should therefore be construed as extinguishing usufructuary rights only if the legislation expressly stated that such was the intent of Congress or if the legislative history and surrounding circumstances made clear that abrogation of treaty-recognized rights was intended by Congress.[161]

The Court reasoned that President Taylor's removal order exceeded the scope of his Executive authority because: a) treaty-abrogation and Indian affairs more broadly is under the purview of Congress, via the plenary power,[162] b) the 1837 and 1842 treaties ratified by Congress were premised upon negotiations which ensured the Anishinaabe's retention of their reserved rights unless they mistreated settlers, c) the historical record

[160] Citing *Washington v. Washington State Comm. Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).
[161] *LCO I*, at ¶ 121.
[162] *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685 (1965); Courts have held that plenary power is rooted in treaty power, U.S. Const. art. II, Sec. 2, cl. 2, and the Indian commerce clause, id. at art. I, Sec. 8, cl. 3.

with regard to the 1850 Removal Order demonstrates that it was not motivated by Indian misbehavior but rather exclusively a desire to free up land for white settlement, and d) abrogation that was not explicitly made by Congress pursuant to the treaty terms would have subject the federal government to compensate the Bands for the extinguished rights, which is further beyond the scope of the Executive's constitutional powers.[163]

Because the 1854 treaty made no reference to usufructuary rights that were reserved in the previous treaties, and the record did not support an intent to abrogate, the Appeals Court reversed and remanded Judge Doyle's decision, and upheld the Lac Courte Oreilles' reserved hunting, fishing, and gathering rights throughout the portions of the ceded territories that were not privately owned.[164]

This 1983 case before the Seventh Circuit, which later became known as LCO I, affirmed the continuing existence of reserved rights under the 1837, 1842, and 1854 treaties and chilled state agencies' efforts to regulate or restrict Band members hunting, fishing, and gathering practices. This decision also raised many more questions than it answered, first by compelling the state to recognize and contend with a group of resource users it did not have immediate jurisdiction over, and also by raising legal questions as to the limits of treaty harvesting practices, with regard to both method of harvesting (i.e. using traditional practices, such as spearing and gillnetting) and geography (throughout

[163] *LCO I*, at ¶ 119–146.
[164] *LCO I*, at ¶ 170. With regard to District Court Judge Doyle's holding that the 1854 treaty implicitly terminated the usufructuary rights reserved in the 1837 and 1842 treaties, the Appeals Court disagreed. Relying on the case *Menominee Tribe v. United States* (391 U.S. 404 (1968)), Judge Pell held that Congressional intent to abrogate treaty rights must either be explicitly stated in the record, or established by the legislative history surrounding the treaty.

the ceded territories). The efforts by the Bands, the State of Wisconsin, Band members, and state residents to wrestle with the details of enforcing LCO I led to a number of subsequent substantive cases (up to LCO X), and many more subsidiary cases dealing with administrative issues of the litigation process. LCO I–III made up the "declaratory phase" of the litigation, and determined "the nature, scope, and extent" of the Bands' usufructuary rights.[165] Beyond LCO I's recognition of the ongoing existence of treaty-based rights in the ceded territories, this first phase of cases determined that Band members could exercise their usufructuary rights throughout the ceded territory, except on land privately owned at the time when the treaties were signed, or when the rights were exercised (LCO II[166] & LCO III[167]). Further, the District Court determined that Band members exercising treaty rights need not be limited to hunting and fishing implements that would have been utilized at the time of the treaty signing, but could use any harvesting methods developed since that time (LCO III[168]). Finally, the Band

[165] *Lac Courte Oreilles Band v. Wisconsin*, 686 F.Supp 226 (W.D. Wis. 1988), at 227.
[166] *Lac Courte Oreilles Band v. Voigt*, 760 F.2d 177 (7th Cir. 1985) [hereinafter *LCO II*] (holding that setting a date of preserving usufructuary rights in perpetuity was not warranted, and that the limitations of the private property exemption needed to be adjudicated through fact finding at the District Court level).
[167] *Lac Courte Oreilles Band v. Voigt*, 653 F.Supp. 1420 (W.D. Wis. 1987) [hereinafter *LCO III*] (Judge Doyle's determination on the historical phase holding, in part, that the usufructuary rights reserved in the 1837 and 1842 treaties had been terminated in all portions of the ceded territory which were privately owned when treaty was signed, or at time of attempted exercise of treaty rights).
[168] *LCO III* (Judge Doyle holding, in part, that the Anishinaabe were not confined to the hunting and fishing methods and implements that their ancestors relied upon at the time of the treaties but could avail themselves of modern improvements and hunting and fishing techniques and could trade and sell their bounties to non-Indians).

members had the rights to sell or trade the fruits of their harvests as necessary to achieve a modest standard of living (LCO III[169]).

The next phase of litigation, known as the "regulatory phase," considered which entities were empowered to regulate harvests and oversee conservation. In LCO IV, District Court Chief Judge Crabb held that the State of Wisconsin could regulate the Bands' off-reservation exercise of usufructuary rights in the interests of conservation and public health and safety, but for no other purpose. State regulations were required to be reasonable and necessary to conserve particular species or resources in a particular area, and could not discriminate against Indians. Following from Judge Doyle's determination in LCO III that the Bands harvest allocations in the ceded territory should be limited to what was required to achieve a "moderate living", the State of Wisconsin requested that it be empowered to enforce a "moderate living limitation" on the tribes' usufructuary rights. Judge Crabb denied the State, granting only that the state could hypothetically enforce such a standard if regulated allocations became necessary in the future to protect a particular resource (LCO IV[170]). The question of allocation based on this "moderate

[169] *LCO III* (Judge Doyle holding, in part, that the Anishinaabe were not confined to the hunting and fishing methods and implements that their ancestors relied upon at the time of the treaties but could avail themselves of modern improvements and hunting and fishing techniques and could trade and sell their bounties to non-Indians. Judge Doyle found that because the Anishinaabe had no interest in the accumulation of wealth at treaty-time, their allocations from the ceded territories should be limited to what was necessary to achieve a "moderate standard of living").

[170] *Lac Courte Oreilles Band v. Wisconsin*, 668 F.Supp. 1233 (W.D. Wis. 1987) [hereinafter *LCO IV*] (District Court Chief Judge Crabb held that the State of Wisconsin could regulate the Bands off-reservation exercise of usufructuary rights in the interests of conservation and public health and safety, but for no other purpose. State regulations were required to be reasonable and necessary to conserve particular species or resources in a particular area, could not discriminate against Indians. The State could not regulate to enforce a "moderate living limitation" on the

standard of living" became a central feature of the next case. Judge Crabb's decision in LCO V relied heavily on the testimony of Professor Ronald Cummings, an economist from the University of New Mexico, who specialized in natural and environmental systems valuation. [171] Judge Crabb, persuaded by Professor Cumming's testimony, found that, even if the Bands were to sell every harvestable resource in the ceded territory (including deer, bear, small game and waterfowl, fish, timber, wild rice, and other plant resources), they would not be able to generate enough income to maintain a moderate standard of living.[172] Therefore, Judge Crabb held that the standard of a modest living could not practicably be applied to determine the Bands' allocation of harvest from the ceded territories.[173]

In 1989, the federal court for the Western District of Wisconsin began to wade more deeply into the weeds of multi-jurisdictional regulation, in its analysis and decision on two contrary plans for regulating harvests of muskellunge and walleye in Wisconsin

---

tribes' usufructuary rights, unless allocation to protect a particular resource became necessary in the future. While Chief Judge Crabb indicated that final determinations on tribal regulation required a full briefing of the question by state and tribal parties, she laid out a few broad guidelines to guide the tribal regulation and co-management disputes: tribes may regulate their members' exercise of off-reservation treaty rights for any "legitimate purpose" but can only preclude state regulations when they address legitimate state concerns in resource conservation, public health, and safety. Tribes must have effective enforcement mechanisms, including competent and adequately trained enforcement personnel, and tribal members must have official tribal identification when exercising off-reservation treaty rights. Tribes and the State must commit to a full exchange of relevant information (including scientific and management information and harvest data).

[171] *Lac Courte Oreilles Band v. Wisconsin*, 686 F.Supp 226 (W.D. Wis. 1988) [hereinafter *LCO V*], at 228–230.

[172] *LCO IV*, at 230. A modest standard of living is here defined as a "zero savings level of income" and the monetary thresholds for this standard are taken from the 1984 and 1986 Consumer Price Index. *Id*. at 228.

[173] *LCO IV*, at 233.

lakes—one submitted by the State Department of Natural Resources, and another submitted by a confederation of Bands. Beginning in 1985, and pursuant to the mandates in LCO I, the Great Lakes Indian Fish and Wildlife Commission (GLIFWC) member Bands had worked with the State DNR to establish and maintain a tribal treaty fishery for walleye and muskellunge, and in the process negotiated four interim agreements to delineate the scope of a spring spearing and gillnet assessment plan (these two methods are referred to throughout the decision as "highly efficient methods").[174] Also during that timeframe, both the Bands and the DNR collected data on tribal harvests and methods in order to determine the "total allowable catch" to maintain healthy fisheries. From that data, each group developed conflicting processes and determinations for establishing the quotas for total allowable catch and returned to the federal district court to resolve the dispute.

The State DNR proposed a more comprehensive regulation on the member Bands' exercise of treaty rights to fish for muskellunge and walleye, including limiting spearing to lakes greater than 500 acres and gillnetting to lakes greater than 1000 acres, and only then when lakes had a population estimate developed within the previous two years, and enforcing tribal quotas of twenty percent of the total allowable catch for any given lake for spearing and gillnetting. The state did not propose additional regulations for less efficient fishing methods.

[174] *Lac Courte Oreilles Band v. Wisconsin*, 707 F. Supp. 1034 (W.D. Wis. 1989) [hereinafter *LCO VI*], at 1047. Spearing is traditional Anishinaabe method for harvesting fish, which utilizes a 10–14 foot spear; Gillnetting is another traditional means of harvesting, through use of nets which are set and checked regularly.

The Band's proposal was negotiated and established through the Voigt Inter-Tribal Task Force Committee, a subsidiary of GLIFWC that was created after the 1983 LCO I decision in order to direct GLIFWC's activities as they related to the 1837 and 1842 ceded territories. The Voigt Task Force proposal, the Management Plan and Model Code of Ordinances Governing Off-Reservation Harvest by Tribal Members was a four-part plan that laid out: 1) the strategy for managing the walleye population, including the population's biological profile, regulatory principles and guidelines, and further research and proposed regulatory framework; 2) an inter-tribal agreement, including decision-making and authority delegation structure; 3) the Voigt Task Force Protocol, with detailed procedures for determining annual walleye harvests and quotas; and 4) the Model Conservation Code, with substantive regulations for off-reservation fisheries and mechanisms for quote enforcement.[175] Each member tribe approved and ratified the Management Plan through their tribal governments, and each agreed to consult with the State DNR, via GLIFWC, to coordinate harvest goals, management, and other regulatory issues.[176] The GLIFWC plan also included a computational method for determining tribal quotas for spearing and gillnetting based on the total catchable harvest, and was based on very conservative estimates of fish populations to address critiques by State regulators.[177] For the individual member Bands of the Voigt Task Force, the proposal served as a

[175] *LCO VI*, at 1051.
[176] *LCO VI*, at 1050–51.
[177] *LCO VI*, at 1051–52.

floor—they could not establish looser standards, but they could establish more stringent standards.

In reviewing these two proposals, Judge Crabb acknowledged the challenging road that led the Bands and the State from LCO I to LCO VI, and commended the work done each party to envision a means of co-managing resources with little guidance in either the legal or biophysical scientific spheres. She writes:

> What the parties in this case have done to give practical effect to plaintiffs' judicially recognized treaty rights is a remarkable story. …It is to this state's credit that its officials did not adopt the recalcitrant attitude of the State of Washington, but chose instead to work to adjust the state's resource management programs to accommodate the newly recognized rights of the tribes…It is to the tribes' credit that they have adopted an equally cooperative attitude toward the implementation of their rights. It has not been an easy time for them, either. The tribes and their members have been subjected to physical and verbal abuse over the recognition of their treaty rights…Tribal members have negotiated and entered into a series of interim agreements with the state that have circumscribed their rights to accommodate state concerns, despite their understandable impatience to reap the benefits of treaty rights they have been forced to forgo for so many years.[178]

In adjudicating the dispute between these two resource management plans for muskellunge and walleye harvests in the ceded territories, Judge Crabb held that, while the State's plan represented a good faith effort to recognize treaty rights and protect fish species, the State was prohibited from imposing its plan upon the Bands "if their tribal organization, resources, and proposed harvest plan are sufficient to regulate tribal

[178] *LCO VI*, at 1052–54 (citing *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, Inc.* 443 U.S. 658 (1979) and *Puget Sound Gillnetters Ass'n v. U.S. District Court*, 573 F.2d 1123 (9th Cir. 1978).

members' off-reservation harvesting activities and conduct and protect the resources at issue."[179] While she recognized inadequacies in the Voigt Task Force plan, she found the tribes had demonstrated a capacity to adequately implement regulations, collect biological data, determine population estimates, and enforce harvest limits and restrictions to protect the resources.[180] Notably, Judge Crabb found that the Bands' rights to regulate their members in the ceded territories did not relieve the state of its fiduciary obligation to manage the resource for the benefit of current and future users, even though it narrowed management options and imposed burdens on the state.[181] Thus, LCO VI enjoined the state from imposing regulations on Band members off-reservation walleye and muskellunge harvests in the ceded territories in Wisconsin, except where the Bands agreed. The Bands, for their part, were deemed the rightful regulators of their members, provided that they established management plans that accorded with the provisions laid out by the court.[182]

The next challenging regulatory question in the LCO series of cases was how to determine allocation percentages between Band members and non-Indians fishing in the ceded territories. Judge Crabb had acknowledged in LCO VI the complexity of the issue

---

[179] *LCO VI*, at 1055 (citing *LCO IV*, 668 F. Supp. 1233, 1241).
[180] However, she found that the Voigt proposal could only be validated if it were amended to include the DNR's concerns about limiting lake size for gillnetting harvests (though she rejected the need for similar requirements for spearing), total limit restrictions for muskellunge harvests, a commitment to use highly efficient methods only on lakes with reliable population estimates, limit highly efficient methods to no more than two years in succession for each body of water to allow for population evaluation and reestablishment, incorporate a method for computing safety factors raised by the DNR, and create a plan for exchanging biological information.
[181] *LCO VI*, at 1060.
[182] *LCO VI*, at 1060.

and the competing norms of equity and fairness in both parties' approaches (the state seeking a percentage-based regulation and the Bands contending that the treaty provided for harvest up to their need for a modest living), but had declined to resolve the question. She returned to it in LCO VII, decided in May of 1990.[183] The decision in LCO VII prohibited the state from interfering with the Bands' regulation of their members' hunting and trapping on public lands in ceded territories in Wisconsin, and declared that all harvestable natural resources in the ceded territories were to be apportioned equally between Band members and non-Indians.[184] Notably, the decision, while enjoining the state from regulating Band members' harvests, created a limited exception with regard to prohibitions on summer deer hunting, and deer hunting using the method of 'shining' to stun the deer. The decision allowed for state enforcement until the Bands adopted their own regulations prohibiting deer harvesting before Labor Day and "identical in scope and content" to the State's restrictions on the shining method.[185]

---

[183] *Lac Courte Oreilles Band v. Wisconsin*, 740 F. Supp. 1400 (W.D. Wis. 1990) [hereinafter *LCO VII*].
[184] *LCO VII*, at 1426. This case also reiterated that treaty rights do not extend to privately owned lands, even if Band members are harvesting with the consent of the landowner, so they are thus subject to state hunting and trapping regulations on private lands.
[185] *LCO VII*, at 1427. In the next phase of litigation, Wisconsin counties intervened alongside the state to contest the Bands' claims to harvest commercial timber resources in the treaty territories. Finding that the Bands did not reserve a usufructuary right to harvest commercial timber resources in 1837 and 1842 treaties, Judge Crabb held that the state and county could impose regulations and permitting requirements on Band members. (*Lac Courte Oreilles Band v. Wisconsin*, 758 F.Supp. 1262 (W.D. Wis. 1991) [*LCO IX*]). LCO X, the final case in the series served as a final determination, reiterating the holdings of each of the prior substantive cases, as well as an unpublished opinion affirming the state's right to enforce boating regulations against Band members exercising treaty rights in state courts (even if the Bands adopt identical regulations), and maintaining that the Bands rights to self-regulate are contingent upon their compliance with the orders established in the preceding decisions. (*Lac Courte Oreilles Band v. Wisconsin*, 775 F.Supp. 321 (W.D. Wis. 1991) [*LCO X*]).

All told, the Lac Courte Oreilles Band, and the GLIFWC member Bands that joined at various stages of the litigation, spent nearly twenty years pushing back against the state and using the federal courts to assert their rights under the treaties of 1837, 1842, and 1854.[186] After the Seventh Circuit's 1983 decision was released, protestors gathered on the shores of Butternut Lake in central Wisconsin, threatening and throwing rocks at treaty fisherman from the Lac du Flambeau and Lac Courte Oreilles Bands.[187] As the conflict wore on, the protests were increasingly framed in racial terms, and in 1988 protests against treaty rights again turned violent at Butternut Lake. Police officers in riot gear were deployed from across the state during spearing season from 1988 to 1991.[188] Protests also erupted across the border in Minnesota, as treaty-rights opponents braced for the outcomes of pending cases in that state.

The Mille Lacs Cases

On August 13, 1990, the Mille Lacs Band of Chippewa Indians and four enrolled members, Arthur Gahbow, Walter Sutton, Carleen Benjamin, and Joseph Dunkley, filed a complaint against the State of Minnesota, the Minnesota Department of Natural Resources (DNR), and a number of state officers, alleging that the State's adoption and enforcement of natural resource laws and regulations against tribal members violated the

---

[186] By *LCO IX*, the Lac Courte Oreilles Band had been joined by Red Cliff, Sokaogon Chippewa Indian Community, Mole Lake, St. Croix, Bad River, and Lac Du Flambeau.
[187] Nesper 2002, at 91–93.
[188] Satz & Apfelback 1996; Herman 2008, at 161.

privileges reserved in the 1837 treaty.[189] Nine Minnesota counties and six Minnesota landowners intervened as defendants and the United States intervened as a plaintiff.[190] After the first phase of litigation, the Fond du Lac Band of Chippewa, several Wisconsin Anishinaabe Bands, and individual members of each band also intervened as plaintiffs.[191]

As with the LCO cases, the District Court in Minnesota bifurcated the litigation into two phases. In the first phase of litigation, Judge Diana Murphy for the District of Minnesota held that usufructuary rights granted to the Band by the Treaty of 1837 continued to exist.[192] These rights included the right to harvest resources commercially, and did not limit use of any particular technique, methods, device, or gear.[193] In addition, following from *LCO I*, *Mille Lacs* Phase I held that neither President Taylor's 1850 Executive Order nor the provisions of an 1855 Treaty extinguished the usufructuary rights granted in the 1837 Treaty.[194]

---

[189] *Mille Lacs Band of Chippewa Indians v. Minnesota*, 853 F.Supp. 1118 (D. Minn. 1994) [hereinafter *Mille Lacs I*]. The litigants and intervening Bands sought a declaratory judgment from the district court that the usufructuary rights granted in the 1837 Treaty continued to exist in the Minnesota portion of the ceded territory. In addition, the suit sought injunctive relief to enforce hunting, fishing and gathering rights free of regulation by the State of Minnesota.
[190] *Mille Lacs I*, at 1123.
[191] *Mille Lacs Band of Chippewa Indians v. Minnesota*, No. 3-94-1226 (D. Minn. Mar. 29, 1996) [hereinafter *Mille Lacs III*]. In this decision, Jude Davis held that the Wisconsin Bands retained rights throughout the 1837 ceded territories, including in present-day Minnesota. She further rejected a claim made by private landowners in the proceeding that treaty rights only extended to full-blooded Chippewa and determined that the Bands' rights throughout the ceded territories were not limited by historic use or occupancy.
[192] *Mille Lacs Band of Chippewa Indians v. Minnesota,* 861 F.Supp. 784, 784 (D. Minn. 1994) [hereinafter *Mille Lacs II*]. *Mille Lacs II* made up the substantive body of Phase I of the litigation, which recognized the ongoing treaty reserved rights and rejected the State's arguments that various actions had diminished or extinguished those rights.
[193] *Mille Lacs II*, at 784.
[194] *Mille Lacs II.* at 823-35.

The second phase of litigation determined resource allocation issues and the validity of particular measures to regulate the exercise of rights.[195] This phase of litigation covered significant ground; Judge Murphy's decisions included guidance for how to determine and resolve conflicts over harvestable surplus levels of fish and wildlife,[196] dealt with the geographic scope of treaty rights,[197], and touched on potential conflicts over allocation and entitlement to resources.[198] The District Court further held that the State failed to demonstrate its controlling interest in regulating harvestable surplus, apportioning boundary lakes, night hunting using the shining method, and the use of gillnets in a small portion of lakes under 1,000 acres.[199]

In these cases, the District Court laid out the federal legal standard for state regulation of Indian usufructuary rights.[200] Relying on *LCO IV*, Judge Murphy held that the State may assert regulatory privilege to ensure public health and safety if the regulations are not discriminatory against the Indians, and are "reasonable and necessary

[195] *Mille Lacs Band of Chippewa Indians v. Minnesota*, 952 F.Supp. 1362, 1366 D. Minn. 1997) [hereinafter *Mille Lacs IV*]. *Mille Lacs IV* serves as the substantive beginning of Phase II, the regulatory portion of the decision.
[196] *Mille Lacs IV*, at 1371, 1396.
[197] *Mille Lacs IV*, at 1376–79 (that treaty rights could be exercised throughout 1837 ceded territory, including the entirety of lakes only partially within ceded territory and exercise of treaty rights on private lands would be limited to those open to public through state laws and regulations; state hunting and fishing regulatory statutes could not be applied to Band members exercising treaty rights pursuant to Band regulation).
[198] *Mille Lacs IV*, at 1395–96 (barring circumstances of deprivation of meaningful opportunity to harvest any resources, no determinations would be made for allocation of resources, and "moderate standard of living" doctrine could not apply to reduce the Bands' entitlement to resources).
[199] *Mille Lacs IV*, at 1369–84.
[200] *Mille Lacs II*, 861 F.Supp. at 838–39; *Mille Lacs IV*, 952 F.Supp. at 1369.

to prevent or ameliorate a substantial risk to the public health or safety."[201] The State must also demonstrate that the regulation is "a reasonable and necessary conservation measure *and* its application to the Indians is necessary in the interest of conservation."[202] However, the State may not impose its own regulations if the Band can effectively self-regulate and if tribal regulations can sufficiently meet conservation, public health, and public safety needs.[203]

The United States Eighth Circuit Court of Appeals affirmed all prior decisions, holding that the 1837 Treaty remained good law.[204] After the Eighth Circuit Court of Appeals upheld the lower court decisions in favor of the Bands, the State of Minnesota appealed to the United States Supreme Court.[205] The Supreme Court decision, written by Justice Sandra Day O'Connor, primarily focused on the issues arising out of Phase I

---

[201] *LCO IV*, at 1241–42.
[202] *Antoine v. Washington*, 420 U.S. 194 (1975).
[203] *United States v. Michigan*, 653 F.2d 277, 279 (6th Cir. 1981); *LCO IV*, at 1241–43; *United States v. Washington*, 384 F.Supp. 312, 340–42 (W.D. Wash. 1974). Meanwhile, in 1995, the Fond du Lac Band of Lake Superior Chippewa appeared before the Eighth Circuit Court of Appeals similarly seeking to enjoin the State of Minnesota from enforcing state fish and game laws against Band members (*Fond du Lac Band v. Carlson*, 68 F.3d 253 (8th Cir. Minn. 1995)). In 1996, the District Court for Minnesota granted the State's request to consolidate the Phase II proceedings of the *Mille Lacs* case and the 1837 treaty portions of the Phase II proceedings of the *Fond du Lac* case (*Mille Lacs Band v.* Minnesota, Case No. 3-94-1226 (D. Minn., June 11, 1996). The 1854 treaty portions of *Fond du Lac v. Carlson* (Case No. 5-92-159 (D. Minn., March 18, 1996) remained separate).
[204] *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904, 934 (8th Cir. 1997) [hereinafter *Mille Lacs V*]. In a non-binding portion of the opinion, the Circuit Court also commended the State of Minnesota and the Bands for their cooperation and agreement with regards to the Conservation Code and Management Plan established alongside the Phase II litigation (*Id*., at 934).
[205] *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 193–95 (1998) [hereinafter *Mille Lacs VI*].

litigation, and upheld the Court of Appeals' decision, finding that President Taylor's Executive Order of 1850 did not terminate usufructuary rights under the 1837 Treaty.

The State of Minnesota argued that its admission to the Union in 1858 abrogated the rights established in the 1837 treaty, because the enabling act of statehood meant to put Minnesota on "equal footing with the original States in all respects."[206] Treaty rights interfered with the state's regulation of natural resources, and therefore the statehood accession would only be "on equal footing" if it trumped the usufructuary rights.[207] The Supreme Court countered that Treaties signed by the United States government were federal matters, not automatically abrogated by the admission of states to the Union, nor the omissions of state enabling acts.[208] Further, the Court held that because treaties are a federal instrument, ratified by Congress, there must be "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty."[209] This burden was not met with Minnesota's statehood-enabling Act.[210]

[206] *Mille Lacs VI*, at 203.
[207] *Mille Lacs VI*, at 203–05.
[208] *Mille Lacs VI*, at 203. For more on the relationship between state enabling acts and Indian Law and policy, *see* Wilkins 1998.
[209] *Mille Lacs VI*, at 202–03 (citing *United States v. Dion,* 476 U.S. 734, 740 (1986)).
[210] The prior Courts also reviewed the State's argument that the Mille Lacs Band of Chippewa Indians relinquished 1837 usufructuary rights when it signed the 1855 Treaty. The Supreme Court held that the 1855 Treaty did not terminate Chippewa usufructuary rights. We agree, but will not address this argument in this Opinion. The issues that are particularly relevant to this Court, namely the Band's ability to rely on rights codified in treaties, and the Band's capacity to effectively regulate resources, are dealt with in this Opinion, without including the 1855 Treaty discussion.

Despite the holdings of prior courts, the state and landowners continued to assert that the 1837 Treaty was made temporary by the language "during the pleasure of the president," and was extinguished by the 1850 Executive Order. The Supreme Court affirmed prior lower court holdings that a President's power to issue an Executive Order must be rooted either in an Act of Congress, or the Constitution,[211] and that the 1850 Executive Order was neither statutorily nor constitutionally authorized by the Removal Act of 1830 or any other legal instrument.[212] While the Seventh Circuit Court of Appeals in *LCO I* laid out fairly specific conditions for revoking treaty rights under the "pleasure of the president" provision, the Supreme Court elected to leave the "pleasure of the president" question unresolved.[213]

The Court also considered the scope of the regulatory questions (though not the substance) that were dealt with in Phase II of the litigation at the District Court level. The Court held that the State's interest in regulating wildlife and natural resources must be held in tension with the Federal Government's enumerated powers, including treaty-making.[214] Justice O'Connor writes:

---

[211] *Mille Lacs VI*, 526 U.S. at 193–95. Citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952).
[212] *Mille Lacs VI*, at 188–95.
[213] In *LCO I*, the Seventh Circuit held the 1850 Removal Order invalid because it exceeded the scope of the language in the 1837 Treaty (*LCO I*, at 358–63). The Supreme Court in *Mille Lacs* takes a similar approach, but unlike the court in *LCO I*, it left open the question of which conditions would have justified abrogation or removal under the terms of the 1837 treaty (as you'll recall, the Seventh Circuit found that the only triggering condition would have been misbehavior by the Indians), focusing only on the unseverability of the unlawful removal order from the abrogation of usufructuary rights in the 1850 Executive Order.
[214] *Mille Lacs VI*, at 204.

> …Indian treaty rights can coexist with state management of natural resources…Here, the 1837 Treaty gave the Chippewa the right to hunt, fish, and gather in the ceded territory free of territorial, and later state, regulation, a privilege that others did not enjoy. Today, this freedom from state regulation curtails the State's ability to regulate hunting, fishing, and gathering by the Chippewa in the ceded lands. But this Court's cases have also recognized that Indian treaty-based usufructuary rights do not guarantee the Indians "absolute freedom" from state regulation.[215]

The Supreme Court's standard for state regulation differed slightly from those articulated by Chief Judge Crabb in *LCO IV* and Judges Murphy and Davis in prior iterations of the *Mille Lacs* cases. According to Justice O'Connor, the state may have authority to "impose reasonable and necessary nondiscriminatory regulations on Indian hunting, fishing, and gathering rights in the interest of conservation."[216] While the Court does not pursue the issue of state regulation any further, it leaves intact the balance struck by the lower courts in the Phase II cases, which provided that the State could not impose regulations if the Bands had implemented self-regulations that met the State's existing conservation, public health, and safety concerns.[217]

---

[215] *Mille Lacs VI*, at 204. Citing *Missouri v. Holland*, 252 U.S. 416 (1920); *Kleppe v. New Mexico*, 426 U.S. 529 (1976); *United States v. Winans*, 198 U.S. 371, 382–84 (1905); *United States v. Forty-three Gallons of Whiskey*, 93 U.S. 188 (1876); *Menominee Tribe v. United States*, 391 U.S. 404 (1968); *Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985).
[216] *Mille Lacs VI*, at 205.
[217] *Mille Lacs II*, 861 F.Supp. at 838–39; *Mille Lacs IV*, 952 F.Supp. at 1369.

Shifting the Jurisdictional Landscape

These two series of cases had profound impacts for the Bands, by affirming a broad legal understanding of ongoing treaty rights and by shaping the mundane regulatory practices of States and Bands managing and harvesting resources in the ceded territories. Wilkins and Lomawaima highlight several of the broad impacts of the Supreme Court's decision:

> First, the Court reaffirmed a long-standing (if not always supported) doctrine that Indian treaty rights cannot be *implicitly* terminated. That is, treaty rights may only be abrogated by Congress, and only when Congress unequivocally expresses its intent to terminate the rights.[218] Second, the Court explicitly reaffirmed two canons of treaty construction: that Indian treaties are to be interpreted liberally in favor of the Indians and any ambiguities in language are to be resolved in the tribes' favor. Third, the Court forcefully reminded the states that they were without inherent power over Indian rights or resources and denied the power of the "equal footing" doctrine to extend state jurisdiction over Indians. The fact that territories were admitted to statehood on an "equal footing" with existing states did not give the states any constitutional or statutory powers over Indians, and certainly not powers over Indians exercising treaty-specified rights. The Court held that the equal footing doctrine, which had been recently revived in federal court discourse, did not interfere with the federal government's authority to control the national's Indian affairs under the commerce clause, the property clause, the supremacy clause, and the treaty-making authority stipulated in the Constitution. Finally, the majority implicitly overruled *Ward v. Race Horse*, the 1896 ruling that had upheld states' rights over Indian treaty rights.[219]

[218] As I'll discuss in the next section, I argue that the Supreme Court, unlike the lower District Courts, equivocated more on this point that Wilkins and Lomawaima acknowledge, creating potential vulnerabilities for future litigation of treaty rights where the treaties include the "pleasure of the president" qualification.
[219] Wilkins & Lomawaima 2001, at 138–139.

These cases undercut what Wilkinson refers to as a "well-worn homily: that states "own" wildlife. Rather than ownership, wildlife management is analyzed in terms of which government has jurisdiction—that is, regulatory authority."[220] The recognition by the courts in these cases that tribes retained the jurisdiction over resources in the ceded territories could be interpreted as the first step in reframing the 'ownership' and 'use' relationships to resources discussed in later chapters. Further, the Supreme Court's rejection of the State of Minnesota's "equal footing" defense reflected a position of tension that the Bands occupy, both within and outside of the federalist hierarchy. In leveraging that argument, the state was appealing to an interpretation of a state / federal relationship to which the tribes, and their treaties, were wholly subordinate. In rejecting this interpretation, the Court reaffirmed that the federal relationship with the tribes predated and, to a degree, superseded the State's position in the federation.

David Delaney argues that federalism in the U.S. is "a way of framing questions about power" that enable an imaginary of "two conceptually distinct "states" or "jurisdictions" that occupy the same segment of the physical world."[221] The jurisdictional divisions that made it appealing for Anishinaabe Bands to litigate their grievances against the States in federal courts are made up of something structural, to be sure, but they also reflect the shifting tensions of jurisdictional boundaries that are made real through negotiation, and given meaning in contestation. When we think about federalism as a lively compromise, we create the conceptual space to understand the Bands as operating

[220] Wilkinson 2005, at 150-151.
[221] Delaney 1998, at 57.

in, utilizing, shaping—but never wholly subsumed by, or beholden to—the political constructs of the settler state.[222]

But these broad questions about federalism and jurisdictional boundaries also demand a reckoning with the fact that many of the most prominent Indian law cases, particularly when they are elevated to the Supreme Court are actually decided as questions about the relationship between federal and state authority, rather than questions of Indigenous sovereignty or legal rights. Wilkins and Lomawaima identify this dynamic as it played out in the *Mille Lacs* case:

> When Minnesota challenged treaty-reserved rights, it challenged federal authority to control the nation's Indian affairs (to repeat, authority established under the Constitution's commerce clause, property clause, supremacy clause, and treaty-making authority). As we have seen, the Court does not usually countenance this type of challenge to federal and constitutional authority.[223]

While the initial phases of these cases recognized the Bands as capable jurisdictional actors with authority to co-manage resources in the ceded territories, these cases are just the beginning of new relationships between the States and Bands; the real work of jurisdiction occurs in each negotiated memorandum of understanding, harvest allocation dispute, and act of regulatory boundary pushing between the Bands and the state.

[222] Ramesh Dikshit argues that federalism is "essentially a compromise between centripetal and centrifugal forces." Dikshit 1971, at 101.
[223] Wilkins & Lomawaima 2001, at 140.

As a matter of daily practice, the *LCO* and *Mille Lacs* decisions have produced relationships between the states and Bands that require the parties to come together to negotiate the particularities of harvest allocations, wildlife population monitoring, and resource stressors in the ceded territories. While many of the Bands that were parties to the litigation had already started to establish resource management departments in the 1970s and 1980s, these cases contributed to an expansion of robust tribal data collection and resource management protocols, so as to remain in compliance with the courts' mandates in the regulatory phases of the cases. But beyond that, these cases made clear that the federal judiciary recognized what the Bands had been saying all along—that they had the capacity, knowledge-base, and expertise that was commensurate with (and according to many Band members, superior to) the States' resource protection frameworks.

In the intervening years since the Supreme Court's *Mille Lacs* decision, the Bands in the 1837, 1842, and 1854 ceded territories have largely relied on negotiated agreements with the States of Minnesota, Wisconsin, and Michigan. Organizations such as GLIFWC, the 1854 Treaty Authority, the Great Lakes Inter-Tribal Council, and other inter-tribal organizations, have emerged as important confederacies for producing research, providing resource management support, and coordinating between the various treaty-signatory Bands to interface with state actors and agencies. The States of Minnesota and Wisconsin have begun to develop—at times begrudgingly—inter-tribal working groups, state to state consultation measures, and tribal liaisons in various

agencies. Within each state, different agencies maintain different levels of engagement and different standards for consultation with the Bands, and more effective state-band relationships tend to be initiated by particular individuals, rather than institutional structures.

While a number of disputes in recent years have raised the specter of litigation, many of the Anishinaabe Bands in the region have focused on negotiating conflicts. In November of 2018, the Fond du Lac Band signed a Memorandum of Understanding with the State of Minnesota that memorialized and institutionalized existing protocols for managing treaty resources, and established mutually-binding systems for communication, information sharing, data collection, harvest allocation, and dispute resolution in the ceded territories. The Lac Courte Oreilles Band has remained more active in the courts, and in 2014, they won a unanimous appeal before the Seventh Circuit, which reversed Judge Crabb's 1991 decision in *LCO IX*, and recognized the Bands' authority to conduct and regulate winter nighttime deer hunts using shining and other methods.[224]

Each of these cases acknowledged that the Bands retained the authority to practice their treaty rights and to regulate the conduct of their Band members harvesting in the

[224] *Lac Courte Oreilles Band v. Wisconsin*, No. 14-1051 (7th Cir., Oct. 9, 2014). The Seventh Circuit decision, written by Judge Richard Posner focused less on the treaty rights outlined in previous cases (in fact there are only two references to the word 'treaty' in the entire opinion), and more on changing circumstances, namely that deer populations had spiked and chronic wasting disease in deer populations posed an increasingly grave concern, leading to increased night hunting by State officials. That, coupled with the exemplary safety record of tribal night hunting on-reservation in Wisconsin, and in the ceded territories of Minnesota, Michigan, Oregon, and Washington. The court did not find the State's counter-arguments to limit Band member hunting in the interest of public safety to be a compelling justification for restraining tribal treaty rights.

ceded territories. While these cases, in broad terms, are largely viewed as wins for the Bands, the process of litigating in federal courts involved compromises. Further, the analysis by the federal courts in these cases heighten certain vulnerabilities for the Bands and highlight some fundamentally different interpretations of how the Tribes function in relation to the structures of American federalism.

Part III. The Cartography of Construals

David Delaney argues that legal argument is similar to cartographic mapping, "in that it is an attempt to reduce the complexity and ambiguity of the world to plausible, practical simplifications and clarifications. But there are many ways to simplify and clarify or *construe*." These different construals, which judges make through strategic acts of clarification and simplification are measured, according to Delaney, in their radically different impacts on people and communities: "The possible construals put forth in legal argument can be considered alternative renderings of the legal landscape."[225] According to political philosopher Dale Turner, "[w]e cannot hope to fully understand the meaning and content of Aboriginal rights without understanding first how colonialism has been woven into the normative political language that guides contemporary…legal and political practices."[226]

In the preceding cases, the various judges and justices who contributed to the legal record rendered the legal landscape in such a way as to compel the states of

[225] Delaney 1998, at 23.
[226] Turner 2006, at 30–31.

Minnesota and Wisconsin to recognize the jurisdictional authority and legitimate resource interests of tribes, and to bind the states to work with tribes in the complex jurisdictional space of the ceded territories. But these renderings were also colored by the U.S. legal system's assertion of supreme sovereign authority in these matters. The court's interpretation of sovereignty produces a legal landscape in which tribes are recognized as distinct political entities but remain beholden to the tripartite branches of the federal government for the maintenance of their treaty rights vis-à-vis the states. In the following section, I will assess the constraints and vulnerabilities for tribes as a result of these cases and attend to the disparate interpretations of treaty-meaning that come out of the courts, with consequences for how tribes assert and maintain multi-jurisdictional relationships in the ceded territories.

Disrupting the Hierarchy of Law in the Mille Lacs & LCO Cases

While contemporary opinions may not always adopt the directly patronizing tone of Marshall's "domestic dependent nations" characterization, the decisions above rely, often implicitly, on many of the same underlying principles—that the Doctrine of Discovery provided a justifiable claim to sovereignty, that the Plenary Power and Trust Doctrine are the foundational governing relationships between the U.S. and the Bands, that tribal sovereignty is necessarily subordinated to other entities in the federalist hierarchy; contemporary cases also sometimes contradict foundational precedent in assuming that the treaties granted something *to* the Bands, rather than *from* them to the

federal government. These underlying *'unspokens'* matter, insofar as they provide the philosophical limits for how the federal courts understand tribal authority, sovereignty, and the scope of the treaty relationship.

This is evident in the Seventh Circuit analysis of *LCO I* in the court's discussion of aboriginal vs. treaty -recognized title:

> Aboriginal title is the right of native people in the new world to occupy and use their native area. The United States' sovereign rights to the land within its borders was subject to the aboriginal title of the various Indian tribes. The United States could, however, extinguish aboriginal title at any time and by any means. The United States did not need to compensate the Indians for the taking of such title. Essentially, aboriginal title was title good against all but the United States. "Treaty-recognized title" is a term that refers to Congressional recognition of a tribe's right to permanently occupy land. It constitutes a legal interest in the land and, therefore, could be extinguished only upon the payment of compensation. The Supreme Court made it clear that abrogation of treaty-recognized title requires an explicit statement by Congress or, at least, it must be clear from the circumstances and legislative history surrounding a Congressional act.[227]

There are a few important philosophical framings implicit in this statement. First, that the United States' mere claim to sovereignty trumped the 'title' that was vested with American Indian nations. So, even to the extent that the U.S. and federal courts recognize tribal sovereignty, it is always already subordinated to the superior power of the sovereign that can extinguish "aboriginal" claims to territory without compensation.

[227] *LCO I*, at ¶¶ 73–75 (in-line citations removed). For discussion of aboriginal title, *see e.g.* Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955). For discussion of compensation for violations of treaty-recognized title, *see e.g.* United States v. Sioux Nation, 448 U.S. 371 (1980). For discussion of Congressional treaty abrogation, *see*, Mattz v. Arnett, 412 U.S. 481 (1973).

Second, that through negotiating the treaties, the U.S. first recognized the tribal nations and gave them legal authority, and then obligated itself to a relationship with them by virtue of signing the treaties. In other words, treaty rights have greater legal weight because the U.S. deemed fit to negotiate them. And finally, even though the U.S. recognized the tribes as entities competent to enter into vast contractual agreements with the U.S., it reserved the power to terminate these contracts to a branch of its own government, with little or no recourse for the tribes.

"During the pleasure of the President": Interpretations of Abrogation

The Seventh Circuit court relied on the historical record and treaty journals to determine that the temporary condition assumed by the "during the pleasure…" language was meant to apply to potential removal if the Bands misbehaved. The Supreme Court similarly found that the Removal Order was not validated by any act of Congress, nor in the language of the treaty itself, but did not spend any time on the question of whether the treaty envisioned removal as a consequence for misbehavior. Rather, the Supreme Court focused on the mechanics of the Order itself. The State argued that the removal portion of the order was severable from the portion that abrogated the treaty rights, and was thus a lawful limitation of the rights under the qualifying language of the treaty.[228] The Court

[228] *Mille Lacs VI*, at 189–195. Having never considered the question of the severability of an executive order, the Court relied on the rules for determining the severability of statutes, finding it essentially a question of legislative intent: "Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Champlin Refining Co. v. Corporation Comm'n of Okla.*, 286 U.S. 210, 234 (1932).

rejected this argument, determining that the 1850 order "embodied a single, coherent policy, the predominant purpose of which was removal of the Chippewa from the lands that they had ceded to the United States."[229] Finding no other purpose for revoking the treaty privileges, except for the unlawful removal, the Court held that the 1850 order was unseverable and thus inadequate to terminate the treaty rights.[230] Justice O'Connor writes:

> We do not mean to suggest that a President, now or in the future, cannot revoke Chippewa usufructuary rights in accordance with the terms of the 1837 Treaty. All we conclude today is that the President's 1850 Executive Order was insufficient to accomplish this revocation because it was not severable from the invalid removal order.[231]

While the Court intentionally did not reach the question of what abrogation "in accordance with the terms of the 1837 Treaty" means, the decision appears to provide

[229] *Mille Lacs VI*, at 191.
[230] In his dissent, Chief Justice Rehnquist argued that the removal order should be severable from the portion of the order abrogating treaty rights, based on the strong presumption supporting the legality of executive action, and argued that the qualifying language of the treaty explicitly authorized this kind of action. Justice Clarence Thomas's dissent considered the impacts of the majority decision regarding the state's preclusion from regulating the Bands exercise of treaty rights, arguing that "any limitations that the Federal Treaty may impose upon Minnesota's sovereign authority over its natural resources exact serious federalism costs." *Mille Lacs VI*, at 221 (Thomas, J., dissenting). Thomas's objection focused on the plain language of the treaty, as well as the historical evidence, which made no mention of territorial, or future, state regulation. This analysis hinges on the language of the 1837 treaty, in which the Anishinaabe reserved the *privilege* of hunting, fishing, and gathering, rather than the *right*. Thomas points to the U.S.'s 1859 Treaty with the Yakima Indians, in which the treaty specified the word 'right' to describe the hunting and fishing provisions. *Id.*, at 223. The majority opinion countered that, given the interpretive requirement that treaties be interpreted as they were understood by the Indians, there was no evidence or justification for assuming that the Anishinaabe negotiators had any understanding of the fine legal distinction between rights and privileges. *Id.*, at 206 (majority opinion).
[231] *Mille Lacs VI*, at 194–95.

much more deference to the "pleasure of the president" than the analysis in *LCO I*, which held that treaty-abrogation was a Congressional matter and thus treaties must be explicitly and intentionally abrogated by Congress (either in plain language or as determined the weight of the Congressional record on the matter).[232] While the Supreme Court decision reflects the principle that "Congress must clearly express an intent to abrogate Indian treaty rights,"[233] it also finds that that the rights reserved in the 1837 treaty could terminate, "when the exercise of those rights was no longer the 'pleasure of the president.'"[234] This suggests a potentially more discretionary standard with regard to presidential authority than what was envisioned in the lower court. Further, as stated above, the Seventh Circuit found that the treaty record suggested that the only condition contemplated for loss of the reserved rights in the negotiations was the behavior of the Indians, thus creating a circumstance in which the Bands had at least some control over their position and rights. The Supreme Court suggests no room for interpreting the Bands behavior as relevant to extinguishment of the reserved rights, and further suggests that, if a president were to issue an executive order that did not include unlawful conditions, Congress may have already implicitly granted that authority in the language of the treaty. The Supreme Court decision is careful not to make any concrete determination on this issue, and thus the stricter requirements for Congressional abrogation remain the standard in the Seventh Circuit and other circuits where similar precedent exists.

---

[232] *LCO I*, at ¶ 119–146, 170.
[233] *Mille Lacs VI*, at 173. Citing *U.S. v. Dion*, 476 U.S. 734, 738–40 (1986).
[234] *Mille Lacs VI*, at 207.

Both the 1842 and 1854 treaties contain similar limiting clauses: Article II of the Treaty with the Chippewa, 1842 reads: "The Indians stipulate for the right of hunting on the ceded territory, with the other usual privileges of occupancy, *until required to remove by the President of the United States*, and that the laws of the United States shall be continued in force, in respect to their trade and intercourse with the whites, *until otherwise ordered by Congress*." (emphasis added). Treaty with the Chippewa, 1854, Article 11 reads: "And such of them as reside in the territory hereby ceded, shall have the right to hunt and fish therein, *until otherwise ordered by the President.*" (emphasis added). If future courts favor the Seventh Circuit's requirement of explicit Congressional abrogation and mandated compensation for the Band's extinguished rights, that creates a significantly higher bar than executive discretion. But even this higher standard would constitute a unilateral breach of an agreement by one party and undermine Anishinaabe understandings of the treaty relationship as rooted in an ongoing commitment of mutual respect, responsibility, and renewal.[235]

"The minute you start to write … it…, you limit it": Treaty Rights as Sovereign Rights

In an interview with staff members at GLIFWC, a policy analyst stated that the tribes and GLIFWC had been so successful at asserting the tribes' treaty-protected practices (hunting, fishing, gathering), that treaty rights had come to be interpreted by courts and the public as synonymous with hunting, fishing, and gathering, when really

[235] Stark 2010, at 156.

treaties were about sovereignty. In these recent cases, the Courts tend to more narrowly focus on reserved usufructuary rights and only broadly touch on the foundational relationship upon which the United States acknowledged the tribes as legitimate negotiating partners. Anishinaabe leaders in the region have consistently maintained that their sovereignty precedes and exceeds the treaties and their relationships with the settler state. They made strategic decisions through the treaties to relinquish certain rights to the United States—such as the right to occupancy in the ceded territories—in exchange for certain grants. But they never ceded their sovereign authority to make decisions on behalf of their own communities. Thus tribal sovereignty exists independent of the federal structure, but by necessity must function in relation to it. When tribes have acceded to the jurisdiction of the federal courts and federal government, legal scholar Matthew L.M. Fletcher argues that they have merely consented to that jurisdiction, and not to the wholesale absorption of their sovereignty into the federalist structure.[236]

I had the privilege of attending an inter-tribal meeting of resource managers and community leaders in January of 2017, during which a discussion arose about what treaty rights meant to each of the participants. As they went around the table, a number of the speakers highlighted Anishinaabe values of taking only what one needs, providing for family and community, upholding the tradition of a respectful relationship with the animals and plants that are harvested. Some expressed frustration that young people thought of treaty rights as only related to hunting and fishing. A Chairman from one of

[236] Fletcher 2010.

the member Bands emphasized that treaty rights were much more than that. Treaty rights are about "sovereignty, nationhood, where the whole is greater than the sum of its parts."

An Elder from another band spoke in detail about how the rights reserved in the treaties were far more than what was written on the paper in the mid-1800s. The first treaties, he noted, were those of creation, the universe, the clan systems. These first treaties established the obligations and responsibilities that are the foundation of a self-regulatory system and are taught through stories and reminders of how to maintain the whole structure of creation. What was established in the written treaties was an agreement for respecting other sovereigns and taking responsibility for one another. But those agreements are now understood to be a place where different sets of values are clashing. While the specific rights delineated in the treaties may have been the rights to hunt, fish, and gather, the Elder contended that what was intended in reserving them was actually the preservation of a way of life, embodied by a collective responsibility to the resources and Anishinaabe people. A former tribal chairman and one of the leaders of the treaty spearing movement in Wisconsin in the 1980s and 1990s, argued that the Bands had to use all of the tools available to them to preserve that way of life, and that the litigation was just one of those tools, but was bolstered by the spiritual and traditional practices that guided the communities throughout the walleye conflicts.

While the courts weigh the degree to which the tribes' authority may be recognized in regulating treaty resources, many tribal leaders view the court cases not as a recognition of their own authority, but a recognition of the limits of the states'

authority. These court decisions do not grant anything that the tribes did not already possess; but they do hold the states and the federal government to their obligations and responsibilities under the agreements that were signed and validated by the U.S.'s own laws and constitutional mandates.

There remains an anxiety among some tribal leaders, though, that the mandates and requirements for demonstrating regulatory capacity that were established in the preceding cases further impinge sovereign practice. As one Elder argued at that meeting, "The minute you start writing down what [sovereignty] means, you start limiting it. Writing these codes starts to limit tribal sovereignty." This tension is something that Band members throughout the region are working to reconcile. While the trappings of data collection and record sharing and harvest regulations bolster Bands' legal arguments and bargaining position with state and federal agencies, there is, for some, a tangible loss in the Bands' ability to govern themselves as they see fit. Further, the fact that the *LCO* cases were only litigated through the Seventh Circuit Court of Appeals, means that the very particularized regulatory holdings in those cases are not binding upon the states of Michigan (which is in the Sixth Federal Circuit) or Minnesota (in the Eighth Circuit). While the *Mille Lacs* cases lay out broadly similar mandates for state/tribal co-management,[237] the jurisdictional structure of the federal court system poses challenges

[237] The Supreme Court holding in *Mille Lacs* is technically binding upon all lower courts, but this holding only found that the treaty rights persisted, had not been extinguished by Minnesota's statehood, subsequent treaties, or the 1850 Executive Order, and that the State's regulatory interests were thus limited. All of the detailed regulatory provisions were established by lower courts and are thus not binding for other federal jurisdictions.

for establishing a common inter-tribal regulatory framework that exists throughout the ceded territories, and resists giving undue credit to the "artificial boundaries of the states."

Even in the aftermath of the *Mille Lacs* case, the State of Minnesota continues to fine Band members exercising their treaty rights in the 1855 ceded territories, calling to mind Vine Deloria's proposition that court holdings dealing with Indian tribes are inconsistently interpreted as over-inclusive when they deal with rules restricting Indian behavior[238] or under-inclusive when they recognize Indian's rights.[239] While the 1855 signatory Bands are awaiting an opportunity to litigate the cases of members ticketed for harvesting in the ceded territories, the State has strategically declined to prosecute Band members, and thus the next phase in treaty-rights litigation in the state remains a future prospect. Meanwhile, a number of Bands have codified reserved treaty rights in their own ordinances as an expression of their sovereign authority. The Fond du Lac Band's Ordinance for Gathering in the 1837 and 1842 Ceded Territory, for instance, establishes that the Band's regulatory code is enacted "pursuant to the inherent sovereign authority of the Fond du Lac Band of Lake Superior Chippewa, as reserved under the Treaty of

[238] Deloria 1996, at 966–969 (citing *Duro v. Reina*, 495 U.S. 676 (1990), in which the Courts holding that the tribe had no jurisdiction over Indians who were not tribal members was binding for all tribes, even if their treaties provided otherwise (this holding was later overturned by Congress in 1991 with the "Duro Fix", which restored tribal jurisdiction over non-member Indians), 25 U.S.C. § 1301)).

[239] Deloria 1996, at 966–969 (noting that treaty rights cases tend to bind only language in specific treaties signed by specific tribes and do not provide a blanket recognition for sustained treaty rights).

LaPointe…"[240] The Mille Lacs Band goes farther, drawing upon its sovereign authority to hold the U.S. accountable to its duties under the treaties. Title 2 of the Mille Lacs Band's Statutes include a section on treaty rights, which reflects the U.S. governments obligations: "The Band Assembly hereby declares that the United States of America is possessed of a legal and moral obligation to guarantee usufructuary rights of members of the Mille Lacs Band of Chippewa Indians by virtue of Congress ratification of the Treaty of 1837."[241]

Shiri Pasternak argues that jurisdiction is "the *authority to have authority*", which means that "the very substance of what *authorizes* law is at stake."[242] The Bands discussed above do not root their own jurisdictional or legal authority in the treaties themselves—that authority predates the treaties and any relationships with the U.S. They likewise do not recognize the federal court decisions as *granting* them authority or extending authority to them. Rather, the federal court decisions, and the treaties themselves, are useful because the bind the States and federal governments to recognize that this authority exists. And, as we'll see in the following chapters, that recognition compels the states to account for tribal jurisdiction and authority in regulatory and administrative decision-making throughout the ceded territories.

---

[240] Fond du Lac Band of Lake Superior Chippewa, Ordinance #03/12, 1837 and 1842 Ceded Territory National Forest Gathering Code.
[241] Mille Lacs Band Statute 1056-MLC-24, §1.02.
[242] Pasternak 2017, at 5.

Part IV. Treaties Take on New Life

In this chapter, I have argued that the litigation of treaty-rights cases in the 1980s and 1990s in the larger Great Lakes region has given new life to the treaties negotiated between the Anishinaabe Bands and the U.S. government in the 1800s. The treaties and subsequent litigation were jurisdictional activities—establishing the boundaries of authority and the terms of negotiation between multiple sovereigns. They also produced the jurisdictional relationships that give rise to the conflicts and controversies we will see in the coming chapters. The treaties created certain relationships and expectations—many of which remain unmet. The litigation restored the treaties' relevance as a tool for asserting Tribal jurisdiction beyond the bounds of the reservation. While this litigation has recognized the ongoing existence of Bands' treaty rights and authority to co-manage resources with states in the ceded territories, the federal opinions still articulated treaty rights in a way that subordinated tribal sovereignty and is often contrary to the way that Band members themselves view the reserved rights and obligations laid out in the treaty-making processes. As I will discuss in Chapter 5, there remains much work to be done to shift the ways in which the federal judiciary conceptualizes Indigenous law and polities. Nevertheless, by reframing the jurisdictional relationships between Tribes and the States, the treaty rights litigation opened the door to additional expressions of Tribal jurisdiction and new, jurisgenerative approaches to resource law.

CHAPTER 3

"Regulatory Ontologies": Wild Rice, Sulfate, and Scientific Legitimacy

> For a long while, I am only interested in the visual experience of standing at eye level with the central figures on the rock. They are simple and extremely powerful. One is a horned human figure and the other a stylized spirit figure who Tobasonakwut calls lovingly, the *Manoominikeshii*, or the wild rice spirit. Once you know what it is, the wild rice spirit looks exactly like itself. A spiritualized wild rice plant. Beautifully drawn, economically imagined…This year, on Lake of the Woods, the rice looks dismal…There will not be enough reserve strength left in the plant to produce a harvest. "And then," Tobasonakwut goes on, "if your parents had no children, you can't have children." In other words, the rice crop will be affected for years. So perhaps this year it is especially important to ask for some help from the Manoominikeshii.
>
> -Louise Erdrich, *Books and Islands in Ojibwe Country*: 51.

> The toxicity of elevated sulfide to freshwater plants was first recognized in paddy-grown white rice (Oryza sativa) in the 1950s. Rice paddies and other water-saturated soils present a profound challenge for rooted plants because of the chemical changes caused by the absence of oxygen and resulting potential toxicity of the pore water… The concentration of sulfide in pore water is the balance between production and competing fates of sulfide, including precipitation with metals such as Fe, oxidation by oxygen introduced by bioturbation or by release from the roots of macrophytes, and by downward advection of surface water due to groundwater movement or transpiration by dense macrophyte stands.
>
> -A. Myrbo, et al. "Sulfide Generate by Sulfate Reduction is a Primary Controller of the Occurrence of Wild Rice (*Zizania palustris*) in Shallow Aquatic Ecosystems": 2737 (internal citations omitted).

On May 25, 2017, Robert Larson, President of the Lower Sioux Indian Community and Chairman of the Minnesota Indian Affairs Council, sent a letter to John Linc Stine,

Commissioner of the Minnesota Pollution Control Agency. The subject of Mr. Larson's letter on behalf of the Minnesota Indian Affairs Council (MIAC), was the state of Minnesota's efforts to revisit the 'Wild Rice Rule', a water quality standard to protect wild rice in the state. Larson's letter highlighted the immense significance of the plant and the tensions surrounding the rule-making process:

> Over the past several decades, we have participated in numerous state agency-led initiatives regarding wild rice, from previous rulemaking to identifying management and restoration strategies. Our motivation for sitting down at the table with the state to talk about wild rice has always been to forge a common understanding of how precious this singular resource is, and to reinforce a shared sense of responsibility to protect it for future generations. As we have repeatedly communicated to you and your staff, wild rice or *Mahnomin*, as the Ojibwe people call it, or *Psiå*, as it is known by the Dakota people, is the preeminent cultural resource of this region and central to our cultural heritage. We see the severe diminishment of wild rice across its historic range as a call for stronger and broader protections of remaining stands here in Minnesota, its last refuge in the United States.[243]

Larson goes on to state that, despite the efforts of tribal leadership and community members to share knowledge and information with the MPCA to aid in protecting wild

---

[243] Letter from Robert L. Larson, President, Lower Sioux Indian Community & Chairman, Minnesota Indian Affairs Council to John Linc Stine, MPCA Commissioner, Re: MPCA's Proposed Rule Revisions for Minnesota's Sulfate Standard to Protect Wild Rice, May 25, 2017 [hereinafter MIAC Letter], at 1. Though the official rule proposal was not released until August 2017, Larson was responding to a memo sent by the MPCA to members of the Wild Rice Advisory Committee in October of 2016, which laid out the likely elements of the proposed rule, which was mostly consistent with the official proposal. Memo from Shannon Lotthammer, Division Dir., Environmental Analysis and Outcomes Division, MPCA, to MPCA Advisory Committee Members, Re: Wild Rice Sulfate Standard Rulemaking, Oct. 18, 2016. Available at: https://www.pca.state.mn.us/sites/default/files/p-ac16-10b.pdf [Last Accessed Nov. 20, 2017] [hereinafter Lotthammer Memo].

rice, and despite the fact that "modern" scientific evidence broadly confirmed what tribes had already known about wild rice sensitivity to sulfate, the MPCA had failed to seriously consider and meaningfully incorporate tribal perspectives. Had the MPCA heeded the tribes' advice, Larson writes, they would be in a position to comment on a water quality standard that actually had the potential to protect the precious resource; instead, the MPCA's rule revision incorporated "a complicated, difficult-to-implement equation for deriving site-specific criteria that itself relies upon data that the state currently does not have."[244] Larson concludes the letter by urging the MPCA to reconsider the tribes' recommendations before advancing the final rule revision, stating, "[w]e know it will take all our efforts, working together, to protect wild rice for future generations."[245]

The MPCA began the process of reassessing the sulfate water quality standard in 2010, at the behest of Iron Range legislators. The contentiousness of the rule-making process amplified key fissures in northern Minnesota identity politics—the taconite industry is a primary discharger of sulfate, as are municipal wastewater treatment. While tribes and environmentalists have opposed the MPCA's new proposed approach on the grounds that it is not protective enough and threatens the very existence of wild rice, mining and labor interests have expressed concern that the proposed standard is too burdensome, threatening the region's entire mining economy. While the public discourse often falls along these lines—tribes and environmentalists versus mining and labor—the

[244] MIAC Letter, at 3.
[245] MIAC Letter, at 5.

reality is much more complicated, and alliances that have emerged around certain facets of the debate are unstable and often contested.[246]

The story of Minnesota's sulfate rule-making process is not just a story about an administrative procedure, although it is certainly that. It is a story about a unique and contested regulatory process, designed to protect a single non-human species. It is a story about the significant role that tribes have played in shaping the process and pushing back against the state. It is also about the ways in which participation in this very specific regulatory framework has provided another hook for tribes to assert their jurisdiction and advance their ontological understanding of the ways in which humans should interact with the non-human world. Tribal engagement has also shined a spotlight on the particular ontological orientations of the state's resource policy approach. It is a story about science, politics, sovereignty, complexity, and the dynamic interrelations of nature and society.

In this chapter, I use the MPCA's wild rice rule-making process to argue that regulatory systems are built on particular onto-epistemologies and embedded with specific power structures. In particular, I look at the role of tribal leaders in the regulatory process, and demonstrate that tribal engagement in the process has a) illuminated the particular regulatory ontologies, contradictions and priorities of the state of Minnesota's

[246] At a meeting of tribal resource managers that I attended in the spring of 2018, a water quality specialist lambasted a representative from a state environmental organization because of the way that environmental groups used Manoomin and Indigenous culture as a "silver bullet" against mining proposals, undermining the work of tribes to compel state agencies to enforce water quality standards more broadly.

approach to environmental protection; b) shaped the discursive relationship between science and politics; and c) created fissures in a state-and-industry-centric regulatory process to suggest ontological and jurisdictional alternatives for environmental protection. This chapter charts some of the concrete strategies tribal entities have used to impact the trajectory of environmental rule-making on the state level and argues that tribal influence on this process has demanded attention to the flaws in a regulatory system that only accounts for non-human life in utilitarian and economic terms. I argue that the tribes’ engagement in this process has not only revealed the fissures in the regulatory ontologies that animate state resource protection efforts, but that the alternatives offered by tribal resource managers carry the jurisgenerative potential of alternative socio-environmental futures.

Part I analyzes the historical development of Minnesota’s sulfate rule and maps the contemporary contestations around implementation of the rule, and efforts to amend it through the administrative legal process. In Part I, I also introduce the concept of ‘regulatory ontologies’ to understand the particular ontological presuppositions that are at the foundation of regulatory frameworks in this dispute. In Part II I attend to the ways in which discourses of scientific legitimacy and complexity came to be political around the sulfate standard, and the role that “tribal science” played in the policy debate. Part III digs into the details of state and federal environmental laws and identifies the ways in which the ‘regulatory ontologies’ on which they are built privilege particular types of human/non-human and nature/society interactions. Further, this section charts the ways in which Bands pushed back against these particular ontological positions and advanced

different ways of managing relationships with the non-human world. Finally, Part IV looks to the jurisdictional implications of tribal involvement in the sulfate standard process.

Part I. The Sulfate Standard Revisited

The original 'Wild Rice Rule', passed by the Minnesota Legislature in 1973, established a limit for sulfate in wastewater discharge at 10 parts per million, and was based upon a seventy-year old understanding that sulfate was generally harmful to wild rice.[247] In 1975, the MPCA first invoked the wild rice sulfate restriction in a permit for a steam power plant, but increased the facility's discharge limit to 40-60 mg/L, after opposition to the statutory 10mg/L from Minnesota Power.[248] The fight with Minnesota Power created political challenges for the MPCA, and the standard was not incorporated into another mining discharge permit until 2010, despite the sulfate limit's inclusion in the state's water quality standards developed to comply with the Clean Water Act.

After nearly 10 years of research, data analysis, and discussion sessions between the MPCA, tribes, environmental groups, cultivated wild rice growers, municipal officials, and mining industry representatives and consultants, the MPCA officially

[247] Moyle 1945, 1969, 1975; Moyle & Krueger 1964; Myrbo et al. 2017a. The 10 mg/L sulfate restriction was later adopted into the state's water quality standards under the Clean Water Act. The Fond du Lac and Grand Portage Bands—the two Minnesota bands to hold 'Treatment as a State' (or assumption of federal laws) status under the CWA—also have the 10 mg/L sulfate restriction established in their EPA-approved water quality standards.
[248] *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency* (Dec. 17, 2012, Unpublished), at 4.

released its proposed revision in August 2017. The proposal made many changes to the original rule, but most notably, adopted an algorithm-based standard dependent on multiple ecological and chemical conditions in specific water bodies, rather than the more typical numeric standard.[249] In addition, the proposed rule shifted the regulatory focus from surface water sulfate to porewater sulfide—a chemical compound that can be created when sulfate diffuses into underlying sediment and interacts with bacteria.[250] Both of these modifications reflected the MPCA's efforts to make the policy responsive to the complexity of sulfate's interactions with other elements in aquatic ecosystems. The proposed revision garnered ire from tribes and laborers, mining companies and environmentalists alike, and remains one of the most highly contested acts of administrative rule-making in the state's history.

In the debate about sulfate and wild rice protection, Minnesota tribes have been actively involved in every step of the process. They have financed studies, conducted extensive data collection, participated in the MPCA's Wild Rice Advisory Council to reassess the sulfate standard, have contributed public comments on many mining permits, and established their own water quality standards. Perhaps more importantly, they have also pushed for heightened enforcement of water quality standards and wild rice protection generally, rooted in an understanding of complex and dependent aquatic

[249] The data collected through this process demonstrated that the conversion of sulfate to sulfide was also dependent on the concentrations of carbon and iron in the sediment, so the equation attempted to establish "a protective sulfate value in the surface water based on the iron and carbon levels." MPCA, Statement of Need and Reasonableness, at 12.
[250] MPCA, Statement of Need and Reasonableness, at 66, 72–76.

ecosystems. Nevertheless, Larson's letter expresses a frustration shared among Bands that is reflected in numerous public statements, hearing testimonies, and administrative filings, regarding the state of Minnesota's failure to properly protect water, wild rice, and other resources from the harmful effects of contamination and water pollution. This frustration is compounded by the perception among many tribal leaders that, while the state has consistently highlighted tribal involvement in the process, it has failed to meaningfully incorporate Indigenous perspectives in its rule-making.

Much of the debate around the sulfate standard has focused on the MPCA's approach and the scientific veracity of the data underlying the rule-making. Iron Range politicians and mining industry spokespeople have framed MPCA's approach as an effort to destroy mining in Minnesota.[251] Tribes, environmental groups, and the EPA have suggested that non-compliance with the existing standard puts the state in violation of its obligations under the Clean Water Act.[252] Tribal members, for their part, have warned repeatedly in public meetings and administrative hearings that any degradation of wild rice would amount to an assault on Indigenous communities and cultures in the region: a number of

---

[251] *See e.g.* Dunbar, Elizabeth. 2015. "MPCA seeks lak-by-lake plan to protect wild rice." *MPR News*, March 25, 2015. Available at: https://www.mprnews.org/story/2015/03/25/mpca-wild-rice [Last Accessed Aug. 1, 2018].

[252] Though sulfate is not expressly listed in the CWA, Minnesota included the sulfate limit in its water quality standards, which were approved by the EPA, and are thus a binding standard. Environmental group Water Legacy has petitioned the EPA to withdraw program delegation from the MPCA and state of Minnesota for mining discharge permits, due to the MPCA's failure to enforce permit obligations and the sulfate limit. WaterLegacy Petition for Withdrawal of Program Delegation from the State of Minnesota for NPDES Permits Related to Mining Facilities, July 2, 2015. Available at: https://www.epa.gov/sites/production/files/2015-09/documents/waterlegacypetitionwithdrawmpca_cwaauthorityjuly22015.pdf [Last Accessed Aug. 10, 2018].

them have used the phrase, “a relative, not a resource,” to highlight the deep relational significance of the wild rice plant. This phrase, and the engagement of tribal leadership on the sulfate issue has established in the public record, forms of Indigenous environmental knowledge that are not often central to environmental policy-making. But, perhaps more importantly, the work of tribes has revealed the particular inconsistencies, oversights, and incommensurabilities of the state’s approach to wild rice and water conservation.

Minnesota’s original sulfate standard is different from most state-based water quality policies in the US. First, sulfate regulation is not specifically required under federal law, and when the EPA does address sulfate contamination, it is only through a non-enforceable guideline of limiting sulfate to less than 250 mg/L in drinking water, a level that is meant to limit cosmetic (skin or tooth discoloration) or aesthetic (taste, odor, color) effects, rather than physiological harms.[253] For opponents of the sulfate standard, this suggests that sulfate does not create a risk commensurate with the cost of mitigating sulfate discharges. This notion of insufficient risk has been repeated by labor leaders at public hearings and in filings by the mining industry.

Further, no other state has adopted a distinct water quality standard to protect a single non-human species. Wild Rice, designated Minnesota’s state grain in 1977, holds a particularly important place in the state imaginary, due in no small part to the fact that this is one of the last places where the sensitive plant still grows. Although at times the

[253] Environmental Protection Agency, National Secondary Drinking Water Regulations (NSDWRs).

symbolic value of wild rice conflicts with other dearly-held identities and state symbols, such as taconite mining, even mining supporters are careful to frame their positions as ultimately based in concern for wild rice protection and preservation.[254] In the discourses around the sulfate standard, Manoomin has become a stand-in for multiple forms of environmental degradation, a move that has at times frustrated tribal resource managers, who fear that environmentalists use Manoomin as a 'silver bullet' to shut down mining, disrupting tribal efforts to push the state to comply with its existing water quality standards more broadly. Manoomin, the aquatic ecosystems in which it lives, and the scientific insights that are enrolled in attempts to understand the particular relationship between Manoomin and sulfate take on distinct legal meanings in the regulatory realm.

Legal geographer David Delaney describes the interplay of legal meanings and various materialities as 'world-making',[255] recognizing the generation of new realities through this interaction between law, legal meaning, and social production. Delaney also notes that the specific ways in which "the environment" that produces and is produced by this 'world-making' remain under-acknowledged in Legal Geography literature.[256] Contemporary scholarship, and the existing American legal system, tend to view

[254] *See e.g.* Burnes, Jerry (2017) "'We Need to Stop the Fighting': Range Proposes Collaborative Effort to Meet State's Wild Rice Goals." *Virginia Free Press*, Oct. 19, 2017. Available at: http://www.virginiamn.com/free_press/we-need-to-stop-the-fighting/article_33002606-b539-11e7-8269-f7b4d983d1ae.html [Last Accessed Nov. 16, 2017]; Iron Mining Association of Minnesota, Petition to oppose sulfate standard, Available at: http://www.taconite.org/call2action [Last Accessed Nov. 16, 2017], stating: "I believe wild rice is an important crop, and I want to maintain its vitality. However, this proposed standard does not appear to accomplish that."
[255] Delaney 2010, at 13.
[256] Delaney 2001, at 219.

questions of environmental legal geography through the vector of property, revealing "the mediation of a spatialized vision of atomized social relations that is intrinsic…to liberal property discourse."[257] Non-human natures are always mediated "through legal categories and the social ontology that undergirds those categories."[258] Looking at the legal system from a macro-scale tends to obscure the particular mechanisms that enable these legal categories and social ontologies to be made material—both through impingements on actions (i.e. regulatory restraints on the mining industry), and through the capacity to shape the physical landscape in a particular image (i.e. through property taxes, jurisdictional markers such as state-entry signs, or even the physical manifestations of permitted mining operations, such as tailings basins).[259] To really understand the ways in which legal meanings become legal realities with material consequences, it is necessary to dig more deeply into the mechanisms through which environmental law functions.

At its core, this is an analysis of a complicated and dynamic regulatory process. Turem & Ballestro (2014) argue that the neoliberal governance technology of regulation functions as

> a set of precepts and practices that potentially avoid the metaphysical commitments that a monolithic conception of legality (as "the law") often brings to the table. Regulation, while providing insights as to the articulation of normative, legal, and functional logics with territories and publics, does not carry the monolithic baggage we associate with the law when studied in the singular. This practical and ideological flexibility makes regulation an analytic category with the potential of generating fresh understandings of rules and their politics in an already

[257] Delaney 2001, at 219; Benson 2012.
[258] Delaney 2001, at 219.
[259] Benson 2012.

neoliberalized world.[260]

The particularities of regulatory processes can be understood as the specific tools, the cogs and grinds, that make up the assemblage of the legal nomosphere. As Melinda Harm Benson argues, "'law is not a single, coherent enactment but is instead a mosaic of overlapping and often contradictory authorities."[261]

Attending to those tools reveals the intricacies of how the legal system operates, deconstructs the flows and trajectories of power, and demystifies the ways in which regulatory decisions of import are negotiated, and by whom. Analyzing regulatory processes provides insights into the ontological suppositions and principles of the broader legal system, by illuminating the incentive structures and limitations of the system's parts.

But, this is also a story about how the scientific record shapes and interact with policy on a micro scale, and how the knowledge and conclusions that emerge through scientific processes are also conditioned by ontological orientations. In "Scientific Objects and Legal Objectivity," Latour describes how "epistemology has adopted a number of the features of its elder sister, justice, and that the law often clothes itself in powers that only science can provide." [262] This recognition is useful in the sulfate standard discussion, in which the advancement of new policy claims legitimacy from the scientific process, a process which was instigated and mediated through legislative

[260] Turem & Ballestero 2014, at 3-4.
[261] Benson 2012, at 1144.
[262] Latour 2004b, at 75.

action. Tribal intervention in each stage of that process disrupted the self-fulfilling logics of the modern,[263] by simultaneously challenging the conceptual distance between science and politics, as well as the ontological separation of the social and the natural.

Further, the regulatory process around sulfate/sulfide contamination is occurring in the context of the litigated treaty rights and court-mandated co-management relationships discussed in Chapter 2. The rule-making process was uncommonly public, involving an advisory committee made up of state, industry, tribal, environmental, and academic representatives, and based on multiple iterations of scientific data collection and policy debate. Before the MPCA's draft proposal was released, I interviewed an EPA attorney, who stated that she had never seen an environmental rule making process like this one in her entire career due to the level of stakeholder engagement, publicity, controversy, and acknowledgement of scientific complexity throughout the process.

Teasing out the complexities of a regulatory framework—particularly one that operates at multiple jurisdictional scales and may conflict with other regulatory priorities[264]—requires engaging, not just with the agency's stated purpose, or the letter of

[263] As Latour argues in *We Have Never Been Modern*, a philosophy of modernity "believes in the total separation of humans and nonhumans, and because it simultaneously cancels out this separation, the Constitution has made the moderns invincible…Everything happens in the middle, everything passes between the two, everything happens by way of mediation, translation and networks, but this space does not exist, it has no place." Latour 1993, at 37.

[264] Regulatory conflicts can exist between agencies (i.e. in the case of a state's commerce agency encouraging less regulation to preserve an industry's bottom line, and an environmental agency administering costly regulations to protect resources); within agencies (i.e. the Department of Natural Resources, which oversees resource extraction and certain environmental protection programs); or at different regulatory scales (i.e. conflicts between the EPA and a state environmental agency).

the law, but with the foundational goals, compromises and complexities of environmental regulation, at the state, federal, and tribal levels. Further, by training a lens on such a particular rule-making process, one that has been characterized by exceptional public input and controversy, we open an empirical space for thinking through Latour's assessments of the ways in which science and politics are intertwined, and particularly the ways in which these connections are obscured and rendered invisible in contemporary discourse around the environment.[265] This ontological inquiry is important on its own accord—scholarship that reveals the 'unthoughts' and 'unsaids' in the world allows us to understand our world differently. But it also has value as a means of producing better policy and more empirically robust ways of engaging with the natural world. As Vine Deloria writes in *The Metaphysics of Modern Existence*, "unless we can discover a basis for examining our attitudes and knowledge about the world, we cannot determine a realistic position from which we can bring about systematic and fundamental change that is self-sustaining and continuing in the face of future insights and acquisitions of knowledge and experience."[266]

Part II. The Politics of Science and the Science of Politics

Minnesota's 1973 'Wild Rice Rule' based its sulfate restriction policy on data collected by biologist Dr. John Moyle in the late 1930s and early 1940s (later updated in 1975). Dr. Moyle's field observation and water chemistry correlation data suggested that

[265] Latour 1993.
[266] Deloria 1979, at 18.

"no large stands of rice occur in water having a sulfate content greater than 10 parts per million (mg/L), and rice is generally absent from waters with more than 50 ppm."[267] Until the mid-2000s, Moyle's conclusions went largely unchallenged. This may be due to the fact that the MPCA did not attempt to enforce the sulfate standard in its mining permits between 1975 and 2010.[268]

In 2005, the state of Minnesota approached the Fond du Lac Band and the 1854 Treaty Authority (1854 TA) to develop a biological assessment of the Saint Louis River from the headwater to Cloquet, Minnesota. In the course of their analysis, water managers from FdL and 1854 TA noticed orange iron bacteria seeps coming through the riverbanks at field sites close to taconite facilities. The technicians collecting water samples noticed spikes in sulfate levels from the taconite sites down to the estuary. In the process of reviewing a proposal from U.S. Steel to expand the wastewater discharge from a tailings basin at their Minntac mining facility, the MPCA draft environmental impact statement identified increasing concentrations of sulfate and other contaminants in the basin.

The Minntac mine is located in the territories ceded in the 1855 Treaty, northwest of the Fond du Lac reservation, and east of Leech Lake. It had been in operation since the

[267] Moyle 1944, 1945.

[268] *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency* (Dec. 17, 2012, Unpublished), at 4. Though the MPCA did cite the rule in setting a wastewater discharge sulfate limit for Minnesota Power's Clay Boswell steam power plant in 1975, Boswell opposed the 10mg/L standard and was ultimately given a variance in an administrative hearing process to discharge sulfate in amounts up to 40mg/L from April 15 to June 15 (or approximately from ice out in Blackwater Lake until the emergence of wild rice), and up to 60mg/L at other times. *Id.*, at 4

1960s, and continues to be one of the most significant producers of taconite pellets in the U.S.[269] The mine’s most recent permit, issued in 1987 had expired in 1992, and did not include a sulfate concentration limit of 10mg/L.[270] Minntac, like many mining facilities in the state, had been operating on an expired permit, and had not been held to compliance with the sulfate concentration limit.

The data that FdL resource managers gathered in the St. Louis River study suggested excessive concentrations of mercury in the fish supply that Band members relied upon for subsistence harvesting, in addition to elevated sulfate levels. Though much of the pollution occurred off-reservation, the vast majority of northern Minnesota mining facilities are located within the territories subject to Anishinaabe treaties with the U.S. Government in the 1800s. From the perspective of resource protection and subsistence harvesting, degradation of the treaty resource was as significant as the pollution of reservation lands. But the fact that pollution was off-reservation made the jurisdictional questions all the more complex, and the treaty resources all the more vulnerable to contamination. These circumstances, along with growing recognition of the number of mining facilities operating on expired permits in the state encouraged FdL Band leadership to wade into the public commenting process for the Minntac permit renewal.

[269] MPCA Minntac DEIS 2004, at S-1.
[270] In 2001, after identifying troubling concentrations of sulfate in the mine’s discharges, the Minntac agreed to process modifications to reduce mass sulfate load discharges, but again did not incorporate the 10mg/L limit set by the wild rice rule.

In early 2011, the MPCA issued modified permits to U.S. Steel for its Keewatin taconite mining facility, which, for the first time, imposed the 10 mg/L sulfate discharge limits, and included a timetable for compliance, as well as a mandate that U.S. Steel complete a number of studies and sulfate-reduction plans for the facility.[271] The Minnesota Chamber of Commerce, on behalf of U.S. Steel and its other mining industry members, later sued to the MPCA to bar enforcement of the standard.

The Chamber argued that the statute should only apply to waters that were used to grow commercially cultivated—and not naturally occurring—wild rice.[272] Though the case was later dismissed, the debate over the standard got the attention of key figures in the Minnesota Legislature. In July 2011, while the case was still pending, the Minnesota Legislature passed a bill that required additional research on sulfate and wild rice, allocated $1.5 million for the study, and initiated a rule-making process to eventually amend the Wild Rice Rule.[273] The MPCA was asked to address water quality standards for both naturally-occurring and cultivated wild rice waters, designate each waterbody (or

[271] *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency (Dec. 17, 2012, Unpublished)*, at 5. In 2009 and 2010, the agency requested that mining companies in the region, including United Taconite LLC, Mesabi Mining LLC, and PolyMet Mining, Inc., begin surveying to detect the presence of wild rice in waters where their facilities discharged effluent, to determine whether they were subject to the sulfate standard, though no permit modifications were issued as a result.
[272] Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency (Dec. 17, 2012, Unpublished), at 6. The District Court and the Appeals Court granted summary judgment for the MPCA and WaterLegacy, an environmental advocacy organization that intervened in the suit, on the grounds that most of the mining companies represented by the Chamber had not had any permit actions enforced against them by the MCPA, therefore had no justiciable claims. Wither regards to U.S. Steel, the Courts found that they had failed to exhaust administrative remedies in contesting the permit, and thus the Court had no grounds to find against the MPCA in the matter. *Id.*, at 8–13.
[273] Minn. Laws 2011, 1st Spec. Sess. ch. 2, art. 4, § 32, at 71–73.

portion thereof) to which the new standard would apply, and specify the times of year during which the standard would be enforced.[274]

As part of the 2011 legislation, the MPCA was directed to convene an advisory committee "to provide input to the Commissioner on a protocol for scientific research to assess the impacts of sulfate and other substances on the growth of wild rice, review research results, and provide other advice on the development of future rule amendments to protect wild rice."[275] The committee included representatives from the industrial discharge (mining) and municipal wastewater facilities, environmental groups, other state agencies and public utilities, university and citizen scientists, wild rice growers and harvesters, as well as the Red Lake, Fond du Lac, and Grand Portage Bands and the 1854 Treaty Authority.[276] From the first meeting, tribal representatives to the committee raised their concern that the MPCA's introductory presentation had included no mention of treaty rights and the need for a sulfate standard to protect wild rice.[277]

The MPCA's preliminary data, published in 2014 confirmed that sulfate itself is not toxic to wild rice, but sulfate can be converted to sulfide, which is toxic. According to information requests documents collected and reported by Star Tribune, the MPCA was preparing to announce in February 2014 that the existing 10 mg/L sulfate rule "was

---

[274] Minn. Laws 2011, 1st Spec. Sess. ch. 2, art. 4, § 32(a).
[275] Minn. Laws 2011, 1st Spec. Sess. ch. 2, art. 4, § 32(c).
[276] The full list of Wild Rice Standards Study Advisory Committee Members (as of Oct. 13, 2015), is available at: https://www.pca.state.mn.us/sites/default/files/wq-s6-42f.pdf [Last Accessed Nov. 20, 2017]. The 1854 Treaty Authority manages the off-reservation treaty rights for the Bois Forte and Grand Portage Bands.
[277] Wild Rice Study Advisory Committee Meeting Summary, Oct. 10, 2011. Available at: https://www.pca.state.mn.us/sites/default/files/wq-s6-42e.pdf [Last Accessed: Nov. 20, 2017].

reasonable and should remain in effect,” but the announcement was postponed and never made.[278] In response, the Minnesota Legislature enacted a provision prohibiting the MPCA from enforcing the 10 mg/L sulfate standard or requiring a permit “to expend money for design or implementation of sulfate treatment technologies or other forms of sulfate mitigation[279].” A 2016 statute explicitly prohibited the MPCA from enforcing the sulfate standard against the U.S. Steel Keetac facility.[280]

Around this time, criticism of the sulfate standard in popular media and among Iron Range Legislators began to take on a common refrain: the notion that the 10 mg/L sulfate standard was “not based in good science” and thus could not be used to constrain or impose costs on mining operations. Throughout the sulfate standard debate, there are numerous examples of politicians and other interested parties developing the trope of old scientific knowledge as compromised and calling for the collection of new data to legitimize existing (or future) policy. Further, recent research that provides more detailed insights into the relationship between sulfates and Manoomin has provoked erroneous claims by politicians and industrialists that this new data renders previous models—such as Moyle’s observations—obsolete. Indeed, Minnesota Governor Mark Dayton signed

---

[278] Marcotty, Josephine. 2014. “Iron Range rebellion halted wild rice initiative.” *Star Tribune*, April 7, 2014. Available at: http://www.startribune.com/iron-range-rebellion-halted-wild-rice-initiative/254052191/ [Last Accessed Nov. 15, 2017]. Contacts from the MPCA have suggested in conversation that the move to make an announcement was premature, and that the announcement was postponed because the MPCA scientists had not conducted sufficient analysis to make a determination about the standard.
[279] Minn. Laws 2015, 1st Spec. Sets., Chapter 4, Article 4, Section 136 (“2015 Wild Rice Legislation), at (a)(1).
[280] Minn. Laws 2016, Ch. 165, Sec. 1.

each piece of legislation limiting the enforcement of the sulfate standard, and stated that the “antiquated” standard was “not even based on current science directly related to the conditions we’re trying to deal with.”[281] A number of scholars have reflected on how claims of ‘antiquated science’ function in political realms.[282] Through his analysis of the history of ecological thought, Bruce Braun shows how new developments in ecological thought were leveraged to render past understandings of ecology to be “*ideological* rather than *scientific*.”[283] Gaston Bachelard argues that “contemporary science is able to designate itself, through its revolutionary discoveries, as a liquidation of the past. Here discoveries are exhibited which send back all recent history to the live of prehistory.”[284] In the case of the sulfate standard, those who collected the new data acknowledged their debts to the work that preceded these new understandings[285]; efforts to render previously collected data prehistoric occurred through the realm of political discourse and regulatory wrangling.

---

[281] Dunbar, Elizabeth. 2015. “MPCA seeks lake-by-lake plan to protect wild rice.” *MPR News*, Mar. 25, 2015. Available at: www.mprnews.org/story/2015/03/25/mpca-wild-rice [Last Accessed Aug. 1, 2018].
[282] Braun 2002; Doremus 2005; Latour 2004a; Stengers 2000; Young 2004.
[283] Braun 2002, at 238.
[284] Translated and quoted by Young 2004: 85 (quoted in Braun 2002, at 238). The original text reads: “À bien des égards, la science contemporaine peut se désigner, par ses découvertes révolutionnaires, comme une liquidation d'un passé. Ici sont exposées des découvertes qui renvoient la toute proche histoire au rang d'une préhistoire.” Bachelard 1972, at 137.
[285] Myrbo et al. 2017a; Myrbo et al. 2017b; Pastor et al. 2017; Pollman et al. 2017.

Discourses of 'scientific legitimacy'

Research conducted by the MPCA, tribal resource managers, and independent biophysical scientists confirmed that sulfate's behavior in aquatic ecosystems can be complex, and its impacts on wild rice may be indirect. As stated in an MPCA memo in 2011, "investigation of sulfate impacts on wild rice is complicated by the potential for sulfate-mediated effects on wild rice rather than direct sulfate toxicity."[286] Put differently, sulfate itself does not necessarily harm wild rice, but sulfate interacts with other elements in the environment to produce toxic effects for wild rice plants. The Fond du Lac and Grand Portage Bands of Lake Superior Chippewa, in partnership with Minnesota's Clean Water Fund and the University of Minnesota Sea Grant College Program funded additional research to determine the specific mechanisms through which sulfate affected wild rice plants. The 2017 publication of this research, led by University of Minnesota, Duluth biologist John Pastor, shed additional light on the dynamic interactions between sulfate, wild rice, and other agents in the aquatic ecosystems of northern Minnesota.

Studies by John Pastor, Amy Myrbo, Curtis Pollman, and other scientists broadly confirmed some of Moyle's observations about the generalized relationship between sulfate levels and wild rice health.[287] However, Pastor's analysis added a layer of complexity to the scenario: his team found that levels of iron and organic carbon in the

[286] MPCA, Wild Rice/Sulfate Protocol Development Discussion Document, May 9, 2011. Available at: https://www.pca.state.mn.us/sites/default/files/wq-s6-40b.pdf [Last Accessed Aug. 1, 2018].
[287] Myrbo et al. 2017a, 2017b; Pastor et al. 2017; Pollman et al. 2017. A number of these scientists had worked with Fond du Lac on its earlier analysis of the St. Louis River, and were selected by peer review panels at the State level to carry on research.

lake sediment could impact sulfate oxidization and resulting impacts on wild rice. In other words, Pastor's team found that higher rates of iron could slow the oxidization of sulfate, preventing it from becoming sulfide, and thus slowing its attacks on wild rice root systems.[288]

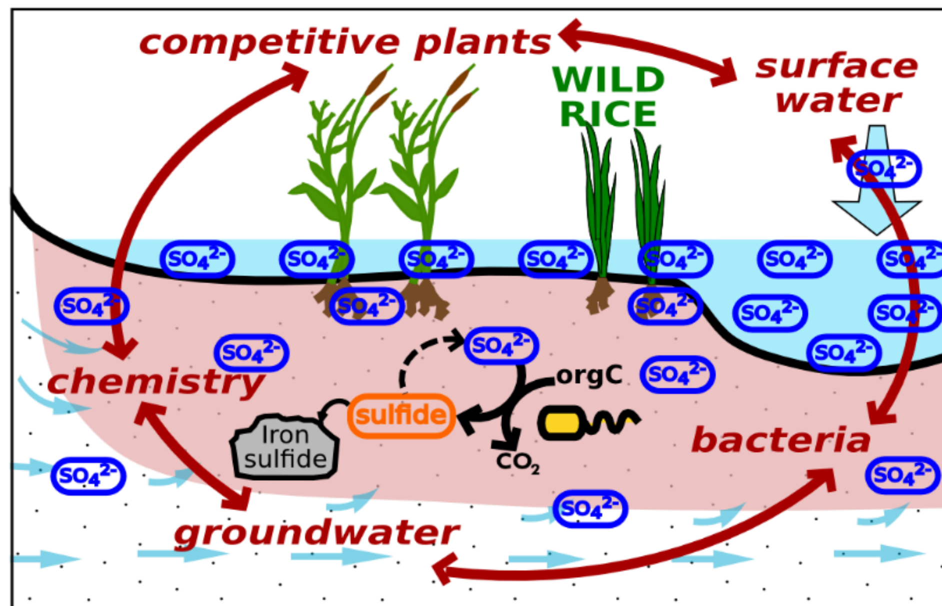

Figure 3. This figure demonstrates how diverse biophysical processes, including sulfate (SO_{4-2}) interact in Manoomin habitats. Created by Crystal Ng 2018.

Evidence that sulfate had an 'indirect' impact on wild rice was immediately seized upon by industry and labor representatives as proof that the costs of regulating sulfate were not justified to protect the plant. A petition circulated by the Iron Mining

[288] Pastor et al. 2017. Even more recent data, which suggests that iron forms a plaque on wild rice root systems and blocks nutrient uptake, undermines the notion that iron can serve as a mitigating factor for sulfide toxicity.

Association of Minnesota reiterated the modernity discourse in a statement accompanying a public petition: “Today, …new research using modern experimental and analytical techniques has shown that sulfate in and of itself is not harmful to wild rice. Instead, the MPCA suggests that sulfide may have an effect on wild rice. However, instead of using this knowledge to conduct further research…the MPCA has moved forward with a draft wild rice sulfate standard based on an inaccurate equation to derive a sulfate water quality standard. This rule could financially devastate my community and is not yet proven to protect wild rice.”[289]

In the sulfate debate, the ‘new science’ has introduced a degree of complexity that has been read among policy-makers and popular press as leading to ‘uncertain conclusions’ about the impacts of sulfate on wild rice.[290] The complexity of the new data has raised the specter of ‘scientific uncertainty,’ and has made it significantly more difficult for the MPCA to develop public support for the proposal. While industry representatives did make efforts during the administrative hearings to sow doubt about the methodological efficacy of some of the studies conducted as a part of the rule revision

---

[289] Iron Mining Association Petition: Take Action Today! Speak up to secure Minnesota Iron’s future. Available at: http://www.taconite.org/call2action [Last Accessed Nov. 16, 2017].

[290] U.S. Steel Corporation – Minntac, Comments on Public Notice Draft NPDES Permit # MN0057207, Dec. 22, 2016. Available at: https://www.pca.state.mn.us/sites/default/files/wq-wwprm1-28c.pdf [Last Accessed November 15, 2017]: “In addition to a lack of regulatory authority to establish a compliance point within the tailings basin, the MPCA cannot support establishing a compliance limit in the tailings basin that relates to compliance with the numeric water quality standard applicable at the U. S. Steel property boundary. It is overly simplistic for the MPCA to base permit conditions on a statement that it is “axiomatic” that prevention of a pollutant release to the environment is easier and less costly in the long run than post-release cleanup measures. MPCA’s authority does not come from axioms and the facts regarding the tailings basin cast doubt in the applicability of the axiom here given the complexity of sulfate reduction and the complexity of groundwater modeling.”

effort, much of the disagreement was not over the data itself, but rather about what kinds of actions and impingements on industry could be justified using imperfect data, and what types or quantities of additional data would be required to come to a justifiable determination.[291]

Philosophers Kyle Powys Whyte and Robert P. Crease have demonstrated the importance of trust in mediating relationships between scientists and the public, and that 'trust' in scientific processes can only be properly theorized through a grounded engagement with expertise, experience, and "epistemic insights of diverse actors."[292] While the MPCA made overtures to a diverse range of epistemic insights and wild rice knowledge and data, their failure to adequately incorporate tribal perspectives into the rule-making eroded trust among tribal leaders. Further, effective public information campaigns about the proposal's risks to businesses and the cost of compliance in the face of 'uncertain' science have left mining supporters and municipalities in the position of claiming that their opposition is rooted in a demand for better science, but without an alternative scientific record. In this space of tension, tribal scientists' contributions to the contemporary scientific record, coupled with their epistemological orientation toward custom, tradition, and multi-generational knowledge production, has created a complicated dynamic whereby tribal science is at once 'old' and 'new'.

[291] Doremus 2005, at 252–253.
[292] Whyte & Crease 2010, at 412.

Enrolling 'tribal science' in the debate

Vine Deloria writes that Western modes of scientific inquiry were framed, for far too long, as existing outside of natural processes, maintaining an 'objective distance,' from which the human could safely observe, but not relate to, non-human natures. This process has been upended in recent years, as scientists increasingly recognize that their work "incorporate[s] relationships of personal quality with nature to produce knowledge."[293] This recognition of the ways in which scientists are personally involved with, produced by, and productive of nature, is, Deloria argues, the foundational starting point of what he calls 'non-Western peoples' engagements with nature. "Western science has thus arrived at precisely the starting point of non-Western peoples in apprehending more than physical and mechanical activities in nature."[294]

This sentiment is also echoed in MIAC's letter to the MPCA, in which Larson writes that the members of MIAC:

> have not been surprised that the research program you conducted has yielded "modern" scientific evidence that wild rice is exceptionally sensitive to sulfate pollution, and that Dr. Moyle's rigorous observational data from decades ago was actually on the mark. Our research, our monitoring and our traditional knowledge concur. We have also emphasized our experience with and concerns for other significant factors that can degrade or destroy natural stands of wild rice, including hydrologic changes, watershed development, invasive species, mechanical damage from motorized watercraft, and the overarching effects of climate change.[295]

[293] Deloria 1979, at 54.
[294] Deloria 1979, at 54.
[295] MIAC Letter, at 2.

At one of the administrative hearings for the sulfate standard, I overheard an engineering consultant for the mining industry suggest to one of his colleagues that, if the state really wanted to protect wild rice, it "should look at what the tribes are doing"—more holistic habitat remediation, addressing hydrologic fluctuations, responding to invasive species, and actively seeding rice beds in troubled waters. This sentiment was echoed later by an Iron Range legislator at a meeting with representatives of the Minnesota Chippewa Tribe. These statements are, in part, a testament to the work that upper Midwest tribes have done in recent years to restore habitats and dwindling species throughout the region. They also highlight the significant role of tribal science and tribal knowledge in framing the terms of the sulfate debate, and suggest a temporal liminality between the "old": inter-generational ecosystemic knowledge, and the "new": tribes' ability to prove the efficacy of their methods using modern techniques.

In much critical science scholarship, other forms of knowledge, including Indigenous knowledge, are interpreted as separate from, or dichotomous to western knowledge. Some of this literature focuses on the ways in which Indigenous knowledge has been subordinated to western hegemonic science through the scientific process.[296] Even more recent scholarship that focuses upon methods of integrating "Traditional Ecological" or Indigenous Knowledges with Western science tend to preserve the presumption of a fundamental dichotomy, even while seeking common-ground.[297]

[296] In Latour's terms, this division is explained through a conceptual fissure between philosophical 'modernity' and 'premodernity'. Latour 1993. For a more grounded analysis, see Tsuji & Ho 2002.
[297] Tusji & Ho 2002; Verma et al. 2016; Bala & Joseph 2007.

However, this presumed dichotomy does not account for the ways in which tribal scientists and resource managers have actively contributed to the development of the scientific record with regard to sulfate contamination. Tribal resource managers that I interviewed and observed in public hearings communicated that they viewed "Western" scientific methods, not as fundamentally distinct from, but merely a different means of demonstrating what Indigenous knowledge-holders already knew to be true. Further, tribal contributions to the scientific and administrative records in the sulfate rule-making process are particular means of advancing Indigenous resource-based ontologies through formal regulatory processes.

Donna Haraway reminds us to attend to the ways in which "the political principle of domination" over natural property has become embedded in scientific principles. She argues that science, "cannot be reclaimed for liberating purposes by simply reinterpreting observations or changing terminology…which denies a dialectical interaction with the animals in the project of self-creation through scientific labour."[298] Tribal leaders have been clear throughout the sulfate rulemaking process that forms of colonial domination continue to reproduce even in this discrete regulatory discussion. However, the role of tribes in this process—as scientists, policymakers, and community members, has also undermined any neat and tidy designations of 'science' as something that is beholden to any one political entity or worldview. Tribal resource managers utilize the scientific method and modern scientific equipment, through experimentation, observation, testing,

[298] Haraway 1991, at 19.

and analysis. And yet, they mediate this process through a very different ontological orientation and understanding of human relationships and obligations to non-humans. Their contributions to the sulfate standard debate have demonstrated that science practiced from different foundations can produce very different results and policy outcomes.

The questions of scientific uncertainty and integrity are central to understanding the political discourse around the sulfate standard, and the unconventional role that Tribes have played in bridging the scientific ‘old’ and ‘new’. But, when scientific integrity is also a matter of policy, interrogating the ontological underpinnings of the regulatory framework can reveal how various forms of evidence are enrolled into the policy framework, and to what end. In the sulfate standard debate, tribal approaches to resource protection have been effective and tribes have used their resources to develop the scientific record in ways that make these forms of knowledge legible to the non-Indigenous science and policy communities. This is, as de la Cadena describes, a form of “boundary-making practice whereby what they have in common becomes difference through practices of translation.”[299] But, perhaps more importantly, tribal involvement in the process has revealed the fissures in how different actors fundamentally conceptualize their relationships to the water, rice, and plant/animal ecosystems.

[299] de la Cadena 2015, at 188.

Part III. Grounding "Regulatory Ontologies"

A series of public hearings on the sulfate standard took place before Administrative Law Judge LauraSue Schlatter across Minnesota in late October 2017. At the hearings, the judge took comments from a variety of speakers—tribal representatives, citizens, mining company consultants and attorneys, environmentalists, labor union members, and others. In a public statement at the St. Paul hearing on October 23, 2017, attorney and director of the environmental advocacy organization WaterLegacy, Paula Maccabee reflected on a lesson that she had learned from a mentor early in her legal career: "If year after year, agency action was leading to a certain result, no matter what the law books might say, that result was the job that politicians who directed…the agency wanted them to do."[300] The message was poignant—the MPCA's failure to enforce the prior sulfate standard cast doubt on its stated intent to protect wild rice through future enforcement of a new standard. Or, as Cover argues, "as the meaning of law is determined by our interpretive commitments, so also can many of our actions be understood only in relation to a norm."[301] Maccabee's statement in the administrative court that day also gestured to the more complex question of the nature of regulatory rule-making itself: that what regulatory agencies claim as their public purpose, what regulatory frameworks are designed to accomplish, and what types of environmental outcomes can be expected, may be completely separate questions.

---

[300] MPCA Proposed Amendment of the Sulfate Water Quality Standard Applicable to Wild Rice and Identification of Wild Rice Waters, OAH Docket No. 80-9003-34519. Public Hearing Oct. 23, 2017, Transcript [hereinafter Sulfate ALJ Hearing Transcript 10.23.17], at 101 – 102.
[301] Cover 1982, at 8–9.

The text of the proposed changes to the sulfate standard provides particularly acute insights into the priorities and regulatory approach of the MPCA, as well as the broader federal environmental protection framework. The rule revision focuses on a few key elements that are particularly resonant to the ontological and epistemological orientations of the MPCA's water quality regulations: determining beneficial use, designating wild rice waters, assessing risk, harm and cost, and attempting to incorporate ecosystem complexity. For each of these aspects of the rule-making process, Indigenous communities and tribal leaders have advanced critiques that cut explicitly into the embedded tensions and inconsistencies in the MPCA regulatory framework. A number of these elements, including beneficial use designations, and risk/cost analysis are integral to the broader federal Clean Water framework, so also provide insights as to the limitations of the U.S.'s multi-scalar water regulation strategy.

Deloria argues that concepts are fundamentally determined by culture: "if we seek to elicit facts of experience on the basis of conceptual activity of the mind, we must certainly choose from the multitude of facts available those that appear familiar to some cultures, thus precluding the understanding of those same facts as conceptualized by other cultures."[302] The feeling among tribal representatives that the MPCA did not adequately attend to the ways in which similar facts may have tremendously different meanings in various registers can also explain some of the foundational conflicts in the sulfate debate. The same group of scientific facts co-produced by University scientists,

[302] Deloria 1979, at 20.

MPCA scientists, and tribal scientists, have resulted in different conclusions regarding the efficacy and reasonability of various policy approaches.

“Beneficial Uses”

When the Minnesota legislature established the specific sulfate wild rice rule in 1973, they developed a unique “beneficial use” designation for “water used for production of wild rice.”[303] This beneficial use designation recognized the importance of wild rice for Minnesotans, acknowledging it as a food source for waterfowl, an economic engine for those who would harvest and market it, and cultural resource for the Anishinaabe peoples of the region.[304]

Black’s Law Dictionary traces the concept of “beneficial use” to the 1891 New York Superior Court case, *Reining v. Railroad Co.*, in which the court recognized that even owners of urban lots, who retained no title to the land itself, were entitled to “the benefit of the street in front of their premises for access and other purposes, of which they cannot be deprived except upon compensation.”[305] Beneficial use provides a legal means of recognizing rights to a property or resource that extend beyond simple rights of ownership, including rights to a view or access to light, air, water, or basic enjoyment of that property. It’s a well-established provision of property law, but has also become a

[303] Lotthammer Memo to MPCA Advisory Committee Members Re: Wild Rice Sulfate Standard Rulemaking, Oct. 18, 2016. Available at: https://www.pca.state.mn.us/sites/default/files/p-ac16-10b.pdf [Last Accessed Nov. 28, 2017].
[304] *Id.*
[305] *Reining v. N.Y.*, 128 N.Y. 157, 164 (N.Y. 1891). Cited in Black 1910, at 126.

preferred mechanism in the legal framework for protecting natural resources, and particularly water and aquatic ecosystems.

The language of beneficial use was taken up in the Clean Water Act of 1977 as a means of identifying harms to water, and establishing state-by-state water quality standards.[306] Minnesota's Water Quality Standards, as approved under the CWA framework, identify seven Beneficial Use Classes for waters in the state.[307] Under both the proposed rule revision and the 1973 Wild Rice Rule, wild rice is covered under Class 4, which protects the beneficial uses of agriculture and wildlife.[308] Under this framework, wild rice, even with its distinctive status, is only protected as a function of its uses for people in the state (and indirectly for waterfowl, which itself is protected as a human food source).

Throughout the rule-making process, tribal leaders and resource managers have repeatedly levied objections to the MPCA's chosen beneficial use classification. In an administrative hearing in northern Minnesota, Nancy Schuldt, Water Projects

---

[306] Federal Water Pollution Control Act, As Amended by The Clean Water Act of 1977, 33 U.S.C. 1251–1387. Available at: https://www3.epa.gov/npdes/pubs/cwatxt.txt [Last Accessed Nov. 28, 2017]. It has also been used to reject legal arguments for resource protection that do not clearly violate established beneficial uses. See e.g. *Alliance to Save the Mattaponi v. Virginia*, 621 S.E.2d, 270 Va. 423 (Sup. Ct. Va. 2005).

[307] Class 1: Domestic consumption (including all groundwater, which is protected as a source of drinking water); Class 2: Aquatic life and recreation; Class 3: Industrial consumption; Class 4: Agricultural and wildlife; Class 5: Aesthetics and navigation; Class 6: Other uses; Class 7: Limited Resource Value Water. Minn. R. ch. 7050.

[308] Under the 1973 rule, wild rice is designated as Class 4A, which was a subclass specially designated for wild rice, and which includes the 10 mg/L sulfate standard. Minn. R. ch. 7050. The rule revision proposes shifting wild rice to Class 4D, which limits the designation of wild rice waters to those specifically listed in the MPCA rulemaking process. Lotthammer Memo, Oct. 18, 2016, at 2.

Coordinator for the Fond du Lac Band, registered the Band's objection to what she referred to as a "structural flaw" in the rule revision. Schuldt noted that the MPCA had insisted on retaining wild rice waters as a Class 4 designation, for Agricultural and wildlife, despite the tribes' objections that wild rice waters deserve to be protected as a fundamental aquatic ecosystem, not just as a food source. Instead, the Band advised that wild rice waters be reclassified as Class 2 waters, protected for their ecological significance.[309] The preservation of this objection in the administrative record is an expression of the Fond du Lac Band's ongoing opposition (echoed by other Indigenous community members and tribal leaders) to the state's narrow and human-centric interpretation of wild rice's importance and value.

Aldo Leopold, writing in 1949, observed that there was "as yet no ethic dealing with man's relation to land and to the animals and plants which grow upon it. Land…is still property. The land-relation is still strictly economic, entailing privileges but not obligations."[310] Inasmuch as the Clean Water Act—and all of the state water quality standards that emerged as its progeny—could be considered an expression of an *ethic* of water conservation, it remains tightly wound up in the property relationship that Leopold identifies. The beneficial use arrangement, while an effort to account for the importance of resources, ultimately reflects a particular philosophical understanding of human's presumed hierarchical and ownership relationship to the natural world. For Leopold, this

[309] Nancy Schuldt Comments to ALJ Hearing, Oct. 26, 2017; Nancy Schuldt Written Comments to Judge Schlatter, Nov. 22, 2017 (on file with author). *See also* Margaret Watkins Comments to ALJ Hearing, Oct. 26, 2017.
[310] Leopold 1970, at 217. Quoted in part in Deloria 1979, at 182.

property ontology dooms conservation efforts because seeing the land as commodity ensures that it will be abused.[311] This has profound legal consequences, and the legal problem is rooted in the ontological baggage of the humanist hierarchy. Deloria clearly articulates the integration of the legal and the ontological with regard to natural resources law:

> Physical entities that support life, such as air, water, and land, are conceived in a legal sense as if they had no existence apart from the human legal rights that have been attached to them. We could easily and legally destroy all vestiges of natural life without ever violating the constitutional provisions regarding the protection of property. Our present conception of property revolves around our use of it, not around its existence as an element of the universe in its own right. Nature has no rights of its own in our legal system. If our legal system reflects our view of reality, then we believe that we exist over and apart from the physical world.[312]

Tribal members and resource managers have levied consistent objections to the MPCA's beneficial use classification in the wild rice rule. These objections have been both ontological—contesting the very premise of a human-oriented hierarchy, and legal—advancing procedural arguments about the statutory classification in the administrative record.[313] These various objections highlight the tensions embedded in the state's protective approach to resources, which, as a matter of both structure and guiding ontology, always subordinates resource relationships to competing property interests. When Indigenous intervenors throughout the public hearing process demanded that the MPCA answer questions about their responsibilities to water-as-water, and not just water-

---

[311] Leopold 1970, at xviii.
[312] Deloria 1979, at 180–181.
[313] *See e.g.* Nancy Schuldt Comments to ALJ Hearing, October 26, 2017.

as-resource for human use, they challenged the assumptions of a nature-society binary and the utilitarian property arrangements upon which the beneficial use classification relies.

But these interventions by tribal leaders and Band members also challenge assumptions about humans-as-such, and the mechanisms through which harms to resources also harm humans. The MPCA and CWA's approaches assume that a harm to a water body can only be understood in terms of its threshold harms to humans who use that water body in a particular way. Indigenous contributors to the process consistently pushed the MPCA to understand that, far beyond the beneficial use designation, harms to wild rice are harms to the people themselves. At a meeting between tribal leaders and Iron Range Legislators in November of 2011, a tribal Chairman articulated it poignantly:

> I see this as a systematic attempt to remove us…If you take away the wild rice, you take one of my arms. If you take the fish and clean water, you take another one of my arms. If you take the trees, you take one of my legs. If you take the animals, you take my other leg. That's my identity. The Manoomin is our migration story. A five hundred year journey from the East Coast to where the food grows on the water.[314]

The ontological differences discussed above signal some fundamental incommensurabilities between the state and federal regulatory structure and Indigenous resource ontologies. Nevertheless, tribes have used the regulatory process and administrative framework to advance their alternative understandings of resource value

[314] This statement was made during a meeting between tribal leaders and Iron Range legislators on November 21, 2017.

and have pushed their conflicting viewpoints through nearly every available administrative mechanism in the sulfate standard process.

Designating Wild Rice Waters and the Temporalities of Degradation

The 2011 legislation that mandated the reevaluation of the sulfate standard directed the MPCA to identify particular waters to which any wild rice sulfate standard would apply. The legislation required that the MPCA identify waters where wild rice occurs naturally and develop criteria for classifying wild rice waters in consultation with the state’s Department of Natural Resources, Minnesota Indian tribes, and other interested parties. The legislation specified that the classification criteria should include “history of wild rice harvest, minimum acreage, and wild rice density.”[315] The MPCA eventually released a list of over 1,300 wild rice waters to which the proposed standard would apply. According to Darren Vogt, Resource Management Division Director for the 1854 Treaty Authority, the MPCA’s list excluded over 1,000 waters, and failed to incorporate tribal feedback or perspectives in its designation. Any water excluded from the MPCA’s official list would have no sulfate threshold; adding a water to the protective list would be done through a separate rule-making process.

Tribal leaders have expressed a number of critiques regarding the MPCA’s method of designating wild rice waters, including that the MPCA proposal establishes an arbitrary and under-inclusive timeframe for addressing wild rice degradation,

[315] Lotthammer Memo, at 3.

classification processes exclude Indigenous knowledge, the procedure for adding protected lakes to the list is burdensome, and the MPCA has failed to recognize tribal sovereignty and jurisdiction in its designation process. Though I will not give full attention to each of these critiques, I aim to highlight the epistemological problems with the MPCA’s mode of classifying wild rice waters, and argue that this aspect of the legislation is rooted in ontological assumptions about the temporalities of harm, assignment of responsibility, and the roots of state authority.

At the first administrative rule-making hearing in St. Paul, an environmental activist with a strong history of tribal advocacy asserted that the potential harms to wild rice were akin to genocide. The statement was met with audible scoffs from industry representatives in the crowd. But tribal leaders have clearly and consistently tied the degradation of wild rice to the settler colonial histories of the region to explain that this concept is rooted in concrete analyses of history, and the concrete vulnerabilities of Indigenous communities in the present. As a tribal representative explained to state legislators, the building of roads and dams has repeatedly destroyed dense wild rice stands throughout the state’s modern history. “We can say that’s progress,” he continued, “but we like to remind people that it was also an attempt at ethnic cleansing and genocide…I don’t believe in historical trauma, not if it’s still present today. And the sulfate and its effects on the Manoomin and our culture can’t be overlooked.”

This statement, which demanded that the “progress” of infrastructural development also be held to account for its modes of destruction, resonates with Isabelle Stengers’s critique of the modernist vision of linear progress, which defines itself through both a

vision of its own forward movement, and a commensurate fear of "backwards returns."[316] Indeed, the linear temporality that establishes progress as always forward moving also tends to temporally silo environmental harms so as to not account for cumulative effects of degradation over time.

The Clean Water Act establishes November 28, 1975 as the threshold date for assessing the types of uses various water bodies support, and establishing appropriate forms of protection, based upon these designated uses (swimming, drinking water, or wildlife habitat, for instance). In other words, if a body of water supported a particular use on November 28, 1975, or has supported that use since, the water body must be maintained for that particular use. The MPCA's proposed rule used this date as a threshold for determining whether wild rice promulgation is an "existing use," protected under the state's water quality framework. The Clean Water Act's designation of a specific threshold date represented a discursive break from past practices of pollution without remediation; the modern era ushered in by the CWA reflected a new commitment to resource stewardship. While this was aspirational, it also established a limit on the liability for past polluters. This, in part, is the extension of a legal principle that one cannot be held to account for behavior that was not illicit at the time it was committed. However, it also drew lines around the types of waters that would be protected and those that would not because they were already too far damaged. This form of exclusion carried over in the MPCA's designation of wild rice waters.

---

[316] Stengers 2000, at 63.

At the meeting between two Iron Range legislators and the Minnesota Chippewa Tribes to discuss the sulfate standard, one of the legislators addressed the inadequacy of applying the CWA’s date, noting that wild rice used to flourish all the way to Iowa; by the 1970s, so much of those waters had been degraded that taking that time period as the temporal threshold meant failing to acknowledge the harms to a vast swath of the state’s historical wild rice waters. The point raised by the legislator was also communicated by tribal elders and resource managers during the many months of consultation, in which they shared community testimonies and historical accounts of wild rice presence and density throughout the ceded territories. And yet, tribes were again frustrated when the list produced by the MPCA failed to include water bodies specifically identified through those consultations.

Tribal resource managers and council members have frequently cited the MPCA’s practices of soliciting—and then excluding—Indigenous knowledge, as a central deficiency of the MPCA’s rulemaking process. Given this dynamic, it is additionally troubling that the MPCA’s proposal for designating wild rice waters specifies that future rulemaking processes are the only avenue for including additional water bodies under the protected status. While tribes have expressed frustration that the list is under-inclusive (in that it employs an arbitrary temporal standard and does not designate bodies that tribes have explicitly identified as important wild rice waters), they have also repeatedly asked that water bodies within the boundaries of reservations be excluded from the MPCA’s list, out of respect for tribal sovereignty and the limits of the state’s jurisdiction on

reservations. As the rule proceeded through the administrative hearings, on-reservation waters were still included.

The Contamination Equation: Incorporating Ecosystemic Complexity

The equation-based sulfate limit in the new proposal attempts to account for the ecosystemic complexity of sulfate as it impacts wild rice. Further, the standard recognizes that different water bodies have different characteristics and behave differently. A number of tribes and environmentalists have suggested that the MPCA's efforts to acknowledge complexity and difference are beneficial. This attempt is, on one level, a step towards understanding human and non-human ecosystemic interactions as dynamic and inter-dependent. However, all of the participants in the process—tribes, environmentalists, mining companies, and municipalities—have been frustrated by the uncertain outcomes of such a novel approach. For mining companies, municipalities, and some state legislators, doubting the scientific basis of either the 10ppm or equation-based standard suggests that these regulations, while burdensome and costly, may not actually have the intended protective effects for wild rice. For tribes—particularly those that played an active role in collecting the data and financing the researching—the science clearly demonstrates that sulfate is harmful to wild rice, even though its effects are indirect, and that sulfate also plays a significant role in expediting mercury methylation in fish and algae blooms in waterways. Tribal resource managers have routinely expressed doubts in public forums that iron can be relied upon to mitigate sulfide's deleterious effects on wild rice. From the perspective of MPCA scientists and staff that I spoke with,

the algorithm was more faithful to the data, and attempts to incorporate the complex relationship between sulfate, sulfide, and other compounds in the ecosystem were a positive development. The fact that the proposed standard was opposed by both sides was articulated by some as an indication that the MPCA had struck a balance between competing interests and interpretations of the data.

I want to return briefly to statements introduced earlier in this chapter made by the mining consultant and Iron Range legislators, which suggested that the state should look to tribal methods for protecting wild rice. As I argued above, these kinds of statements are a reflection of the efficacious habitat and species remediation work that upper Midwest tribes have developed in recent years. The approach of decentering sulfate as the primary locus for wild rice protection is an acknowledgement of the fact that aquatic ecosystems are complicated and dynamic. Yet, I want to return to these statements because, in the context of a regulatory fight such as this, undermining the role of sulfate and sulfide contamination in wild rice degradation functions also as a means of defraying liability for sulfate polluters. If mining companies, municipalities, and their supporters can make a case that the impacts of sulfate are either uncertain or indirect enough, then they can reasonably contest any responsibility to mitigate their sulfate discharges. And this form of contestation works because the structure of state and federal environmental regulation in the US is designed primarily to balance costs and benefits. This structural configuration is based upon an ontological presupposition that the non-human environment exists to meet human need, and that industry’s benefits to humans are as, or more, valuable as the beneficial uses of natural resources. Thus, the tribes

occupy an odd position in the debate, at once challenging the foundational presumptions upon which the state regulatory structure is based, but also recognizing that a specific discharge limit for a discrete pollutant is the only way to reasonably constrain future pollution and ensure industry accountability.

An alternative ontology

Despite the tribes’ participation in developing the scientific record, identifying issues, and contributing to the private and public rule-making processes, there remains some significant fissures between the science and policy approaches of MPCA and the tribes. An Anishinaabe Band member and community leader at the Nibi Manoomin Symposium articulated it this way: “There’s a fundamental difference between Western science and Indigenous science because western science compartmentalizes creation…they cut it, direct it, but never get to the source, which is spirit.” The problem of the “Western” tendency to compartmentalize and disaggregate is well-worn territory in critical science[317] and critical legal scholarship.[318] The perspective offered by the Red Lake member identifies this limitation of “Western” science, but goes further to diagnose the ontological problem at the root. The tribes are increasingly using the same scientific tools and processes as the scientists employed by state and federal agencies. They are observing the same biophysical processes, but their identification of acceptable responses—through policy and practice—are different. That difference can be traced to

[317] Latour 2004a, 2004b, 1993; Stengers, 2010, 2000; Haraway 2016, 1991.
[318] Deloria 1979; Wilkins 2003; Fletcher 2011a.

foundational beliefs about humans' obligations to non-humans', and the ways that responsibility, care, and cost must be allocated in order to fulfill those obligations.

The Band member at Nibi Manoomin went on to say, "We are not put here to be stewards of anything. Rather, we are here to live in…harmony with all other aspects of creation." Many critical science scholars have traced the ways in which ontologies of human hierarchy have permeated scientific inquiry and resource policy, and have ultimately undermined resource protection, and perhaps even human survival on a changing planet.[319] Tribal resource managers and participants in public meetings that I've observed have shared these criticisms, but have also repeatedly expressed a compelling alternative way of thinking about humans' place in a resource hierarchy: humans are at the bottom. We are completely dependent on everything around us, while nothing is dependent on us. This reframing of the hierarchy upends the logics of a regulatory framework which allows for degradation of a resource even as it strives to protect, and undermines the lauded position of humans as capable of producing 'stewardship' through property-based regulation.

Indeed, it shifts the entire interaction from one of diagnosis and prescription of nature by a field of human experts—to one of encounter, in which the non-humans are the experts and the humans must learn through their engagement. In *The Science Wars*, Isabelle Stengers develops the concept of *ecological thought*, which "implies a culture of disorientation, whose touchstone is not so much an openness to others but the ability to

[319] Deloria 1979; Latour 1993, 2004a; Howitt & Suchet-Pearson 2003; Clark 2011.

"introduce oneself," the condition for any civilized encounter."[320] In this language of 'encounter' and 'introductions,' Stengers is making an appeal for a relationality (on some level, a sociality) that meets the Other (whether that be other person, practice, molecule, etc.) from a position of unknowing, a position that refuses to predetermine meaning or claim final legitimacy "in the name of" a legitimizing agent. Stengers charges the scientist "to avoid dreaming the dream of experimental creation, of turning a living being into a reliable witness for its own functioning, that is, of defining it through the unilateral requirements of proof."[321] Stengers's urges that, in order to fully understand what is presupposed, what is practiced, and what is required in formulating and answering scientific questions, we must peel back the proxies of legitimacy, proof and authority.[322]

By upending the presumptions of a human-led hierarchy and asserting that humans' relationships to non-humans must be oriented in respect and accountability, tribal scientists, resource managers, and political leaders have demanded a very different kind of science-based policy than what is proposed by the MPCA. Returning to the MIAC letter quoted in the beginning of this chapter provides some concrete examples of how these alternative ontologies might be integrated into a more effective and holistic wild rice policy platform: "wild rice, in order to survive and thrive into the future, needs stronger and broader protections than just a single water chemistry criterion; one which, in fact has not been properly implemented in the decades since it was promulgated."[323]

[320] Stengers 2010, at 62.
[321] Stengers 2010, at 68.
[322] Stengers 2010, at 68.
[323] MIAC Letter: 2.

Larson recommends a far more holistic and multi-faceted policy; one that is rooted in a recognition of Manoomin’s “priceless value to the people of Minnesota and its exceptional ecological significance”, is inclusive and conservative in designating wild rice waters, acknowledges the vast diminishment of wild rice stocks over time, reflects wild rice’s “sensitivity to pollution, habitat degradation and hydrologic alteration”, defines sustainable levels of harvest and healthy wild rice conditions through robust assessment methodologies, and maintains the existing protective criteria for sulfate.[324]

Part IV. Regulatory Ontologies, Incommensurability, and Jurisdictional Practice

As I suggest in the Introduction, if jurisdiction is “the power to speak for the law,” then jurisdictional questions are also questions about what the law says. Fights for jurisdiction are not just fights over how power is allocated within an existing legal framework. Sometimes, they are also contestations over ontological underpinnings of the law itself. This reflects Richard Thompson Ford’s characterization of jurisdiction as a discourse, a way of speaking and understanding the social world.[325]

The sulfate standard debate leaves many open questions. But, as this chapter has argued, the process and contentions around the sulfate standard rulemaking have revealed important things about the functioning of regulatory ontologies around environmental protection, and the role of tribes in both pushing state and federal regulators and providing an alternate ontological framework for thinking about resource management,

---

[324] MIAC Letter: 2.
[325] Ford, R.T. 1999, at 855.

obligations, and the costs of contamination and mitigation. The tribes' and individual Band members' involvement in this process—through the wild rice advisory committee, formal submissions to the court, statements at administrative hearings, consultations with MPCA officials, development of on-reservation water quality standards, and so on—are all methods of asserting tribal interests in the water quality process, establishing tribal resource perspectives in the legal record, and advancing the tribes' jurisdictional authority as resource managers on par with the states. These constant practices of reasserting tribal authority and interest in all aspects of water regulation are jurisdictional practices. As Ford argues, jurisdictional lines are neither merely fixed boundaries, nor ideological constructs, "they are real because they are constantly being made real…the lines don't preexist the practices."[326] Thus, the divisions between 'state jurisdiction' and 'tribal jurisdiction' are not so clear in the context of a standard that impacts waters on reservations and across the ceded territories, and has consequences for treaty resources, such as Manoomin. Jurisdiction is not a line in the sand; it is the constant, iterative practice of tribes and the state negotiating the bounds of their respective authorities and asserting their respective interests.

However, this case—while providing important insights into tribal leaders' sustained impacts on resource regulation and scientific discourse—also demonstrates the significant tensions and incommensurabilities between tribal ontologies and state-federal regulatory regimes. While tribal leaders took a leading role in both the scientific and

[326] Ford, R.T. 1999, at 856.

political aspects of the rule-making process, the proposed standard and the advisory process was also a source of frustration for tribal leaders and Band members.

Tribal leaders and environmental protection advocates who were frustrated by the proposed standard have suggested that the next step may be legal action against the beleaguered MPCA. Though legal action is, at this point, only speculative, thinking through the legal questions provides a window into the concrete ways in which tribes can use regulatory processes such as this to advance their jurisdictional authority over environmental management practices. Questions about the ways in which philosophical or ontological incommensurability have played out in this process are also useful for a broader theorization of jurisdiction as a dynamic, complex, multi-scalar, and value-laden enterprise, which is shaped—not by centralized political authority—but by negotiated and contested political, discursive, social, and even scientific processes. The following chapters will build upon this theme.

Incommensurability in a Complex Jurisdictional Landscape

The legal and jurisdictional complexities may provide important spaces for tribes to push back against state authority and enforce their own standards against sulfate dischargers. But there still remains a philosophical question about the degree to which Indigenous environmental ontologies can ever be adequately represented in a regulatory system that is built on such radically different priorities. This situation embodies the "peculiar relation between technicality and metaphysical invocations" that can be observed in regulatory frameworks, which are "legal to the extent that they are formally

recognized as such and technical to the extent that their subject matter determines their character and reach."[327] Here, the legal questions provide distinct fissures through which tribes can push their jurisdictional capacity. The metaphysical creeps through in the question of subject matter: what is the law in these jurisdictional spaces? And how are human/non-human environments conceptualized in this realm? Ian Barbour argues that communication between two disparate communities is only possible when they partially share a common language. Without a "core of shared terms" and "experiences in common to both communities", their communications are "incommensurable."[328] But understanding something to be incommensurable does not always suggest incompatibility.[329] Marisol de la Cadena calls this,"[c]ontrolling the equivocation," which requires "probing the translation process itself to make its onto-epistemic terms explicit, inquiring into how the requirements of these terms may leave behind that which the terms cannot contain, that which does not meet those requirements or exceeds them."[330]

While there may be a foundational ontological incommensurability, tribes in the Upper Midwest and beyond have expertly utilized the language of American law—and all of the presumptions that come along with it—to produce a sense of common ground with the colonial state and federal structures. By creating some semblance of shared interest through their intervention in legal and regulatory processes, tribal leaders have exposed inconsistencies in the state's guiding principles and legal approaches and have

[327] Turem & Ballestero 2014, at 7.
[328] Barbour 1974, at 145 (cited in Deloria 1979, at 26).
[329] Snelgrove et al. 2014, at 3.
[330] De la Cadena 2005, at 116.

used every opportunity to assert their own foundational worldviews into the official record and administrative process. In calling for more holistic and comprehensive management of wild rice, they are also calling for a different way of doing politics, one which incorporates tribal knowledge, recognizes tribal sovereignty, and respects the ways in which humans are beholden to—rather than dominant over—non-human entities.[331] Many of the Indigenous community leaders I have interviewed recognize that their way of thinking about non-human agency is challenging for those who were raised in a different ontological perspective. While there may never be complete "commensurability" between tribal and state resource approaches, tribal investment in the sulfate standard have forced state officials to reckon with, and publicly respond to, their cultural understanding of wild rice as relation. This has impacted the course of the regulatory process in the sulfate standard negotiation and adds fresh philosophical weight to tribes' jurisdictional practices.

Part V. Postscript

As I wrote this chapter in the fall of 2017, the MPCA was participating in administrative hearings across the state and taking public comments on the proposed rule. On January 11, 2018, Administrative Law Judge LauraSue Schlatter released her report

[331] There are echoes of this in Stengers's call for a "different way of doing politics, one that integrates … human affairs (*praxis*) and management-production of things (*technë*)," in order to privilege "becomings" (the vector of fiction, possibility, creative passion, and humor), and decenter power. Stengers 2000, at 163, 167.

on the sulfate standard rule-making.[332] Judge Schlatter rejected the proposed repeal of the 10 mg/L sulfate standard on the grounds that the MPCA had failed to establish the reasonableness of the repeal, and because the proposed standard would violate Minnesota's water quality obligations under state and federal law.[333] Judge Slatter further disapproved the equation-based standard and the MPCA's proposed list of wild rice waters. Judge Slatter's opinion, while rooted in an interpretation that the proposed standards did not meet the procedural or substantive requirements of state and federal law, also focused in on the role of tribes and perspectives of Native American participants in the process. For one, Judge Schlatter rejected the equation-based approach's narrow focus on sulfate and sulfide interactions, highlighting tribal members' reliance upon fish and Manoomin and the potential impacts between sulfate and increased levels of methylmercury in fish as well as concerns about iron sulfide plaques on wild rice plant roots.[334] Perhaps inadvertently channeling the work of Whyte and Crease (discussed above), she writes, "While the MPCA had responses to each of these concerns, the volume and nature of the comments from the Native American community demonstrated that the Agency has not succeeded in building an atmosphere of trust

[332] *In the Matter of the Proposed Rules of the Pollution Control Agency Amending the Sulfate Water Quality Standard Applicable to Wild Rice and Identification of Wild Rice Rivers*, Report of the Chief Administrative Law Judge LauraSue Schlatter, January 9, 2018 [Hereinafter ALJ Report, Sulfate Standard].
[333] 33 U.S.C. § 1313(c); 40 C.F.R. § 131.10(b) (2015); Minn. R. 7050.0155 (2017).
[334] ALJ Report, Sulfate Standard, at ¶ 59.

regarding this proposed rule, or in making the Minnesota Native American community feel that it has been heard."[335]

Judge Schlatter's decision found fault with the MPCA's approach to a number of concerns the tribes had raised throughout the process, including the rule's 'beneficial use' and 'existing use's designation for wild rice, limited classification of wild rice waters, and limited applicability of the standard.[336] Ultimately, the Judge concluded, in part, that MPCA's failure to recognize the proposed rule's burdens on Native American communities,[337] and its failures to account for the jurisdictional conflicts of a state standard that was no longer in line with downstream tribal water quality standards, marked the rule's demise.[338] In May of 2018, the MPCA officially withdrew the revised rule from consideration.[339]

While the results of Judge Schlatter's decision were satisfying for tribal leaders (many of whose concerns were reflected in her analysis) and for industry leaders (who opposed the possibility of more stringent standards at all), the Legislature quickly acted to mitigate Judge Schlatter's support of the existing 10ppm standard. In April, Legislators introduced and quickly passed H.F. 3280 (and its companion bill, S.F. 2983), repealing the existing standard. On May 9, 2018, Governor Dayton vetoed H.F. 3280, arguing that it undermined Minnesota's obligations under the Clean Water Act, and ensured ongoing

[335] ALJ Report, Sulfate Standard, at ¶ 60. Whyte & Crease 2010, at 412.
[336] ALJ Report, Sulfate Standard, at ¶¶ 76, 151, 152, 287, 288.
[337] ALJ Report, Sulfate Standard, at ¶¶ 61–62.
[338] ALJ Report, Sulfate Standard, at ¶¶ 70, 99, 151, 153.
[339] Minnesota State Register, Vol. 42, No. 45, May 7, 2018.

litigation that would exacerbate and prolong regulatory uncertainties. In May, the Governor vetoed another House bill (H.F. 3422), which would have limited the rule "until cost-effective treatment technology…is available," and which would have established a Wild Rice Working Group to further study sulfate impacts on wild rice.[340] In response, the Governor established his own Task Force on Wild Rice via Executive Order, an initiative that is currently underway.

While the MPCA's sulfate standard rule revision has been withdrawn, the resolution of the sulfate standard debate remains very uncertain. But the outcome is, in many ways, less important than the process. The defeat of the MPCA's proposed rule is a reminder that jurisdictional authority—even a state's jurisdictional authority to manage resources within its boundaries—is very much a contested and iterative process. The ways in which tribes asserted their own authority through jurisdictional practices—demanding government-to-government consultation, formally intervening in Administrative Hearings, consistently articulating their concerns through various formal and informal avenues, and by developing standards for their own reservation resources—demonstrate the complex, fragmented, and dynamic work of jurisdiction. In this debate, the braiding together of tribal knowledge and scientific method has itself been a form of jurisdictional practice, as tribes increasingly contribute to the scientific record in support of resource-protective policies. While the full jurisgenerative potential of tribal engagement—and tribal pushes for more protective and holistic standards—remains to be

[340] Conference Committee Report on H.F. No. 3422, May 20, 2018, at 1, 3–4.

seen, their impact upon the sulfate standard rule-making process was made clear throughout the administrative decision.

CHAPTER 4

Pipeline Problems: Materiality, Temporality, and Assessing Impacts in the Ceded Territories

> The space of impact is not a continuous territory or corridor with well-defined borders. Impacts may be located in specific places, or spread over large areas…The space of impacts is not fixed: it is a shifting field of events, some of which may be more likely, more extensive, or longer lasting than others…
>
> -Alexander Barry, *Material Politics: Disputes Along the Pipeline*, at 128–129.

> From pipelines, to wild rice and walleye, the State of Minnesota does not appear to be protectively regulating the natural resources or pipelines, but rather defining acceptable levels of degradation in the land of sky blue waters for the profits of foreign corporations.
>
> - Arthur LaRose, Chairman of the 1855 Treaty Authority, in a letter to Minnesota Governor Mark Dayton, August 7, 2015.

In April 2016, the Standing Rock Sioux tribe began organizing a campaign to challenge the construction of the Dakota Access pipeline through territories just north of their reservation and across the Missouri River and Lake Oahe, the tribe's primary water source. The tribe, and its supporters, argued that the pipeline's route threatened their fundamental water supply and that insufficient environmental review and consultation with tribes during pipeline permitting activities threatened tribal sovereignty. Between April and December of 2016, a movement grew at Standing Rock, inspiring the largest gathering of American Indian tribes and supporters in over a century.

Standing Rock brought national attention to tensions that had been simmering on reservations for years. In 2013, when the Alberta Clipper pipeline was up for re-permitting, no tribes participated in the state of Minnesota's regulatory process. Just a few months later, three tribes intervened in the permitting process for the proposed Sandpiper pipeline, and in 2015, five of the seven Anishinaabe Bands located in present-day Minnesota intervened and became significant forces in the trajectory of both the Sandpiper and Line 3 projects. As tensions rose around Line 3, numerous media outlets raised the specter of Minnesota's Standing Rock. While a peaceful protest camp, referred to as the Makwa Camp, has started to develop along the pipeline route in the eastern corner of the Fond du Lac Reservation, much of the tribal pushback over Sandpiper and Line 3 has thus far occurred through the legal and administrative permitting processes.[341] In the past few years, tribes have shaped the national discussion about pipelines, forcing state and federal authorities to reckon with tribal jurisdiction as well as the inadequacies and inconsistencies in environmental review for pipeline permitting. Along the way, they have become governmental forces to be reckoned with.

---

[341] In September of 2016, Melanie Benjamin, Chief Executive of the Mille Lacs Band of Ojibwe submitted a White Paper to the White House Tribal Nations Conference discussing the similarities, differences, and lessons learned between the tribal opposition to the Dakota Access Pipeline at Standing Rock and the tribal opposition to the Sandpiper and Line 3 pipelines proposed to run from the North Dakota border, through Minnesota, to Superior Wisconsin. Chairwoman Benjamin addressed the fundamental failures in the state and federal consultation process that had plagued both the Standing Rock Band and the Anishinaabe Bands in the Upper Midwest throughout the pipeline contestations and included specific recommendations for how tribes should be engaged effectively on a government-to-government level on any federally permitted or commented-on project that may impact tribal nations. Benjamin, Melanie. 2016. *Pipelines and Tribal Governments: The Experience and Recommendations of the Mille Lacs Band of Ojibwe Indians*. White Paper, submitted to the White House Tribal Nations Conference, September 26, 2016.

This chapter assesses the perennial environmental and jurisdictional problems that pipelines pose for tribes. While there are no consistent methods for analyzing entire pipelines, and jurisdictional frameworks that govern pipelines are often unclear or underdeveloped, this creates a variety of openings for tribes to assert themselves as important actors in the decision-making process. In this chapter, I look specifically at debates over Enbridge's proposed Line 3 "replacement," as well as the Sandpiper and other pipeline projects, and trace the procedural and conceptual consequences of tribal interventions in the pipeline permitting process in the region. I argue that tribal interventions have contributed to a slowing of the permitting process, and they have foregrounded discussion of long-term consequences, undermining the rhetoric of political and economic urgency. They have demanded a more through reckoning with the impacts of pipelines and crude as actors and agents in the ecosystem and have worked to patch jurisdictional holes and develop understanding of pipeline impacts as they traverse multiple jurisdictions. As with tribal engagement in the sulfate standard process, these interventions have disrupted state agency deliberations and have demanded a different way of thinking about regulatory obligations to non-human natures. In the case of the pipeline permitting, tribal groups have also highlighted the ways in which the existing regulatory approaches artificially limit analysis of impacts to narrow geographic and temporal scales. I argue that tribal entities' sustained attention to the temporality and materiality of potential harms, paired with their increasing jurisdictional influence, undermines existing cost-benefit analyses for pipeline permitting, and encourages a

thorough accounting of the role that regulatory structures can play in the degradation—or potential restoration—of vulnerable ecosystems.

Part I of this chapter lays out the development of pipeline infrastructures in the Great Lakes region, addresses the patchwork regulatory framework under which oil pipelines are governed, and looks to a few notable pipeline proposals and disasters in the region that have catalyzed tribal involvement in pipeline decision-making. Part II attends to the materiality of pipelines and the forms of crude oil travelling through them, and the temporal dynamics of oil spill emergencies refracted through permitting and policy debates. Part III delves into how pipelines shape the landscape, and how environmental analysis accounts (or fails to account) for their cumulative impacts. Part IV further develops the ways in which tribes have used various strategies to patch the jurisdictional holes in pipeline regulation and to create openings to assert their own jurisdictional authority.

Part I. Pipeline Histories & Pipeline Futures in the Ceded Territories

The United States has the world's most expansive network of energy pipelines, encompassing over 2.5 million miles of pipe, including over 51,000 miles of crude oil distribution pipelines.[342] While the U.S. oil industry first took shape in northwestern Pennsylvania in the 1850s,[343] the Great Lakes region was more directly affected by the

[342] INTEK Inc. and AOC Petroleum Support Services, LLC. 2014. *United States Fuel Resiliency: Volume 1*. Prepared for Office of Energy Policy and Systems Analysis, U.S. Department of Energy, September 2014.
[343] Klass & Meinhardt 2015, at 959.

discovery and expansion of oil in the Canadian province of Alberta in the late 1940s.[344] Favorable relationships between the U.S. and Canada incentivized the importation of Alberta oil to the U.S.; this led to a boom of pipeline construction from Alberta through the Great Lakes region, connecting the oil fields to U.S. refineries and markets.

In recent years, increased imports of heavy synthetic crude from Canada and extractions of more complex crude oil deposits from the Alberta Tar Sands and Bakken shale deposits in North Dakota have inspired a sense of urgency among U.S. and Canadian officials and industry leaders regarding the existing oil transportation infrastructure.[345] In the current moment, we are witness to the biggest expansions (ongoing and proposed) of energy pipelines since World War II.[346] This combined with a number of high profile pipeline ruptures have increased attention to the effects of aging and maintenance needs for the existing pipeline networks that run throughout the U.S.

In the 1950s, Lakehead Pipeline Company,[347] a subsidiary of the company now known as Enbridge began construction on the Lakehead Pipeline System to transport crude oil from Alberta, connecting Canadian oil to refineries across the United States and

---

[344] MacFadyen & Watkins 2014.

[345] The United States Fuel Resiliency Report: Volume 1 reported that imports of this type of crude from Canada increased from 2.845 million barrels per day in 2018 to nearly 3.125 million barrels per day in 2014.

[346] Klass & Meinhardt 2015, at 970–71 (citing Hays, Kristen. 2012. "Insight: Oil Pipeline Crunch Shifts U.S. Shale Race from Drillbits to Valves," *Reuters*, July 30, 2012. Available at www.reuters.com/article/2012/07/30/us-oil-usa-pipelines-idUSBRE86T02820120730 [Last Accessed April 27, 2018]).

[347] In 1949, Interprovincial Pipe Line Company (IPL) was incorporated in Alberta, Canada. Lakehead Pipe Line Company was created to operate the United States portion of the pipeline, built in 1950. After a number of reorganizations and name changes, the company became Enbridge Inc. in 1998. In 2001, Lakehead Pipe Line Company was renamed Enbridge Energy Partner to align it with its parent corporation.

Canada. Today, it runs 1,900-miles, and is the world's longest petroleum pipeline network, traversing treaty-ceded territories throughout present-day Minnesota, Wisconsin, and Michigan. The first line in the Lakehead system was constructed in 1950, crossing approximately 990 miles from Redwater, Alberta to Superior, Wisconsin. Over the course of the next twenty years, Lakehead and its partners installed six more pipelines as a part of this system. In 2002, a new wave of construction began, and Enbridge built eight additional pipelines in the region.

The primary corridor from Edmonton to Superior, houses five pipelines—Lines 1, 2B, 3, 4, and 67 (and two more that come to a juncture in Clearbrook, Minnesota). This corridor runs directly through the Leech Lake and Fond du Lac reservations, crosses an eight-acre parcel of land held in trust for the Red Lake Band, and traverses the territories ceded by the Anishinaabe in the Treaties of 1837, 1847, 1854, 1855, 1863, 1866, 1867, and 1889. Upon reaching Superior, the system splits: Lines 6A and 14 run south through the Lac Courte Oreilles Reservation and on through the 1842 and 1837 ceded territories; Lines 61 and 13 take roughly the same route as 6A and 14, but cut south, skirting the boundary of the Lac Courte Oreilles Reservation;[348] Line 5 travels north, bisecting the Bad River Reservation and on through the 1842 and 1836 ceded territories, across present-day northern Wisconsin, the Upper Peninsula of Michigan, and through the Mackinac Straits. All told, there are nearly a dozen oil and hundreds of natural gas

[348] In the 1990s, the Lac Courte Oreilles Band refused to grant Enbridge's request to expand pipelines 61 and 13, so the company rerouted those lines around the reservation boundaries.

pipelines through the territories ceded in the Chippewa Treaties in present-day Minnesota, Wisconsin, and Michigan.

Figure 4. Lakehead System Map. Reprinted from EPA.gov (2017)

As this first group of pipelines was being installed in the 1950s and 1960s, the U.S. was undergoing a different sort of policy wave. Reactionary responses to the 1934 Indian Reorganization Act began to gain steam among legislators in the 1940s, leading to investigations by the Senate and the House into the effects of the IRA, and resulting in sustained criticism of the IRA's administrative costs and failures to properly assimilate Indians into mainstream American culture.[349] Over the ensuing decade, a variety of

[349] Wilkinson & Biggs 1977 (citing S. Rep. No. 310, 78th Cong, 2d Sess. (1943), which called for the immediate elimination of all research and rehabilitation programs for Indians, the transfer of management of forests, infrastructure, hospitals, schools, and other public entities to different

reports and administrative efforts sought to eradicate Indian status and push for, in the words of the 1949 Hoover Commission, the "complete integration" of Indians as tax-payers and citizens.[350] This "complete integration" approach was adopted with zeal by Dillon S. Myer, the former director of the World War II Japanese-American concentration camps, who became Commissioner of the BIA in 1950.[351] Myer spearheaded a "Voluntary Relocation Program" to move American Indians from the reservations into urban areas, spurring additional land loss through the sale and lease of the lands occupied by tribal members who relocated. As Myer reshaped the administrative organization of the BIA, he upended BIA oversight mechanisms and eradicated provisions that recommended gaining tribal consent for administrative decisions.[352]

In 1953, the U.S. House passed Concurrent Resolution 108, which declared termination to be an official policy of Congress and demanded that termination proceedings be implemented rapidly. This Resolution, along with a number of other administrative decisions and policies, fundamentally undermined the federal trust relationship and sought to eradicate tribal jurisdiction and decision-making authority in all realms. Public Law 280 transferred jurisdiction over Indians from the tribes and

agencies, cessation of land purchases by and for tribes, the eradication of trust status for Indian lands, the division of all trust funds).

[350] Wilkinson & Biggs 1977, at 147 (citing the Commission on Organization of the Executive Branch of the Government, *Indian Affairs: A Report to Congress* (Mar. 1949)).

[351] Wilkinson & Biggs 1977, at 147.

[352] Wilkinson & Biggs 1977, at 148.

federal governments to the states in a number of civil and criminal matters,[353] and a host of other actions transferred educational and health policies to the states, authorized the sale of trust lands to non-Indians, and rejected consultation with tribes in any formal capacity on infrastructure or development projects.[354]

It was against this policy backdrop that Lakehead Pipeline Company began negotiating easements to build pipelines across tribal lands and ceded territories in Minnesota and Wisconsin. There is little documentation of the easements secured by Lakehead Pipeline as it laid Lines 1, 2, 3, and 4 between 1950 and 1973. What exists shows that Lakehead managed to secure easements in 1954 from the Department of the Interior for twenty-year terms in order to construct Lines 1 and 2 across Fond du Lac and Leech Lake Reservations.[355] The easement for Line 5 through the Bad River Reservation was signed by the BIA, allegedly without the knowledge of Bad River tribal leadership. In 1962, the company approached MCT's Tribal Executive Committee, which agreed to a 50-year right of way for Line 3, and Lakehead agreed to pay $64,000 for this and

[353] Public Law 83-280, Aug. 15, 1953 (18 U.S.C. § 1162, 28 U.S.C. § 1360, 25 U.S.C. §§ 1321–1326) established state jurisdiction over civil and criminal matters in Indian country, undermining both tribal and federal jurisdiction. The Act applied to Minnesota (except the Red Lake Nation), Wisconsin (the Menominee Reservation was later exempted) and four other states. The Supreme Court decisions in *Bryan v. Itasca County* (426 U.S. 373 (1976)) and *California v. Cabazon Band of Mission Indians* (480 U.S. 202 (1987)) clarified that P.L. 280 did not extend states' authority to impose taxation or regulate civil matters on Indian reservations. Regarding criminal jurisdiction, the Tribal Law and Order Act (TLOA), July 29, 2010 (Title II of Public Law 111-211) permits an American Indian tribe subject to state criminal jurisdiction under P.L. 280 to request concurrent federal jurisdiction to prosecute violations of the Major Crimes Act (18 U.S.C. 1153) and General Crimes Act (18 U.S.C. 1152) on that tribe's reservation. The White Earth Band and Mille Lacs Band are two of the three tribes nationwide who have been granted a concurrent jurisdiction agreement under TLOA.
[354] Wilkinson & Biggs 1977, at 149–150.
[355] ALJ Report, Line 3, at 142–143, ¶¶ 446–452.

extension of the easements for Line 1 and 2 to fifty year terms.[356] In 2009, Enbridge renegotiated easements with the Fond du Lac and Leech Lake Bands in order to install Line 13 (also known as Southern Lights, carrying diluent north to Alberta) and Line 67, the Alberta Clipper Line along the mainline system; the negotiated agreement also included a twenty-year extension of the existing easements for Lines 1–4.[357]

Jurisdictional Wormholes in the Regulatory Framework

In a 2008 article, Legal Geographer Hari Osofsky introduced the concept of *justice wormholes*, "governmentally-constructed links between legal spaces devoid of the supposedly familiar guarantees of procedural or substantive protection. They confirm that legal justice is a concept that depends on the proper interrelation of place, space and time."[358] While Osofsky focuses on the venues for redress in key property and criminal law cases, the question of justice wormholes—the liminal spaces in which legal frameworks fail to provide substantive protections for legal subjects—is also resonant in the environmental regulatory realm. Oil pipelines are one example of a regulatory framework that has largely been reactive—emerging in the wake of environmental disaster—which has left large open questions about responsibility, jurisdiction, and

[356] ALJ Report, Line 3 at 143, ¶ 450.
[357] ALJ Report, Line 3 at 142, ¶ 452. While these easements grant Enbridge the right to maintain its operations through the reservation portions of the mainline corridor, a federal consent decree discussed below has mandated replacement of Line 3. The easements do not outright grant Enbridge the right to replace pipelines in trench, they merely allow them to continue operating them for the twenty-year duration of the easement.
[358] Osofsky 2008, at 118 (internal quotes removed).

agency in making decisions about pipeline routing, replacement, and expansion. Jurisdictionally-speaking, oil pipelines are strange beasts. Unlike natural gas pipelines, which are federally—and fairly comprehensively—regulated, oil pipelines are subject to an odd semblance of jurisdictional authorities.

In the 1950s and 1960s, when the main corridor of the Lakehead system was laid, pipeline installations were primarily governed by easements and state requirements on infrastructural work. Much of the early regulatory response to pipelines was focused on disrupting the power of oil monopolies and prohibiting rate discrimination.[359] In 1977, Congress established the Federal Energy Regulatory Commission (FERC), which functioned as an independent entity within the Department of Energy. Congress placed oil pipelines under the regulatory jurisdiction of FERC, but this jurisdiction was limited to regulating rates and terms and conditions of service for oil pipelines engaged in interstate commerce.[360] Unlike natural gas pipelines, which are primarily overseen by FERC and are subject to a host of federal oversight mechanisms, states exercise nearly exclusive control over the siting and permitting approvals for oil pipelines.[361] The

---

[359] By the early 1900s, Standard Oil had a stranglehold on crude oil production, pipeline infrastructure, and refining and had started fixing prices to undercut competitors. The Hepburn Act, passed in 1906, put interstate oil pipelines under the jurisdiction of the Interstate Commerce Commission (ICC) and made pipelines common carriers, which prohibited price fixing and discrimination. Klass & Meinhardt, at 960.

[360] Klass & Meinhardt 2015, at 980–81.

[361] Oil and gas transport and storage laws in the U.S. March 13, 2018. Morgan Lewis & Bockius LLP. Available at: https://www.lexology.com/library/detail.aspx?g=1a7105d5-25cc-4546-bccd-5d4665217478 [Last Accessed April 25, 2018]. According to Alexandra Klass and Danielle Meinhardt, the “differences [between oil and natural gas] in means of transportation and regulation of that transportation arose in part because of the physical properties of each resource but also because each regulatory system developed during different political and economic times and in response to different constellations of actors, assumptions regarding the scarcity or

Department of Transportation (DOT)'s Pipeline and Hazardous Materials Safety Administration (PHMSA), enforces standards for pipeline design, construction, operation, maintenance, inspection, and testing.[362]

If a pipeline crosses federal lands, it must secure right-of-way permits from the Bureau of Land Management (BLM), or the U.S. Forest Service (if crossing federal forest land), and must comply with federal environmental regulations; a pipeline that does not cross federal lands does not require approval from FERC or BLM, and only requires approvals from other federal agencies under particular circumstances. Certain stages of construction may require approval from the DOT and the EPA exercises jurisdiction over compliance with federal environmental statutes and over oil spills from large pipelines."[363] Under the Clean Water Act and National Environmental Policy Act, the U.S. Army Corps of Engineers is required to assess pipelines that cross regulated waters, though the agency often does this through generalized permits, rather than individual assessments.[364]

---

availability of the resource in question, the role of federal and state governments in regulating energy transportation, and varying concerns over monopoly power." Klass & Meinhardt 2015, at 950.

[362] Brownman 2010.

[363] Klass & Meinhardt 2015, at 981; Association of Oil Pipelines 2015.

[364] The use of general permits is a more recent innovation by the Army Corps, implemented with the intent to streamline the evaluation process. Nationwide Permit 12 is used to conduct these assessments, rather than conducting individualized review. Arkfield 2017. This practice has been opposed by a number of tribes and others, who argue that the dangers of oil pipelines are different from other materials carried by pipeline and should thus be assessed differently. U.S. Army Corps of Engineers, Discussion Document, Nationwide Permit 12, Dec. 21, 2016, at 6–25. Available at: http://www.usace.army.mil/Portals/2/docs/civilworks/nwp/2017/NWP_12_2017_final_Dec2016.pdf?ver=2017-01-06-125514-797 [Last Accessed May 4, 2018]; Letter to Hon. Lawrence Roberts, Acting Assistant Secretary Indian Affairs, U.S. Dept. of the Interior, Hon. Jo-Ellen Darcy, Assistant Secretary of the Army (Civil Works), and Tracy Toulou, Director, Office of

Much of the regulatory framework for pipeline safety focuses on natural gas and other hazardous liquids.[365] The signature oil spill legislation in the U.S.—the Oil Pollution Act of 1990, was the result of a slew of major oil spills from tankers that occurred in 1989—the Exxon Valdez in Alaska, the World Prodigy tanker in Newport, Rhode Island, the Presidente Rivera in the Delaware River, and the Rachel B Tank Barge in the Houston, Texas Ship Channel.[366] The Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011 was proposed by PHMSA in the wake of devastating pipeline ruptures—the 2010 Deepwater Horizon spill in the Gulf of Mexico, the 2010 Kalamazoo River spill in Michigan, and the 2011 Yellowstone River spill in Montana.[367] Thus, the genesis of safety legislation for oil pipelines has largely developed as a response to specific crises, rather than a forward-thinking approach to safety and environmental protection.

Questions about where and how to locate or replace pipelines, how to permit these activities, and how to conduct environmental assessments are largely the purview of state law. The state of Minnesota requires that pipeline operators obtain a certificate of need

---

Tribal Justice, from Kevin Dupuis, Sr., Chairman, Fond du Lac Band of Lake Superior Chippewa, Re: Consultation with Tribes on Federal Infrastructure Decision-making, Nov. 29, 2016.

[365] The Hazardous Liquid Pipeline Safety Act of 1979 establishes an oil spill clean-up fund, but primarily focuses on regulating other materials traveling through pipelines. 49 U.S.C. § 60101.

[366] NOAA Office of Response and Restoration. 2015. "It Took More Than the Exxon Valdez Oil Spill to Pass the Historic Oil Pollution Act of 1990." Aug. 18, 2015. Available at: https://response.restoration.noaa.gov/oil-and-chemical-spills/significant-incidents/exxon-valdez-oil-spill/it-took-more-exxon-valdez-oil-s [Last Accessed May 5, 2018].

[367] Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011, Public Law 112-90, Jan. 3, 2012, 125 Stat. 1904. Expanded pipeline safety regulatory measures under PHMSA, including expanding civil penalties for violators, granting authority to enforce spill response plans required by the Oil Pollution Act of 1990, requiring additional monitoring technologies, mandating data collection on oil flows, and expanding the Oil Spill Liability Trust Fund.

and a route permit. The Minnesota Public Utilities Commission (PUC) generally oversees this process, and Environmental Impact Statements are generally coordinated by the Energy Environmental Review and Analysis unit of the Minnesota Department of Commerce (DOC-EERA). The Minnesota Department of Natural Resources and Pollution Control Agency provide comments and consultation on impacts, can issue permits to regulate pollution associated with pipeline construction or maintenance, and can cooperate on rights of way for state land, wetland or waterway crossings. Similarly, in Wisconsin, siting and approval for oil pipelines rests with the Public Service Commission (PSC) but is also subject to a host of other agency inputs, dealing with environmental impacts and easements. Pipeline operators must also secure easements or rights-of-way over all the land under which the pipeline will pass. This is generally done through a combination of negotiations with private land owners and state agencies, and occasionally through the state exerting eminent domain authority, but "there is no federal process to obtain a permit for the entire length of the pipeline and no federal eminent domain authority to acquire the land."[368]

In this jurisdictional hodgepodge, it is particularly difficult to get a grasp on the number of authorities, landowners, and processes that have a stake in a decision about pipeline installation and replacement, and more difficult still to get a comprehensive sense of the cumulative impacts of pipeline installations across a territorial landscape. Nevertheless, tribes have carved out a number of spaces for intervention. Despite the lack

[368] Klass & Meinhardt 2015, at 982.

of tribal involvement in the Alberta Clipper permitting processes in 2013, they have become important actors in every pipeline permitting action in the region since. As formal government intervenors and as sovereigns with the capacity to restrict pipeline activities across reservation borders, tribes have used a variety of jurisdictional tools to impact the pipeline permitting processes. But the jurisdictional wormholes of pipeline regulation have significantly limited tribes' abilities to serve as regulatory authorities over—or even to gain information about—pipelines in the ceded territories. Here, intertribal and treaty-rights agencies have attempted to leverage relationships with federal agencies to try to fill those gaps. When Enbridge applied for a reissuance of its easement for Line 5 across an eleven-mile stretch the Chequamegon-Nicolet National Forest, GLIFWC relied upon its Memorandum of Understanding with the U.S. Forest Service to compel analysis of pipeline integrity and ecosystemic impacts before the easement could be renewed. Efforts like this demonstrate the various jurisdictional hooks that tribes and intertribal groups have used to impact pipeline regulation, but also the challenges that pipelines pose for tribal jurisdiction in the ceded territories.

The Kalamazoo River Spill

On July 25, 2010, an Enbridge pipeline, known as Line 6B, ruptured in a rural area near Marshall, Michigan. Line 6B, the southern Michigan portion of the Lakehead network, was installed in 1969, and was designed to carry crude oil from Griffiths, Indiana to Sarna, Ontario. The 30-inch diameter pipe carried up to 190,000 barrels of

light synthetic, medium, and heavy crude oil per day.[369] Though technicians detected a low-pressure alarm at 5:58 that evening, throughout the night of June 25 and morning of June 26, heavy crude oil flowed into a culvert leading into Talmadge Creek and then on to the Kalamazoo River. Enbridge technicians eventually identified the rupture and began their response at 11:41am on July 26, 2010. They notified the National Response Center nearly two hours later, at 1:29pm.[370] Just ten days before the spill, Enbridge representatives appeared before the House Subcommittee on Railroads, Pipelines, and Hazmat and made assurances about the promptness of their response time in case of a rupture.[371] Prior to that appearance, they had requested a two and a half year extension from DOT's pipeline and Hazmat Office to repair 329 defects on Line 6; they had been aware of these defects for 2 years.[372]

Residents reported that by July 26, the air was painful to breath and the Kalamazoo River had turned black; those who lived within 200 feet of the river were banned from using anything but bottled water for months after the spill.[373] The lush, low-lying wetlands, marshlands, wildlife, and aquatic ecosystems around Talmadge Creek and that portion of the Kalamazoo River were devastated by the spill, and its proximity to the Kalamazoo increased the scope of the spill's range; when the final analyses were conducted, federal regulators found the spilled oil as far as 39 miles downstream near an

[369] Hearing on "Enbridge Pipeline Oil Spill in Marshall, Michigan", at 22–28.
[370] Hearing on "Enbridge Pipeline Oil Spill in Marshall, Michigan", at, vii–x.
[371] Hearing on "Enbridge Pipeline Oil Spill in Marshall, Michigan", at vii–x.
[372] Hearing on "Enbridge Pipeline Oil Spill in Marshall, Michigan", at 2.
[373] Hearing on "Enbridge Pipeline Oil Spill in Marshall, Michigan", at 22–28.

existing Superfund site.[374] Enbridge reported that the rupture released more than 840,000 gallons (20,000 barrels) of heavy diluted bitumen crude (or dilbit); EPA estimates put the amount closer to one million gallons.[375] It was one of the largest inland oil spills in U.S. history.[376]

In the aftermath of the Line 6B rupture, the Nottawaseppi Huron Band of the Potawatomi Tribe and the Match-E-Be-Nash-She-Wish Band of the Pottawatomi Tribe took an active role in clean up and investigating the natural resource impacts of the spill. The Kalamazoo River was an important part of traditional territory of the Match-E-Be-

[374] Final Damage Assessment and Restoration Plan/Environmental Assessment for the July 25-26, 2010 Enbridge Line 6B Oil Discharges near Marshall, MI. Prepared by U.S. Fish and Wildlife Service, Nottawaseppi Huron Band of the Potawatomi Tribe, and Match-E-Be-Nash-She-Wish Band of the Pottawatomi Tribe. October 2015. Available at: https://www.fws.gov/midwest/es/ec/nrda/MichiganEnbridge/pdf/FinalDARP_EA_EnbridgeOct2015.pdf [Last Accessed April 25, 2018]; Hearing on "Enbridge Pipeline Oil Spill in Marshall, Michigan", at vi.

[375] Final Damage Assessment, at 4; Hearing on "Enbridge Pipeline Oil Spill in Marshall, Michigan", at vi. The House Hearing does not go into detail about the differences between DilBit and crude oil, except to discuss their differential gravity ratings. Because the gravity rating of the oil that Enbridge reported it was transporting at the time had a gravity rating of 11, it is defined as "a heavy oil" in the House report (heavy oil is classified as having gravity below 22.3; very heavy oil has gravity below 10; bitumen from the oil sands deposits has gravity around 8). The House report does indicate that the crude oil Enbridge was transporting did contain diluents (naphthalene) which diluted the heavier oil in order to enable it to flow through the pipeline. Hearing on "Enbridge Pipeline Oil Spill in Marshall, Michigan", at vii. Subsequent analyses have characterized the oil as DilBit. *See* FOSC Desk Report for the Enbridge Line 6b Oil Spill, Marshall, Michigan, April 2016. Available at: https://www.epa.gov/sites/production/files/2016-04/documents/enbridge-fosc-report-20160407-241pp.pdf [Last Accessed April 25, 2018]; Papoulias, D.M., V. Veléz, D.K. Nicks, and D. Tillitt (2014). "Health Assessment and Histopathologic Analyses of Fish Collected from the Kalamazoo River, Michigan, Following Discharges of Diluted Bitumen Crude Oil from the Enbridge Line 6B." U.S. Geological Survey, Administrative Report 2014. Columbia, MO.

[376] The only inland spills that exceeded the volume of the Kalamazoo River spill occurred in 1973 when Line 3 ruptured near Argyle, Minnesota, spilling 1.3 million gallons, and again on Line 3 on March 3, 1991, near Grand Rapids, Minnesota, which released nearly 1.7 million gallons of crude oil (including over 300,000 gallons into the Prairie River).

Nash-She-Wish peoples and near to both the traditional territories and contemporary community and casino operation of the Nottawaseppi. Both bands were appointed as Natural Resources Trustees for the federally-mandated Natural Resource Damage Assessment (NRDA) reporting process,[377] and partnered on the development of the Federal On Scene Coordinator (FOSC)'s report on the oil spill and its aftermath.[378] The Bands have remained active advocates for pipeline safety and oversight, and in 2015, Homer A. Mandoka, Chairman of Tribal Council for the Nottawaseppi Huron Band of the Pottawatomi was appointed to the 16-member Michigan Pipeline Safety Advisory Board.

The spill was a wake-up call for tribes across the country, highlighting the urgent need to establish strong emergency response plans, and to engage more aggressively on the permitting, management, and oversight of pipeline operations in the region. In the aftermath of Kalamazoo, tribes across the Great Lakes region held trainings with pipeline spill simulations, became much more engaged in public comment and permitting processes, and sent delegations to Standing Rock to support the water protectors in their fight against the Dakota Access pipeline. Two months later, in September of 2010, a third-party water pipeline failure led to a rupture in Line 6A, discharging "harmful

[377] NRDAs are authorized by the Oil Pollution Act of 1990 (OPA 90), 33 U.S.C. §2701 et seq. (1990), and other statutes, depending on the type of contamination.
[378] FOSC Desk Report for the Enbridge Line 6b Oil Spill.

quantities of oil" into tributaries of the Des Plaines River near Romeoville, Illinois.[379] In 2012, Line 14 ruptured near Grand Marsh, Wisconsin.[380]

The Kalamazoo River spill, and those that followed it, pushed Anishinaabe tribes in the region to engage more critically and intensively with the pipeline permitting processes for proposals in Minnesota and Wisconsin. As will be discussed in more detail later in the chapter, the environmental analysis from Kalamazoo River indicated that the dilbit crude travelling through Lines 3, 5, 6, and others had different properties than lighter crude, which complicated emergency response and clean up.[381] This, coupled with the fact that many pipelines in the area were starting to reach their projected lifespans increased the stakes for tribes to make a jurisdictional claim on the environmental review, permitting, and oversight of oil pipelines in the ceded territories.

Replacing and Rerouting: Shifting Pipeline Infrastructures in the Lakehead System

In order to understand the ways in which the proposed Line 3 replacement has moved through regulatory structures in the state of Minnesota, it is important to look first at its predecessor project, the Sandpiper Pipeline. The Sandpiper Pipeline was proposed in 2013 by the North Dakota Pipeline Company, in coordination with Enbridge Energy Partners, Limited Partnership, and Williston Basin Pipeline. The proposed route would

---

[379] *U.S. v. Enbridge*, Case 1:16-cv-00914-GJQ-ESC, ECF No. 14, Consent Decree, Filed May 24, 2017, at 2 [hereinafter Consent Decree]. Enbridge estimated that the rupture spilled over 6,000 barrels of oil.
[380] Consent Decree, at 6.
[381] FOSC Desk Report for the Enbridge Line 6b Oil Spill.

transport light crude from the Bakken Formation in North Dakota to the pipeline terminal in Clearbrook, Minnesota, and on to Superior. The proposed Sandpiper route diverged from the other lines in the Lakehead Corridor at Clearbrook by cutting south between the boundaries of the White Earth, Red Lake, and Leech Lake reservations, before heading east where it cut south of both the Leech Lake and Fond du Lac reservations. Though the route avoided tribal reservations, it traversed the heart of the ceded territories, and through important watersheds, aquatic ecosystems, and natural Manoomin beds that were as-yet untouched by pipelines. Nearly a year after Enbridge Energy Partners filed its application for a certificate of need and route permit for the Sandpiper line, it filed an application to replace and reroute Line 3.

The Sandpiper proposal generated almost instantaneous opposition from tribes, and both tribes and environmental groups expressed the concern that the Sandpiper project was being rushed through the regulatory process without adequate environmental review or oversight.[382] Tribes also expressed repeated frustration that the state agencies shepherding the project through the permitting process were failing to live up to their

[382] Letter from Arthur LaRose, Chairman, 1855 Treaty Authority to Minnesota Governor Mark Dayton, Re: Notice of 2015 wild rice harvesting season, August 7, 2015; Letter from Arthur LaRose, Chairman, 1855 Treaty Authority to Hon. Sally Jewell, Sec. of the Interior and Hon. Kevin Washburn, Asst. Sec. of the Interior, Re: Petition for Environmental Protection, July 15, 2015; GLIFWC Line3 SDEIS Comments. Letter from Esteban Chiriboga, GLIFWC Environmental Specialist to Jamie MacAlister, Environmental Review Manager, Minnesota Department of Commerce, July 10, 2017; Letter from Esteban Chiriboga, GLIFWC Environmental Specialist to Paul Strong, Forest Supervisor, Chequamegon-Nicolet National Forest, Nov. 7, 2017.

duties to consult with tribes.[383] One of the route alternatives proposed by Enbridge for the Sandpiper was an expansion of existing capacity through the mainline; Steven Howard, the Executive Director at that time for the Leech Lake Band responded in no uncertain terms that Enbridge

> …does not have legal or regulatory approval to expand its existing corridor through the Reservation…Enbridge lists the route through the Reservation as an "alternate route" [however, it is] not an alternate at all as it is an impossible route. The perplexing aspect of this situation is that Enbridge is fully aware that it has neither the legal nor regulatory capability to build another pipeline through the Reservation[384]

In August 2014, both the Minnesota DNR and PCA submitted comments opposing the proposed Sandpiper Route, citing the vulnerabilities to aquatic ecosystems and freshwater resources posed by the preferred Sandpiper route.[385] To the dismay of tribes and environmental groups, Minnesota's Public Utility Commission (MPUC) granted a certificate of need for the Sandpiper line in August of 2015.[386]

---

[383] State of Minnesota, Executive Department, Executive Order 13-10, Signed by Governor Mark Dayton on Aug. 8, 2013. This order established a duty for all executive branch agencies in the state to "recognize the unique legal relationship between the State of Minnesota and the Minnesota Tribal Nations," and adhere to consultation policies developed in coordination with tribes.

[384] Letter from Steven Howard, Executive Director, Leech Lake Band of Ojibwe, to Tracy Smetana, Minnesota Public Utilities Commission, Re: MN-PUC Docket No. PL6668/CN-13/473, October 28, 2013.

[385] Minnesota Department of Natural Resources & Pollution Control Agency, Comments submitted to Public Utilities Commission, Docket No. PL6668/PPL-13-474 (Aug. 21, 2014).

[386] *In the Matter of the Application of Enbridge Energy, Limited Partnership for a Certificate of Need for the Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border*, Findings of Fact, Conclusions of Law, and Recommendation, Report of Administrative Law Judge Ann C. O'Reilly, April 23, 2018, at 14–15 [Hereinafter ALJ Report, Line 3].

Environmental organization Friends of the Headwaters appealed the MPUC's decision, arguing that the granting of the certificate of need without requiring an Environmental Impact Statement violated the Minnesota Environmental Policy Act (MEPA).[387] The Mille Lacs and White Earth Bands intervened in the permitting process, supporting arguments about the PUC's violations of MEPA, and additionally contending that tribal interests were not being adequately represented by the PUC or incorporated into the permitting framework.[388] In 2016, a three-judge panel of the Minnesota Court of Appeals held that the MPUC had ignored the plain language and central requirements of MEPA, which required public interest analysis and thorough consideration of routing conflicts. The Court reversed the MPUC's decision to grant the certificate of need for Sandpiper and required the agency to conduct a full EIS before taking any major action on the project. The Minnesota Supreme Court declined to hear an appeal of the holding. Shortly thereafter, Enbridge abandoned the Sandpiper Project, withdrawing its application from the MPUC, and diverting its financial investment to the Dakota Access Pipeline.[389]

---

[387] ALJ Report, Line 3, at 15.
[388] *In the Matter of the Application of Enbridge Energy, Limited Partnership for a Certificate of Need for the Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border*, White Earth Band of Ojibwe, Petition to Intervene (May 1, 2014) (eDocket No. 20145-99115-01); *In the Matter of the Application of Enbridge Energy, Limited Partnership for a Certificate of Need for the Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border*, Mille Lacs Band of Ojibwe, Petition to Intervene (September 17, 2015) (MPUC Docket Nos. PL-6668/CN-13-473/PPL-13-474).
[389] ALJ Report, Line 3, at 15.

After the withdrawal of the Sandpiper route, Enbridge turned its attention to the replacement of Line 3. Of particular concern was how to navigate tribal considerations, given the mainline corridor's route through reservations and treaty territories.[390] Much of the debate that emerged around Sandpiper lives on in Line 3; in reviewing the permitting process for Line 3, Administrative Law Judge Ann C. O'Reilly noted that Line 3 and the Sandpiper Projects tracked closely with one another, "due to the corporate relationship between the applicants in both projects (both Enbridge entities), as well as the proposed shared corridor for the two lines from Clearbrook to Superior – a new oil pipeline corridor for Minnesota."[391] Where the Line 3 corridor was posed as Enbridge's preferred alternate route to Sandpiper, the company's preferred alternative route to avoid tribal lands along Line 3 was substantially similar to the Sandpiper route.

---

[390] Only a relatively small portion of Line 3 runs into Wisconsin to join the terminal in Superior, and permissions for that segment were secured relatively quickly; thus, the debate about Line 3 is focused in Minnesota.
[391] ALJ Report, at 15.

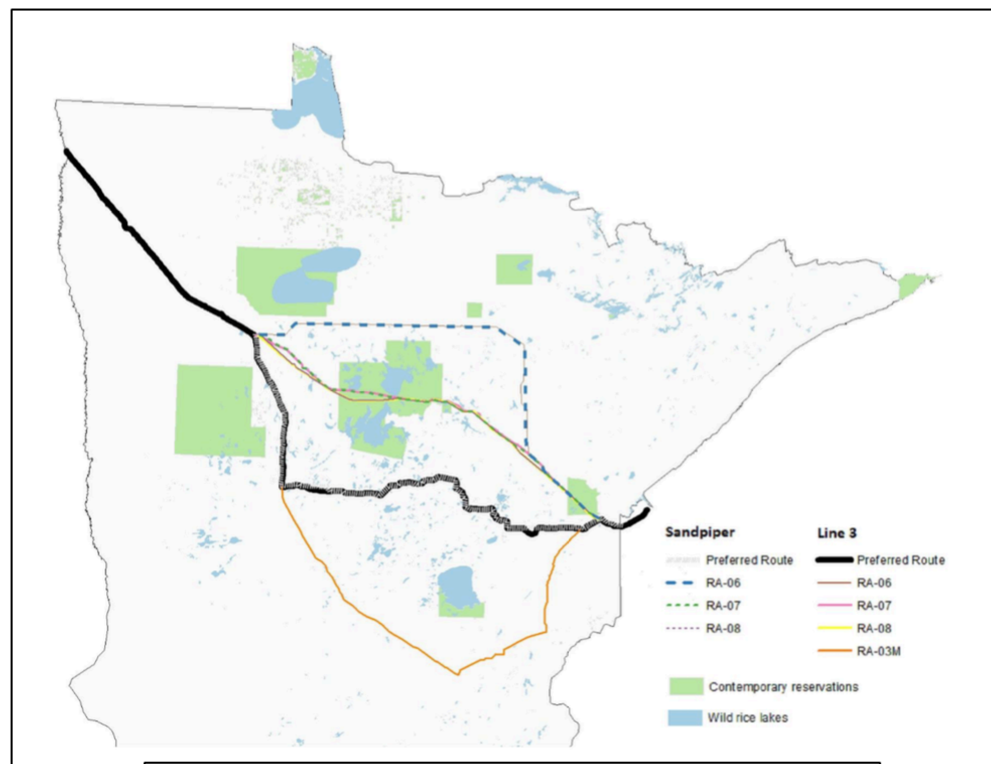

Figure 5. Line 3 and Sandpiper Route Maps with Reservations and Manoomin waters. Created by Melinda Kernik, 2018.

In other ways, the processes for Sandpiper and Line 3 have gone very differently, largely due to the enhanced scrutiny of the permitting process after the Sandpiper project's failure. The Appeals Court's Sandpiper decision gave the PUC mandates for how it must address environmental impacts and route alternatives before issuing a certificate of need. In August of 2017, the Minnesota DOC-EERA staff published its Final Environmental Impact Statements for Line 3. The EIS highlighted the vast jurisdictional complexity of the Line 3 replacement. In addition to the Certificate of Need and Route Permit issued by the state, the project would require a U.S. Army Corps of Engineers permit for certain water crossings, a special-use permit from the U.S. Forest

Service for any route crossing Forest Service land, and tribal approval for any easement crossing tribal trust lands or lands under the jurisdiction of the BIA. The EIS also rejected any suggestion that Enbridge could use eminent domain to acquire a pipeline right-of-way across tribal, state, or federal public lands.[392] On September 11, 2017, the DOC submitted testimony to the PUC arguing that the Certificate of Need for the Line 3 replacement be denied.[393]

The Line 3 debate has also been complicated by the fallout from the Kalamazoo spill. In May 2017, the U.S. government, on behalf of the EPA and the U.S. Coast Guard filed a consent decree and complaint against Enbridge and its subsidiaries, which required Enbridge to pay civil penalties, costs related to the spill, replacement, and removal of Line 6B pipes, install a number of safety technologies, enhance reporting

---

[392] Minnesota Department of Commerce Energy Environmental Review and Analysis, Final Environmental Impact Statement Line 3 Project, Docket Nos. PPL-15-137/CN-14-916, Aug. 17, 2017, at ES-8 [hereinafter FEIS, Line 3]. The Draft EIS had been published in May 2017, and comments on that draft informed the final document. Minnesota Department of Commerce Energy Environmental Review and Analysis, Final Environmental Impact Statement Line 3 Project, Docket Nos. PPL-15-137/CN-14-916, May 15, 2017 [hereinafter DEIS, Line 3].

[393] Minnesota Department of Commerce, Press Release, September 11, 2017. Available at: https://mn.gov/commerce/energyfacilities/documents/34079/press-release-sept11.pdf [Last Accessed May 20, 2018]; *In the Matter of the Application of Enbridge Energy, Limited Partnership for a Certificate of Need for the Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border*, Direct Testimony of Kate O'Connell on Behalf of the Minnesota DOC-EERA, Sept. 11, 2017; *In the Matter of the Application of Enbridge Energy, Limited Partnership for a Certificate of Need for the Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border*, Direct Testimony of Dr. Marie Fagan and Oil Market Analysis Report on Behalf of the Minnesota DOC-EERA, Sept. 11, 2017. *In the Matter of the Application of Enbridge Energy, Limited Partnership for a Certificate of Need for the Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border*, Direct Testimony of David J. Dybdahl and Insurance and Risk Financing Report on Behalf of the Minnesota DOC-EERA, Sept. 11, 2017.

requirements, reassess emergency response protocols, among other stipulations.[394] The consent decree also mandated that Enbridge replace the Line 3 segment of the Lakehead system, "provided that Enbridge receives all necessary approvals to do so."[395] This provision of the consent decree was widely criticized for giving Enbridge an upper hand in negotiations over Line 3 and undermining state and tribal regulatory frameworks by mandating replacement.[396] The Grand Traverse Band of Ottawa and Chippewa Indians filed an objection to the consent decree based on a failure to consult with tribes, breach of trust obligations, and violation of treaty rights.[397]

The White Earth and Mille Lacs Bands had originally intervened to oppose Sandpiper and filed the first applications to intervene in the Line 3 permitting process. By the summer of 2017, they were joined by Leech Lake, Fond du Lac, and Red Lake Bands.[398] In a Line 3 administrative hearing on November 14, 2017, tribal attorneys

---

[394] Consent Decree.

[395] Consent Decree, at 25.

[396] See e.g. *In Re: U.S. v. Enbridge Energy et al.*, Brief submitted to Assistant Attorney General, Environment and Natural Resources Division, U.S. DOJ—ENRD, by Sierra Club Environmental Law Program, For Love of Water (FLOW), Center for Biological Diversity, and Natural Resources Defense Council, D.J. Ref. No. 90-5-1-1-10099, Aug. 24, 2016; Letter from Frank Bibeau, Executive Director, 1855 Treaty Authority to Assistant Attorney General, Environment and Natural Resources Division, U.S. DOJ—ENRD, Re: *U.S. v. Enbridge Energy et al.*, D.J. Ref. No. 90-5-1-1-10099.

[397] *In the Matter of U.S. v. Enbridge Energy et al.*, Objection, Demand for Tribal Consultation, and Request for Extension of Comment Deadline Until 90 Days After Completion of the Tribal Consultation Process, Filed by Grand Traverse Band of Ottawa and Chippewa Indians, W.D. Michigan Case No. 1:16-cv-00914-GJQ-ESC), Aug. 23, 2016.

[398] Additional intervenors include Enbridge partner companies, a number of environmental groups (including Honor the Earth, Sierra Club, and Friends of the Headwaters), two farmers who own property along the proposed route, and a group of thirteen young people who call themselves "Youth Climate Intervenors." Intervening parties in the State permitting process serve a more formal role than the general public. They attend all hearings, participate in discovery (both as

cross-examined Paul Eberth, Enbridge's Project Director for Line 3. At the hearings, Mr. Eberth intimated that the degree of the Band's involvement in the process was unique, particularly the Bands' involvement in conducting surveys off reservation. Mr. Eberth, upon prompting from an attorney from the Leech Lake Band, stated that Enbridge recognized the sovereignty of the Bands and articulated that the Bands are the only entities with the authority to allow routing of pipelines through the reservations. When asked if he was surprised at the degree of tribes' interest in intervening, Mr. Eberth acknowledged the significance of the treaty territories for the Bands.

On April 26, 2018, after concluding months of hearings and reviewing the thousands of pages produced by the EIS and public comments, Administrative Law Judge Ann C. O'Reilly released her report on Line 3. While Judge O'Reilly found that Enbridge had not established that Minnesota refiners or citizens would be adversely affected by denying the certificate of need, she concluded that granting the certificate would likely provide a benefit to refiners in the region, and that denying a Certificate of Need for Line 3 "would adversely affect the future adequacy, reliability, or efficacy of the transportation of crude oil by…Canadian crude oil shippers."[399] The Judge expressed concern, however, that Enbridge's preferred route created consequences for Minnesota that outweighed the benefits of the project, unless the line were replaced in its current location. "In such a circumstance, the benefits to Minnesota refiners, refiners in the region, and the people of

---

requesters and fulfillers of disclosure requests), file motions, call and cross-examine expert witnesses, and navigate the procedural framework of the administrative legal process.

[399] ALJ Report, at 9.

Minnesota slightly outweigh the risks and impacts of a new crude oil pipeline."[400] With regard to the tribal lands along the route, Judge O'Reilly relied on the fact that Enbridge had easements from the federal government enabling it to run six pipelines through Leech Lake and Fond du Lac until 2029, thus Enbridge was obligated sometime before 2029, to renegotiate tribal easements or remove the lines from the Reservation lands. Despite her preference for maintaining the current route through tribal reservations, Judge O'Reilly put the onus on tribal governments to make the ultimate determinations, arguing that the route preference did not "in any way, infringe on the sovereignty of the various Indian tribes to disapprove permits or other approvals required for construction of the Project through land over which the tribes maintain jurisdiction. Just like the Commission cannot bind the federal government, the Commission does not have the authority to require the Indian tribes to permit the replacement of Line 3 within the Reservation."[401]

The Leech Lake Band's Environmental Director, Ben Benoit, issued a press release the next day, arguing that the Judge's recommendation for in-trench replacement ignored environmental risks and environmental justice concerns that were not adequately assessed in the EIS, and assaulted tribal sovereignty, putting "undue burden on the Leech Lake Band of Ojibwe to hold the risk of the pipeline replacement and to revoke the permit."[402]

---

[400] *Id.*
[401] *Id.*, at 10.
[402] Leech Lake Band of Ojibwe, Press Release, Leech Lake Band of Ojibwe Opposes Administrative Law Judge Recommendation on Line 3 Replacement Route Through Our Reservation, April 24, 2018. Available at https://www.leechlakenews.com/2018/04/24/leech-

Line 5, another Lakehead system pipeline that runs across the Bad River Reservation, through northern Wisconsin, through Michigan's upper peninsula, across the Mackinac Straits, and down through mainland Michigan has also generated attention in recent years. While the disputes have not yet generated the legal and political attention given to Sandpiper and Line 3, heightened concern for the unique and vulnerable ecosystem of the Mackinac Straits, and the pipeline's trajectory across tribal lands and ceded territories presently owned by the U.S. Forest Service have made it another interesting site for thinking through tribal jurisdiction in the context of pipelines. As noted above, GLIFWC has used its relationship with the U.S. Forest Service—established by a Memorandum of Understanding and rooted in the trust relationship between federal agencies and the tribes—to gain more information about pipeline impacts in the ceded territories.

The disputes over pipeline projects across the region have diverged in terms of their legal trajectories, the differing requirements of Minnesota, Wisconsin, and Michigan, and the nature of the environmental review required for permitting each project. Tribes and inter-tribal organizations have been actively involved in the policy discussions about how to proceed with each pipeline and have used different jurisdictional strategies to assert their interests in each case. There are also similarities—each pipeline proposal has generated concerns about pipeline integrity, ecosystemic vulnerability, emergency response planning, tribal consultation and the role of tribes in

---

lake-band-of-ojibwe-opposes-administrative-law-judge-recommendation-on-line-3-replacement-route-through-our-reservation/ [Last Accessed May 2, 2018].

decision-making, and the potential degradation of Manoomin, water, and other resources. The material forms of pipelines and the oil they carry have important consequences—both for understanding the politics surrounding pipeline decision-making, and for thinking about the impacts and interactions of pipelines in the ecosystem. These materialities have also been central to tribes' assertions of jurisdiction over aspects of the pipeline process, including on-reservation pipeline replacement and in the assessment protocols for pipelines in the ceded territories.

Part II. Materiality, Emergent Emergency, and the Temporal Challenge

In *Material Politics: Disputes Along the Pipeline*, Andrew Barry argues that investigating the materiality of pipelines provides an important window into the relationship between materiality and politics more broadly. He writes,

> metals are not the hard, unchanging objects that they are often thought to be. Metal structures such as pipelines form part of dynamic assemblages in which the expertise of engineers, metallurgists and other material scientists have come to play a critical part. They have become informationally enriched, and part of the driving force for this enrichment comes from growing efforts both to regulate and enhance the properties of materials.[403]

The metals from which pipelines are produced "can contain historical records of their own past," and "have surfaces [that] are sites of transformation, such as corrosion and friction, as well as functioning as boundaries…Metals' capacity to continue to exist over years and years depends on fatigue and creep: the minute internal transformation of

[403] Barry 2013, at 138.

metals under fluctuating conditions of stress and temperature."[404] Engaging with the materiality of pipelines and the substances that flow through them is significant on its own accord—the capacity of that material character to shift and to change, to withstand both below freezing and record high ambient temperatures, to break, to leak, to mix with water and soil, to change ecosystems, is part and parcel of the political wrangling around pipeline permitting. But a discussion of pipeline materiality also requires an engagement with temporality—the lifespans of the pipelines themselves, the time from application to groundbreaking for pipelines projects, federal agencies' timelines for spill cleanup, the number of generations required for ecosystem rehabilitation if crude leaks into the water or soil, the geologic timescale required to produce the crude, and the rapidity with which we extract and consume it.

This section looks at the interplay between materiality of the pipelines and crude and how understandings about these materialities have contributed to discourses of urgency in the Line 3 debate. The various understandings of urgency have encouraged very different temporal configurations of the pipeline process itself, and the tribes' interventions have added a layer of complexity that has slowed the movement of Sandpiper and Line 3 through the regulatory system. Further, the tribes' contributions to the public record demand vastly different temporal scales for assessing and addressing impacts of the pipelines and potential spills. Barry describes the tests, measurements, integrity and safety protocols routinely carried out on infrastructure systems as

[404] Barry 2013, at 140.

governmental acts, "intended to manage the potentially unruly conduct of material assemblages, aligning them with broader economic and governmental objectives."[405] In the case of the proposed pipelines in the ceded territories, Enbridge and state regulatory agencies have been forced to reckon with a different set of political priorities and objectives advanced by tribal governments, and this has had consequences for the substance and procedure of pipeline permitting.

Materiality: Pipeline Infrastructures and the "New Crude"

Line 3 was installed in 1967, just two years before Line 6B; both pipelines were constructed out of carbon steel and were coated with adhesive-backed polyethylene tape,[406] which was installed in the field at the time of pipeline construction.[407] In its report on the Kalamazoo River spill, the National Transportation Safety Board concluded that the Line 6B rupture was a result of corrosion fatigue cracks that were exacerbated by moisture trapped along the surface of the pipe under the disbonded polyethylene tape.[408] Similarly, the Administrative Report on Line 3 highlighted a number of integrity issues, concluding that "[e]xisting Line 3's pipe materials, coating, manufacturing process, installation method, and operating history have resulted in Line 3 having the largest

[405] Barry 2013, at 142.
[406] Hearing on "Enbridge Pipeline Oil Spill in Marshall, Michigan", at 22–28; ALJ Report, Line 3, at 112.
[407] National Transportation Safety Board. 2012. *Enbridge Incorporated Hazardous Liquid Pipeline Rupture and Release, Marshall, Michigan, July 25, 2010.* Pipeline Accident Report NTSB/PAR-12/01 (Washington, D.C.: NTSB), at 19 [hereinafter NTSB Report]; ALJ Report, Line 3, at 112.
[408] NTSB Report, at xii, 1, 3,

external corrosion anomaly density of all pipelines in Enbridge's Mainline System."[409] When these pipelines were installed, Enbridge and its subsidiaries represented that they would have a lifespan of fifty to sixty years; Line 3 turned fifty in 2017, and, though it has been reduced to about 50 percent of its capacity, it continues to carry approximately 390,000 barrels of light crude oil per day.[410] The fact that Line 3 continues to transport oil despite its degraded state was significant to Judge O'Reilly's finding that replacement of the line "is a reasonable and prudent action."[411]

While Line 3 currently transports light crude, the proposed Line 3 would carry sixty-five percent heavy crude oil, including dilbit, and thirty-five percent light crude.[412] These different forms of crude are materially distinct from one another—they have different physiochemical properties, which influence "the fate, transport, and potential impacts of crude oil in the environment and toxicity to humans and other biological receptors…"[413] The heavy crude oils and dilbits are of a higher density, and have lower vapor pressure and solubility than light crudes. Further, heavier crudes have higher concentrations of nitrogen, oxygen, sulfur, heavy metals, and polycyclic aromatic hydrocarbons (PAHs).[414]

---

[409] ALJ Report, Line 3, at 112. In 1991, Line 3 ruptured and released 1.7 million gallons (40,500 barrels) of oil near Grand Rapids, Minnesota; in 2002 it ruptured again and released approximately 6,000 barrels of oil near Cohasset, Minnesota. ALJ Report, at 111.
[410] ALJ Report, Line 3, at 13. The new proposed line would transport an average of 760,000 barrels of both heavy and light crude oil per day. *Id.*
[411] ALJ Report, Line 3, at 8.
[412] Minnesota Department of Commerce, Energy Environmental Review and Analysis. 2017. *Final Environmental Impact Statement, Line 3 Project*, Docket Nos. PPL 15-137/CN-14-916, Aug. 17, 2017 [hereinafter FEIS Line 3].
[413] FEIS Line 3, at 10-22.
[414] The National Academies of Sciences. 2016. *Spills of Diluted Bitumen from Pipelines: A Comparative Study of Environmental Fate, Effects, and Response* (Washington D.C.: The National Academies Press), at 22.

Unlike the Sandpiper, which would have carried light crude from the Bakken shale fields of North Dakota, the proposed Line 3 would carry crude from the Alberta Tar Sands in Canada. Bitumen, the type of oil produced in the tar sands is the most viscous, heaviest and thickest type of crude; it will only flow through pipelines when it is diluted with agents such as diluent, a light hydrocarbon composite.[415] While various agents can be used as diluent, natural gas condensate, variably composed of propane, butane, pentane, and hexane are currently used to increase the viscosity of Canadian bitumen.[416] Beyond the inclusion of volatile diluent compounds, dilbit's heightened toxicity is the result of the particular ways in which the microorganisms that became bitumen reserves biodegraded "on a geological time scale [into] light and medium hydrocarbons, concentrating PAHs, resins, and asphaltenes in the reserves."[417] Further, while lighter varieties of crude can contain up 97% of petroleum, heavy oils and bitumen can contain as little as 50% petroleum, requiring significantly more processing prior to consumption.[418]

---

[415] FEIS Line 3, at 10-23. Diluents can be composed of natural gas condensate and naphtha, but natural gas condensate is currently used to transport the Candian heavy crude. Bitumen, composed of heavy hydrocarbons, has a typical API gravity of < 10 degrees. Alberta bitumen's API gravity is as low as 8 degrees. *Id.* According to Le Billion & Vandecasteyen, a significant quantity of diluent is imported into British Columbia from Asia, and then travels through pipelines running under unceded aboriginal territory and ecologically significant wetlands to Alberta. After the Alberta dilbit travels through the Great Lakes region to U.S. refineries, a significant portion is shipped back to East Asian Markets. Le Billon, Philippe & Ryan Vandecasteyen. 2013. "(Dis)Connecting Alberta's Tar Sands and British Columbia's North Coast." *Studies in Political Economy* 91(Spring): 35–57.
[416] FEIS Line 3, at 10-23.
[417] FEIS Line 3, at 10-23.
[418] Dupuis & Ucan-Marin 2015.

These details, and the distinct geochemical composition of the dilbt flowing through Line 6 and proposed to flow through Line 3 have significant impacts for how the crude interacts with the environment in the case of a spill. Unlike conventional lighter crude, which begins to evaporate promptly, dilbit forms a dense, viscous residue that adheres to other surfaces and substances.[419] During the Kalamazoo oil spill, while the crude initially floated when discharged into the river, the denser components of the dilbit sank, mixed with river sediments, and collected on the river bottom, making it significantly more difficult to remediate.[420] As the diluents interacted with the atmosphere and swiftly flowing waters, they volatilized, raising concerns about potential explosions and health impacts, and creating additional needs to monitor and remediate air quality in the area.[421] Studies of dilbit's impacts on wildlife have suggested heightened toxicity exposure, including "sublethal biochemical and hormonal responses," including reductions in steroid production and observed embryonic and larval deformities following exposure to waters impacted by oil sands.[422]

[419] The National Academies of Sciences 2016.
[420] NTSB Report, at 63; FOSC Desk Report, at 35–36, 88–89; The National Academies of Sciences. 2016. *Spills of Diluted Bitumen from Pipelines: A Comparative Study of Environmental Fate, Effects, and Response* (Washington D.C.: The National Academies Press), at 42–43.
[421] FOSC Desk Report, at 150. Toxic concentrations of benzene in the atmosphere required evacuations in the vicinity of the spill. NTSB Report, at 18; The National Academies of Sciences. 2016. *Spills of Diluted Bitumen from Pipelines: A Comparative Study of Environmental Fate, Effects, and Response* (Washington D.C.: The National Academies Press), at 3.
[422] Dupius & Ucan-Marin, at 33. Samples taken from fish and benthic invertebrates in the wake of the Kalamazoo spill found toxic effects, though samples taken three years later were less conclusive. National Academies of Sciences, *Spills*, at 43.

Dilbit's capacity to adhere to other molecules and change the character of the lake sediment, water column, and wildlife makes it a potentially transformative agent in any aquatic ecosystem to which it could be exposed; the particularities of dilbit's impacts on the environment are nevertheless poorly accounted for in existing regulation.[423] While studies of the cleanup process in Kalamazoo have suggested enhanced toxicity and environmentally degrading effects of dilbit spills, there is much that remains unknown about the particular impacts and interactions of dilbit in the environment. Further, the vast majority of studies that measure health impacts of potential pollutants tend to focus on human health, and to value impacts to fish and other wildlife only insofar as these impacts might affect human health. For the tribes, this bisecting of humans from non-humans is ethically untenable and produces unacceptable incentives for degradation of water and other non-human species.

The material character of dilbit and the unknowns surrounding environmental impacts have factored directly in tribal contributions to the ongoing debates about proposed pipelines through the Great Lakes region; a number of the tribal submissions to the official record in the Line 3 process have argued that these material characteristics change the stakes for environmental review, emergency preparation and response in case of a pipeline rupture.[424] In this case, the material components of the dilbit have significant

---

[423] The National Academies of Sciences 2016, at 4. In reviewing regulations established by PHMSA, the EPA, and the U.S. Coast Guard, the Report finds that "regulations and agency practices do not take the unique properties of diluted bitumen into account, nor do they encourage effective planning for spills of diluted bitumen." *Id.*
[424] ALJ Report, Line 3, at 79, 88, 412; *In the Matter of the Application of Enbridge Energy, Limited Partnership for a Certificate of Need for the Line 3 Replacement Project in Minnesota*

consequences for the political wrangling around the pipeline, for the disparate timelines of conducting adequate investigating into impacts and the political urgency of pipeline approval, and for diagnosing the insufficiencies in the regulatory framework

Emergent Emergency: Politics of Urgency in Pipeline Disputes

The material condition of the existing Line 3 pipeline and the projected lifespans for any pipes laid in the future, the heightened demand for North American oil, the advancement of fracking technologies to access heretofore unreachable reserves, and the geochemical and ecological characteristics of dilbit create the circumstances for what I will refer to as an emergent emergency. While this term might seem oxymoronic, it reflects the ways in which concerns about oil emergencies are produced in relation to discourses about looming or emergent conditions, with significant consequences for how

---

from the North Dakota Border to the Wisconsin Border, Fond du Lac Band of Lake Superior Chippewa Responses to Enbridge Energy, Limited Partnership's Information Requests, Direct Testimony of Nancy Schuldt, Oct. 30, 2017, at 5 [Hereinafter Nancy Schuldt Responses, Line 3]. The summary of comments opposing Line 3 from the Administrative Hearings includes comments about the character of crude that is proposed to travel through the new Line 3. It reads: "Tar sands oil from Alberta, Canada, is some of the "dirtiest" oil in the world, as it is 21 percent more carbon-intensive than other oils due to the extraction method used. Therefore, tar sands oil contributes more to climate change/global warming than other forms of crude. The social costs of the carbon produced by the tar sands oil and its extraction method far exceed the benefits of the oil." ALJ Report, Line 3, at 79. Part of the environmental concern has to do with the unique character of Alberta tar sands oil. Alberta's crude reserves are particularly difficult to access—the bitumen deposits (which are semi-solid compounds in their original state), are intermixed with layers of silica sand, clay minerals, and water; they lie under millions of acres of old growth boreal forests and peat bogs. Riebeek 1984. Extraction requires significant amounts of water and the bitumen contains a variety of carcinogenic compounds that are regularly found in oil, but in much higher concentrations, including benzene, and benzopyrene, toluene, ethylbenzene, and xylene, increasing concerns about the significant carbon footprint of extracting from this particular deposit. Best 2012.

decisions are made in the present. However, the various actors in the pipeline dispute characterize this emergent emergency quite differently.

The Bands and inter-tribal organizations that participated in the Sandpiper and Line 3 permitting process were concerned about the impending emergency of an oil spill in wetlands, Manoomin waters, and other ecosystems, the potential needs of an extensive cleanup operation, and the multigenerational impacts of water quality degradation and contaminants on plants and animals.[425] As Nancy Schuldt, Water Projects Coordinator for the Fond du Lac Band stated in her testimony before the Line 3 Evidentiary hearings, the "extraordinarily water-rich" and "interconnected" aquatic ecosystems make Enbridge's preferred route,

> just about the worst place in the United States to put a heavy crude oil pipeline. Any spill from this line has the potential to severely damage the remaining Manoomin, and that would be a profound loss for the Fond du Lac Band[,] as well as the greater population of Minnesota….The introduction of heavy crude oil into a wild rice water could mean the permanent expiration of any wild rice in that water body.[426]

---

[425] Letter to Burl W. Haar, Executive Secretary, Minnesota Public Utilities Commission, from Karen R. Diver, Reservation Business Committee Chairwoman, Fond du Lac Band of Lake Superior Chippewa, Re: Comments on the Application of Enbridge Pipelines for a Certificate of Need and Pipeline Routing Permit for the Sandpiper Project, Docket No. PL-6668/CN-13-473/PPL-13-474, Sept. 29, 2014; Testimony of Philomena Kebec, Policy Analyst, Great Lakes Indian Fish and Wildlife Commission, Relating to Enbridge Energy's Proposal to Construct the Sandpiper Pipeline, Set for Public Hearing, June 5, 2015.

[426] ALJ Report, Line 3 at 245 ¶877, Ex. FDL-8B (Schuldt Summary). The MPCA agreed: "Any pipelines that are built to transport material out of the Clearbrook terminal are forced to enter the largest concentration of lakes, streams, and open-water wetlands in the state. Any route proposed out of Clearbrook, either south or east will cross dense expanses of open waters. A northern to eastern route from Clearbrook would cross massive wetland complexes and areas with stands of wild rice. If future, new terminals were to be constructed in western Polk (could collect from Canada or North Dakota), Kittson (could collect from Canada or North Dakota) or even Clay counties (North Dakota) the creation of a route proposal that avoids the greatest concentration of

In her written testimony, Schuldt detailed conversations with EPA Region 5 staff and trainings with the Nottawaseppi Huron Band of Potawatomi who participated in the Kalamazoo River cleanup efforts; she testified that these groups reported that traditional remediation methods for conventional petroleum were significantly less effective for cleaning up the spilled dilbit.[427] In a letter detailing the Band's opposition to the Sandpiper pipeline, former Fond du Lac Chairwoman Karen Diver noted that "Enbridge pipelines failed in some way over 800 times between 1999 and 2010, resulting in close to seven million gallons of oil spilled into the environment."[428] The emergency that Bands anticipate here is a multi-dimensional and likely multi-generational emergency that would pollute water, decimate Manoomin, and cripple aquatic ecosystems.

Enbridge has done little to assuage the fears of tribes and environmental groups about the potential impacts of a spill. In response to assertions by pipeline opponents that spills are inevitable, Enbridge simply replied that those parties had not supplied statistical or anecdotal evidence in support of their assertions.[429] To address concerns over the

---

surface waters becomes feasible." MPCA Comments—Supplemental Comments Replacing MPCA Letter, May 30, 2014, filed with PUC as Doc 20146-100780-01, at 15.

[427] Nancy Schuldt Responses, Line 3, at 5.

[428] Letter to Burl W. Haar, Executive Secretary, Minnesota Public Utilities Commission, from Karen R. Diver, Reservation Business Committee Chairwoman, Fond du Lac Band of Lake Superior Chippewa, Re: Comments on the Application of Enbridge Pipelines for a Certificate of Need and Pipeline Routing Permit for the Sandpiper Project, Docket No. PL-6668/CN-13-473/PPL-13-474, Sept. 29, 2014, at 1–2.

[429] *In the Matter of the Applications of Enbridge Energy, Limited Partnership for a Certificate of Need and Pipeline Routing Permit for the Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border*, Enbridge Energy Limited Partnership's Proposed

impacts of dilbit in the Kalamazoo River spill, Enbridge replied that they had established a new emergency response plan and in the future would respond more quickly before the bitumen could sink.[430] In the Evidentiary hearings, Enbridge witness and environmental consultant Heidi Tillquist testified that it is possible for "recovery of the natural environment and socioeconomic conditions" to occur, but it would depend on a variety of factors including site-specific conditions, magnitude of release and emergency response and cleanup strategy. Thus, recovery could take days, decades, or longer, and groundwater-impacting spills would likely take the longest.[431] Upon further pressing, Ms. Tillquist admitted that Enbridge's standard of recovery was that the environment met regulatory standards, not that it was restored to pre-spill conditions. Recovery on these terms conceptualizes particular plant life, such as Manoomin, as expendable, assuming that in its absence, other species would adapt to different food sources. Ecosystemic, cultural and other non-subsistence impacts are further excluded from this conception of recovery.[432]

In an interview with the New York Times about inter-tribal mobilization around the Dakota Access pipeline, Chairman of the Standing Rock Sioux Tribe, Dave Archambault II, connected pipeline contestations to longer histories of Indigenous land

---

Findings of Fact, Conclusions of Law, and Recommendations, at 119 ¶ 453 [hereinafter Enbridge Proposed Findings].

[430] Enbridge Proposed Findings, at 107–108, ¶¶ 412–419.

[431] ALJ Report, Line 3 at 245 ¶878, Evid. Hrg. Tr. Vol. 5B at 107-140 (Tillquist).

[432] ALJ Report, Line 3, at 245 ¶879, Evid. Hrg. Tr. Vol. 5B at 107-140 (Tillquist).

dispossession and marginalization. Referring to the ways in which these histories have built up to the present conflict, he states, "It's a tipping point for our nations." [433] The language of tipping point has also been frequently deployed by environmental activists to warn about the looming point-of-no-return for climate change, pushed on by the burning of increasingly impure, resource-intensive, and difficult to access fossil fuels. The suggestion that pipelines are contributing to a looming "tipping point"—for Manoomin and other aquatic resources, for climate change, and for tribal/non-tribal government relationships calls upon a particular type of emergent emergency, one that is defined by its duration and the significant difficulties of mitigation or effective response.

The emergent emergencies as conceived by entities like Enbridge share some similar characteristics with the concerns of tribes and environmentalists, but they demand very different outcomes. The first emergency that Enbridge warns of in its submissions to the Administrative Judge is the potential for a spill or costly monitoring and repairs if the rotting infrastructure of the existing Line 3 is not replaced, or if shippers are forced to transport oil through alternate means;[434] the second is the looming economic and energy

[433] Healy 2016.
[434] Enbridge Proposed Findings, at 90–92 ¶¶ 336–344, 105 ¶ 408. Enbridge touts its adherence to established federal regulations around pipeline safety, including those established by PHMSA and other federal agencies (Enbridge Proposed Findings, at 106–107 ¶¶ 410–411), however the National Academies of Sciences has found that these regulations are inadequate to respond to the unique characteristics of dilbit spills (National Academies of Sciences, *Spills*, at 4). Further, the Bands and inter-tribal organizations have repeatedly pointed out Enbridge's poor record on spill response, urging a full accounting of Enbridge's response and clean-up history in the Environmental Impacts analysis. Letter from Karen R. Diver, Reservation Business Committee Chairwoman, Fond du Lac Band of Lake Superior Chippewa, to Burl W. Haar, Executive Secretary, Minnesota Public Utilities Commission, Re: Comments on the Application of Enbridge Pipelines for a Certificate of Need and Pipeline Routing Permit for the Sandpiper Project, Docket No. PL-6668/CN-13-473/PPL-13-474, Sept. 29, 2014, at 2; Letter from Esteban Chiriboga,

security costs if the project is not allowed to proceed and Line 3 is not restored to its full carrying capacity.[435]

Gavin Bridge and Andrew Wood trace the ways in which discourses of resource scarcity and resource access shape financialization incentives and policy in the global oil sector. They argue that the oil industry's claims of physically-induced scarcity often serve as smoke screens, obfuscating understanding of oil access and accumulation.[436] In the case of Line 3, scarcity serves as the justification for transporting the harder to access, harder to transport, and significantly more concentrated reserves from the Alberta tar sands and play directly into concerns about national security. At the public evidentiary hearings for Line 3, supporters of the pipeline noted the need for high paying high skilled jobs in rural areas of Minnesota, expressed concern that rejecting the pipeline would limit the supply of oil resulting in higher fuel prices,[437] and raised the issue of national security stemming from consumption of North American, as opposed to Middle Eastern, oil.[438]

While Enbridge is focused on costs to consumers, through the evidentiary process, they were also compelled to provide the Judge with an analysis of projected crude prices to demonstrate that the project would be financially worth the risk. Judge

Environmental Specialist, GLIFWC, to Jamie MacAlister, Environmental Review Manager, Minnesota Department of Commerce, Re: DEIS for the Line 3 Replacement Project, July 10, 2017 at 3.

[435] With regard to economic costs, see Enbridge Proposed Findings, *passim*. While Enbridge does not address the question of national or energy security in its own analysis, it does highlight public comments and statements by entities such as the governments of Canada and Alberta that raised these particular concerns. Enbridge Proposed Findings, at 9 ¶ 21, 10 ¶ 24, 11 ¶25–26.

[436] Bridge & Wood 2010, at 565. *See also* Labban 2010.

[437] ALJ Report, Line 3, at 95, 101, 415.

[438] ALJ Report, Line 3, at 102, 415.

O'Reilly analyzed the evidence presented by Enbridge and others about the projected financial markets for Alberta crude, and raised a concern that emerged in various contexts throughout the report, that,

> [I]f oil prices continue to decline and Canadian oil is no longer profitable or in sufficient demand, Minnesota could be left with abandoned infrastructure encumbering nearly 300 miles of Minnesota land. Applicant's easements give Applicant the option to simply abandon and "idle" the proposed pipe on private landowner's property. As Applicant has acknowledged, such infrastructure will remain in Minnesota for thousands of years into the future—simply abandoned in the wake of a changed world.[439]

Here, the temporal dynamics of the "scarcity emergency" intersect with the multigenerational scales of the after effects of the crude oil, potentially vast spills, and steel infrastructures changing—and necessarily altering—the aquatic landscape. These two forms of emergent emergency intersect and coexist in important ways in the permitting process as well—one calling for the process to slow down in order to adequately account for the potential consequences and impacts of the project, and the other demanding that the process speed up in order to prevent economic or national security-oriented catastrophes.

The Bands that have engaged with the pipeline permitting process in Minnesota are certainly not the only parties to raise concerns about potential emergencies and material concerns for the region's aquatic ecosystems. Numerous environmental groups, private

[439] ALJ Report, Line 3, at 208 ¶ 731. Earlier in the Report, Judge O'Reilly similarly addresses the threats of a degrading abandoned steel infrastructure as the state and world move away from fossil fuels due to increased consciousness about the costs of carbon. ALJ Report, at 10.

individuals, and state agencies highlighted these issues throughout the Evidentiary hearings and public comment process. But the Bands occupy a different position than special interest groups; as distinct governments they have opportunities for government-to-government consultation with the state and can serve as formal intervenors in the process. In this role, the Bands have used their jurisdictional authority to shift the temporal dynamics of the permitting process and to insist upon a different timescale for thinking through the potential impacts, consequences, and costs of allowing the Line 3 replacement or expansion to proceed.

With regards to the administrative process, the Bands' opposition to the Sandpiper projects had direct temporal consequences for Line 3. Tribal frustrations about the PUC's failure to consider their concerns or heightened vulnerabilities during the initial Sandpiper permitting process led to the DOC-EERA's addition of a full chapter considering tribal concerns during the drafting of the Line 3 EIS. The tribes' demands for government-to-government consultation—which has been an obligation of state agencies for some time but has often been overlooked or ineffectively implemented—has compelled state agencies to slow their timelines for permitting completion and to develop more substantive environmental review processes and has forced them to reckon with tribal authority to block pipeline activities on reservations. The tribes' consistent assertions of sovereignty over reservation lands has forced both state officials and Enbridge to reckon with tribal authority to block pipeline activities on reservations and means that Enbridge is compelled to negotiate individually with each tribe that may be impacted by replacement or abandonment. At numerous points during the formal

hearings, tribal attorneys asked Enbridge representatives and state authorities to acknowledge tribal sovereignty on the record, establishing protections against the possibility that tribal sovereignty and consent would be undermined in future agreements between Enbridge and state or federal agencies. And Judge O'Reilly's finding of need only in the context of in-trench replacement has put a further burden on Enbridge to attempt to find agreeable terms with tribes in order to negotiate tribal permits and easement extensions. These impacts have significantly slowed the pace of—and in the case of Sandpiper outright halted—the permitting process, to the dismay of pipeline supporters.[440]

The tribes' interventions and slowing of the approval for Line 3 have not only focused on taking the time to conduct a fully-developed environmental review and thoroughly consider the potential costs and consequences in the present; they have also pushed state and federal authorities to reframe their analysis to consider a significantly longer timescale for damage. In an interview with Al Jazeera America, the Fond du Lac Band's Water Projects Coordinator Nancy Schuldt commented, "Today, tribes are exercising environmental authorities to a greater extent. There has been a tremendous amount of capacity building in terms of tribal staff and expertise to actually follow up on our request for a seat at the table when decisions like this are being made….It's quite

[440] *See e.g.* George, Gordon & Lee. 2016. "Commentary: In Minnesota, red tape is strangling projects like Sandpiper pipeline." *Star Tribune*, August 21, 2016. Available at: http://www.startribune.com/in-minnesota-red-tape-is-strangling-projects-like-sandpiper-pipeline/390753911/ [Last Accessed May 2, 2018].

common for tribes to be thinking about what actions of today would do to affect seven generations down the road."[441]

Further, GLIFWC's responses to the Line 3 SDEIS specifically highlight the untenable position of reconciling these two forms of emergent emergency: "…we believe that the DEIS presents tribes and the public with two unacceptable choices. Use the old pipeline and risk a spill, versus replace the pipeline and perpetuate climate change emissions." Instead they proposed a third alternative to be analyzed within the Line 3 DEIS, based on the speculative nature of oil projections, and the turning tide in U.S. and Canada on fossil fuels and climate change mitigation: "Decommission Line 3 and determine the amount of climate change mitigation that would be achieved."[442]

Alexander Barry describes the metals that produce pipelines as "sites of transformation…spaces within which minute changes occur routinely and catastrophic failures may represent the cyrstallisation of a series of infinitesimal movements rather than the immediate impact of an external force."[443] Throughout this permitting process, tribes and inter-tribal organizations have called attention to infinitesimal movements, drawing the regulatory process to account for the material consequences we understand, and to allow time to gather information on those that we do not understand. In this way,

---

[441] Guntzel 2013. "Seeking Copper, Canada's Polymet Offers Minnesota Jobs and Water Pollution." *Al Jazeera America*, Dec. 6, 2013. Available at: http://america.aljazeera.com/articles/2013/12/6/seeking-copper-polymetoffersminnesotajobsandwaterpollution.html [Last accessed May 15, 2018].
[442] Letter from Esteban Chiriboga, Environmental Specialist, GLIFWC, to Jeff Schimpff, Wisconsin Department of Natural Resources, Bureau of Environmental Analysis and Sustainability, Re: DEIS for the Sandpiper and Line 3 Replacement Projects, April 11, 2016, at 3.
[443] Barry 2013, at 140 (citing Tarde 2001).

they are resisting the state of emergency as an impetus for scientific and political decision making. They are enacting Stengers' charge in the *The Cosmopolitical Proposal*, "that we slow down, that we don't consider ourselves authorized to believe we possess the meaning of what we know."[444] The question of what we know is deeply tied to the question of impacts. In this way, the tribes—through small but cumulative practices asserting their jurisdictional authority and claiming a role in the regulatory process—are also jurisgeneratively shaping the process. By slowing the tide of permitting, and demanding attention to both the untested material impacts of dilbit and the untenable contradictions in the industry's version of 'emergent emergency', the tribes are disrupting approval-by-default methods of pipeline permitting. The tribes have also trained a light on the ways in which the state regulatory framework draws arbitrary and ineffective lines around its understanding of pipeline impacts more broadly.

Part III. Territory Terraformed: Tracing Cumulative Impacts

If you look at an aerial photo of the eastern portion of the Bad River Reservation, just northwest of the White River Boreal Forest, you can see lines that look like county roads carved out of the forest and crossing the ribbon of the White River. These road-like lines are the rights of way for Line 5 and a series of natural gas pipelines that traverse the area. This type of pipeline terraforming can be observed across the region.

[444] Stengers 2005, at 995.

Figure 6. Aerial Image of Rights-of-Way for Line 5 and natural gas pipelines near Bad River Reservation, Ashland & Odanah, Wisconsin.

In a letter to Burl W. Haar, at the time serving as Executive Secretary of the Minnesota Public Utilities Commission, then-Chairwoman of the Fond du Lac Band, Karen Diver addressed the ways that pipelines had shaped the physical landscape of the Fond du Lac reservation and treaty territories.

> Changes in hydrology affect wetland type, and indirectly affect wetland functions, including wildlife habitat, fisheries habitat, groundwater recharge, surface water retention, nutrient transformation, sediment retention, conservation of biodiversity, etc. The Alberta Clipper and Southern Lights projects have already impacted the Fond du Lac wetlands along the Enbridge pipeline corridor. A [GIS] analysis reveals up to forty (40) newly developed intermittent streams since the pipelines were installed. The National Wetland Inventory (NWI) documents a wetland type change from one side of the pipeline corridor to the other, clearly showing hydrology impacts from pipeline installations… The proposed pipeline route has the potential to further

> permanently fragment an already-fragmented landscape. Forest and shrubland become fragmented from pipeline construction partly due to the compacted soils on top of the pipeline, which prevents forest growth through the corridor. This changes the migration patterns of the local animals, as well as impacting wetlands by creating dams that alter substrate water flow.[445]

Diver's concerns reflect issues that were raised repeatedly by the Bands in the permitting processes for Sandpiper, Line 3, and Line 5.[446] First, that pipelines terraform the landscape—they create pathways over and through ecosystems that change as a result of their presence. The process of building and installing the pipelines requires the creation of access roads, clearcutting, and digging corridors into the earth. Maintaining these pipelines requires integrity digs along the route, the installation of monitoring systems, and the continued clearcutting of pipeline corridors to access all portions of the route if needed. Ecosystems are fragmented, invasive species and competitive perennial plants fill the gaps where corridors have been cleared of trees and other plant species, and hydrological flows and levels can shift based on both the changes in ground cover and the placement of the pipelines themselves, particularly if they run through wetlands. Second,

---

[445] Letter from Karen R. Diver, Reservation Business Committee Chairwoman, Fond du Lac Band of Lake Superior Chippewa, to Burl W. Haar, Executive Secretary, Minnesota Public Utilities Commission, Re: Comments on the Application of Enbridge Pipelines for a Certificate of Need and Pipeline Routing Permit for the Sandpiper Project, Docket No. PL-6668/CN-13-473/PPL-13-474, Sept. 29, 2014, at 1–2.

[446] Letter from Arthur LaRose, Chairman, 1855 Treaty Authority to Minnesota Governor Mark Dayton, Re: Notice of 2015 wild rice harvesting season, August 7, 2015; Letter from Arthur LaRose, Chairman, 1855 Treaty Authority to Hon. Sally Jewell, Sec. of the Interior and Hon. Kevin Washburn, Asst. Sec. of the Interior, Re: Petition for Environmental Protection, July 15, 2015; GLIFWC Line3 SDEIS Comments. Letter from Esteban Chiriboga, GLIFWC Environmental Specialist to Jamie MacAlister, Environmental Review Manager, Minnesota Department of Commerce, July 10, 2017; Letter from Esteban Chiriboga, GLIFWC Environmental Specialist to Paul Strong, Forest Supervisor, Chequamegon-Nicolet National Forest, Nov. 7, 2017.

through consistent critiques about the scope of state agencies' environmental analysis for Sandpiper, Line 3, and Line 5, the Bands have pursued a more complex and thorough understanding of impacts, demanding attention to how pipelines become agents in the ecosystem.

Defining Scope, Limiting Impacts

In his investigation of the Baku-Tbilisi-Ceyhan pipeline that runs from the Caspian Sea to the Mediterranean Sea, Alexander Barry argues that different ways of thinking about "impacts" fundamentally shaped and informed the contestations the pipeline. The first, Barry characterizes as a *measured impact*, which "points to how environmental problems are constituted as 'impacts' through multiple methods and techniques,"[447] through techniques such as modeling, sampling, epidemiological studies, direct observation, and so on. This way of thinking about impacts, Barry argues, is not about complexity or a holistic understanding of an environmental problem, but rather disaggregating constituent parts of environmental impacts "in forms that render them amenable to management."[448] He writes:

> In this way, scientific research on environmental impacts can be likened to a form of medical investigation concerned with determining the nature of a disease in the patient's body. The medical doctor does not attempt to understand the body as a totality but, working with other specialists and deploying a variety of techniques, multiplies the forms of the existence of the disease. Likewise, the environmental scientist concerned with the

[447] Barry 2013, at 118.
[448] Barry 2013, at 118.

> problem of the impacts of construction work does not need to conceptualise the environment as a totality or system; rather, the environment is abstracted in a diversity of informational forms, as 'impacts', in order to determine who or what is responsible for them. Nonetheless, the abstraction of environmental impact should not be understood as a projection of scientific categories onto nature. Rather, impacts are abstractions.[449]

The second form of impact with which Barry is concerned is 'impact as an event.' In contrast to *measured impacts*, or impact-as-abstraction, impact-as-event allows for attention to the multiple causalities that produce impacts and complex elements that make up an impact. "The notion of the event directs us towards the 'impenetrable maze' of relations that could enter into any particular impact, including those that cannot readily be measured or assessed but are discernable nonetheless."[450] Abstractions segment impacts into identifiable, traceable, and manageable parts; Events are impacts in all of their complexity and immeasurability. As discussed in Chapter 3, much of the regulatory environmental protection framework is designed to focus on these discrete, measurable impacts, and to assign liability accordingly. Measurable impacts are governable impacts. Throughout the Sandpiper, Line 3, and Line 5 processes, the tribes have pushed state regulators to think beyond abstract impacts, and to consider event impacts as well—to understand ecosystemic and agentive complexity beyond what can be easily managed. Their interventions have called attention to the way in which state and federal environmental protection efforts segment natures and abstract impacts in order to

[449] Barry 2013, at 118–119 (citing Mol 2002, at 119 (in-line citation removed)).
[450] Barry 2013, at 119 (citing Whitehead 1920, at 78).

accommodate regulatory structures, rather than making regulatory structures responsive to dynamic ecosystemic natures and complex impact-events.

In pipeline permitting operations, the applicant company and administrative review entity designate particular limits—geographic and conceptual—for their environmental review. As agencies establish the scoping parameters, tribes and other interested parties in the region engage in an iterative process in which they provide comments on drafts, and then submissions based on whether their concerns were adequately addressed in scoping or environmental review documents. In the case of Line 3, GLIFWC was particularly involved in this iterative process, and documented a number of concerns with the way that the states of Minnesota and Wisconsin were limiting their analysis of "impacts."[451]

In their responses, GLIFWC's Environmental Specialist Esteban Chiriboga repeatedly raised concerns about the limited scope of the assessment. Some of these concerns were geographic: Minnesota's Draft Environmental Impact statement for Line 3 used a 2,500 foot buffer range on either side of the pipeline's proposed route for identifying natural features, including lakes and rivers, and terrestrial habitats that could be impacted, and identified a 10-mile downstream "region of interest" for assessing downstream impacts in case of a spill. While Chiriboga agreed that the range may be appropriate for terrestrial habitats, he argued that both the 2,500-foot buffer and 10-mile region of interest were insufficient to understand the full-range of potential pipeline

[451] The Wisconsin DNR was involved in permitting the small portion of Line 3 that travelled from the Minnesota border to the pipeline terminus at Superior, Wisconsin.

impacts.[452] Instead, Chiriboga proposed, based on examples of analyses that GLIFWC had conducted in the past, that the assessment vary for each stream or river crossing, extend downgradient to the nearest major barrier to waterflow (including dam or large lake), and that it account for the material factors that impact how oil travels in water (including the gravity of the oil, the character of the river bed and bank, average flow of the river).[453] Chiriboga further argued that the state's EIS had not adequately assessed the interrelated hydrological relationships between ground and surface water quality with regard to pipeline impacts.[454]

Other concerns focused on the characterization of "minor" impacts: while the Draft EIS document characterized impacts due to maintenance and activities (such as routine integrity digs) as temporary or minor, Chiriboga pointed out that these activities create "hydrologic and biologic alterations that may not be temporary."[455] He cites as an example an integrity dig in a forest wetland, which "would require clearing of trees that may take decades to grow again. The clearing facilitates introduction of invasive exotic species and once cleared, the forest wetland may never recover its previous function."[456]

---

[452] Letter from Esteban Chiriboga, Environmental Specialist, GLIFWC, to Jamie MacAlister, Environmental Review Manager, Minnesota Department of Commerce, Re: DEIS for the Line 3 Replacement Project, July 10, 2017 at 2–3 [Hereinafter GLIFWC Letter to MacAlister]. The letter specifically cited the 32 mile downstream impacts from the Kalamazoo Spill, and a 2016 spill into the North Saskatchewan River in Canada that flowed for over 190 miles from the initial rupture. *Id.*

[453] Chiriboga Letter to MacAlister, at 3. Despite GLIFWC's urging, these metrics were not modified in the Final Environmental Impact Statement. FEIS Line 3, ES-15–ES-16.

[454] Chiriboga Letter to MacAlister, at 3.

[455] Chiriboga Letter to MacAlister, at 3–4.

[456] Chiriboga Letter to MacAlister, at 3–4.

The DEIS similarly did not assess the use of herbicides or other methods to clear vegetation along the pipeline corridor, providing no analysis of the potential "impacts of these herbicides on biota and waterbodies."[457] Failure to conceptualize these undefined maintenance activities as impacts, the letter argues, provides an incomplete picture of the pipeline's effects on the ecosystem and provides no basis on which to develop a mitigation strategy.

Some of the concerns addressed focused on the conceptual barriers placed between "cultural" and "environmental" impacts. Chiriboga and others praised the EIS for devoting an entire chapter to "Cultural Impacts" of the pipeline for tribes. In fact, every tribal resource manager I have spoken to could not identify another state-sponsored environmental analysis that had devoted so much attention to tribal concerns, cultural values, and Indigenous ways of thinking about human/non-human relationships. Chiriboga writes that the "DEIS correctly states…that for tribes there is no distinction between natural resources and cultural resources."[458] However, Chiriboga and others have argued that this recognition produces inconsistencies that resulted from failing to carry those cultural considerations through to other conclusions in the analysis. The EIS siloes the "cultural impacts" section in one chapter, while evaluating impacts to resources exclusively from a utilitarian perspective (number of fish harvested, etc.) throughout the remainder of the text. Chiriboga argues that loss of those resources or loss of access opportunities has "both a utilitarian and a cultural impact on the tribes"; the EIS's failure

[457] Chiriboga Letter to MacAlister, at 4.
[458] Chiriboga Letter to MacAlister, at 2.

to consider both types of impact led to insufficient conclusions about route alternatives.[459]

While these examples focused on very specific deficiencies in the EIS's approach to understanding pipeline impacts, these issues each contribute to GLIFWC's broader concern that the DEIS failed to sufficiently address the true cumulative impacts of the pipeline. Chiriboga writes:

> The analysis of cumulative effects should be broad enough to account for regional impacts such as habitat fragmentation and wetland fragmentation…. Unfortunately, the DEIS does the opposite of our recommendation. It restricts the analysis to pipeline and transmission lines that cross the Line 3 route alternatives. This creates a scenario that is illogical to the extreme; the exclusion from cumulative analysis of a pipeline that runs parallel nearby, but does not intersect the Line 3 [right of way]. This method of analysis is not actually cumulative because it not only ignores parallel pipelines but also ignores the existing road network and other regional activities that, in combination to the new Line 3, create regional scale impacts. For example, the existing road network is already causing habitat fragmentation and impacts to stream water quality (e.g. use of salt in winter). A question that the cumulative effects analysis should have addressed is, how do the different route alternatives expand existing habitat fragmentation? And how does the pipeline affect existing water quality impairments?[460]

The GLIFWC critiques of the environmental impacts scope highlights an argument that Barry makes about complexity in the governance of impacts, "[w]hile the informational space of the pipeline corridors maps onto a narrow strip of land, the space

[459] Chiriboga Letter to MacAlister, at 2.
[460] Chiriboga Letter to MacAlister, at 4–5.

of impact projects a more complex topology…In this way, the assessment of impacts folds a series of dispersed and specific materials together in a heterogeneous and shifting field of events."[461] Chiriboga's critique goes a step further to specifically point out that the conventional approach is not cumulative and is designed to artificially segment the analysis such that a true understanding of cumulative ecosystemic impacts is impossible. Unfortunately, the tribes demands for a more comprehensive, robust, and topologically complex analysis of impacts were largely unaccounted for in the final version of the EIS.

Rethinking Cumulative Impacts and Accountability

On March 15, 2017 the Minnesota Chippewa Tribe convened a special meeting and passed a resolution to develop a tribal cumulative impacts statement.[462] The resolution specifically addressed the sacredness and vulnerability of water and Manoomin, and the potentially devastating impacts of oil pipelines, underground and strip mines, and other large infrastructure projects for tribal lands, waters, and cultural resources. The resolution also conceived of the tribal impacts assessment as a legal record, to be "incorporated into the administrative record of an EIS to preserve legal arguments and standing; and to also serve as substantive, relevant comments for any future proposed large infrastructure project that may impact reservations, treaty lands or treaty-protected resources".[463] The document that was produced from this resolution, the

[461] Barry 2013, at 119–120 (citing Murdoch 2006; Blok 2010).
[462] MCT, Resolution 72-17, March 15, 2017.
[463] MCT, Resolution 72-17, March 15, 2017.

Anishinaabe Cumulative Impact Assessment (ACIA) is still in the process of being drafted and reviewed by the tribal intervenors in the Line 3 process, but this and similar efforts to create parallel documents rooted in Anishinaabe perspectives reflect a growing interest in redefining concepts like cost, emergency, and impact in the regulatory sphere. Further, institutional efforts to create documents like the ACIA suggest tribes' frustrations with existing opportunities to be heard in the permitting process and provide an alternative outlet that tribes will likely push to have included in the state's administrative record. The cumulative effect of these small efforts by tribes has already impacted the process—as evidenced by the state of Minnesota's heightened (though imperfect) attention to tribal concerns in the EIS.

In *Staying with the Trouble*, Donna Haraway asks us to consider "[w]hat happens when human exceptionalism and the utilitarian individualism of classical political economics become unthinkable in the best sciences across the disciplines and interdisciplines? Seriously unthinkable: not available to think with."[464] For many of the tribes, that point has already come. The ACIA represents an attempt not only to think past this human-centric utilitarianism, but to chart its inadequacies and advance a different way of "thinking with" in the legal and administrative records.

[464] Haraway 2016, at 57.

Part IV. Jurisdiction's Dance

Richard Thompson Ford describes jurisdiction as "a set of social practices, a code of etiquette," which he compares to how the Tango establishes a map for where and how the dancer is to move. He writes:

> [J]urisdiction is a function of its graphical and verbal descriptions; it is a set of practices that are performed by individuals and groups who learn to "dance the jurisdiction" by reading descriptions of jurisdictions and by looking at maps. This does not mean that jurisdiction is "mere ideology," that the lines between various nations, cities and districts "aren't real." Of course the lines are real, but they are real because they are constantly being made real, by county assessors levying property taxes, by police pounding the beat (and stopping at the city limits), by registrars of voters checking identification for proof of residence. Without these practices the lines would not "be real"—the lines don't preexist the practices.[465]

For Ford, jurisdiction is a practice, a series of rehearsed movements, choreography in which different actors perform different steps. But this choreography is contested, and can take different forms, depending on whether the parties agree to its terms. In the preceding pages, we have seen tribes engage in the jurisdictional dance over pipeline permitting—they intervened in the process as governmental entities, they submitted comments and articulated expectations for the environmental review through formal channels, they made (and obliged state and industry representatives to make) statements on the record affirming their jurisdiction over certain lands, they rejected the feasibility of routes that crossed reservation boundaries, and they used formal relationships with federal agencies to compel further analysis as a condition for renewing

[465] Ford 1999, at 856.

easements. State actors responded to these moves, evidenced in part by how different the Line 3 process was from the Sandpiper—they required a more comprehensive environmental analysis, highlighted tribal perspectives and cultural considerations in the EIS process, acknowledged tribal jurisdiction on reservation lands and interests in the ceded territories. The state also responded by contesting the tribes' efforts to expand their jurisdictional authority off-reservation and pushing back on certain Bands' outright rejection of cross-reservation routes. Tribes and Inter-tribal groups counter-moved… and so on. In these interactions, state actors, agencies, and judicial officials often treated this jurisdictional choreography as though the state were leading, and in some ways they were. But the tribes also lead the leader—adding moves, demanding responses, and significantly slowing the pace of the dance. At each step, the tribes and state actors made their jurisdictional claims real through these practices and forced the other to reckon with their movements. Jurisdiction functions in tension—always responsive to another jurisdictional authority.

The pipeline permitting process also reflects Mariana Valverde's contention that the "machinery of jurisdiction is not tethered to or limited by spatial analysis, since the (non-spatial) mode of governance is also a major if somewhat invisible part of the work of jurisdiction" which requires an interrogation of temporality and history as well as territory and cartography.[466] The pipeline as a geographically-situated entity frustrates a simple spatial analysis because it exists in a patchwork of jurisdictional wormholes, not

[466] Valverde 2009, at 154–55.

regulated or overseen as a consistent and whole legal entity. The history of pipeline development in this region also dovetails with federal policies toward tribes that limited their authority over pipeline installation; that historical convergence established the conditions for the current jurisdictional fights over the routes, compromised infrastructures, and discourses of emergency surrounding both the old and new pipelines.

Tribal influence on the process and trajectory of Sandpiper and Line 3 was significant. Nevertheless, the ways in which they shaped the process and shifted the terms of the jurisdictional dance rests uneasily with the regulatory outcome. In May 2018, the Minnesota State House and Senate, frustrated with the pace of the process and the ALJ Report's findings, stepped in and each approved a bill to allow Enbridge to bypass the final regulatory approval process through the Public Utilities Commission. While Governor Dayton vetoed the reconciled bill a few days later, on June 28, 2018, the PUC voted 5-0 to approve the Certificate of Need for Line 3, citing the poor condition of the existing pipeline infrastructure, and the heightened threats of a spill along the existing route. Though the Commissioners did not reach agreement on the route, they ultimately voted 3-2 for Enbridge's preferred route—which tracked roughly with the proposed route for the Sandpiper pipeline—with specific modifications for avoiding Manoomin waters. The two Commissioners who dissented on the route vote cited tribes' preferences as the reason for their vote.[467]

[467] The Official Commission Order on the vote has not yet been realized, but the details of the hearings and Commission meeting were reported by Minnesota Public Radio and other media outlets. *See e.g.* Dunbar, Elizabeth & Dan Kraker. 2018. "PUC backs Enbridge Line 3 oil pipeline, sets route." *MPR News*, June 28, 2018. Available at:

Shiri Pasternak writes,

> Impositions of state and private authority grossly undermine, yet do not necessarily succeed in extinguishing, Indigenous governance over their lands through literal expulsion. What do we call a process of colonization where the effect of dispossession is not removal but the perpetuation of a set of exhaustive administrative regimes that undermine, erase, and choke out the exercise of Indigenous jurisdiction, rendering Indigenous people peripheral to effective participation in land governance?"[468]

In the pipeline permitting debates outlined in this chapter, I would argue that tribal governments and intertribal organizations were far from peripheral to the process, rather they were central to the heightened environmental and administrative scrutiny and shifted the regulatory discourse about the pipeline projects by demanding attention to the specific material conditions of the crude, competing emergent emergencies, and limitations of conventional impacts analysis. These contributions altered the pipeline approval process in ways that may well transfer to future pipeline permitting endeavors in the state. In previous chapters, I have thought about jurisgenerativity as something conceptual—breathing different meanings, concepts, and ontologies into the law. But processes can also be shaped jurisgeneratively—the regulatory system can be altered to require adequate time and attention to a broader range of impacts, threats, and eventualities. And yet, the outcome of the Line 3 process is that the pipeline will be installed across a stretch of the ceded territories, along a

https://www.mprnews.org/story/2018/06/28/enbridge-line-3-minnesota-support-public-utilities-commission [Last accessed Aug. 14, 2018].
[468] Pasternak 2017, at 55.

route crossing culturally significant Manoomin waters that the tribes specifically opposed. One could argue that this decision, while respecting tribes' jurisdictional authority to reject pipelines across reservation boundaries, has seriously undermined their effective participation in the environmental governance of the ceded territories. Tribal nations have many jurisdictional and political tools—how individual Bands and Indigenous people choose to respond to the PUC's decision will be revealed in time. Nevertheless, the circumstances surrounding the Line 3 process are a reminder that tribal jurisdictional expansion and jurisgenerativity often coexist simultaneously and in tension with outcomes that undercut tribal interests.

CHAPTER 5

Healing a Thousand Cuts: Stemming the Tide of Resource Degradation in Indian Country

> Developing a sense of ourselves that would properly balance history and nature and space and time is a more difficult task than we would suspect and involves a radical reevaluation of the way we look at the world around us. Do we continue to exploit the earth or do we preserve it and preserve life? Whether we are prepared to embark on a painful intellectual journey to discover the parameters of reconciling history and nature is the question of this generation.
>
> - Vine Deloria, Jr. *God is Red*, at 61.[469]

> The large scale destruction of habitat through land use conversion has already occurred. What remains are small, individual actions whose cumulative impacts are being felt by an already devastated salmon population. There is no longer a single smoking gun or party at fault, but rather salmon are experiencing a slow death by a thousand cuts. In order to lessen the effects of these impacts, one first step is consistent and adequate rule enforcement.
>
> - The Stillaguamish Tribe of Indians, Natural Resource Department, *Death by a Thousand Cuts: An examination of regulation enforcement in the Stillaguamish Watershed and the effects on EAS-listed Chinook Salmon*[470]

On a cold, sunny afternoon, in March of 2017, I sat in the GLIFWC offices with Ann McCammon Soltis, Director of Intergovernmental Affairs, and Philomena Kebec, the organization's Policy Analyst. I had gotten to know them over my months of

[469] Quoted in Krakoff 2008, at 865.
[470] The Stillaguamish Tribe of Indians, Natural Resource Department, *Death by a Thousand Cuts: An examination of regulation enforcement in the Stillaguamish Watershed and the effects on EAS-listed Chinook Salmon*, April 2016, http://www.stillaguamishwatershed.org/Documents/StillaguamishTribe_RegulatoryStudy.pdf

attendance at the Voigt Task Force meetings and had the great fortune that afternoon to sit and talk with them about their work, and their combined wealth of knowledge of the complex realm of treaty rights and inter-tribal resource management. As our conversation was nearing its end, I asked them what they thought the most pressing issues were for tribal environmental jurisdiction in the region. Ann replied that while the mining pollution and pipelines were the most visible consistent threats, treaty resources and tribal environmental jurisdiction were primarily threatened with "death by a thousand cuts." By this she meant that the lakeshore dredging on private property, highway infrastructure development, damming projects, and the myriad initiatives overseen by highly segregated state agencies—the impacts of which were never conceptualized in terms of their whole ecosystem effects—were the biggest threats for tribes seeking to protect treaty resources in the ceded territories. Ann's statement highlighted something that I address throughout this dissertation—that the environmental regulatory and administrative frameworks of the state and federal system are designed to segment natures and ecosystems into smaller, more manageable parts, and that this segmentation can compromise protection for resources that are fundamentally interdependent.

Ann's statement also shaped the way I approached this dissertation. As the previous chapters demonstrate, treaty rights litigation gave tribes the jurisdictional foothold to demand a seat at the management table, and tribes are increasingly staking claim in the multi-jurisdictional regulatory decision-making around water quality standards and extractive enterprises, including mining and oil pipelines in the ceded territories. These hot-button issues pose clear environmental challenges, engage multiple

jurisdictional actors, and inspire heated responses from a host of environmental and Indigenous advocacy groups. However, an analysis of tribal jurisdiction that fails to take into account this "death by a thousand cuts" dynamic that tribes and ecosystems contend with would fail to capture an integral part of the story.

In the following sections, I will chart a few different ways of thinking about methods that tribes could entertain to protect the ceded territories from these thousands of cuts, including legal strategies or theories that tribes in other parts of the country have used to assert broader authority over particularly important resources. Part I roots this 'speculative' turn in a broader literature of speculative thought, and grounds my particular approach to speculative legal geography in the techniques, tools, and strategies through which Tribes could potentially continue the work of jurisdictional expansion. Part II discusses a series of cases that have come out of Washington State that address a state's duties to protect and prevent degradation of treaty resources. Part III assesses the opportunities and limitations of using 'treatment as a state' (TAS) status under the Clean Water Act to assert Tribal interests on-reservation and beyond. Part IV looks at the *Winters Doctrine*, an affirmation of tribally reserved water rights from a 1908 Supreme Court case and assesses more recent efforts to think about how this doctrine might apply to questions of water access and water quality beyond the Western states where these issues have traditionally been litigated. Part V reflects on the development of tribal court jurisprudence and tribal codes to think about how internal strategies for asserting tribal authority may have jurisdictional impacts, and further, how Anishinaabe and other Indigenous thinkers and scholars are pushing the limits of the law to push for a future not

tethered to existing legal structures.

Part I. A Speculative Turn

Recent work in critical theory and continental philosophy has revisited the study of metaphysics through the project of 'speculative materialism', or the 'speculative turn.'[471] Much of this work is motivated by critiquing 'correlationist' approaches to understanding human and non-human subjectivities, and rejects the notion that the world can only be understood through our relations to it.[472] While this 'speculative turn' contains a diverse array of viewpoints and oft-conflicting and contested approaches, it shares an affinity with other philosophical engagements with the 'ontological turn', 'new materialism', object-oriented ontologies, post-humanism, and theoretical engagements with emergence and immanence.[473] Much of this work focuses on the role of speculation as a grand, world-shaping enterprise that confronts mortality, species-thinking, and the vast implications of human and non-human life in the Anthropocene. These grand forms of speculation are deeply important for critically engaging a changing planet, but I would like to carve out space for a more process-oriented form of speculation. In prior chapters,

---

[471] *See e.g.* Åsberg, Thiele & van der Tuin 2015; Bennett 2009; Bryant, Srnicek & Harman 2011; Clark 2011; Häkli 2017; Haraway 1991, 2003, 2016; Harman 2011; Huber 2012; Latour 2011; Povinelli 2016, 2017; Stengers 2010, 2011a, 2011b.

[472] Bryant, Srnicek & Harman 2011; Huber 2012.

[473] Bryant, Srnicek & Harman 2011, at 5; Thompson 2017, at 266–268; Huber 2015, at 216; Srnicek 2011, at 164. This body of scholarship has also been critiqued for ignoring the contributions of Indigenous philosophers (Blaser 2014; Todd 2016), and for its failure to account for epistemology, and a lack of groundedness in object orientations, power, knowledge, feminist thought, history, relationality, or politics (Åsberg, Theile & van der Tuin 2015, at 148–150; Blaser 2014; Huber 2015, at 216; Joronen & Häkli 2017; Lillywhite 2017; Todd 2016).

I made the case for thinking about jurisdiction through the minutiae of administrative procedures and rule-making; here I attempt to make a case for a type of 'speculative turn' that envisions onto-epistemic change, but which operates through existing and embedded structures and systems.

I am not alone in this endeavor, many Indigenous scholars and philosophers are embarking on their own speculative project by envisioning worlds and lifeways rooted in different philosophical traditions, while remaining responsive to the conditions of politics that define and constrain the present moment.[474] I will talk more about some of those approaches at the end of this chapter. In some way, I hesitate to connect my approach, focused on the minutiae of legal strategy and possibilities within a proscriptive, traditional, and conservative-leaning framework, to the philosophical treatises of the speculative turn in critical theory and in Indigenous philosophy. However, I posit that there is also a value to a speculative approach that is less expansive—one that is oriented toward the different possible paths, outcomes, and futures that exist in, but are always pushing back on, and in turn shaping—our existing normative frameworks.

This approach, which I refer to as 'speculative legal geography' is a form of speculative realism that draws on the work that attorneys and legal scholars do as a point of practice.[475] They interpret existing precedent, assess contemporary conditions, and develop legal arguments with an eye to the possible attendant outcomes of those

[474] Doerfler, Sinclair & Stark 2013; Simpson, L.B. 2012; Whyte 2013, 2018a; Whyte & Crease 2010.
[475] Thank you to Bruce Braun for offering the term and identifying the different mechanisms through which this form of speculation operates.

arguments. Legal geography pushes us to understand how legal processes matter, how legal conditions create spatial formations, produce power, and are themselves mediated and made meaningful by social forces.[476] Speculative legal geography provides space for understanding how these processes, structures, and formations can be harnessed to produce alternative outcomes and articulate different legal futures. As I noted above, my impetus for incorporating a small-scale speculative analysis in this Dissertation originated in conversations with Tribal and Intertribal staff and leaders. I wanted to write a section of this dissertation that could provide some support to their own speculative work—tracing the possibilities and weighing the risks and rewards of various legal and extra-legal approaches to ecosystem protection and expanding Tribal jurisdiction in the ceded territories. As I have argued throughout this Dissertation, I believe that this jurisdictional work—including the small-scale speculative possibilities of doctrinal legal strategizing—is imbued with great jurisgenerative potential, creating space for actualizing and engaging with grander-scale ontological multiplicities and divergent understandings of human/non-human relationships in our political and social practices. As Haraway argues, via Stengers, "we cannot denounce the world in the name of an ideal world…decisions must take place somehow in the presence of those who will bear their consequences."[477] As we have seen, Tribes have chosen to push the boundaries of their realities and relationships with the State and federal governments using the jurisdictional and legal tools. These are

[476] Blomley 1994a, 2003, 2008; Blomley et al. 2001; Braverman et al. 2014; Delaney 2010; Ford, R.T. 1994, 1997, 1999.
[477] Haraway 2016, at 12 (citing Stengers 2010, 2011b).

not their only tools, but they are integral to Tribes' strategies of navigating the existing world, attempting to shift the consequences and risks of political and regulatory decision-making, and working towards a different ideal world.

As a result, I take a different approach in this chapter than I have in the previous chapters. Each of those prior chapters focused on specific events, or culminations of events. This chapter looks instead to a variety of strategies. Event-based approaches provide piecemeal solutions. Bands are working to establish more holistic and ecosystemic approaches to resource protection and are looking for strategies to influence the state and federal governments to adopt different kinds of approaches to understanding human/non-human relationships in this multijurisdictional landscape. In the previous chapters I have discussed a number of jurisdictional mechanisms that tribes have used: intervening in regulatory processes, using Tribal codes and permitting requirements to regulate non-members on reservation, developing various tools to compel negotiation by state and private industry, pushing statements recognizing and respecting tribal sovereignty into every administrative record possible. No doubt Tribes in the region will continue to use and expand upon these jurisdictional hooks despite the significant hurdles they face; but there is also a burgeoning need to look beyond those case-by-case responses and develop novel approaches to the existing precedent and obstacles.

It is important to note that the strategies and possibilities I discuss here are just a small sampling of the various ways that tribes are engaging and thinking about expanding their jurisdiction over resource protection. An exhaustive account is beyond the scope of this dissertation, but those catalogued here have been highlighted by Tribal leaders,

liaisons, and state and federal agency representatives in my interviews and interactions over the past few years.

Part II. Establishing a "Duty Not to Degrade": the Washington Culverts Cases

In 1970, the United States attorney, on behalf of seven Tribes in the state of Washington (seven additional Tribes later intervened), filed a claim in the U.S. District Court for the Western District of Washington, alleging that the State of Washington was arresting and fining Indians for their non-compliant fishing practices, in violation of a series of treaties—known as the "Stevens Treaties"—signed by the Tribes between 1854 and 1855.[478] In 1974, district court Judge George Hugo Boldt held that the Tribes retained treaty fishing rights to fifty percent of the harvestable number of fish in the state, and mandated that the state could only regulate the Indians by demonstrating that such regulation was required to conserve fish populations.[479] In 1975, the Ninth Circuit Court of Appeals upheld Judge Boldt's decision, reaffirming the rights reserved by American Indian Tribes in the State of Washington.[480] As in the *Voigt* and *Mille Lacs* cases, the Ninth Circuit Court found that Washington lacked the jurisdiction to enforce state regulations against tribal members, and that Tribes had the power to self-regulate and co-manage shared salmon fisheries with the state. Furthermore, the Circuit Court upheld the

---

[478] *U.S. v. Washington*, 384 F.Supp. 312 (W.D. Wash. 1974) [Boldt Decision].
[479] *U.S. v. Washington*, 384 F.Supp. 312 (W.D. Wash. 1974) [Boldt Decision].
[480] *U.S. v. Washington*, 520 F.2d 676 (9th Cir. 1975).

district court's provision that it retained "continuing jurisdiction to provide advance judicial scrutiny" in any future matter affecting Indian treaty fishing rights.[481]

Pursuant to the district court's retention of "continuing jurisdiction," the details of treaty-based co-management continued to be litigated through the state and federal courts in the ensuing decades, with the outcomes largely protecting the Tribes' harvesting rights.[482] Beginning in the mid-1980s a number of Tribes began noticing a marked decline of salmon at customary fishing grounds, and became concerned that fish migration was being prevented by State-installed barrier culverts.[483] In September 2001, the federal government joined with twenty-one Tribes to file a request with the federal district court, seeking a determination that Washington's culvert system deprived the Tribes of a moderate living from the fisheries, as guaranteed by the treaties.[484] The suit

---

[481] *U.S. v. Washington*, 384 F.Supp. 312 (W.D.Wash. 1974) [Boldt Decision].

[482] In 1980, the district court held that the State has a duty, shared by the federal government and third parties, to refrain from damaging fish habitats that may interfere with the treaty reserved rights. *U.S. v. Washington*, 506 F.Supp. 187 (W.D.Wash. 1980) [Phase II]. On appeal of this phase of litigation, the 9th Circuit decision left open the question of the State's affirmative duty to not degrade fish habitats. At the State level, the Puget Sound Gilnetters Association and the Washington State Commercial Passenger Fishing Vessel Association brought claims to state court to block implementation of the regulations developed by the Washington Department of Fishers after the Boldt decision. The Washington State Supreme Court in both cases blocked the Fisheries Department from complying with the federal injunction in the Boldt case, finding that the treaties did not guarantee a right to a share of the fish runs for the Indians. *Puget Sound Gillnetters Assn. v. Moos*, 88 Wash.2d 677 (1977), *Fishing Vessel Assn. v. Tollefson*, 89 Wash.2d 276 (1977). The U.S. Supreme Court vacated the State Supreme Court's opinion, upholding the Tribes' treaty rights, defending the equitable apportionment provision, and holding that the State Court's mandate to disobey the district court's decision were preempted by the Supremacy Clause. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

[483] *U.S. v. Washington*, No. 13-35474, Filed June 27, 2016, Amended March 2, 2017 (9th Cir. 2017), at 28.

[484] The Tribes included the Suquamish Indian Tribe, Jamestown S'Klallam, Lower Elwha Band of Klallams, Port Gamble Clallam, Nisqually Indian Tribe, Nooksack Tribe, Sauk-Suiattle Tribe,

sought a permanent injunction, requiring Washington to "repair, retrofit, maintain, or replace" within five years any culverts that "degrade appreciably" the passage of fish.[485]

The district court granted summary judgment on behalf of the Tribes and federal government in August 2007, finding the State in violation of the treaty protections and holding that "the right of taking fish, secured to the Tribes in the Stevens Treaties, imposes a duty upon [Washington] to refrain from building or operating culverts under State-maintained roads that hinder fish passage and thereby diminish the number of fish that would otherwise be available for Tribal harvest."[486] In March 2013, the district court filed a Permanent Injunction ordering the State, in consultation with the Tribes and federal government, to prepare a list of all state-owned barrier culverts within six months, and to correct all state-owned barrier culverts managed by the State DNR, State Parks, and State Fish and Wildlife Department by the end of October 2016. The State Department of Transportation was given a seventeen-year window for replacing most of its barrier culverts.[487] On appeal, in a unanimous 3-0 decision, the Ninth Circuit Court of Appeals affirmed the district court's injunction, holding that "in building and maintaining

---

Upper Skagit Tribe, Tulalip Tribes, Lummi Indian Nation, Quinault Indian Nation, Puyallup Tribe, Hoh Tribe, Confederated Tribes and Bands of the Yakama Indian Nation, Quileute Indian Tribe, Makah Indian Tribe, Swinomish Indian Tribal Community, and the Muckleshoot Indian Tribe. *U.S. v. Washington*, No. 13-35474, Filed June 27, 2016, Amended March 2, 2017 (9th Cir. 2017), at 25–26.

[485] *U.S. v. Washington*, No. 13-35474, Filed June 27, 2016, Amended March 2, 2017 (9th Cir. 2017), at *26.*

[486] *U.S. v. Washington*, No. 13-35474, Filed June 27, 2016, Amended March 2, 2017 (9th Cir. 2017), at *27.*

[487] *U.S. v. Washington*, No. 13-35474, Filed June 27, 2016, Amended March 2, 2017 (9th Cir. 2017), at 28–29.

the barrier culverts Washington has violated, and continues to violate, its obligation to the Tribes under the fishing clause of the Treaties.[488]

In January 2018, the U.S. Supreme Court granted certiorari, agreeing to hear the State's appeal. The State and the Tribes and federal government delivered oral arguments on April 18, 2018, and two months later, on June 11 an equally divided Supreme Court affirmed the Ninth Circuit holding.[489] This decision cements Washington's responsibility to replace the salmon-blocking culverts in accordance with the Ninth Circuit holding. However, the Supreme Court released no Opinion to support its decision, which means that the question of whether a State is bound by an affirmative duty to not degrade a treaty resource remains unresolved, there continues to be no binding federal standard for litigating State obligations around treaty-resource degradation, and the precedential value of this case for future claimants is uncertain.[490] That four justices supported the Ninth Circuit decision suggests that there is significant room for future litigation on the issue, but the refusal of the justices to author an Opinion means that using *Washington v. U.S.* as a foundation for strategy remains a deeply speculative pursuit.

[488] *U.S. v. Washington*, No. 13-35474, Filed June 27, 2016, Amended March 2, 2017 (9th Cir. 2017), at 69.
[489] Justice Kennedy recused himself due to his involvement as a Ninth Circuit judge in a previous iteration of the case.
[490] Legal scholar Matthew L.M. Fletcher has suggested that this case may create stronger hooks for Tribes to demand higher standards of review and consultation in pipeline permitting processes, but other matters will have to be litigated in order to see if *Washington v. U.S.* can be valuable precedent for Tribal claimants. *See* Stateside Staff. 2018. "Michigan tribes could have stronger case against Line 5 thanks to SCOTUS decision." Interview with Matthew L.M. Fletcher. *Michigan Radio*, June 15, 2018. Available at: http://www.michiganradio.org/post/michigan-tribes-could-have-stronger-case-against-line-5-thanks-scotus-decision [Last accessed August 12, 2018].

Any move to litigation by Tribes is risky and rife with uncertainty (likewise for States contesting Tribal interests). However, legal scholar Matthew L.M. Fletcher argues that strategic litigation may be a necessary component of any Tribal strategy to push back on court precedent that limits tribal jurisdiction. Fletcher calls for a "paradigm-shifting re-examination *by Indian tribes and Indian people* about their place in the American constitutional structure," and argues that Tribal advocates must embark upon a project of "forc[ing] federal judges to rethink everything they know about federal Indian law."[491] The two strategies Fletcher develops are first, establishing among federal and other non-tribal legal actors a baseline knowledge about how Tribal nations function in the 21st century, and second, pursuing litigation within the federal court system that will strategically undermine precedent that limits Tribal jurisdiction. While the Ninth Circuit decision in *Washington* may provide a potential opportunity for similar litigation in other federal circuits, the next two sections lay out alternative possibilities for expanding tribal jurisdictional hooks based in strategic engagement with federal agencies and courts.

Part III. Enforcing Tribal Water Quality Standards

The water quality standard debate discussed in Chapter 3 remains lively, even after Administrative Law Judge LauraSue Schlatter rejected the MPCA's proposed sulfate standard rule revision. While Judge Schlatter declined to overturn the existing 10 ppm standard, the Minnesota Legislature has still forbidden enforcement of that standard,

[491] Fletcher 2010, at 973, 976.

setting the stage for possible litigation. While litigation is only one of many options, it seems increasingly likely, given the wide range of dissension from tribes, industry, and environmental groups over the existing and proposed rules. In this sub-section, I'll just briefly trace some of the odd jurisdictional relationships that would be mobilized in litigation against the MPCA in this matter and think through the potential impacts of Tribal water quality standards on future litigation.

First, the MPCA's water quality standards are not only the purview of the state agency. They are water quality standards that were explicitly approved by the EPA in compliance with the state's obligations under the Clean Water Act. Structurally, the CWA relies on state environmental agencies to develop standards that comply with (or exceed) the CWA baselines, and delegates state agencies to implement and enforce the CWA through grants, permitting, and other regulatory functions.[492] One of those permitting functions is the National Pollutant Discharge Elimination System (NPDES) program, which regulates discharge from mining operations. In July 2015, WaterLegacy petitioned the EPA to withdraw program delegation from the MPCA for its failure to enforce CWA requirements in its administration of NPDES permits for the mining industry.[493] The petition cited the legislature's prohibition on the MPCA for enforcing the 10ppm sulfate standard, as well as MPCA's failure to enforce existing permits or issue

---

[492] 33 U.S.C. 1299, Sec. 219 "State Certification of Projects"

[493] WaterLegacy Petition to the EPA for Withdrawal of Program Delegation from the State of Minnesota for NPDES Permits Related to Mining Facilities, July 2, 2015. Available at: https://www.epa.gov/sites/production/files/2015-09/documents/waterlegacypetitionwithdrawmpca_cwaauthorityjuly22015.pdf [Last Accessed Dec. 4, 2017].

new ones, and its issuance of variances for mining companies to avoid compliance with existing standards.[494] In response, the EPA requested that MPCA submit a statement from the Attorney General explaining whether the MPCA retained sufficient authority—in light of the legislative prohibition on sulfate standard enforcement—to implement approved water quality standards, in compliance with the CWA[495]. In August 2016, Minnesota Attorney General Lori Swanson submitted a letter to the EPA explaining the rule revision mandate and context, and arguing that, while the sulfate research was underway, the MPCA was still equipped to enforce other water quality standards, and would complete the rule revision in a reasonable amount of time.[496]

The EPA's investigation remains ongoing and any determination will likely be delayed until the questions surrounding the State's rulemaking efforts are resolved. It has, however, submitted detailed official comments on the proposed sulfate standard. This means that, even though the Clean Water Act does not mandate regulation of sulfate, the state is obligated to adhere to its approved water quality standards; while the state agencies determine their standards, new standards must be approved by the EPA in order to be enforced under the state's CWA delegation. If the EPA, in investigating

---

[494] WaterLegacy Petition: 2.
[495] Letter from Tinka Hyde, Dir. Water Division, EPA, to Rebecca Flood, Assistant Commissioner of Water Policy, MPCA Re: MPCA's Legal Authority to Implement its Authorized NPDES Program While Working Under Laws of Minnesota 2016, Chapter 165, Section 1. Available at: https://www.epa.gov/sites/production/files/2016-06/documents/mpca_mn_2016_chapter_165_ltr_1.pdf [Last Accessed Dec. 4, 2017].
[496] Letter from Lori Swanson, Attorney General of Minnesota, to Tinka Hyde, Dir. Water Division, EPA, Re: MPCA's Legal Authority to Implement its Authorized NPDES Program, August 12, 2016. Available at: https://www.epa.gov/sites/production/files/2016-08/documents/mn_ag_cert.pdf [Last Accessed Dec. 4, 2017].

WaterLegacy's allegations, ultimately finds that the MPCA is unable to enforce existing water quality standards under its NPDES program delegation, it will remove authority and set up an EPA office to handle NPDES permitting in the state. This complicated relationship between the EPA and MPCA, coupled with the tribes' constitutional relationship with the federal government means that tribes have historically found an ally in the EPA when trying to enforce water quality standards against states or municipalities.

This is particularly true for the tribes that have their own water quality standards under the 'Treatment as a State' (TAS) provision of the CWA.[497] In 1987, the CWA was amended to include tribes as partners. Under Section 518 of the CWA, tribes may gain regulatory authority through Cooperative Agreements or TAS status.[498] Cooperative Agreements are negotiated contracts resembling interstate compacts.[499] TAS confers a heightened authority, and implicitly recognizes tribes as equal to states in regulatory capacity.[500] In Minnesota, only two tribes have been certified for TAS to administer

[497] Since 1987, Native American tribes may apply for and be granted 'Treatment as States' status by the Environmental Protection Agency (EPA). This status recognizes tribes' authority to set standards, permit, regulate, monitor, and broadly enforce, either in whole or in part, the Clean Water Act (33 U.S.C.A. §§ 1251–1377), Clean Air Act (42 U.S.C.A. §§ 7401–7642), and a number of additional environmental protection measures. For more information on tribal water quality standards, see: Environmental Protection Agency, Water: State, Tribal & Territorial Standards, Indian Tribal Approvals. Available at http://water.epa.gov/scitech/swguidance/standards/wqslibrary/approvtable.cfm [Last Accessed Dec. 4, 2017). In order to achieve TAS status under the CWA, Bands must meet certain criteria, including federal recognition under the Indian Reorganization Act, a substantial governing body, and regulatory capacity. Clean Water Act, 33 U.S.C. § 1377(e) (2006).
[498] 33 U.S.C. §§ 1377(d) & (e).
[499] Owley 2004, at 74.
[500] Owley 2004, at 74.

water quality standards under the CWA: the Fond du Lac (FdL) Band of Chippewa and the Grand Portage Band of Chippewa.[501] These two Bands were also the most active tribal contributors to the scientific record on sulfate and wild rice.

TAS status enables tribes to access grant funds, establish water quality standards, issue permits, manage pollution, and more. Tribes, like states, are authorized to pursue TAS status for all programs, or focus on certain CWA provisions. Despite the heightened recognition of tribal autonomy through TAS status, in practice, tribal standards are still sometimes subordinated to state authority.[502]

It is important to note that FdL's TAS status under the Clean Water Act does not expressly delegate authority to the Band to regulate nonmember, off-reservation activities.[503] The CWA authorizes the EPA to grant TAS status for the protection of water resources "within the borders of an Indian reservation."[504] But, of course, water flows do not adhere to political boundaries, and external pollution that enters reservation waters raises important questions about jurisdictional limits and tribal autonomy to designate water standards extra-territorially.[505]

---

[501] Environmental Protection Agency, Water: State, Tribal & Territorial Standards, Indian Tribal Approvals, available at http://water.epa.gov/scitech/swguidance/standards/wqslibrary/approvtable.cfm (last visited May 10, 2014). In order to achieve TAS status under the CWA, Bands must meet certain criteria, including federal recognition under the Indian Reorganization Act, a substantial governing body, and regulatory capacity. Clean Water Act, 33 U.S.C. § 1377(e) (2006).
[502] Kahn 2012, at 203.
[503] *Wisconsin v. EPA*, 266 F.3d 741 (7th Cir.).
[504] CWA, Section 518(e)(2). Under Section 401 of the CWA, FdL is authorized to grant or deny certification of compliance with tribal standards affecting water quality.
[505] Fort, D. 1995, at 776; Baker 1997, at 367.

The EPA defines Indian Country in part as "all lands within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation."[506] On this definition of reservation, land owned by non-Indians in fee simple but within the reservation limits may be subject to tribal water quality standards.[507] With regard to waterways, this is particularly important in the wake of the Supreme Court's holding in *Montana v. U.S.* that tribes do not own the riverbeds of navigable waterways even within the reservation.[508] Based on the EPA language, the tribe may assert authority to regulate non-tribally owned water resources under the TAS system, even in light of the EPA's reliance on the *Montana* exceptions.[509] Also relevant is the Supreme Court's holding in *Idaho v. U.S.*, that if a reservation was established prior to statehood, the tribe may have title to underground bedlands.[510] Both the FdL and GP reservations were established four years prior to Minnesota's grant of statehood.[511]

---

[506] 40 C.F.R. 71.2

[507] Owley 2004, at 79.

[508] *Montana v. U.S.*, 450 U.S. 544 (1981). The Court in *Montana* held that tribes may exercise jurisdiction over nonmember activities on nonmember fee land, only (i) where nonmembers engage in "consensual relationships with the tribes or its members, through commercial dealing, contracts, leases or other arrangements" or (ii) where nonmember conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. 544, 566 (1981). Since this case was decided, a number of jurisdictions have treated the exceptions in the *Montana* case liberally and recognized tribal ownership of bedlands by tribes. Cole 1985.

[509] Owley 2004, at 79.

[510] 533 U.S. 262, 278–80 (2001).

[511] In Wisconsin, the Bad River, Lac du Flambeau & Mole Lake Bands have TAS status, though it is unlikely that water discharge in Minnesota would trigger a sulfate dispute for those Bands.

Because the EPA encourages states and TAS entities to set their own water quality standards, regulatory bodies may have conflicts over water that flows cross-jurisdictionally. If a conflict arises between two states, the higher standards of a downstream state will receive priority.[512] For TAS tribes to be truly treated as states, this same rule should hold if the downstream entity is a tribe. But, to what degree a tribe with TAS status can regulate off-reservation activities that significantly impact the health and welfare of reservation residents is a largely unsettled question in Minnesota and the 8th Circuit. Other circuits have broadly recognized TAS regulatory authority in similar cases. Most notable is the 10th Circuit decision in *City of Albuquerque v. Browner*, which held that the Isleta Pueblo tribe could set water quality standards for arsenic levels that exceeded federal and state regulations. By virtue of these regulations, the court found that the tribe could compel the city of Albuquerque, the upstream polluter, to increase its effluent waste standards for water discharged into the Rio Grande River.[513]

Similarly, in *Wisconsin v. EPA*, the Seventh Circuit held that the EPA was within its authority to grant the Sokaogon Chippewa Community TAS status, and to permit the Sokaogon to regulate a water body that did not fall completely within the borders of the reservation. Though the Court was cautious in its approach, and hinged its finding of

[512] See *Arizona v. Oklahoma*, 503 U.S. 91 (1992). Though the CWA does not mandate that upstream polluters comply with higher standards, the EPA can require compliance. According to EPA regulations, a permit will not be issued if the water conditions of a project will disrupt compliance with water quality requirements from all affected states, regardless of which entity administers the permit. 40 C.F.R. § 122.4(d) (2000). For a more in-depth discussion, *see* Owley 2004, at 76.
[513] *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir., 1996).

regulatory authority on the Sokaogon's ownership of the entire reservation area, the decision was lauded as a significant victory for tribal TAS jurisdiction.[514] According to the court, a grant of TAS status enabled the tribe to "require off-reservation dischargers, conducting activities that may be economically valuable to the state (e.g. zinc and copper mining), to make sure that their activities do not result in contamination of the downstream on-reservation waters."[515] The Court was not swayed by the State's argument that compliance imposed higher costs on the company, and could deter the discharge altogether.[516] Here, the court held the relationship between the Sokaogon and the state of Wisconsin to be equivalent for CWA purposes, authorizing the tribe to demand state compliance with heightened standards.

If the MPCA were to change its water quality standards to set a sulfate discharge limit that exceeded 10ppm for a discharger whose waste flowed onto the FdL or GP reservations, the tribes may have the authority to compel the state permit to comply with the 10ppm limit established in the tribal water quality standards. The EPA has already—under past administrations—expressed a willingness to accommodate tribal standards that exceeded the state permit: in 2012, the MPCA sought EPA approval for a variance that allowed the Mesabi Nugget iron processing plant (near the proposed NorthMet site) to

---

[514] *Wisconsin v. EPA*, 266 F.3d. at 750. The Court's reliance on the "Montana Test" even where it was unnecessary further enshrines the problematic ambiguities of the test. *Id.*
[515] *Wisconsin v. EPA*, 266 F.3d 741 (7th Cir. 2001) (citing *Albuquerque v. Browner*).
[516] "Since a state has the power to require upstream states to comply with its water quality standards, to interpret the statutes to deny that power to tribes because of some kind of formal view of authority or sovereignty would treat tribes as second-class citizens. Nothing in § 1377(e) indicates that Congress authorized any such hierarchy." *Id.* at 750. See also, *Montana v. EPA*, 137 F.3d 1135 (9th. Cir. 1998).

violate state water quality standards. The FdL and Grand Portage Bands along with two environmental groups filed suit against the EPA, protesting the variance and citing harms to tribal water resources. In March 2014, the EPA reversed its approval of the Mesabi Nugget variance.[517] The current presidential administration's drastic shifts on prior EPA policy raise some serious concerns about the degree to which tribes may rely on the EPA as a partner in contesting state and municipal discharge permitting. But, given existing EPA precedent, and the holdings in *Albuquerque* and *Wisconsin*, there is a strong legal argument that the tribes that have TAS water quality standards may demand more restrictive limits on upstream discharge. Regulation of water supply is fundamental to self-government, and critical to a whole range of governmental prerogatives, including maintenance of the drinking water, crop harvests, and preservation of wildlife and fish stocks.[518]

It is important to note that this potential legal recourse only exists for discharges that flow onto, or otherwise impact tribal resources on reservations. It has also only been tested by tribes that have a legal relationship with the EPA to enforce their existing water quality standards under the Clean Water Act. At this juncture, there is no known resource for tribes without TAS to enforce heightened standards against an off-reservation

---

[517] Joint Press Release, FdL and Grand Portage Bands, *FdL and Grand Portage Bands Persuade EPA to Reverse Approval of 2012 Mesabi Nugget Water Quality Variance* (Mar. 10, 2004), www.FdLrez.com/FDL.GP.Joint%20Press%20Release.Mesabi%20Nugget.3.10.14.pdf; Steve Karnowsky, *EPA Reverses Decision to Grant Variance from Water Quality Standards for Mesabi Nugget Plant*, A.P. (Mar. 11, 2014), www.startribune.com/249441021.html.
[518] *Wisconsin v. EPA*, 266 F.3d at 748.

polluter, thus, there exists a lingering question of how tribes articulate a more fundamental claim to water rights—and what the limits of those rights may be.

Part IV. Pushing the Limits of the 'Winters Doctrine'

The case *Winters v. United States* was decided by the U.S. Supreme Court in 1908.[519] The suit was brought by the United States, on behalf of the Gros Ventre and Assiniboines tribes, to restrain Henry Winter and other cattlemen from damming the Milk River upstream of the Fort Belknap Reservation.[520] The case proceeded to the Supreme Court, and in an opinion written by Justice McKenna, the Court held that the creation of the reservation through an 1888 agreement between the Bands and the federal government reserved the river waters "flowing through [the] territory and exempt[ed] them from appropriation under the laws of [Montana, which gained statehood the following year in 1889]."[521] Though the 1888 treaty agreement did not explicitly address the issue of the tribes' water rights, the Court inferred that the federal government intended to preserve water rights to the reservation, because one of the purposes of the reservation—to establish agricultural practices among the tribes—could not have been fulfilled without access to sufficient water resources. The holding in the case established the *Winters Doctrine*, a legal principle that presumes that "when land is set aside as an Indian reservation, sufficient water is impliedly reserved to fulfill the purposes for which

[519] 207 U.S. 564 (1908).
[520] Royster 2011a. The appellant in the case was named Henry Winter, but his name was misspelled as Winters throughout the litigation. *Id.*
[521] 207 U.S. 564, at 565. Justice McKenna was also the author of the canonical treaty rights case *U.S. v. Winans*, 198 U.S. 371 (1905), discussed in Chapter 2.

the reservation was created. These Indian water rights are federal law rights and may not be defeated or impaired by subsequent state-law rights."[522] The *Winters* doctrine reserves rights to water necessary to fulfill the purpose of the reservation and reserves water appurtenant to reservation land.[523]

Winters established a foundation that tribes' water rights on-reservation as senior to the rights of the states and non-Indians utilizing the same sources. The opinion itself is quite short, just four pages, and its recognition of the Tribes' rights is worded broadly enough that many scholars have questioned the actual limits of *Winters* as a recognition of tribal reserved water rights.[524] As with the treaty cases discussed in Chapter 1, water rights and the authority to regulate water are rife with jurisdictional and logistical complexities. The following section explores the possibilities of expanding—or more broadly applying—the *Winters* doctrine in ways that enhance the Great Lake's Bands' abilities to exercise jurisdictional and regulatory authority over water resources, and/or to compel the states to embrace more protective measures in their own water regulation.

Water Quantity: Applying Winters in Riparian States

In the U.S., water rights are allocated using two different regimes: prior appropriation and riparian rights. The circumstances in the *Winters* case dealt with Montana's water regime of prior appropriation—favored in dryer Western states—in

[522] Royster 2011a, at 105.
[523] *Winters*, 207 U.S. at 575 – 78; *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist*., No. 15-55896 (9th Cir., Mar. 7, 2017), at 12.
[524] Babcock 2006; Osborne 2013; Royster 2000, 2011b.

which the right to water is vested in the user who makes the first "beneficial use" of a water supply, regardless of whether or not they own or live on that waterway. Riparian rights—favored in more water-rich Eastern and Upper Midwest states, including Minnesota, Wisconsin, and Michigan—treat water as a public good that is not owned by a particular appropriator, but is shared proportionally by adjacent users. Riparian rights do not function on the basis of temporal priority, like prior appropriation rights, but are rather structured around the principle of "reasonable use."[525] Because prior appropriation regimes generally function in regions with more significant water shortage problems, the *Winters* doctrine has most often been mobilized in conflicts over water quantity, particularly when tribal allocations leave junior rights holders with insufficient water resources.[526] As such, *Winters* conflicts have not been historically focused in Eastern and Upper Midwest States, though concerns about water shortages have become increasingly salient across the country.[527] Though the *Winters* decision did not address reserved water in the context of a riparian regime, it determined that the state's establishment of a particular water allocation system (in that case prior appropriation) was immaterial to the fact that the tribes' water right superseded the state law, and even federal law.[528] Thus,

[525] Royster 2000, at 187. Many states, including Minnesota, Wisconsin, and Michigan, are rooted in the common law riparian doctrine (which does not include a system of administrative oversight), but are increasingly establishing regulations and permitting requirements to ensure reasonable use and allocate water supplies between various users. *Id.* at 188–89.
[526] Brougher 2011, at 2.
[527] Royster 2000.
[528] Royster 2000, at 173.

Winters should be applied in full force to protect the water rights of tribes regardless of which water allocation method is favored by the surrounding state(s).[529]

Beyond Agrarianism: the "Purposes" of Water Use

The Court in *Winters* primarily looked to the federal government's intention of recasting tribal communities as agrarian when it created the Fort Belknap Reservation for the Gros Ventre and Assiniboines tribes. Subsequent courts have wrestled with the limits of "the purposes for which the reservation was created"—some have hewed close to the language in *Winters*, only allocating water rights where it serves agricultural needs;[530] others have interpreted purpose broadly to include maintenance of fisheries and other non-agrarian water uses, understanding the purpose of the reservation to be the creation of a separate tribal homeland.[531] In addressing the temporal question of "use," the Supreme Court held in *Arizona v. California*, that the federal government reserved on behalf of the tribes enough water resources to irrigate the irrigable portions established reservation lands for present and future needs.[532]

---

[529] As legal scholar As Judith V. Royster argues, "tribal reserved rights are neither appropriative or riparian, but a third distinct type of water right reserved as a matter *of federal* law." Royster 2000, at 193.
[530] Royster 2000, at 177, citing *In re General Adjudication of All Rights to Use Water in the Big Horn River System* (Big Horn I), 753 P.2d 76, 97 (Wyo. 1988), *aff'd by an equally divided Court sub nom. Wyoming v. United States*, 492 U.S. 406 (1989). In both cases, the courts found that water for livestock, municipal, domestic, and commercial uses were included in the agricultural purpose. *Id.*
[531] Royster 2000, at 175–76, citing *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47, 49 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981).
[532] *Arizona v. California*, 373 U.S. 546 (1963). The Court further classified the tribes' water rights as "present perfected rights" entitled to priority. Maccabee 2015, at 658.

Further, some courts have explicitly established that treaty-reserved fishing, hunting, and gathering practices both on-reservation and in the ceded territories, implicitly include a reservation of sufficient water to support those reserved activities.[533] The guiding principle here is that tribes would not have bargained in the treaties to specifically reserve the rights to continue traditional practices unless they had a reasonable expectation that there would be sufficient water to maintain those practices.[534] While the facts of the case in *Winters* specifically deal with on-reservation reserved water rights, the Opinion indirectly addresses the broader question of how water rights intersect with treaty-reserved rights when it asks: "The Indians had command of the lands and the waters, command of all their beneficial use, whether kept for hunting, 'and grazing roving herds of stock' or turned to agriculture and the arts of civilization. Did they give all this up?'" The Court finds that they did not. Justice McKenna, who wrote the decision in *Winters*, also authored the opinion in *U.S. v. Winans*,[535] just three years prior. The reasoning in *Winters* seems to build upon the *Winans* decision's interpretation of treaty rights as grants *from* not *to* the Indians, and that the tribes retained all that they did not explicitly grant to the U.S. in treaty.[536] Reading these two cases side-by-side suggests that, if the creation of the reservation implicitly reserved the rights to all water necessary for the function of the reservation, the tribes' withholding of treaty-reserved rights to

[533] Royster 2000, at 176, citing *U.S. v. Adair*, 723 F.2d 1394, 1414 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984), *State ex rel Greely v. Confederated Salish & Kootenai Tribes*, 721 P.2d 754, 764 (Mont. 1985).
[534] Royster 2000, at 176.
[535] 198 U.S. 371 (1905).
[536] 198 U.S., at 381.

hunt, fish, and gather, were established with the implicit expectation of water sufficient to carry out those practices.

Groundwater: Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District and the extent of Winters protections for groundwater

Groundwater supplies seventy-five percent of Minnesota's drinking water and ninety-percent of the state's irrigation for agricultural uses,[537] nearly two-thirds of the state of Wisconsin's drinking water needs,[538] and about ninety percent of Michigan's freshwater supply.[539] The majority of the Bands in this region likewise rely on groundwater, and groundwater interactions with surface water are important for sustaining aquatic ecosystems,[540] including Manoomin habitats. While each of these three states within the Lake Superior treaty areas have paid increased attention to groundwater in recent years and expanded the regulatory framework around groundwater and surface water interactions, groundwater is still significantly less-regulated than surface water in

[537] "Groundwater." *Minnesota Department of Natural Resources*. Available at: https://www.dnr.state.mn.us/waters/groundwater_section/index.html [Last Accessed May 11, 2018].
[538] "Groundwater." *Wisconsin Department of Natural Resources*. Available at: https://dnr.wi.gov/topic/GroundWater/ [Last Accessed May 11, 2018].
[539] "DEQ Fact Sheet: Groundwater Statistics." *Michigan Department of Environmental Quality*, Rev. Jan. 20, 2018. Available at: https://www.michigan.gov/documents/deq/deq-wd-gws-wcu-groundwaterstatistics_270606_7.pdf [Last Accessed May 11, 2018].
[540] Saha et al. 2017.

the U.S.[541] Recent conflicts over groundwater use and environmental impacts in Minnesota have heightened concerns about groundwater allocation and impacts.[542]

Policy-makers are increasingly recognizing what scientists have been expressing for generations, that groundwater and surface water are synchronous—"groundwater becomes surface water, becomes groundwater."[543] Because most Minnesota lakes and streams are groundwater fed, jurisdiction over groundwater has important implications for broader access to clean water resources. Legal scholar Judith Royster writes,

> [h]istorically, the primary impediment to conjunctive management of water resources has been legal regimes that fail to take account of the hydrologic connection between ground and surface waters. What science has long known about the interrelationship of water sources, the law has largely ignored…allocations of one type of water (by whatever system) fail to take account of the impacts of the other type of water resource. Each is treated as a separate, legally-unconnected resource.[544]

The question of whether tribes' rights to groundwater are covered by *Winters* seems to be increasingly resolving in favor of the tribes, but remains complicated. The Wyoming Supreme Court held in 2005 that tribes have no right to groundwater under *Winters*,[545] but most other state and federal courts others have found that *Winters* does

---

[541] Gerlak et al. 2013, "Appendix B", at 4–6.
[542] *Minnesota v. 3M*, Court File No. 27-CV-10-28862, Settlement Agreement and Order (4th Dist. Minn., Feb. 20, 2018), in which the State and 3M Corporation reached an $850 million settlement in the state's lawsuit over groundwater contamination with perfluorochemicals (PFCs); *White Bear Lake Restoration Ass'n v. Minnesota DNR*, Court File No. 62-CV-13-2414 (2nd Dist. Minn.), a temporary settlement to halt litigation over decreasing water levels in White Bear Lake, due to complex interconnected forces, including strains on the groundwater supply.
[543] Quote from conversation with hydrologist Crystal Ng, May 9, 2018.
[544] Royster 2011b, at 255–56.
[545] *Big Horn River Sys. & All Other Sources*, Civ. No 4993 (Wyo. Nov. 29, 2005).

protect fundamental rights to groundwater. There remains a problem of variability in state court interpretations of litigated water rights, and tribes' stake in those rights.[546]

In March of 2017, the Ninth Circuit Court of Appeals released its decision in the case *Agua Caliente Band v. Coachella Valley Water District*, in which it considered the question of reserved rights to groundwater.[547] The three-judge panel held that the *Winters* doctrine "does not distinguish between surface water and groundwater. Rather, its limits derive only from the government's intent in withdrawing land for a public purpose and the location of the water in relation to the reservation created."[548] Further, the court held that the fact that the Band had not historically accessed this groundwater was not determinative; the right was vested in federal law at the time the reservation was created and is maintained in perpetuity.[549] The Supreme Court denied *certiorari* review on November 27, 2017,[550] noting that, while the Supreme Court "had never explicitly applied the *Winters* doctrine to groundwater, its precedents support that result."[551] The

---

[546] Though *Winters* is a federal decision, preserving federal rights for tribes, the McCarran Amendment of 1952 allowed for the federal government to be joined in lawsuits over water rights to a stream system. In subsequent interpretations, the federal government has been joined to litigate tribal water rights in suits in state court. The tribes may consent to intervene but must then waive their sovereign immunity, or they must permit the federal government to litigate on their behalf without their direct input. While McCarran does not prohibit federal jurisdiction, the Supreme Court established a doctrine of federal abstention to allow the cases to proceed through state courts, thus the majority of contemporary *Winters* litigation occurs in state courts. Royster 2011b, at 263. *See also*, Blumm et al. 2006.

[547] *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, No. 15-55896 (9th Cir., Mar. 7, 2017).

[548] *Agua Caliente* (9th Cir., Mar. 7, 2017), at 21.

[549] *Agua Caliente* (9th Cir., Mar. 7, 2017), at 20.

[550] *Coachella Valley Water District v. Agua Caliente Band of Cahuilla Indians*, Nos. 17-40, 17-42, Order Denying Cert. (U.S., Nov. 27, 2017).

[551] *Coachella Valley Water District v. Agua Caliente Band*, Order Denying Cert., at 9. The Court looks specifically at the decision in *U.S. v. Cappaert*, 426 U.S. 128 (1976), in which the Court

Supreme Court declined to hear the appeal on the basis that most federal and state courts that had heard groundwater cases had held that *Winters* applied.

However, access to groundwater is different from regulation of groundwater, or the capacity to compel certain forms of regulation. As Royster notes, "relatively few tribes regulate groundwater use and allocation," which means that state groundwater management is not presently engaging in jurisdictional conflicts with tribes over regulation under *Winters*.[552] A number of states have established water settlements or compacts with tribes, delineating each entities' stake in available water resources, and have developed negotiated agreements to address more specific questions of groundwater apportionment.[553]

Integration of groundwater and surface water systems makes sense in terms of regulating water resources ecosystemically, and Minnesota, Wisconsin, and Michigan are each establishing their own measures to address the relationship between ground and surface water in policy and practice.[554] But this integration also creates openings for tribes to argue that their *Winters* rights extend to groundwater. For states that do not

interpreted the subterranean pool that was at issue in the *Winters* analysis as surface water, so never reached the question of rights to groundwater. However, the Court held in in *Cappaert* that (1) "the United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater," and (2) the U.S. "acquired by reservation water rights in unappropriated appurtenant water…sufficient to maintain the level of the pool." *U.S. v. Cappaert*, 426 U.S. at 142–43, 147. Thus, the Court determines that previous holdings, including *Cappaert*, lead to the conclusion that *Winters* does apply to groundwater.

[552] Royster 2006, at 489.

[553] Mack 2008.

[554] Gerlak et al. 2013; Minnesota Dep't of Natural Resources. 2013. *Draft Strategic Plan for the Minnesota Department of Natural Resources Groundwater Management Plan* (October, 2013). Available at: https://files.dnr.state.mn.us/waters/gwmp/gwsp-draftplan.pdf [Last Accessed May 14, 2018].

currently embrace conjunctive management strategies, there are no comprehensive approaches to regulating water, which enhances vulnerability for tribes and every other community or species that depends on access to clean water.[555] As noted above, while access to water resources under *Winters* is currently less pressing for tribes in Riparian states, establishing a *Winters* right for all appurtenant water sources is necessary for next arguing that *Winters* also entails a duty for states to protect water quality.

Could Winters provide a framework for protecting water quality?

The cases discussed above suggest that a number of federal courts are open to interpretations of *Winters* that extend beyond the very limited language of the original holding in order to fulfill the broader purpose of the rule, which is that reservations should have access to water supplies necessary to fulfill the purposes of the reservation. Courts above have also been open to reading the purposes of the reservation broadly enough to extend beyond agriculture and include traditional practices and maintenance of fisheries. The question of water quality standards is increasingly salient, particularly given the heightened consumption of fish and waterfowl among tribal members, and their increased exposure to toxins in the aquatic ecosystem.[556] While the *Winters* opinion never explicitly addressed the issue of water quality, the use of water for irrigation at issue in the case implied that the water was of sufficient quality to neither harm the crops nor contaminate other resources upon which the tribe relied. The fact that water quality was

[555] Royster 2011b, at 259.
[556] Dellinger 2004; Harper & Harris 2008.

not at issue in the case may suggest that the type of widespread water contamination we face today was not conceived of by the Supreme Court of 1908. But, of course, the question of access to water resources, which *was* at issue in *Winters*, eventually begets the question of regulation over the access itself, and what is being accessed.

Though the issue has not explicitly arisen in federal court, a number of scholars have advanced arguments that *Winters* should be interpreted to protect tribes' access to water *of a particular quality*.[557] As Judith Royster notes, while tribes have found some success levying challenges to specific state allocation permits, that kind of approach is far too piecemeal to serve as a viable protection for tribal water resources.[558] Royster argues that there are times when water quality and quantity are inseparable, for instance when streams need quantities of water significant enough to maintain a temperate environment for fish habitats, the *Winters doctrine* could be extended to protect that particular use.[559] Further, in *United States v. Gila Valley Irrigation District*, the federal district court in Arizona held that upstream irrigators were required to limit their diversions in order to limit recharges that increased the salinity of the tribal river source.[560] The court's analysis directly tied the quality of the water to the tribes irrigation issues, finding that the upriver irrigators' appropriations impermissibly altered water quality in violation of the tribe's reserved water rights. These cases and situations suggest the possibility of *Winters* for

[557] Tilton 2016, at 307; Brougher 2011; Royster 1997, at 50; Chandler 1994, at 105.
[558] Royster 1997, at 51.
[559] Royster 1997, at 51, citing *United States v. Anderson*, 6 Indian L. Rep. F-129 (E.D. Wash. 1979).
[560] 920 F. Supp. 1444 (D. Ariz. 1996).

tribes who are concerned about the impacts of upstream polluters on tribal water resources. As Royster argues "If the reason for the *Winters* right to a quantity of water is to fulfill the purposes for which the reservations were set aside, and those purposes will fail without water of adequate quality, then the *Winters* right must include a right to water quality."[561]

Tribal Jurisdiction over Water Resources

Each of these pieces discussed above—*Winters'* application in Riparian states, *Winters'* extension to groundwater, and the possibility of applying *Winters* to issues of water quality—build upon one another to get to the primary question of the State's duty not to degrade, and the tribes' capacity to regulate waters that flow through or under multiple jurisdictions. In the Lake Superior region, the Bad River, Fond du Lac, Grand Portage, Lac du Flambeau, and Sokaogan Bands have 'TAS' status under the Clean Water Act, so their regulations for on-reservation water resources are protected by federal law. For the remaining Bands in these ceded territories, there are currently no federal water quality baselines for tribal lands, and because state regulation does not apply on reservation, the tribes have very little recourse for enforcement of water access or quality, or to assert their jurisdiction over non-members on fee land on the reservation. Further,

[561] Royster 1997, at 52; *See also* Treuer 1984.

existing impediments in BIA policy create hurdles for tribes that wish to establish water codes independent of jurisdictional mechanisms like TAS status.[562]

The courts have established additional jurisdictional limitations on tribes that attempt to regulate non-members or non-Indians on-reservation. The most notable contemporary example is a Supreme Court case decided in 1981 called *Montana v. U.S.*,[563] in which the Court, undermining some of its own significant precedent,[564] found that the Tribe's authority over non-members was among the powers of sovereignty that were "necessarily …lost by virtue of a tribe's dependent status" and were not necessary to a tribe's prerogatives of internal self-governance.[565] The Court preserved two exceptions to this jurisdictional limitation: 1) that a "tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements"; and 2) a "tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic

[562] In 1975, the BIA established a moratorium on the approval of tribal water codes, under pressure from Western states. While some tribal water codes have been approved in the intervening years, the continued existence of this policy creates additional burdens for tribes that wish to regulate on-reservation water and are subject to BIA approval for tribal codes. Royster 2011b, at 259; Anderson 2015, at 224–26. A number of tribes have also established federally-approved standards for regulating drinking water under the Safe Drinking Water Act, however these standards focus entirely upon human consumption of drinking water, and do not cover the ecosystemic dynamics of water quality. Marx et al. 1998, at 326–34.
[563] 450 U.S. 544 (1981).
[564] See e.g. *U.S. v. Winans*, 198 U.S. 371 (1905); *Ex Parte Crow Dog*, 109 U.S. 566 (1883); *Menominee Tribe v. U.S.*, 391 U.S. 404 (1968).
[565] 450 U.S. at 564–65.

security, or the health or welfare of the tribe."[566] While these exceptions theoretically preserve a broad range of tribal authority, the Court has been exceptionally reluctant to justify any tribal jurisdiction over nonmembers, even when the facts of subsequent litigation seem to play directly into the circumstances envisioned in the *Montana* decision.[567]

However, a number of scholars have argued that *Montana* does not neatly apply to on-reservation water regulation because the waters that flow through, on, or under a reservation are starkly different from non-member fee lands, which were at issue in *Montana*.[568] As Robert T. Anderson argues,

> Even if the rule were applicable, tribal interests in protecting on-reservation water resources would seem to satisfy even the most stringent application of the test employed [in *Montana*]….Indian tribes have property interests in waters of reservations for agricultural, municipal, and domestic uses, and for instream flows to protect fish habitat. The inchoate property right of the tribe in reservation waters provides a basis for regulatory authority over such waters.[569]

---

[566] 450 U.S. at 565–66 (citations and footnotes omitted).

[567] *See e.g.* Justice Ginsburg's dissent in *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316 (2008), which points out the majority's failure to recognize leases of fee land as fitting within the *Montana* exceptions, despite *Montana's* specifically highlighting commercial dealing, contracts, and leases as examples of consensual relationships that may be regulated by tribes. *See also*, Banker & Grgurich 2010, at 565.

[568] Anderson 2015, at 215; Maccabee 2015, at 648.

[569] Anderson 2015, at 215. See also the Supreme Court's holding in *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, in which the Court distinguishes the tribe's contested zoning regulations (at issue in *Brendale*), from tribes 'legitimate' jurisdiction over water resources, pursuant to section 518 of the Clean Water Act. 492 U.S. 408 (1989). The opinion describes § 518 as a "delegation" of jurisdiction from Congress to the tribes, rather than, more accurately reflecting that § 518 recognizes tribal jurisdiction and "delegates" the primary responsibility for enforcement of federal law. Marx et al. 1998, at 326–34, 343.

While questions about the extent of recognized tribal jurisdiction remain contested, two cases in the Ninth Circuit Court of Appeals have considered the scope of *state* jurisdiction over non-Indians' use of water within reservations. The opinion in *Colville Confederated Tribes v. Walton* rejected the state of Washington's exercise of jurisdiction over non-Indians' water use within the Colville reservation[570]; in *United States v. Anderson*, the same circuit recognized state jurisdiction over on-reservation water use by non-Indians, but only on non-Indian land and only over use of "excess waters" (i.e. waters in excess of the tribes' usage needs).[571] The opinion in Colville argued that "regulation of water on a reservation is 'critical to the life- style of its residents' and the 'lifeblood of the community,'" and that creation of the reservation by the federal government preempted state law on the matter.[572] The Seventh Circuit also rejected a municipality's attempts to regulate storm water runoff on land held in trust for the Oneida Tribe of Indians.[573] With regard to the question of regulation, the court argued that the federal government holding land in trust for Indians was intended to "reestablish [the Indians'] sovereign authority over that land."[574] Thus, the proper regulators of storm water were the "Indian governments of those lands".[575] The Colville Tribal Court of

[570] *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 52 (9th Cir. 1981).
[571] *U.S. v. Anderson*, 736 F.2d 1358 (9th Cir. 1984). Despite the holding in *Anderson*, the state of Washington has since declined to exercise its regulatory authority, even in the case of *off-reservation* water uses that interfere with Indian rights. Anderson 2015, at 218.
[572] Anderson 2015, at 219, quoting *Walton*, 647 F.2d 42, 52–53.
[573] *Oneida Tribe of Indians v. Village of Hobart*, 732 F.3d 837, 839 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 2661 (2014).
[574] 732 F.3d 837, at 839.
[575] 732 F.3d 837, at 839–40.

Appeals also asserted tribal authority in water quality matters, holding that "Tribes have express delegated authority to regulate water quality within the Reservation", and that such authority extends to non-Indian activities on non-Indian fee lands on the reservation.[576]

The dispossession of tribal lands through allotments sold to non-Indians, and the patchwork jurisdictional Framework of the reservations further complicate the picture,[577] though the court in *Hobart* likened tribal jurisdictional patchworks to that of the federal government more broadly, arguing that sovereign authority scattered throughout a territory was not an impingement on exercise of that sovereignty:

> It is awkward for parcels of land subject to one sovereign to be scattered throughout a territory subject to another. But actually it's a familiar feature of American government. Federal facilities of all sorts, ranging from post offices to military bases, are scattered throughout the United States, and are subject to only as much regulation by states and local governments as the federal government permits. A similar scatter is common in Indian country, primarily as a result of allotment acts....acts allotting reservation land to individual families to liberate them from tribal ownership that Congress in that era considered socialistic, to encourage their assimilation into mainstream American life, and not incidentally to facilitate the transfer of Indian land to non-Indians.[578]

If tribes were to be able to establish that *Winters* also presumes water of sufficient quality to carry out the intended purposes of the reservation, they would have a much

[576] *Hoover v. Colville Confederated Tribes*, 6 CCAR 16, 3 CTCR 44 (Colville App. 2002).
[577] Salamander 2009.
[578] *Oneida Tribe of Indians v. Village of Hobart*, 732 F.3d 837, at 840 (citing Newton et al., § 1.04).

more solid footing for compelling the state to establish higher standards to prevent the degradation of fresh water resources that flow through or under the reservations. Further, to the extent that the treaties provided for tribes' ongoing access to traditional subsistence practices, Bands may be able to argue that the explicit inclusion of wild rice lakes within the reservation also inferred a right to water capable of sustaining that crop.

Pushing states to think about groundwater as a treaty protected resource under *Winters* is not only about establishing an additional appurtenant water source for tribal use—it also compels a more complex regulatory engagement with the symbiotic exchanges between groundwater and surface water and the broader ecosystemic impacts of water pollution across the water system. While *Winters* only applies to waters appurtenant to the reservation, establishing a water quality right under *Winters* would also have implications for protecting treaty reserved rights in the ceded territories. If sufficient water resources were necessary to maintain the Tribes on the reservations created by treaty, presumably the promises in the treaties that ensured the tribes' ongoing hunting, fishing, and gathering rights would also have been illusory if the water that sustained those practices was not also included in the treaty commitment.

While recognition of tribal authority to regulate water resources through mechanisms like TAS has enabled tribes to push back against states' failures to adequately regulate pollution and other water degredation,[579] TAS limits tribes to

[579] *City of Albuquerque v. Browner*, 865 F.Supp. 733 (D.N.M. 1993) (upheld by 10th Cir.: 97 F.3d 415 (10th Cir. 1996), which held that the Isleta Pueblo tribe could set water quality standards for arsenic levels that exceeded federal and state regulations. By virtue of these

enforcing existing federal law. Establishing a more fundamental right that preexists the United States, but that was enshrined in federal law with the making of the treaties, gives tribes significantly more latitude to negotiate with states, define water quality using culturally specific metrics,[580] and establish their sovereign authority to protect a vital resource on and off-reservation. As legal scholar Sarah Krakoff argues,

> The final unraveling of settler-colonialism, which would redeem both American Indian law and natural resources law, would be to unhook natural resources law from its Lockean (and Jeffersonian) assumptions. Instead of measuring tribal rights based on dated ideas about Western land use and arcane understandings of tribal governments, the better approach would be a hybrid that reaches back to a pre-colonial past while also incorporating ecological and economic realities of today. Such an approach would allow tribes, on the one hand, to use waters (and lands) as they did historically, but also to be contemporary economic actors. Their rights to those resources would not depend on claims to irrigate the desert, but instead would exist regardless of whether they chose to keep water in the stream or, moving in another direction, to market it to users with higher needs. Reversing settler colonialism in natural resources law, in other words, means both going back to tribal resource use patterns of the past, and going forward to recognize tribes as contemporary governments and economic actors today.[581]

---

regulations, the court found that the tribe could compel the city of Albuquerque, the upstream polluter, to increase its effluent waste standards for water discharged into the Rio Grande River.

[580] For instance, tribal water quality considerations could incorporate the cultural values protecting the needs of non-human agents, including water, account for tribal-subsistence patterns like significantly higher consumption of fish, and specifically protect culturally important crops like wild rice that live in aquatic ecosystems.

[581] Krakoff 2013, at 286.

Part V. Anishinaabe Law, Tribal Legal Systems, and Beyond

Previous chapters have worked to demonstrate how Tribal intervention in federal and state legal and regulatory forums have made Tribes formidable actors in environmental regulatory decision-making. Previous sections of this chapter have looked at potential strategies for pushing those boundaries even further in relationship to existing federal court jurisprudence and policy. However, as Kyle Powys Whyte points out, there's a significant body of scholarship which argues that, "indigenous peoples are going to have to work with more than just federal and state governmental partners in order to build in the flexibility and scalability needed to address certain climate change impacts."[582] Much of the literature that Whyte references suggests that the International law and policy framework is the primary forum through which Indigenous peoples can transcend the limitations of federal and State law.[583] I do not deal with this literature explicitly here, in part because we are in an era of U.S. policy that is actively resisting and undermining its international commitments and negotiated agreements. And secondly, as Whyte argues, these forums require just as much—if not more—education for non-Indigenous actors about Indigenous self-determination and cultures, though without the incentivizing accountability mechanisms like Indian treaties and tribal jurisdiction that often exist on a national scale.[584]

[582] Whyte 2014, at 11.
[583] Parker 2012; Smith, R. 1997; Watson 2011; Williams 1990; Xanthaki 2009.
[584] Whyte 2014, at 14–15.

Instead of looking to the realm of international forums, I would like to focus briefly on the role of Indigenous law and tribal courts in pushing the environmental protection discourse and articulating alternative legal visions. The Anishinaabe Bands of the Great Lakes have always had their own justice systems and means of structuring social obligations, including distinct methods for resolving disputes involving the protection and allocation of hunting, fishing, gathering, and ways of living with the land.[585] Much of this dissertation has discussed the ways in which tribal leaders engage with and influence state policy, rooted in different ways of understanding humans' obligations to the non-human world. As they continue to do this work externally—to push for more thoughtful and more reciprocal engagements between non-Indigenous policy-makers and the natures they touch—they are also looking inward to tribal courts and Indigenous legal systems, both to assert their sovereignty and approach jurisdictional conflicts from within their own bodies of law, and to re-establish the rhythms and social expectations that keep their own communities' accountable to the plants, animals, air and water. Robert William's Jr., drawing upon Homi Bhabha, argues that,

> [t]he social articulation of difference, from the minority perspective is a complex, on-going negotiation that seeks to authorize cultural hybridities that emerge in moments of historical transformation.' Tribal courts are today recognized by tribal advocates, legal scholars, and other important legal commentators as important jurisgenerative institutions that enable Indian tribes to revive and assert a robust and rights-affirming Indian vision of justice based on indigenous American tribal values of human dignity and respect from the equality of all races in America.[586]

[585] Fletcher 2011b, at 11.
[586] Williams 2005, at 148 (quoting Bhabha 2004, at 2).

In Minnesota, Wisconsin, and Michigan, every federally recognized tribe has a tribal court system.[587] In Minnesota, the Minnesota Chippewa Tribe operates its own Appellate Court. Each court is different, enforcing different tribal codes, hearing different kinds of disputes, utilizing their own systems, and drawing from their own sources of law. As Williams posits, tribal courts have been jurisgenerative sites through which tribal customs, traditions, and stories have been articulated alongside and in relationship to principles of American federal law.

Much has been made in federal jurisprudence of tribal courts' efforts to exercise jurisdiction over non-tribal members.[588] A spate of Supreme Court decisions over the past forty years have significantly constrained tribal jurisdiction, both on- and off-reservations, most notably *Montana v. U.S.*, discussed above.[589]

---

[587] As of 2013, Matthew L.M. Fletcher reported that over two-hundred tribes in the U.S. had functioning court systems, and those that did not were in the process of developing them. Fletcher 2013, at 195.

[588] *Oliphant v. Suquamish*, 435 U.S. 191 (1978), denying tribal jurisdiction over non-Indians who commit crimes on Indian reservations); *Montana v. U.S.*, 450 U.S. 544 (1981), limiting tribal jurisdiction over non-members in civil or regulatory matters, unless the controversy falls under one of two exceptions; *South Dakota v. Bourland*, 508 U.S. 679 (1993), denying tribal jurisdiction to regulate hunting and fishing in an area where Congress had taken reservation land for other purposes, finding that the act of Congress abrogated the Tribe's treaty rights to regulate non-Indian hunting and fishing on those lands. *Strate v. A-1 Contractors* (520 U.S. 438 (1997), denying tribal court jurisdiction to hear case between two non-Indian parties on non-Indian land; *Nevada v. Hicks*, 533 U.S. 353 (2001), denying tribal court jurisdiction to regulate actions of non-Indian state officials on Indian land; *Adoptive Couple v. Baby Girl*, 570 U.S. (2013), rejecting Cherokee membership determination in holding that the Indian Child Welfare Act did not apply; *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316 (2008), denying tribal court jurisdiction to hear (Indians') claims of discriminatory conduct against (non-Indian) bank, rejecting tribal authority over non-Indians, further constraining the exceptions laid out in *Montana*.

[589] 450 U.S. 544 (1981).

Frank Pommersheim lamented in 2000,

> Tribal courts are the premier judicial forums in Indian country, but they cannot seem to move ahead or even dispose of the cases—particularly those involving non-Indians and their activities in certain portions of Indian country—that come before them without generating sparks that federal courts increasingly take as their task to contain if not extinguish...[590]

The situation is not much improved in 2018. Legal scholar Matthew L.M. Fletcher traces a shift in tribal relationships with the federal judiciary, noting that until the early to mid-2000s, tribal courts and Indian law practitioners routinely deferred to federal court orders in defining the limits of tribal jurisdiction. He argues that that is beginning to change, as Tribal courts continue to push the boundaries of the Supreme Court's holdings.[591] The piecemeal nature of the Court's holdings on tribal jurisdiction suggest that a further reckoning with the history of federal Indian law and the contemporary significance of tribal courts in the U.S. more broadly is overdue. Further, federal courts' attempts to constrain tribal jurisdiction have inspired burgeoning tribal court systems to more aggressively pursue jurisdictional expansion; during this time a number of tribal legal systems have developed reciprocity arrangements with states and counties to mutually respect court orders, and the volume of Indigenous law based in tribal codes, Elder's councils and custom and tradition has become foundational to the functioning of tribal governments.[592] As we saw in Part IV, a number of Tribes have

---

[590] Pommersheim 2000.
[591] Fletcher 2010, at 975.
[592] Re: emerging cooperative agreements and dynamic relationships between Tribes and States, *see* Fletcher 2008, at 181, 2006.

already addressed issues of water jurisdiction through Tribal water codes and have handled water-related disputes in Tribal courts.

Fletcher argues that the first step in Tribal resistance to federal court infringements should be "to apply a truly *tribal* jurisdictional test, rooted in Tribal constitutional provisions and statutes that define Tribes' own jurisdictional authorities, whether they choose to acknowledge federally imposed limitations or not.[593] But these efforts should be accompanied, Fletcher argues, by Tribes continued efforts to assert civil jurisdiction over nonmembers, refusing to recognize the legitimacy of federal court oversight of tribal courts in civil regulatory matters, and by an aggressive litigation strategy to overturn precedential federal cases that restrict tribal jurisdiction.[594]

---

[593] Fletcher notes that that some tribes have adopted clauses that establish that they will not push their jurisdictional authority further than what is proscribed in federal law (citing the Constitution of the Little River Band of Ottawa Indians, art. I §2). Other Bands have explicitly rejected limitations placed by Congress or cases such as *Montana v. U.S.*, instead asserting jurisdiction over all persons, in some cases not limited by the geographic boundaries of tribal lands. (citing the Constitution of the Little Traverse Bay Bands of Odawa Indians, art. IV, § B). Another example not discussed by Fletcher is the Constitution of the White Earth Nation, which was approved by popular vote and implemented in 2013. Chapter 1 of the Constitution states:

> The White Earth Nation shall have jurisdiction over citizens, residents, visitors, altruistic relations, and the whole of the land, including transfers, conferrals, and acquisitions of land in futurity, water, wild rice, public and private property, right of way, airspace, minerals, natural resources, parks, and any other environmental estates or territories designated by and located within the boundaries of the White Earth Reservation, as established and described in the Treaty of March 19, 1867, and over the reserved rights within the ceded waterways and territories of the Treaty of 1855.

[594] Fletcher 2010, at 1010–1012. Resistance can occur, Fletcher argues, if tribal judges and tribal courts make decisions regardless of the limitations imposed by federal precedent, and by refusing to appear if they are sued in federal court by nonmember defendants from tribal court cases. And, as Fletcher notes, in each of the federal cases that constrained tribal jurisdiction, the courts have consistently left the door open for future litigation and declined to eliminate the possibility of Tribes asserting civil jurisdiction over non-members in other circumstances. In other words,

The internal development of Tribal common law in the realm of civil regulatory and resource management jurisdiction is essential both for levying challenges against federal oversight, as Fletcher argues, and for foregrounding Tribes as necessary jurisdictional authorities and partners with regard to resource-protection decisions at the State and local scales. Throughout much of this Dissertation, I've referred to jurisdictional expansion as creating the openings for jurisgenerative possibilities. In the arena of emerging Tribal law, the jurisdictional expansion is itself jurisgenerative, as Tribes reconcile what Fletcher refers to as "intertribal" common law—which is applied by tribal courts to cases rooted in non-Indigenous/Anglo-American legal constructs (Fletcher uses the example of an employment contract), with "intratribal" common law—applications of Indigenous sources of law to respond to traditional problems (i.e. inheritance disputes over on-reservation hunting grounds).[595] Based on Tribal courts' own precedents of engaging with and incorporating existing principles of federal law, they are uniquely situated to envision and apply a legal formation that integrates legal principles from multiple sources and pushes the boundaries of law's potential in the civil regulatory realm. This is perhaps the clearest expression of the aspirational ideal of jurisgenesis, law as "a bridge in normative space,"[596] "connecting the world that is with worlds that might be."[597]

---

jurisdictional expansion efforts in the tribal courts that face challenges in federal courts may push those openings wider. For more on resistance through refusal, *see* Simpson, A. 2014.

[595] Fletcher 2006, at 707.

[596] Cover 1985, at 181.

[597] Berman 2007, at 308.

Beyond this, tribal jurisprudence and law-making is jurisgenerative because it calls into being laws rooted in fundamentally different conceptions of the social, natural, and onto-epistemological. John Borrows argues that shifts in normative law are necessary to meet the contemporary challenges of an over-burdened world. He writes,

> Profound legal change requires that questions be examined from perspectives that partially emerge from sources outside Western legal discourses, motivated by considerations from Indigenous normative orders. Standards for judgment must not only flow from the common law but also should spring from Indigenous legal values. Anishinabek law should guide our decision-making. Precedent should not be confined to dusty old law books but should be alive to the authority of our teachings and life-ways. . . . Our traditions and stories should guide how we answer the problems we face. They are a necessary part of our internal regulation and organization. Our customs are necessary to meet challenges that lie ahead. They should be simultaneously compared, contrasted, combined with, and disaggregated from critical and constructive norms arising from many philosophical and cultural legal traditions. We should be able to dream about what our own law should look like in our contemporary lives.[598]

While I have argued throughout this Dissertation that the small-scale jurisdictional strategies that Tribes employ are important for understanding current developments in Tribal governance over resource issues, the exceptional burdens on the non-human world also demand speculative and jurisgenerative thought that exceeds the bounds of existing legal forms and social structures. As Haraway argues, "the means and processes of collective movement must be imagined and acted out in new geometries."[599]

---

[598] Borrows, J. 2012, at 197.

[599] Haraway 1991, at 239 fn. 3.

Just a couple of months ago, in the late winter of 2018, I spoke on the phone with an Environmental Services Manager for a Band near Lake Superior. We were talking about research, Manoomin, and the Band's protectiveness over its culturally significant lakes, given past experiences with researchers and state representatives coming in and taking what they wanted without regard for the Band's interests. I mentioned the importance of finding ways to compel researchers and the State to respect tribal sovereignty in these matters, and he replied that it was "not so much about tribal sovereignty, but just [the need] to protect the resource. It's hard to get the rice back." This conversation catalyzed something important for me about the fundamental ontological differences in how tribes approach resource protection—the resource and the ecosystem are always foregrounded in a way that is impossible in the stratified and segregated realm of state and federal resource regulation. Beyond that, for many tribal members, the resource cannot be distinguished from the community itself, the person is related to the plant, is related to the water, is related to the four-legged. If the distinction between fish and water fowl management and water quality (one overseen by the State DNR, the other by the State Pollution Agency) seems arbitrary, the distinction between human and non-human is similarly unhelpful when your primary focus is only to protect your community—both human and non-human.

Thus, it is also important to address Anishinaabe forms of worldmaking and law-making that are not rooted in the formal venues of courts, or councils, or legislatures. These alternate forms—often rooted in the realm of storytelling—have perhaps the greatest speculative potential for envisioning and articulating a different world, and

different normative engagements with human and non-human alike. In their exceptional collection, *Centering Anishinaabeg Studies: Understanding the World through Stories*, Jill Doerfler, Niigaanwewidam James Sinclair, and Heidi Kiiwetinepinesiik Stark compare stories—and the histories, traditions, and values they contain—to "maps, or perhaps instructions, that teach us how to navigate the past, present, and future. They tell about the past, but at the same time inform our present and guide our future….[and] are ultimately about creation and re-creation."[600]

Methods of meaning-making, including but not limited to storytelling, become the foundations for normative and legal meanings and expectations. Stories reflect philosophies, ontologies, and epistemologies in ways that are hard to grasp through the more limited registers of policy, regulation, and legal decision-making. Stories transcend jurisdiction,[601] but they also produce the authorities, sources of law, and expectations that guide behavior. In this way, stories are jurisdictional practices: "stories not only are things but *do things*, like provoke action, embody sovereignty, or structure social and political institutions."[602]

A number of Anishinaabe legal and social scholars have recently foregrounded the importance of stories and forms of meaning-making as ways of thinking through interconnected futures, in which legal norms are not and cannot be separable from the

[600] Doerfler, Sinclair & Stark 2013, at xviii.
[601] Doerfler, Sinclair & Stark 2013, at xviii (quoting Henry, Soler & Martínez-Falquina, eds. 2009, at 18).
[602] Doerfler, Sinclair & Stark 2013, at xxiii (quote from Heidi Kiiwetinepinesiik Stark).

worlds with which they interact.[603] These thinkers, and those that follow them, are the ones that will articulate and enact the legal visions of their communities, and provide roots and a foundation for future jurisdictional and jurisgenerative work.

[603] *See e.g.* Blaeser 2013; Borrows, J. 2011, 2012; Borrows, L.K. 2013, 2018; Doerfler 2013; Doerfler, Sinclair & Stark 2013; Fletcher 2013; Nelson 2013; Simpson, A. 2014; Simpson, A. & Smith 2014; Simspon, L.B. 2012; Simpson, L.B. & Manitowabi 2013; Sinclair 2013; Stark 2013; Vizenor & Mackay 2013; Whyte 2018a.

CHAPTER 6

Conclusion

> We are all bound by a covenant of reciprocity: plant breath for animal breath, winter and summer, predator and prey, grass and fire, night and day, living and dying. Water knows this, clouds know this. Soil and rocks know they are dancing in a continuous giveaway of making, unmaking, and making again the earth.
>
> - Robin Wall Kimmerer, *Braiding Sweetgrass: Indigenous Wisdom, Scientific Knowledge, and the Teachings of Plants*, at 383.

> [E]nvironmental science and health is the large arena where answers depend on many disciplines of science, and where the fractionation of knowledge into isolated compartments, differing philosophies, definitions and approaches may even impede the synthesis of proper hypotheses to understand and react to a changing world. The reductionist approaches used to address different parts of a complex system may be irreversible, blocking easy access back to the starting point.
>
> -Werner Burkhart, "Compartmentalization in environmental science and the perversion of multiple thresholds," at 65.

In early 2018, the Fond du Lac Band began a triennial review of its water quality standards and regulatory framework for protecting Manoomin, including nearly two-decades of monitoring data.[604] As a component of this effort, the Band established a Health Impact Assessment Committee and partnered with the Minnesota Department of Health to evaluate and communicate the potential impacts of changes to water quality

[604] "Collaborative Health Impact Assessment: Effects of wild rice water quality rule changes on Tribal health." *Ashi-niswi giizisoog (Thirteen Moons)*, June 2018. Available at: http://www.fdlrez.com/newspaper/archive/June17.pdf [Last Accessed Aug. 10, 2018].

standards for community health. Central to this analysis are the potential impacts to the sustainability of key cultural and subsistence resources, including Manoomin.[605] That the Department of Health agreed to step into an issue as politically polarized as the sulfate standard speaks to the inadequate attention to community health through the sulfate standard rule-making process.[606] In part, that lack of attention is a function of the very regulatory compartmentalization that we have seen in the prior chapters. States' pollution agencies have different mandates from their DNRs, which have different mandates from their health departments, and so on. These mandates preserve discrete agency jurisdiction over particular issues and hinder thorough or comprehensive policy engagements with issues that transect these artificial boundaries.

A variety of Tribes in recent years have turned to HIAs as a tool to look more broadly at how these complex ecosystemic issues impact community health, and to make a case for community health as fundamentally inextricable from the health of non-human species. These HIAs have also encouraged states to embrace heightened air and water quality regulations, have engaged oft-marginalized tribal communities in regulatory decisions, and have advanced a tribes' evidence-based analyses of risk, harm, and pollution impacts for Indigenous communities. They are yet another tool that tribes have

---

[605] "Water quality standards and health impact assessments at Fond du Lac Resource Management." *Ashi-niswi giizisoog (Thirteen Moons)*, February 2018. Available at: http://www.fdlrez.com/RM/13moons/13MoonsFeb18.pdf [Last Accessed Aug. 10, 2018].

[606] Interviews with participants in the HIA development process have suggested that the DOH has received pushback for its participation from officials at other state agencies, who would prefer that the discussion of water quality preserve the discrete jurisdiction of certain agencies over environmental issues.

used to shape policy at a variety of scales, and to demand that their jurisdictional authority be recognized at the regulatory tables of state and federal agencies.

Fond du Lac has also notably drafted its water quality standards HIA to address the diverging paths that tribal and state approaches are taking. The two figures, reprinted below, diagram the projected impacts and Manoomin futures on the path of restrictive and limited rule-making (Figure 1) or on the path of a more protective and comprehensive water quality approach (Figure 2). In each diagram, regulatory impacts to Manoomin are associated with a whole range of other community concerns, including historical trauma and land dispossession, cross-generational harvesting and traditional practices, government-to-government relationships, economic and financial security, community strength and food security, resilience, connections to lifeways, and ability to implement forward-looking principles of preservation for seven generations. Only in the diagram tracing the less-protective approach (Figure 1) is legal action mentioned, and then it is in the context of strained resources and limited Indigenous voices in public policy forums. In the alternative tribal approach, law is not explicitly mentioned—not because it is not important, but because it is not external to the work of protecting Manoomin: "what serves the rice is law; what harms the rice is illegal."[607]

This is a legal vision in which the law is not just a system of biopolitical governance imposed by a centralized state but is also a way of observing and

[607] Vennum 1988, at 177. Citing a quote from an Anishinaabe elder printed the work of anthropologist Eva Lips (Lips 1956). Lips conducted ethnographic field work on the Nett Lake Reservation in Minnesota in the summer and fall of 1947.

understanding the relations between humans and non-humans and the normative practices that enable societies to function and balance. As Borrows writes, law should not be a dictator, but a servant, at its “most successful when it expresses the normative order of the people whom it serves.”[608] Throughout this dissertation I have focused on the various ways in which Anishinaabe tribes across the region have advanced their jurisdictional authority in attempts to change the normative order through which state and non-state actors engage with the non-human world. Change the normative order, change the law.

[608] Borrows 2010, at 64.

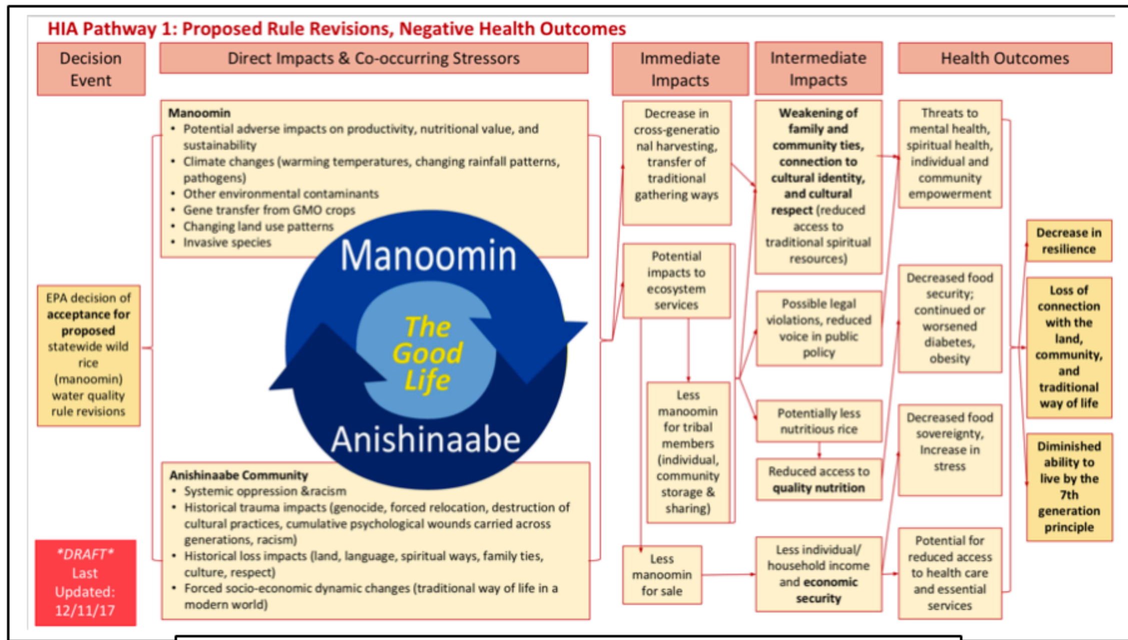

Figure 7. Pathway 1 Diagram, State Proposal.
Fond du Lac Band Draft Health Impacts Assessment. 2017.

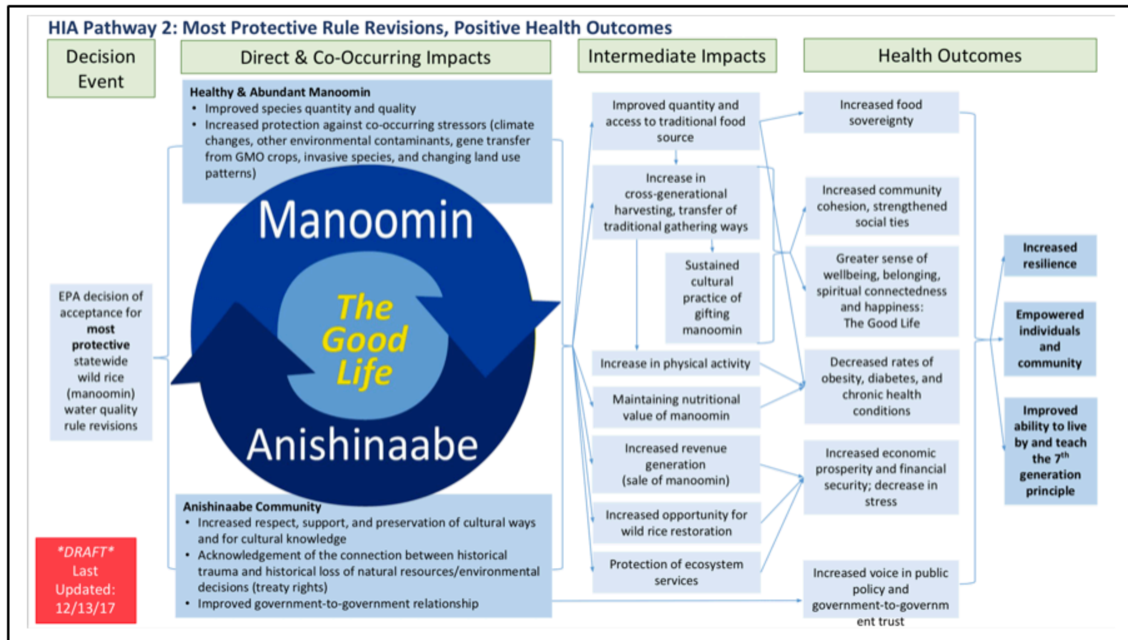

Figure 8. Pathway 2 Diagram, Tribal Proposal.
Fond du Lac Band Draft Health Impacts Assessment. 2017.

I have argued here that contests about jurisdiction are not just minute conflicts over staid administrative units within fixed governmental hierarchies, but also enroll the authority to interpret and define the normative order that is the law. Jurisdiction is practiced and produced through the day to day acts of permitting, rule-making, enforcing regulatory standards, litigating conflicts, building infrastructures, degrading and restoring habitats, and "speaking" the law. [609] Tracing the jurisdictional expansions of the "third sovereign" trains a lens on the particular functions and ontologies that animate state and federal jurisdictional practices and regulatory mechanisms, and provides a set of alternatives—with regard to both ontological foundations and the mechanisms of resource protection in an integrated and co-dependent socioenvironmental ecosystem. These alternatives are jurisgenerative, weaving together the mechanisms of state jurisdiction with an eye toward a different legal future that functions, "not in a hierarchy but a circle."[610]

In the preceding chapters, I have attempted to show that the day-to-day practices of governmental authorities—permitting, infrastructural development, administrative negotiations, rule-making, decision-making, regulatory interventions, negotiating and managing interactions with other authorities—are the practices through which jurisdiction is created and contested. In addition, I have worked to create a record of tribes' jurisdictional practices around key environmental issues in order to think through the process and potential of jurisdictional expansion in a particular time and place, and to

[609] Ford, R.T. 1999, at 855.
[610] Kimmerer 2013, at 385.

understand jurisdiction as a concept that exceeds the embedded scales and hierarchies of federalism. It is my hope that these chapters have demonstrated that jurisdiction is a way of understanding how authority and legal power are situated, but also that jurisdiction functions through daily practices and regulatory minutiae as various entities and authorities make claims and advance their interests. Chapter 2 set the stage for understanding treaties and treaty rights litigation as productive of particular jurisdictional relationships in the ceded territories and between tribes, federal and state governments. Treaty litigation shifted the jurisdictional landscape by compelling the states to recognize tribal jurisdiction in the ceded territories and account for tribal authority in managing treaty resources. This chapter, in providing a foundation for the chapters that followed, also served as a reminder that treaty histories, and history in general, remain alive and continue to be a force in tribal interactions with state actors.

Chapter 3 charted Minnesota tribes' unprecedented assertion of their interests and authority in the state's sulfate standard rule-making process. Through the jurisdictional practices of demanding enforcement of existing standards, engaging with federal authorities to draw attention to state water quality issues, contributions to data collection, and participation through consultation, formal advising, and public commentary, tribal engagement shaped the discourses of 'scientific legitimacy' and offered different ways of thinking about the regulatory impacts of observation and data collection. As a result, tribes demanded attention to the limits of state regulatory processes and offered ontological alternatives to the narrow rule-making mandate. The alternatives contained in tribal approaches demonstrated that there are fundamental issues of incommensurability

that can only be accounted for when the regulatory ontologies that animate state and federal resource protection strategies are critically engaged.

Chapter 4 looked at a different set of jurisdictional practices, in a regulatory process characterized by jurisdictional wormholes and uncertain authority. I traced the history of pipeline development in the U.S. alongside important eras of federal law that dispossessed tribes and encouraged assimilation practices, contrasted against the contemporary era of tribal resurgence, engagement, and intervention. In this realm, tribes used jurisdictional mechanisms such as formal intervention in the permit process, blocking renewal of pipeline permits on reservation land, compelling analysis by partnering federal agencies, developing tribal emergency response plans, and advocating for more comprehensive whole pipeline regulatory frameworks to assert their interest in and authority to influence pipeline permitting across the ceded territories and reservations. In so doing, tribes successfully slowed the permitting process, reframed the discourse of 'emergency' intended to speed the permitting, highlighted the arbitrary limits set around state practices of evaluating harm, risk, and impact, and asserted the necessity of evaluating long-term impacts to ecosystems within the ceded territories. By claiming fundamental jurisdiction over reservation lands, tribes compelled the state and industry to address the costs of rerouting the pipeline with regard to human and non-human long-term ecosystemic impacts.

Finally, Chapter 5 took a speculative turn to address the potential strategies that tribes could deploy to further expand their jurisdictional authority and interests in the resources of the ceded territories and push standards for off-reservation polluters. This

speculative approach reflects the calculations and balancing that accompany any potential strategic or boundary-pushing jurisdictional practices and also reflects on the limits of tribal jurisdiction in relation to existing legal mechanisms. This chapter is a bit of an intellectual exercise, but also an attempt to understand the uncertainties and dynamic conditions in which tribes are advancing their own jurisdiction and pushing back on the state and federal governments. As such, this chapter also reflects on some of the work that tribes are doing to reestablish legal traditions and expectations that may not be legible to federal and state regulation or cooperation. Though much of what I focus on in these chapters is the jurisgenerative possibilities as tribal and state jurisdiction intersect, it is also important to address the other space in which Bands are renewing their lifeways and communities, and in the process, developing ways of living in the present that reflect different ontologies and different legal visions.

This dissertation attempted to carve out a space for thinking about how jurisdiction functions in practice, to create an empirical record of tribes in this region expanding and pushing back on the boundaries of jurisdictional authority, and to understand how tribal jurisdictional expansion creates the opportunities and conditions for jurisgenesis. Though I've tried to shed some light on the particular intersections of jurisdiction and jurisgenesis, and the foundational role of tribal nations in creating these intersections, there remain significant opportunities for further research on the role of tribal nations that are using jurisdictional tools to shape environmental politics and demand attention to different environmental ontologies in regulation. Significant scholarship has demonstrated how the law can be jurispathic—using jurisdiction as a tool

to consolidate power, entrench institutional privileges, and further undermine marginalized claimants.[611] But the work of the third sovereigns to advance their own jurisdictional authority—related to but not contained within the jurisdictional framework of federalism—demonstrates the potential of tribal nations to a) reveal the limitations of other jurisdictional authorities,[612] and b) push alternative and jurisgenerative ways of understanding law.

The resurgence of Indigenous communities and tribal nations in the U.S. deserves scholarly and popular attention but must also be held in tension with the ongoing and emerging challenges Indigenous communities face. As Kyle Whyte points out, the Anishinaabe "already inhabit what [their] ancestors would have understood as a dystopian future."[613] These challenges—not limited to climate change, attacks on tribal sovereignty at various levels of government, extractive industry development, energy demands, ecosystem degradation, polarizing political discourse—require heightened attention to our philosophical commitments, and those of the systems of governance in which we live. As Vine Deloria writes in *The Metaphysics of Modern Existence*, "unless we can discover a basis for examining our attitudes and knowledge about the world, we cannot determine a realistic position from which we can bring about systematic and

[611] Cover 1972, 1982. *See also* Alfred 2009; Bell 1995; Chang 2010; Coulthard 2014; Deloria 1985; Deloria & Wilkins 2011, 1999; Ford, R.T. 1994, 1999; Pommersheim 2009; Rifkin 2009; Robertson 2005; Wilkins 2013, 2003, 1998; Wilkins & Lomawaima 2001.
[612] Pasternak 2017.
[613] Whyte 2017a., at 207.

fundamental change that is self-sustaining and continuing in the face of future insights and acquisitions of knowledge and experience."[614]

One small anecdote from my field work experience stands out in this regard. One afternoon in early winter 2016, I was talking with a resource manager about the Fond du Lac Band's successes in reestablishing sturgeon populations in the St. Louis River. I naively wondered about the reasoning behind such a concerted effort to renew this species: "Are they good to eat?" I asked. He looked at me oddly and said, "Well, they were there before, so they should be there again." The sturgeon should be there, and be able to thrive, not because of their benefit to humans, but because of they have a right to exist independent of humans. His statement demanded a relearning on my part, and a reflection on my own perspective, which until that point had been more akin to the regulatory 'beneficial use' calculation discussed in Chapter 3. Other scholars who I've encountered in these spaces are beginning to walk down the path of identifying, unlearning, and relearning the ontological presumptions, colonial expectations, and relational hierarchies that have fomented the industrialization and degradation of the world we live in. Taking a page from Donna Haraway, and "all offspring of colonizing and imperial histories, I—we—have to relearn how to conjugate worlds with partial connections and not universals and particulars."[615] Throughout the course of this research, I have seen state agency staff in the midst of their own world-reshaping

[614] Deloria 1979, at 18.
[615] Haraway, Donna J. (2016). *Staying with the Trouble: Making Kin in the Chthulucene* (Durham, NC: Duke University Press), at 13.

moments, and have seen them reconsider their own philosophical engagement with a regulatory framework that compartmentalizes the non-human world in particular ways. It is in these small moments of unlearning and relearning among scholars, state officials, and even within tribal governments that we may ultimately see the greatest potential for jurisgenesis.

The preceding chapters have also demonstrated that there is incommensurability in these different ontological positions, and in the regulatory frameworks that were built on top of particular ontologies. In the current political moment of heightened hostility to environmental regulation, these frameworks are on one level all that we have. Many tribes recognize that and are engaging with these regulatory frameworks in ways that create jurisdictional footholds to push resource protection and restoration farther. But, as we saw in Chapters 3 and 4, sometimes the frameworks themselves limit the capacity of Indigenous ontologies to gain ground or establish more comprehensive or effective restoration strategies. These are difficult conflicts to solve. But acknowledging ontological incommensurability in environmental protection does not have to be a dead end. There are opportunities within and beyond law-making for engagement between Indigenous and non-Indigenous communities that is "incommensurable but not incompatible", "grounded in actual practices and place-based relationships."[616] Supporting tribes' demands to be present and active contributors in regulatory spaces changes the calculus in those spaces. It may slow down fast-paced permitting processes,

[616] Snelgrove et al. 2014, at 3.

call attention to tribal resource managers methods of interacting with non-human ecosystems, demand recognition of tribal authority and legal interest in ceded territories, compel more thorough environmental analysis or expand the scope of impacts surveyed. These are concrete shifts in regulatory processes in recent years that are the direct result of tribes' involvement as governmental actors. Through this work of "staying with the trouble"[617] there is the possibility of a different future.

[617] Haraway 2016, at 1.

BIBLIOGRAPHY

CASES & COURT DOCUMENTS
TRIBAL

Hoover v. Colville Confederated Tribes, 6 CCAR 16, 3 CTCR 44 (Colville App. 2002).

PacifiCorp v. Mobil Oil Corp, Navajo Nation Supreme Court, No. SC-CV-27-01, 4 Am. Tribal Law 694, 8 Navajo Rep. 378 (Nov. 23, 2004)

Skokomish Tribe v. Mosbarger, Skokomish Tribal Court of Appeals, No. I 12774, 7 NICS App. 90 (June 26, 2006).

U.S.

Alliance to Save the Mattaponi v. Virginia, 621 S.E.2d, 270 Va. 423 (Sup. Ct. Va. 2005).

Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408 (1989).

Bryan v. Itasca County, 426 U.S. 373 (1976).

California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

City of Albuquerque v. Browner, 865 F.Supp. 733 (D.N.M. 1993) (upheld by 10th Cir.: *97 F.3d 415* (10th Cir. 1996).

City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 219 (2008).

Ex Part Crow Dog, 109 U.S. 556 (1883).

In the Matter of the Application of Enbridge Energy, Limited Partnership, for a Certificate of Need for the Line 3 Project in Minnesota from the North Dakota Border to the Wisconsin Border, Findings of Fact, Conclusions of Law, and Recommendation, Report of Administrative Law Judge Ann C. O'Reilly, April 23, 2018 [ALJ Report, Line 3].

In the Matter of the Application of Enbridge Energy, Limited Partnership for a Certificate of Need for the Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border, Fond du Lac Band of Lake Superior Chippewa Responses to Enbridge Energy, Limited Partnership's Information Requests, Direct Testimony of Nancy Schuldt, Oct. 30, 2017 [Nancy Schuldt Responses, Line 3].

In the Matter of the Application of Enbridge Energy, Limited Partnership for a Certificate of Need for the Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border, Direct Testimony of Kate O'Connell on Behalf of the Minnesota DOC-EERA, Sept. 11, 2017.

In the Matter of the Application of Enbridge Energy, Limited Partnership for a Certificate of Need for the Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border, Direct Testimony of Dr. Marie Fagan and Oil Market Analysis Report on Behalf of the Minnesota DOC-EERA, Sept. 11, 2017.

In the Matter of the Application of Enbridge Energy, Limited Partnership for a Certificate of Need for the Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border, Direct Testimony of David J. Dybdahl and Insurance and Risk Financing Report on Behalf of the Minnesota DOC-EERA, Sept. 11, 2017.

In the Matter of the Applications of Enbridge Energy, Limited Partnership for a Certificate of Need and Pipeline Routing Permit for the Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border, Enbridge Energy Limited Partnership's Proposed Findings of Fact, Conclusions of Law, and Recommendations [Enbridge Proposed Findings].

In the Matter of the Application of Enbridge Energy, Limited Partnership for a Certificate of Need for the Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border, White Earth Band of Ojibwe, Petition to Intervene (May 1, 2014) (eDocket No. 20145-99115-01).

In the Matter of the Application of Enbridge Energy, Limited Partnership for a Certificate of Need for the Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border, Mille Lacs Band of Ojibwe, Petition to Intervene (September 17, 2015) (MPUC Docket Nos. PL-6668/CN-13-473/PPL-13-474).

In the Matter of the Proposed Rules of the Pollution Control Agency Amending the Sulfate Water Quality Standard Applicable to Wild Rice and Identification of Wild Rice Rivers, Public Hearing Oct. 23, 2017, Transcript, Public Hearing Oct. 23, 2017 [hereinafter Sulfate ALJ Hearing Transcript 10.23.17], at 101 – 102.

In the Matter of the Proposed Rules of the Pollution Control Agency Amending the Sulfate Water Quality Standard Applicable to Wild Rice and Identification of Wild Rice Rivers, Report of the Chief Administrative Law Judge LauraSue Schlatter, January 9, 2018, OAH Docket No. 80-9003-34519 [ALJ Report, Sulfate Standard].

In the Matter of U.S. v. Enbridge Energy et al., Brief submitted to Assistant Attorney General, Environment and Natural Resources Division, U.S. DOJ—ENRD, by Sierra Club Environmental Law Program, For Love of Water (FLOW), Center for Biological Diversity, and Natural Resources Defense Council, D.J. Ref. No. 90-5-1-1-10099, Aug. 24, 2016.

In the Matter of U.S. v. Enbridge Energy et al., Objection, Demand for Tribal Consultation, and Request for Extension of Comment Deadline Until 90 Days After Completion of the Tribal Consultation Process, Filed by Grand Traverse Band of Ottawa and Chippewa Indians, W.D. Michigan Case No. 1:16-cv-00914-GJQ-ESC), Aug. 23, 2016.

Johnson v. M'Intosh, 21 U.S. 543 (1823).

Kimball v. Callahan, 493 F.2d 564 (9th Cir. 1974), cert. denied 419 U.S. 1019 (1974).

Lac Courte Oreilles v. Wisconsin, 700 F.2d 341 (7th Cir. 1983) (Voigt Decision)

Lone Wolf v. Hitchock, 187 U.S. 553 (1903).

Menominee Tribe of Indians v. U.S., 391 U.S. 404 (1968).

Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency (Dec. 17, 2012, Unpublished).

Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999).

Montana v. U.S., 450 U.S. 544 (1981).

Nevada v. Hicks, 533 U.S. 353 (2001).

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316 (2008).

Reining v. N.Y., 128 N.Y. 157, 164 (N.Y. 1891).

Strate v. A-1 Contractors, 520 U.S. 438 (1997).

Tee-Hit-Ton Indians v. U.S., 348 U.S. 272 (1955).

U.S. v. Dion, 476 U.S. 734 (1986).

U.S. v. Enbridge, Case 1:16-cv-00914-GJQ-ESC, ECF No. 14, Consent Decree, Filed May 24, 2017, at 2 [Consent Decree].

U.S. v. Kagama, 118 U.S. 375 (1886).

U.S. v. Sandoval, 231 U.S. 28 (1913).

U.S. v. Washington, 520 F.2d 676 (9th Cir. 1975).

U.S. v. Winans, 198 U.S. 371 (1905).

Worcester v. Georgia, 31 U.S. 515 (1832).

<u>**STATUTES, LEGISLATION, & EXECUTIVE ACTIONS**</u>

Clean Water Act, 33 U.S.C.A. §§ 1251–1377

Clean Water Act, 33 U.S.C. §§ 1377 (d) & (e)

Clean Water Act, Section 518(e)(2)

Clean Water Act, 33 U.S.C.A. §§ 1251–1377

Federal Water Pollution Control Act, As Amended by The Clean Water Act of 1977, 33 U.S.C. 1251–1387. Available at: https://www3.epa.gov/npdes/pubs/cwatxt.txt [Last Accessed Nov. 28, 2017].

General Crimes Act (18 U.S.C. 1152).

Major Crimes Act (18 U.S.C. 1153).

Minn. Laws 2011, 1st Spec. Sess. ch. 2, art. 4, § 32.

Minn. Laws 2015, 1st Spec. Sets., Chapter 4, Article 4, Section 136 ("2015 Wild Rice Legislation).

Minn. Laws 2016, Ch. 165, Sec. 1.

Minn. R. 7050.0155 (2017).

Minnesota Chippewa Tribes, Resolution 72-17, March 15, 2017.

Minnesota State Legislature, Conference Committee Report on H.F. No. 3422, May 20, 2018.

Minnesota State Register, Vol. 42, No. 45, May 7, 2018.

Oil Pollution Act of 1990 (OPA 90), 33 U.S.C. §2701 et seq. (1990).

Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011, Public Law 112-90, Jan. 3, 2012, 125 Stat. 1904.

Public Law 83-280, Aug. 15, 1953 (18 U.S.C. § 1162, 28 U.S.C. § 1360, 25 U.S.C. §§ 1321–1326).

State of Minnesota, Executive Department, Executive Order 13-10, Signed by Governor Mark Dayton on Aug. 8, 2013.

Tribal Law and Order Act (TLOA), July 29, 2010 (Title II of Public Law 111-211).

GOVERNMENT AND INDUSTRY REPORTS & PUBLICATIONS

Association of Oil Pipelines. 2015. *Comprehensive Pipeline Safety Laws and Regulations.* Available at: www.aopl.org/safety/safety-rules-regulations [Last Accessed May 20, 2018].

Benjamin, Melanie. 2016. *Pipelines and Tribal Governments: The Experience and Recommendations of the Mille Lacs Band of Ojibwe Indians*. White Paper, submitted to the White House Tribal Nations Conference, September 26, 2016.

BFF Associates & Konrad J.A. Kundig. 2011 Market Study: Current and Projected Wind and Solar Renewable Electric Generating Capacity and Resulting Copper Demand. Available at: http://www.copper.org/environment/sustainable-energy/renewables/education/Projectedwind- solar-copper-demand.pdf.

Busiahn, Tom & Jonathan Gilbert. 2009. *The Role of Ojibwe Tribes in the Co-Management of Natural Resource in the Upper Great Lakes Region: A Success Story*, GLIFWC Report.

Commission on Organization of the Executive Branch of the Government, *Indian Affairs: A Report to Congress* (Mar. 1949).

Davis, Alex. 2014. China Copper, Iron Ore Purchases Climb as Total Imports Increase, *Bloomberg* (May 8, 2014). Available at: http://www.bloomberg.com/news/articles/2014-05-08/china-copper-iron-ore-purchases-climb-as-total-imports-increase.

Dupuis, Alain and Francisco Ucan-Marin. 2015. "A literature review on the aquatic toxicology of petroleum oil: An overview of oil properties and effects to aquatic biota." Canadian Science Advisory Secretariat, Research Document 2015/007.

Environmental Protection Agency, National Secondary Drinking Water Regulations (NSDWRs).

Federal On Scene Coordinator (FOSC) Desk Report for the Enbridge Line 6b Oil Spill, Marshall, Michigan, April 2016. Available at: https://www.epa.gov/sites/production/files/2016-04/documents/enbridge-fosc-report-20160407-241pp.pdf [Last Accessed April 25, 2018].

Final Damage Assessment and Restoration Plan/Environmental Assessment for the July 25-26, 2010 Enbridge Line 6B Oil Discharges near Marshall, MI. Prepared by U.S. Fish and Wildlife Service, Nottawaseppi Huron Band of the Potawatomi Tribe, and Match-E-Be-Nash-She-Wish Band of the Pottawatomi Tribe. October 2015. Available at: https://www.fws.gov/midwest/es/ec/nrda/MichiganEnbridge/pdf/FinalDARP_EA_EnbridgeOct2015.pdf [Last Accessed April 25, 2018].

Great Lakes Indian Fish and Wildlife Commission. 2016. *Metallic Mineral Mining: The Process & the Price.*

INTEK Inc. and AOC Petroleum Support Services, LLC. 2014. *United States Fuel Resiliency: Volume 1*. Prepared for Office of Energy Policy and Systems Analysis, U.S. Department of

Energy, September 2014.

Kebec, Philomena. 2015. Policy Analyst, Great Lakes Indian Fish and Wildlife Commission, Testimony Relating to Enbridge Energy's Proposal to Construct the Sandpiper Pipeline, Set for Public Hearing, June 5, 2015.

Leech Lake Band of Ojibwe, Press Release, Leech Lake Band of Ojibwe Opposes Administrative Law Judge Recommendation on Line 3 Replacement Route Through Our Reservation, April 24, 2018. Available at https://www.leechlakenews.com/2018/04/24/leech-lake-band-of-ojibwe-opposes-administrative-law-judge-recommendation-on-line-3-replacement-route-through-our-reservation/ [Last Accessed May 2, 2018].

Minnesota Chippewa Tribes (MCT), Resolution 72-17, March 15, 2017.

Minnesota Department of Commerce, Energy Environmental Review and Analysis. 2017. *Final Environmental Impact Statement, Line 3 Project*, Docket Nos. PPL 15-137/CN-14-916, Aug. 17, 2017 [FEIS].

Minnesota Department of Commerce, Press Release, September 11, 2017. Available at: https://mn.gov/commerce/energyfacilities/documents/34079/press-release-sept11.pdf [Last Accessed May 20, 2018].

Minnesota Department of Natural Resources & Pollution Control Agency. 2014. Comments submitted to Public Utilities Commission, Docket No. PL6668/PPL-13-474 (Aug. 21, 2014).

Minnesota Pollution Control Agency. 2017. Statement of Need and Reasonableness: Amendment of the sulfate water quality standard applicable to wild rice and identification of wild rice waters. Minn. R. chapters 7050 and 7053, July 2017. Available at: https://www.pca.state.mn.us/sites/default/files/wq-rule4-15i.pdf [Last Accessed Sept. 8, 2018].

Minnesota Pollution Control Agency. 2015. Wild Rice Standards Study Advisory Committee Members (as of Oct. 13, 2015). Available at: https://www.pca.state.mn.us/sites/default/files/wq-s6-42f.pdf [Last Accessed Nov. 20, 2017].

Minnesota Pollution Control Agency. 2014. Comments—Supplemental Comments Replacing MPCA Letter, May 30, 2014, filed with PUC as Doc 20146-100780-01.

Minnesota Pollution Control Agency. 2013. *Saint Louis River Watershed Monitoring and Assessment Report*. Available at: http://www.pca.state.mn.us/index.php/view-document.html?gid=19270 (last visited May 14, 2015).

Minnesota Pollution Control Agency. 2011. Wild Rice Study Advisory Committee Meeting Summary, Oct. 10, 2011. Available at: https://www.pca.state.mn.us/sites/default/files/wq-s6-42e.pdf [Last Accessed: Nov. 20, 2017].

Minnesota Pollution Control Agency. 2011. Wild Rice/Sulfate Protocol Development Discussion Document, May 9, 2011. Available at: https://www.pca.state.mn.us/sites/default/files/wq-s6-40b.pdf [Last Accessed Aug. 1, 2018].

Minnesota Pollution Control Agency. 2004. *Minntac Draft Environmental Impact Statement*. September 2004 [MPCA Minntac DEIS 2004].

Moyle, J.B. 1975. "Review of Relationship of Wild Rice to Sulfate Concentration of Waters." Report to Minnesota Pollution Control Agency, March 16, 1975.

---- 1969. "Wild Rice – Some Notes, Comments, and Problems." *State of Minnesota Department of Conservation Division of Game and Fish*, Special Publication No. 47, Nov. 29, 1967 (revised July 3, 1969).

Moyle, J.B. and Paul Krueger. 1964. "Wild Rice in Minnesota." *State of Minnesota Department of Conservation Division of Game and Fish*, Special Publication No. 18, July 1, 1964.

The National Academies of Sciences. 2016. *Spills of Diluted Bitumen from Pipelines: A Comparative Study of Environmental Fate, Effects, and Response* (Washington D.C.: The National Academies Press).

National Research Council of the National Academies (2013) *Effects of Diluted Bitumen on Crude Oil Transmission Pipelines*, Transportation Research Board Special Report 311 (Washington, D.C.: Transportation Research Board).

National Transportation Safety Board. 2012. *Enbridge Incorporated Hazardous Liquid Pipeline Rupture and Release, Marshall, Michigan, July 25, 2010*. Pipeline Accident Report NTSB/PAR-12/01 (Washington, D.C.: NTSB) [NTSB Report].

National Wildlife Federation. 2011. *Facing the Storm: Indian Tribes, Climate-Induced Weather Extremes, and the Future for Indian Country* (Boulder, CO: National Wildlife Federation).

NOAA Office of Response and Restoration. 2015. "It Took More Than the Exxon Valdez Oil Spill to Pass the Historic Oil Pollution Act of 1990." Aug. 18, 2015. Available at: https://response.restoration.noaa.gov/oil-and-chemical-spills/significant-incidents/exxon-valdez-oil-spill/it-took-more-exxon-valdez-oil-s [Last Accessed May 5, 2018].

Papoulias, D.M., V. Veléz, D.K. Nicks, and D. Tillitt (2014). "Health Assessment and Histopathologic Analyses of Fish Collected from the Kalamazoo River, Michigan, Following Discharges of Diluted Bitumen Crude Oil from the Enbridge Line 6B." U.S. Geological Survey, Administrative Report 2014. Columbia, MO.

Riebeek, Holli. 1984. "Athabasca Oil Sands." NASA Earth Observatory. Available at: https://earthobservatory.nasa.gov/Features/WorldOfChange/athabasca.php [Last Accessed May 18, 2018].

State of Minnesota, Executive Department, Executive Order 13-10, Signed by Governor Mark

Dayton on Aug. 8, 2013.

U.S. Army Corps of Engineers. 2016. Discussion Document, Nationwide Permit 12, Dec. 21, 2016, at 6–25. Available at: http://www.usace.army.mil/Portals/2/docs/civilworks/nwp/2017/NWP_12_2017_final_Dec2016.pdf?ver=2017-01-06-125514-797 [Last Accessed May 4, 2018]

U.S. House of Representatives Committee on Transportation and Infrastructure, Hearing on "Enbridge Pipeline Oil Spill in Marshall, Michigan", September 15, 2010, 58-236 PDF (Washington, D.C.: U.S. Government Printing Office).

U.S. Steel Corporation – Minntac, Comments on Public Notice Draft NPDES Permit # MN0057207, Dec. 22, 2016. Available at: https://www.pca.state.mn.us/sites/default/files/wq-wwprm1-28c.pdf [Last Accessed November 15, 2017].

Winterstein, T.A. 2002. *Hydrology and Water Quality of the Grand Portage Reservation, Northeastern Minnesota, 1991–2000*. Water-Resources Investigations Report 02-4156. U.S. Department of the Interior & U.S. Geological Survey.

LETTERS & CORRESPONDENCE

Letter from Arthur LaRose, Chairman, 1855 Treaty Authority to Hon. Sally Jewell, Sec. of the Interior and Hon. Kevin Washburn, Asst. Sec. of the Interior, Re: Petition for Environmental Protection, July 15, 2015.

Letter from Arthur LaRose, Chairman, 1855 Treaty Authority to Minnesota Governor Mark Dayton, Re: Notice of 2015 wild rice harvesting season, August 7, 2015.

Letter from Esteban Chiriboga, GLIFWC Environmental Specialist to Jamie MacAlister, Environmental Review Manager, Minnesota Department of Commerce, July 10, 2017.

Letter from Esteban Chiriboga, Environmental Specialist, GLIFWC, to Jeff Schimpff, Wisconsin Department of Natural Resources, Bureau of Environmental Analysis and Sustainability, Re: DEIS for the Sandpiper and Line 3 Replacement Projects, April 11, 2016.

Letter from Esteban Chiriboga, GLIFWC Environmental Specialist to Paul Strong, Forest Supervisor, Chequamegon-Nicolet National Forest, Nov. 7, 2017.

Letter from Karen R. Diver, Reservation Business Committee Chairwoman, Fond du Lac Band of Lake Superior Chippewa, to Burl W. Haar, Executive Secretary, Minnesota Public Utilities Commission, Re: Comments on the Application of Enbridge Pipelines for a Certificate of Need and Pipeline Routing Permit for the Sandpiper Project, Docket No. PL-6668/CN-13-473/PPL-13-474, Sept. 29, 2014.

Letter from Robert L. Larson, President, Lower Sioux Indian Community & Chairman, Minnesota Indian Affairs Council to John Linc Stine, MPCA Commissioner, Re: MPCA's Proposed Rule Revisions for Minnesota's Sulfate Standard to Protect Wild Rice, May 25, 2017 [MIAC Letter].

Letter from Steven Howard, Executive Director, Leech Lake Band of Ojibwe, to Tracy Smetana, Minnesota Public Utilities Commission, Re: MN-PUC Docket No. PL6668/CN-13/473, October 28, 2013.

Memo from Shannon Lotthammer, Division Dir., Environmental Analysis and Outcomes Division, MPCA, to MPCA Advisory Committee Members, Re: Wild Rice Sulfate Standard Rulemaking, Oct. 18, 2016. Available at: https://www.pca.state.mn.us/sites/default/files/p-ac16-10b.pdf [Last Accessed Nov. 20, 2017] [Lotthammer Memo].

POPULAR MEDIA & OTHER ONLINE RESOURCES

Burnes, Jerry (2017) "'We Need to Stop the Fighting': Range Proposes Collaborative Effort to Meet State's Wild Rice Goals." *Virginia Free Press*, Oct. 19, 2017. Available at: http://www.virginiamn.com/free_press/we-need-to-stop-the-fighting/article_33002606-b539-11e7-8269-f7b4d983d1ae.html [Last Accessed Nov. 16, 2017].

Carleton, Sean. 2016. "Decolonizing Cottage Country: Anishinaabe Art Intervenes in Canada's Wild Rice War." *Canadian Dimension*, Sept. 15, 2016. Available at: https://canadiandimension.com/articles/view/decolonizing-cottage-country-anishinaabe-art-intervenes-in-canadas-wild-ric [Last Accessed Aug. 14, 2018].

Dunbar, Elizabeth. 2015. "MPCA seeks lak-by-lake plan to protect wild rice." *MPR News*, March 25, 2015. Available at: https://www.mprnews.org/story/2015/03/25/mpca-wild-rice [Last Accessed Aug. 1, 2018].

Dunbar, Elizabeth & Dan Kraker. 2018. "PUC backs Enbridge Line 3 oil pipeline, sets route." *MPR News*, June 28, 2018. Available at: https://www.mprnews.org/story/2018/06/28/enbridge-line-3-minnesota-support-public-utilities-commission [Last accessed Aug. 14, 2018].

George, Jason, Matthew Gordon & Joan Lee. 2016. "Commentary: In Minnesota, red tape is strangling projects like Sandpiper pipeline." *Star Tribune*, August 21, 2016. Available at: http://www.startribune.com/in-minnesota-red-tape-is-strangling-projects-like-sandpiper-pipeline/390753911/ [Last Accessed May 2, 2018].

Guntzel, Jeff Severns. 2013. "Seeking Copper, Canada's Polymet Offers Minnesota Jobs and Water Pollution." *Al Jazeera America*, Dec. 6, 2013. Available at: http://america.aljazeera.com/articles/2013/12/6/seeking-copper-polymetoffersminnesotajobsandwaterpollution.html [Last accessed May 15, 2018].

Hays, Kristen. 2012. "Insight: Oil Pipeline Crunch Shifts U.S. Shale Race from Drillbits to Valves," *Reuters*, July 30, 2012. Available at www.reuters.com/article/2012/07/30/us-oil-usa-pipelines-idUSBRE86T02820120730 [Last Accessed April 27, 2018]).

History of the Leech Lake Band of Ojibwe, Available at: http://www.llojibwe.org/drm/subnav/llbohistory.html [Last accessed Aug. 3, 2018].

History of the Mille Lacs Band of Ojibwe, Available at: https://www.millelacsband.com/about/our-history/historical-timeline [Last accessed Aug. 3, 2018].

History of the White Earth Nation, Available at: http://www.whiteearth.com/history.html [Last accessed Aug. 3, 2018].

Iron Mining Association of Minnesota, Petition to oppose sulfate standard, Available at: http://www.taconite.org/call2action [Last Accessed Nov. 16, 2017].

Iron Mining Association Petition: Take Action Today! Speak up to secure Minnesota Iron's future. Available at: http://www.taconite.org/call2action [Last Accessed Nov. 16, 2017].

Marcotty, Josephine. 2014. "Iron Range rebellion halted wild rice initiative." *Star Tribune*, April 7, 2014. Available at: http://www.startribune.com/iron-range-rebellion-halted-wild-rice-initiative/254052191/ [Last Accessed Nov. 15, 2017].

Stateside Staff. 2018. "Michigan tribes could have stronger case against Line 5 thanks to SCOTUS decision." Interview with Matthew L.M. Fletcher. *Michigan Radio*, June 15, 2018. Available at: http://www.michiganradio.org/post/michigan-tribes-could-have-stronger-case-against-line-5-thanks-scotus-decision [Last accessed August 12, 2018].

WaterLegacy Petition for Withdrawal of Program Delegation from the State of Minnesota for NPDES Permits Related to Mining Facilities, July 2, 2015. Available at: https://www.epa.gov/sites/production/files/2015-09/documents/waterlegacypetitionwithdrawmpca_cwaauthorityjuly22015.pdf [Last Accessed Aug. 10, 2018].

ACADEMIC REFERENCES

A

Aalberts, Tanja E. 2012. *Constructing Sovereignty Between Politics and Law* (New York: Routledge).

Agamben, Giorgio. 2005. *State of Exception* (Chicago: Univ. of Chicago Press).

Agnew, John. 2009. *Globalization and Sovereignty* (Lanham, MD: Rowman & Littlefield).

Alexander, Samuel. 2014. "Wild Law from below: examining the anarchist challenge to Earth Jurisprudence," In *Wild Law – In Practice*, Maloney, Michelle and Peter Burdon, eds. (New York: Routledge).

Alfred, Taiaiake. 2009. *Peace, Power, Righteousness: An Indigenous Manifesto*. Oxford University Press.

---- 2005. *Wasáse: indigenous pathways of action and freedom* (Ontario: Broadview Press).

Amin, Ash. 2004. "Regions unbound: towards a new politics of place." *Geografiska Annaler: Series B* 86(1): 33–44.

Anderson, Robert T. 2015. "Water Rights, Water Quality, and Regulatory Jurisdiction in Indian Country." *Stanford Environmental Law Review* 34(2): 195–245.

Andow, David et al. 2009. "Wild Rice White Paper: Preserving the Integrity of Manoomin in Minnesota." People Protecting Manoomin: Manoomin Protecting People: A Symposium Bridging Opposing Worldviews. Available at: https://www.cfans.umn.edu/sites/cfans.umn.edu/files/WhitePaperFinalVersion2011.pdf.

Arkfield, Alexander S. 2017. "Nationwide Permit 12 and Domestic Oil Pipelines: An Incompatible Relationship?" *Washington Law Review* 92(4).

Arneil, Barbara. 1996. *John Locke and America: The Defence of English Colonialism*. Oxford: Clarendon Press.

Åsberg, Celia, Kathrin Thiele and Iris van der Tuin. 2015. "Speculative before the turn. Reintroducing feminist materialist performativity." *Cultural Studies Review* 21(2): 145–72.

B

Babcock, Hope M. 2006. "Reserved Indian Water Rights in Riparian Jurisdictions: Water, Water Everywhere, Perhaps Some Drops for Us." *Cornell Law Review* 91: 1203–1260.

Bachelard, Gaston. 1972. *L'Engagement Rationaliste* (Presses Universitaires de France).

Badger, Austin. 2011. "Comment: Collective v. Individual Rights in Membership Governance for Indigenous Peoples," *American University International Law Review* 26(2): 486–514.

Baker, Janet K. 1997. Tribal Water Quality Standards: Are There Any Limits? *Duke Environmental Law and Policy Forum* 7: 367–391.

Bakker, Karen. 2013. "Debating the 'post-neoliberal turn' in Latin America." *Progress in Human Geography* 38(1).

Bala, Arun and George Gheverghese Joseph. 2007. "Indigenous Knowledge and Western Science: the Possibility of Dialogue." *Race & Class* 49(1): 39–61.

Banker, Paul A. and Christopher Grgurich. 2010. "The Plains Commerce Bank Decision and its Further Narrowing of the Montana Exceptions as Applied to Tribal Court Jurisdiction Over Non-member Defendants," *William Mitchell Law Review* 36: 565.

Barbour, Ian. 1974. *Myths, Models and Paradigms* (New York: Harper & Row).

Barkan, Josh. 2013. *Corporate Sovereignty: Law and Government Under Capitalism* (Minneapolis, MN: Univ. of Minnesota Press).

Barker, Joanne. 2011. *Native Acts: Law, Recognition, and Cultural Authenticity*. Duke University Press.

Barnett, Clive. 2006. "Postcolonialism: Space, Textuality, and Power," in *Approaches to Human Geography*, Stuart Aitken & Gill Valentine, eds. (London: Sage Publications Ltd.).

Barry, Andrew. 2013. *Material Politics: Disputes Along the Pipeline* (Oxford, UK: Wiley Blackwell).

Bartelson, Jens. 2006. "The Concept of Sovereignty Revisited." *European Journal of International Law* 17(2): 463–474.

Bebbington, Denise Humphreys & Anthony Bebbington. 2012. "Post-what? Extractive industries, narratives of development and socio-environmental disputes across the (ostensibly changing) Andean region." In *New Political Spaces in Latin American Natural Resource Governance*, H. Haarstad, ed. (Palgrave Macmillan).

Becker, C. Dustin & Elinor Ostrom. 1995. "Human Ecology and Resource Sustainability: The Importance of Institutional Diversity." *Annual Review of Ecology and Systematics* 26: 113–133.

Bell. Derrick. 1995. "*Brown v. Board of Education* and the Interest Convergence Dilemma." In Crenshaw et al. 1995. *Critical Race Theory: The Key Writings That Formed the Movement*. Introduction (New York: The New Press).

Bellier, Irène Bellier & Martin Préaud. 2012. "Emerging issues in indigenous rights: transformative effects of the recognition of indigenous peoples." *The International Journal of Human Rights* 16(3) 474–488.

Bennett, Jane. 2009. *Vibrant Matter: A Political Ecology of Things* (Durham, NC: Duke Univ. Press).

Benoist, Alain de. 1999. "What is Sovereignty?" *Éléments* 96: 24–35. Translated from French by Julia Kostova (original title: "Qu'est-ce que la souveraineté?").

Benson, Melinda Harm. 2012. Mining sacred space: law's enactment of competing ontologies in the American West. *Environment and Planning* 44(6): 1443–1458.

Berger, Bethany. 2009. "Red: Racism and the American Indian." *UCLA Law Review* 56: 591–656.

Berman, Paul Schiff. 2007. "A Pluralist Approach to International Law." *The Yale Journal of International Law* 32(2): 301–329.

---- 2002. "The Globalization of Jurisdiction." *University of Pennsylvania Law Review* 151(2): 311–529.

Best, Allen. 2012. "Pipeline Safety on Trial." *Planning* 78(7): 28–33.

Bhabha, Homi. 2004. *The Location of Culture* (New York: Routledge).

---- 1990. *Nation and Narration* (New York: Routledge).

Bhandar, Brenna. 2015. "Title by Registration: Instituting Modern Property Law and Creating Racial Value in the Settler Colony." *Journal of Law and Society* 42(2): 253–82.

---- 2011. "Plasticity and Post-Colonial Recognition: 'Owning, Knowing and Being'." *Law Critique* 22: 227–49.

Black, Henry Campbell. 1910. *A Law Dictionary* (Eagan, MN: West Publishing Co.).

Blaikie, Piers, and Harold Brookfield, eds. 1987. *Land Degradation and Society.* London: Methuen.

Blaeser, Kimberly. 2013. "Wild Rice Rights: Gerald Vizenor and an Affiliation of Story." In *Centering Anishinaabeg Studies: Understanding the World through Stories*, Jill Doerfler, Niigaanwewidam James Sinclair, & Heidi Kiiwetinepinesiik Stark, eds. (East Lansing, MI: Michigan State Univ. Press).

Blaser, Mario. 2014. "Ontology and indigeneity: on the political ontology of heterogeneous assemblages." *Cultural Geographies* 21(1): 49–58.

Blok, Anders. 2010. “Topologies of Climate Change: Actor-network theory, relational-scalar analytics, and carbon-market overflows,” *Environment and Planning D: Society and Space* 28(5): 896–912.

Blomley, Nicholas K. 2014a. “Learning from Larry: Pragmatism and the Habits of Legal Space.” In *The Expanding Spaces of Law: A Timely Legal Geography*. Irus Braverman et al., eds. (Stanford, CA: Stanford Law Books).

----- 2014b. “Disentangling Law: The Practice of Bracketing.” *Annual Review of Law and Social Sciences* 10: 133–48.

---- 2011. “Colored Rabbits, Dangerous Trees, and Public Sitting: Sidewalks, Police, and the City.” *Urban Geography* 33(7): 917–35.

---- 2008. “Simplification is Complicated: Property, Nature, and the Rivers of Law,” *Environment & Planning A* 40: 1825.

---- 2008. “The Spaces of Critical Geography,” *Progress in Human Geography* 32: 285- 293.

---- 2007. “Critical Geography: Anger and Hope.” *Progress in Human Geography* 31: 53-65.

---- 2006. “Uncritical Critical Geography?” *Progress in Human Geography* 30: 87-94.

---- 2005. “Remember Property?” *Progress in Human Geography* 29: 125-27.

---- 2004. “The Boundaries of Property: Lessons from Beatrix Potter.” *The Canadian Geographer* 48, 2: 91-100.

---- 2003. “Law, Property, and the Geography of Violence: The Frontier, the Survey, and the Grid,” *Annals of the Association of American Geographers* 93(1): 121–141.

---- 1994a. *Law, Space, and the Geographies of Power* (New York: The Guilford Press).

---- 1994b. "Mobility, empowerment and the rights revolution," *Political Geography* 13(5): 407.

Blomley, Nicholas, et al. (eds). 2001. *The Legal Geographies Reader* (Oxford: Blackwell).

Blumm, Michael C., David H. Becker & Joshua D. Smith. 2006. “The mirage of Indian reserved water rights and western streamflow restoration in the McCarran amendment era: a promise unfulfilled.” *Environmental Law* 36(4): 1157.

Blunt, Alison, and Gillian Rose (eds.). 1994. *Writing Women and Space: Colonial and Postcolonial Geographies* (New York: The Guilford Press).

Borrows, John. 2012. *Drawing Out Law: A Spirit’s Guide* (Toronto: University of Toronto Press).

---- 2011. *Canada’s Indigenous Constitution* (Toronto: Univ. of Toronto Press).

---- 2009. "Physical Philosophy: Mobility and the Future of Indigenous Rights." In *Indigenous Peoples and the Law: Comparative and Critical Perspectives*. B. Richardson, I. Shin and K. McNeil (eds) (Portland, OR: Hart Publishing).

---- 2005. *Crown and Aboriginal Occupations of Land: A History & Comparison*. Ontario: Ipperwash Inquiry.

---- 2002. *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: Univ. of Toronto Press).

---- 2001. "Because it Does Not Make Sense": Sovereignty's Power in the Case of *Delgamuukw v. The Queen 1997*." In *Law, History & Colonialism: The Reach of Empire*, Diane Kirkby & Catharine Coleborne, eds. (Manchester, U.K.: Manchester Univ. Press).

---- 1999. Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*." *Osgoode Hall Law Journal* 37: 537.

---- 1997. "Contemporary Traditional Equality: The Effect of the Charter on First Nations People." In *Charting the Consequences: The Impact of Charter Rights on Canadian Law and Politics*, David Schneiderman & Kate Sutherland, eds. (Toronto: Univ. of Toronto Press).

---- 1992. "A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government." *Osgoode Hall Law Journal* 30: 291–354.

Borrows, Lindsay Keegitah. 2018. *Otter's Journey Through Indigenous Language and Law* (Vancouver, BC: UBC Press).

---- 2013. "On the Road Home: Stories and Reflections from Neyaashiinigiming." In *Centering Anishinaabeg Studies: Understanding the World through Stories*, Jill Doerfler, Niigaanwewidam James Sinclair, & Heidi Kiiwetinepinesiik Stark, eds. (East Lansing, MI: Michigan State Univ. Press).

Braun, Bruce. 2008. "Environmental issues: inventive life." *Progress in Human Geography* 32(5): 667–679.

---- 2007. "Biopolitics and the molecularization of life." *Cultural Geographies* 14 (1):6–28.

---- 2006. "Towards a New Earth and a New Humanity: Nature, Ontology, Politics." In *David Harvey: A Critical Reader*. Noel Castree and Derek Greogry, eds. (Malden, MA: Blackwell Publishing).

---- 2005. "Environmental issues: writing a more-than-human urban geography." *Progress in Human Geography* 29(5): 635–650.

---- 2003. "'On the Raggedy Edge of Risk': Articulations of Race and Nature after Biology." In *Race, Nature and the Politics of Difference.* Moore, Donald S., et al., eds. (Durham, NC:

Duke Univ. Press).

---- 2002. *The Intemperate Rainforest: Nature, Culture, and Power on Canada's West Coast* (Minneapolis, MN: University of Minnesota Press).

Braverman, Irus, et al. (eds). 2014. *The Expanding Spaces of Law: A Timely Legal Geography* (Stanford, CA: Stanford University Press).

Bridge, Gavin. 2015. "Energy (in)security: world-making in an age of scarcity." *The Geographical Journal*.

---- 2013. "Resource geographies II: The resource-state nexus." *Progress in Human Geography* 38(1): 118–130.

---- 2008. "Global production networks and the extractive sector: governing resource-based development," *Journal of Economic Geography*.

Bridge, Gavin et al. 2013. "Geographies of energy transition: Space, place and the low-carbon economy." *Energy Policy*.

Bridge, Gavin and Andrew Wood. 2010. "Less is more: Spectres of scarcity and the politics of resource access in the upstream oil sector." *Geoforum* 41(2010): 565–576.

Brougher, Cynthia. 2011. "Indian Reserved Water Rights Under the *Winters* Doctrine: An Overview." CRS Report for Congress, June, 8, 2011.

Brown, Wendy. 1995. *States of Injury* (Princeton, NJ: Princeton Univ. Press).

Brownman, Charles. 2010. "Hazardous Liquids Pipelines—Regulation and Due Diligence." *American Bar Association*. Available at: https://apps.americanbar.org/buslaw/blt/content/2010/10/0002e.pdf [Last Accessed May 5, 2018].

Bruyneel, Kevin. 2007. *The Third Space of Sovereignty* (Minneapolis, MN: Univ. of Minnesota Press).

Bryan, Brandley. 2000. "Property as Ontology: On Aboriginal and English Understandings of Ownership." *Canadian Journal of Law and Jurisprudence* 13(1): 3-31.

Bryan, Michelle. 2017. "Valuing Sacred Tribal Waters Within Prior Appropriation." *Natural Resources Journal* 57: 139 - 181.

Bryant, Levi, Nick Srnicek & Graham Harman. 2011. *The Speculative Turn: Continental Materialism and Realism* (Melbourne: re.press).

Bryant, Raymond L., and Sinéad Bailey. 1997. *Third World Political Ecology.* London and New York: Routledge.

Brysk, Alison. 1996. “Turning Weakness into Strength: The Internationalization of Indian Rights.” *Latin American Perspectives* 23(2): 38–57.

Burchell, Graham, Colin Gordon & Peter Miller, eds. 1991. *The Foucault Effect: Studies in Governmentality* (Chicago: Univ. of Chicago Press).

Burden, Peter D. 2014. “Earth Jurisprudence and the project of Earth democracy,” In *Wild Law – In Practice*, Maloney, Michelle and Peter Burdon, eds. (New York: Routledge).

Burger, Joanna & Michael Gochfeld. 2011. Conceptual Environmental Justice Model for Evaluating Chemical Pathways of Exposure in Low-Income, Minority, Native America, and Other Unique Exposure Populations, *American Journal of Public Health* 101(1): S63–S73.

Burkhart, Werner. 2000. “Compartmentalization in environmental science and the perversion of multiple thresholds.” *The Science of the Total Environment* 249(2000): 63 – 72.

Burns, Lorna & Birgit M. Kaiser, eds. 2012. *Postcolonial Literatures and Deleuze* (New York: Palgrave Macmillan).

Busiahn, Tom & Jonathan Gilbert. 2009. The Role of Ojibwe Tribes in the Co-Management of Natural Resource in the Upper Great Lakes Region: A Success Story, GLIFWC Report.

Butlin, Robin. 1993. *Historical Geography: Through the Gates of Space and Time* (New York: Routledge).

C

Cairns, Alan C. 2000. *Citizens Plus: Aboriginal Peoples and the Canadian State* (Seattle: Univ. of Washington Press).

Carpenter, Kristen A. & Angela R. Riley. 2014. “Indigenous Peoples and the Jurisgenerative Moment in Human Rights.” *California Law Review* 102(1): 173.

Carpenter, Kristin A., Matthew L.M. Fletcher & Angela R. Riley, eds. 2012. *The Indian Civil Rights Act at Forty* (Los Angeles, CA: UCLA American Indian Studies Center).

Castree, Noel. 2007. “Making First World Political Ecology.” *Environment and Planning A* 39, 2030–36.

---- 2004. “Differential geographies: place, indigenous rights and ‘local’ resources.” *Political Geography* 23, 133–67.

Castree, Noel & Brett Christophers. 2015. “Banking Spatially on the Future: Capital Switching, Infrastructure, and the Ecological Fix.” *Annals of the Association of American Geographers* 105(2), 1–9.

Chakrabarty, Dipesh. 2009. “The Climate of History: Four Theses.” *Critical Inquiry*, 35(2): 197–222.

Chandler, Mark E. 1994. “A Link Between Water Quality and Water Rights: Native American Control Over Water Quality.” *Tulsa Law Journal* 30: 105.

Chang, David. 2010. *The Color of the Land: Race, Nation, and the Politics of Landownership in Oklahoma, 1832 – 1929* (Chapel Hill, NC: Univ. of North Carolina Press).

Chari, Sharad. 2008. “Critical Geographies of Racial and Spatial Control,” *Geography Compass* 2(6): 1907–1921.

Churchill, Ward. 2011. “A Travesty of a Mockery of a Sham: Colonialism as Self-Determination in the UN Declaration on the Rights of Indigenous Peoples.” *Griffith Law Review: Special Issue on the 2007 Declaration on the Rights of Indigenous Peoples: Indigenous Survival—Where To From here?* 20(3): 526–556.

Cirkovic, Elena. 2006. “Self-Determination and Indigenous Peoples in International Law.” *American Indian Law Review* 31: 375.

Clark, Nigel. 2011. *Inhuman Nature: Sociable Life on a Dynamic Planet* (London: Sage Press).

Clark, Nigel & Kathryn Yusoff. 2014. “Combustion and society: a fire centered history of energy use.” *Theory, Culture, and Society* 31(5): 203–226.

Clayton, Daniel W. 2000. *Islands of Truth: The Imperial Fashioning of Vancouver Island* (Vancouver: UBC Press).

Clifton, James A. 1987. “Wisconsin Death March: Explaining the Extremes in Old Northwest Indian Removal.” *Transactions of the Wisconsin Academy of Sciences, Arts and Letters* 75: 1–40.

Coates, Ken S. 1995. *Summary Report, Social and Economic Impacts of Aboriginal Land Claims Settlements: A Case Study Analysis*. Report prepared for the Ministry of Aboriginal Affairs, Province of British Columbia Federal Treaty Negotiations Office.

Cohen, Felix S. 1953. “The Erosion of Indian Rights, 1950–53,” *Yale Law Journal* 62: 348–390.

Cole, D.H. 1985 “Tribal Bedlands Claims Since Montana v. United States.” P*ublic Land & Resource Law Review* 6: 119.

Colebrook, Claire. 2014. *Death of the PostHuman: Essays on Extinction, Vol. I* (Ann Arbor, MI: Open Humanities Press).

Cossman, Brenda. 1991. “Reform, Revolution, or Retrenchment? International Human Rights in the Post-Cold War Era.” *Harvard International Law Journal* 32: 339.

Cotner, James B. et al. 2004. "Organic carbon biogeochemistry of Lake Superior." *Aquatic Ecosystem Health & Management* 7(4): 451–464.

Coulthard, Glen. 2014. *Red Skin, White Masks*. Minneapolis: University of Minnesota Press.

---- 2007. "Subjects of Empire: Indigenous Peoples and the 'Politics of Recognition' in Canada." *Contemporary Political Theory*. 6: 437.

Cover, Robert M. 1981. "The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation." William & Mary Law Review 22(4): 639–68or2.

---- 1983. "The Supreme Court, 1982 Term—Foreword, *Nomos* and Narrative." *Harvard Law Review* 97(1): 4–68.

---- 1985. "The Folktales of Justice: Tales of Jurisdiction." *Capital University Law Review* 14(2): 179–203.

Coulter, Robert T. 2000. "Remarks: International Norms and Indigenous Peoples: The Contest Over Group Rights." *American Society of International Law Proceedings* 94: 314.

Cozzetto, K. et al. 2013. "Climate change impacts on the water resources of American Indians and Alaska Natives in the U.S." *Climatic Change* 120: 569–584.

Cronon, William. 1983. *Changes in the Land: Indians, Colonists, and the Ecology of New England* (New York: Hill and Wang).

---- 1996. "The Trouble with Wilderness; or, Getting Back to the Wrong Nature." In *Uncommon Ground: Rethinking the Human Place in Nature*, William Cronon, ed. (New York: Norton).

D

Davis, Megan. 2008. "Indigenous Struggles in Standard-Setting: The *United Nations Declaration on the Rights of Indigenous Peoples*." *Melbourne Journal of International Law* 9: 439.

---- 2007. "The United Nations Declaration on the Rights of Indigenous Peoples," *Australian Indigenous Law Review* 11: 55.

Deer, Sarah and John Jacobson. 2013. "Dakota Tribal Courts in Minnesota: Benchmarks of Self-Determination." *William Mitchell Law Review* 39(2): 611–632.

de la Cadena, Marisol. 2015. *Earth Beings: Ecologies of Practice Across Andean Worlds* (Durham, NC: Duke Univ. Press).

Delaney, David. 2015. "Legal geography I: Constitutivities, complexities, and contingencies." *Progress in Human Geography* 39(1): 96–102.

---- 2010. *Nomospheric Investigations: The Spatial, The Legal and the Pragmatics of World-Making* (New York: Routledge).

---- 2001. “Environmental Regulation, Introduction.” In Part II, Section 2 of the *Legal Geographies Reader*. Nicholas Blomley, David Delaney, & Richard T. Ford, eds. (Malden, MA: Blackwell Publishers).

---- 1998. *Race, Place and the Law, 1836 – 1948* (Austin: Univ. of Texas Press).

Delaney, David, Richard T. Ford, and Nicholas Blomley. 2001. “Preface: Where is Law?” In *The Legal Geographies Reader*, eds. Nicholas Blomley, David Delaney, and Richard T. Ford (Malden, MA: Blackwell).

Delaney, David & Helga Leitner. 1997. “The political construction of scale.” *Political Geography* 16(2): 93–97.

Dellinger, John A. 2004. “Exposure assessment and initial intervention regarding fish consumption of tribal members of the Upper Great Lakes Region in the United States.” *Environmental Research* 95: 325–340.

Deloria, Vine, Jr. 1996. “Reserving to Themselves: Treaties and the Powers of Indian tribes.” *Arizona Law Review* 38(3): 963–980.

---- 1985. *American Indian Policy in the Twentieth Century*, ed. (Norman, OK: Univ. of Oklahoma Press).

---- 1979. *The Metaphysics of Modern Existence* (Golden, CO: Fulcrum).

---- 1973. *God is Red* (Golden, CO: Fulcrum).

Deloria, Vine Jr. and Raymond J. DeMallie, eds. 1999. *Documents of American Indian Diplomacy: Treaties, Agreements, and Conventions, 1775–1979*, Volume One (Norman: University of Oklahoma Press).

Deloria, Vine, Jr. and Clifford M. Lytle. 1984. *The Nations Within: The Past and Future of American Indian Sovereignty* (Austin, TX: Univ. of Texas Press).

Deloria, Vine Jr. and David E. Wilkins. 2011. *The Legal Universe: Observations on the Foundations of American Law* (Golden, CO: Fulcrum Publishing).

---- 1999. *Tribes, Treaties, & Constitutional Tribulations* (Austin, TX: Univ. of Texas Press).

Dikshit, Ramesh D. 1971. “Geography and Federalism.” *Annals of the Association of American Geographers* 61(1): 97–115.

Doerfler, Jill. 2013. “A Philosophy for Living: Ignatia Broker and Constitutional Reform among the White Earth Anishinaabe.” In *Centering Anishinaabeg Studies: Understanding the World through Stories*, Jill Doerfler, Niigaanwewidam James Sinclair, & Heidi Kiiwetinepinesiik Stark, eds. (East Lansing, MI: Michigan State Univ. Press).

Doerfler, Jill, Niigaanwewidam James Sinclair, & Heidi Kiiwetinepinesiik Stark, eds. 2013. *Centering Anishinaabeg Studies: Understanding the World through Stories* (East Lansing, MI: Michigan State Univ. Press).

Doremus, Holly. 2005. "Science Plays Defense: Natural Resource Management in the Bush Administration." *Ecology Law Quarterly* 32: 249–305.

Dupuis, Alain and Francisco Ucan-Marin. 2015. "A literature review on the aquatic toxicology of petroleum oil: An overview of oil properties and effects to aquatic biota." Canadian Science Advisory Secretariat, Research Document 2015/007.

E

Elden, Stuart. 2010. "Land, terrain, territory." *Progress in Human Geography* 34(6): 799–817.

Egan, Brian Francis. 2008. *From dispossession to decolonization: Towards a critical indigenous geography of Hul'qumi'num territory* (ProQuest Dissertations and Theses).

Elkins, C. and S. Pederson, eds. 2005. *Settler Colonialism in the Twentieth Century*. New York and London: Routledge.

Engle, Karen. 2011. "On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights." *The European Journal of International Law* 22:1, 141.

Erdrich, Louise. 2003. *Books and Islands in Ojibwe Country* (Washington, D.C.: National Geographic Society).

Erlinder, Peter. 2015. "*Minnesota v. Mille Lacs Band of Chippewa*: 19th Century U.S. Treaty-Guaranteed Usufructuary Property Rights, the Foundation for 21st Century Indigenous Sovereignty." *Law and Inequality: A Journal of Theory & Practice* 33(1): 143–230.

---- 2010. "The *Anishinabe* Nation's "Right to a Modest Living" From the Exercise of *Off*-Reservation *Usufructuary* Treaty Rights…in *All* of Northern Minnesota." Working Paper. Available at: https://www.perm.org/pdfs/Treaty%20Rights-Erlinder.pdf.

F

Fanon, Frantz. 1952. *Black Skin, White Masks* (New York: Grove Press).

Fennell, Lee Anne. 2011. "Ostrom's Law: Property Rights in the Commons." *International Journal of the Commons* 5(1): 9–27.

Fisher, D.E. 2014. "Jurisprudential challenges to the protection of the natural environment." In Wild Law – In Practice, Maloney, Michelle and Peter Burdon, eds. (New York: Routledge).

Fitz-Henry, Erin. 2014. "Decolonizing personhood." In Wild Law – In Practice, Maloney,

Michelle and Peter Burdon, eds. (New York: Routledge).

Fleder, Anna & Darren J. Ranco. 2004. "Tribal Environmental Sovereignty: Culturally Appropriate Protection or Paternalism." *Journal of Natural Resources and Environmental Law* 19(1): 35–58.

Fletcher, Matthew L.M. 2013. "A Perfect Copy: Indian Culture and Tribal Law." In *Centering Anishinaabeg Studies: Understanding the World through Stories*, Jill Doerfler, Niigaanwewidam James Sinclair, & Heidi Kiiwetinepinesiik Stark, eds. (East Lansing, MI: Michigan State Univ. Press).

---- 2011a. "Ethical Implications of the Montana Rule and Exceptions." *Turtle Talk*, March 25, 2011. Available at: https://turtletalk.wordpress.com/2011/03/25/ethical-implications-of-the-montana-rule-and-exceptions/

---- 2011b. (Ed). *American Indian Tribal Law* (New York: Aspen Publishers).

---- 2010. "Resisting Federal Courts on Tribal Jurisdiction." *University of Colorado Law Review* 81: 973–1025.

---- 2008. "The Original Understanding of the Political Status of Indian Tribes." *St. John's Law Review* 82: 153–181.

---- 2006. "Toward a Theory of Intertribal and Intratribal Common Law." *Houston Law Review* 43 (3): 701–742.

Fletcher, Matthew L.M. et al. 2013. Conference Transcript: Heeding Frickey's Call: Doing Justice in Indian Country. *American Indian Law Review* 37: 347–422.

Folke, Carl et al. 2011. "Reconnecting the Biosphere." *AMBIO* 40: 719–738.

Ford, Lisa. 2010. *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788–1836* (Cambridge, MA: Harvard Univ. Press).

Ford, Richard Thompson. Ford, Richard Thompson. 1999. "Law's Territory (A History of Jurisdiction)." *Michigan Law Review* 97: 843.

----- 1997. "Geography and Sovereignty: Jurisdictional Formation and Racial Segregation." *Stanford Law Review* 49: 1365.

---- 1994. "The Boundaries of Race: Political Geography in Legal Analysis." *Harvard Law Review* 107(8): 1841.

Forest, Benjamin. 2000. "Placing the Law in Geography." *Historical Geography* 28.

Fort, Denise D. 1995. State and Tribal Water Quality Standards Under the Clean Water Act: A Case Study. *Natural Resources Journal* 35: 771–802.

Fort, Kathryn E. 2011. "Disruption and Impossibility: The New Laches and the Unfortunate Resolution of the Modern Iroquois Land Claims." *Wyoming Law Review* 11(2): 375–405.

---- 2008. "New Laches: Creating Title Where None Existed." *George Mason Law Review* 16(2): 357–401.

Foucault, Michel. 2008. *The Birth of Biopolitics: Lectures at the Collége de France 1978–79* (New York: Picador).

---- 2007. *Security, Territory, Population: Lectures at the College de France 1977–1978* (New York: Picador).

---- 1984. "Des Espace Autres, March 1967." *Architecture /Mouvement/ Continuité* Oct.

---- 1980. *Power/Knowledge: Selected Interviews & Other Writings 1972–1977* (New York: Vintage Books).

---- 1978. *The History of Sexuality, Volume One* (New York: Vintage Books).

---- 1977. "Nietzsche, Genealogy, History." In *Language, Counter-memory, Practice: Selected Essays and Interviews by Michel Foucault*, Donald F. Bouchard, ed., (Ithaca, NY: Cornell University Press).

French, Jan Hoffman. 2011. "The Power of Definition: Brazil's Contribution to Universal Concepts of Indigeneity." *Indiana Journal of Global Legal Studies* 18(1): 241.

Fromherz, Christopher J. 2008. "Indigenous Peoples' Courts: Egalitarian Juridical Pluralism, Self-Determination, and the United Nations Declaration on the Rights of Indigenous Peoples." *University of Pennsylvania Law Review* 156(5): 1341–1382.

Futemma, Célia et al. 2002. The Emergence and Outcomes of Collective Action: An Institutional and Ecosystem Approach. *Society & Natural Resources: An International Journal* 15: 503–522.

G

Gerlak, Andrea K., et al. 2013. "Groundwater Governance in the U.S., Appendix B: Qualitative Survey Responses." In *Groundwater Governance in the U.S.: Summary of Initial Survey Results*, Gerlak, Andrea K. et al. (Tucson, AZ: University of Arizona)

Getches, David. 1988. "Resolving tensions between tribal and state governments: Learning from the American experience." In *Governments in Conflict?: Provinces and Indian Nations in Canada*. Long, J.A. & M. Boldt, eds. (Toronto: Univ. of Toronto Press).

Gibson-Graham, J.K. 1994. "'Stuffed If I Know!': Reflections on Post-Feminist Social Research." *Gender, Place and Culture* 1: 203-224.

Gilbert, Jérémie. 2011. "Indigenous Peoples' Human Rights in Africa: The Pragmatic Revolution of the African Commission on Human and Peoples' Rights." *International and Comparative Law Quarterly* 60(1): 245–270.

---- 2007 "Nomadic Territories: A Human Rights Approach to Nomadic Peoples' Land Rights." *Human Rights Law Review* 2007: 1–36.

---- 2006. *Indigenous Peoples' Land Rights Under International Law: From Victims to Actors* (Ardsley, NY: Transnational Publishers).

Gilroy, Paul. 2003. "After the Great White Error . . . The Great Black Mirage." In *Race, Nature and the Politics of Difference*, Moore, Donald S., et al., eds (Durham, NC: Univ. of North Carolina Press).

Glasbeck, Harry. 2002. *Wealth by Stealth: Corporate Crime, Corporate Law, and the Perversion of Democracy* (Toronto: Between the Lines).

Gochfeld, Michael & Joanna Burger. 2011. "Disproportionate Exposures in Environmental Justice and Other Populations: The Importance of Outliers." *American Journal of Public Health* 101(1): S53–S63.

Godlewska, Anne, and Neil Smith, eds. 1994. *Geography and Empire.* Oxford: Blackwell.

Goeman, Mishuana R. 2009. "Notes toward a Native Feminism's Spatial Practice." *Wicazo Sa Review* 24(2): 169–187.

Goodman, Ryan & Derek Jinks. 2003. "Toward an Institutional Theory of Sovereignty." *Stanford Law Review* 55: 1749–1788.

Graham, Brian, and Catherine Nash, eds. 2000. *Modern Historical Geographies.* London: Longman.

Gramsci, Antonio. 1971. *Selections from the Prison Notebooks*. Translated and edited by Quintin Hoare and Geoffrey Nowell Smith (New York: International Publishers).

Gregory, Derek. 2000. "Edward Said's Imaginative Geographies." In *Thinking Space*, eds. Mike Crang and Nigel Thrift, eds. (London: Routledge).

---- 2004. *The Colonial Present* (Malden, MA: Blackwell).

Grossman, Zoltán & Alan Parker (eds). 2012. *Asserting Native Resilience: Pacific Rim Indigenous Nations Face the Climate Crisis* (Corvallis, OR: Oregon State University Press).

Gunn, Brenda L. 2007. "Protecting Indigenous Peoples' Lands: Making Room for the Application of Indigenous Peoples' Laws Within the Canadian Legal System." *Indigenous Law Journal* 6: 31.

H

Häkli, Jouni. 2017. "The subject of citizenship – Can there be a posthuman civil society?" *Political Geography* (In Press).

Hamilton, Alexander. 2006. "No. 22." In *The Federalist Papers*. Alexander Hamilton, James Madison, John Jay, eds. (New York: Cosimo Classics).

Hanlon, Sean M. 2008. "A Non-Indian Entity is Pollution Indian Waters: "Water" Your Rights to the Waters, and "Water" Ya Gonna Do About It?" *Montana Law Review* 69: 174–226.

Haraway, Donna J. 2016. *Staying with the Trouble: Making Kin in the Chthulucene* (Durham, NC: Duke University Press).

---- 2003. *The Companion Species Manifesto: Dogs, People, and Significant Otherness* (Chicago: Univ. of Chicago Press).

---- 1991. *Simians, Cyborgs and Women: The Reinvention of Nature* (London: Free Association Books).

Harding, Sandra. 1991. *Whose Science? Whose Knowledge?* (New York: Cornell University Press).

Harman, Graham. 2011. "On the Undermining of Objects: Grant, Bruno, and Radical Philosophy." In *The Speculative Turn: Continental Materialism and Realism*, Levi Bryant, Nick Srnicek & Graham Harman, eds. (Melbourne: re.press).

Harper, Barbara L. & Stuart G. Harris. 2008. "A possible approach for setting a mercury risk-based action level based on tribal fish ingestion rates." *Environmental Research* 107: 60–68.

Harris, Cole. 2004. "How did colonialism dispossess? Comments from the edge of empire." *Annals of the Association of American Geographers* 94.

Harry, Debra. 2011. "Biocolonialism and Indigenous Knowledge in United Nations Discourse." *Griffith Law Review* 20: 702.

Hart, Gillian. 2004. "Geography and Development: Critical Ethnographies." *Progress in Human Geography* 28(1): 91-100.

Harvey, David. 2008. "The Right to the City." *New Left Review* 53.

---- 1996. *Justice, Nature and the Geography of Difference* (Cambridge, MA: Blackwell).

Healy, Jack. 2016. "Occupying the Prairie: Tensions Rise as Tribes Move to Block a Pipeline." *New York Times*, Aug. 23, 2016. Available at: https://www.nytimes.com/2016/08/24/us/occupying-the-prairie-tensions-rise-as-tribes-move-to-block-a-pipeline.html [Last Accessed May 17, 2018].

Henry, Gordon, Jr., Nieves Pascual Soler, and Silvia Martínez-Falquina, eds. 2009. *Stories through Theories/Theories through Stories: North American Indian Writing, Storytelling and Critique* (East Lansing, MI: Mich. State Univ. Press).

Herman, Jennifer. 2008. *Wisconsin Encyclopedia* (Hamburg, MI: State History Publications).

Hinchliffe, Steve. 2007. *Geographies of Nature* (London: Sage Publications Ltd.).

Hixson, Walter L. 2013. *American Settler Colonialism* (New York: Palgrave MacMillan).

Holbraad, Martin and Mroten Axel Pedersen. 2017. *The Ontological Turn: An Anthropological Exposition* (Cambridge: Cambridge Univ. Press).

Holifield, Ryan. 2012. "Environmental Justice as Recognition and Participation in Risk Assessment: Negotiating and Translating Health Risk at a Superfund Site in Indian Country." *Annals of the Association of American Geographers* 102(3): 591–613.

Howe, Nicolas. 2008. "Though shalt not misinterpret: Landscape as a legal performance." *Annals of the Association of American Geographers* 98: 435–460.

Howitt, Richard & Sandra Suchet-Pearson. 2003. "Ontological pluralism in contested cultural landscapes." In *Handbook of Cultural Geography* Eds Kay Anderson, Mona Domosh, Steve Pile, Nigel Thrift (Sage, London): 557–569.

Huber, Matthew & Jody Emel. 2008. "Fixed minerals, scalar politics: the weight of scale in conflicts over the '1872 Mining Law' in the United States." *Environment and Planning A* 41: 371–388.

Huber, Tobias. 2012. "The Speculative Turn: Continental Materialism and Realism, eds. Levi Bryant, Nick Srnicek and Graham Harman." *Journal of the British Society for Phenomenology* 43(2): 214–216.

Hull, Ruth N. et al. 2015. "Risk-based screening of selected contaminants in the Great Lakes Basin." *Journal of Great Lakes Research* 41: 238–245.

Humphrey, Michael. "Reconciliation and the Therapeutic State." *Journal of Intercultural Studies* 26, 3 (2005): 203-220.

Hunt, Sarah. 2013. "Ontologies of indigeneity: the politics of embodying a concept." *Cultural Geographies* 0(0): 1–6.

I

Ingold, Tim. 2000. *The Perception of the Environment: Essays in Livelihood, Dwelling and Skill* (New York: Routledge).

J

Jackson, Sue & Lisa R. Palmer. 2016. "Reconceptualizing ecosystem services: Possibilities for

cultivating and valuing the ethics and practices of care." *Progress in Human Geography* 39(2).

Janke, Ronald A. 1982. "Chippewa Land Losses." *Journal of Cultural Geography* 2(2): 84–100.

Jarosz, Lucy. 2004. "Political Ecology as Ethical Practice." *Political Geography* 23: 917- 927.

Jay, John. 2006. "No. 64." In The Federalist Papers. Alexander Hamilton, James Madison, John Jay, eds. (New York: Cosimo Classics).

Jepson, Wendy. 2012. "Claiming space, claiming water: Contested legal geographies of water in South Texas." *Annals of the Association of American Geographers* 102: 614–631.

Johnson, Barry L. & Sandra L. Coulberson. 1993. "Environmental Epidemiologic Issues and Minority Health." *Annals of Epidemiology* 3(2): 175–180.

Joronen, Mikko & Jouni Häkli. 2017. "Politicizing ontology." *Progress in Human Geography* 41(5): 561–579.

K

Kahn, Benjamin A. 2012. "Separate and Unequal: Environmental Regulatory Management on Indian Reservations." *U.C. Davis Law Review* 35: 203–229.

Kain, Roger J.P., and Elizabeth Baigent. 1992. *The Cadastral Map in the Service of the State: A History of Property Mapping* (Chicago: The Univ. of Chicago Press).

Katanski, Amelia V. 2017. "Stories that Nourish: Minnesota Anishinaabe Wild Rice Narratives." *American Indian Culture and Research Journal* 41(3): 71–91.

Keller, Robert H. 1986. "The Chippewa Treaties of 1826 and 1836." *American Indian Journal* 9: 27–32.

Kerfoot, W. Charles, et al. 2004. "Local, Regional, and Global Implications of Elemental Mercury in Metal (Copper, Silver, Gold, and Zinc) Ores: Insights from Lake Superior Sediments." *Journal of Great Lakes Research* 30(1): 162–184.

Kimmerer, Robin Wall. 2013. *Braiding Sweetgrass: Indigenous Wisdom, Scientific Knowledge, and the Teachings of Plants* (Minneapolis, MN: Milkweed Editions).

Kinnison, Akilah Jenga. 2011. "Indigenous Consent: Rethinking U.S. Consultation Policies in Light of the U.N. Declaration on the Rights of Indigenous Peoples." *Arizona Law Review* 53(4): 1301–1332.

Kirby, Sandra, and Kate McKenna. 1989. *Experience, Research, Social Change: Methods from the Margins* (Toronto: Garamond).

Kirkby, Diane & Catharine Coleborne, eds. 2001. *Law, History, Colonialism: The Reach of Empire* (New York: Manchester Univ. Press).

Klass, Alexandra B. and Danielle Meinhardt. 2015. "Transporting Oil and Gas: U.S. Infrastructure Challenges." *Iowa Law Review* 100: 947–1053.

Knafla, Louis A. & Haijo Westra, eds. 2010. *Aboriginal Title and Indigenous Peoples* (Vancouver: UBC Press).

Knopf, Kerstin. 2007. "Terra – Terror – Terrorism?: Land, Colonization, and Protest in Canadian Aboriginal Literature." *Canadian Journal of Native Studies* 27(2): 293–329.

Kobayashi, Audrey. 2001. "Negotiating the Personal and the Political in Critical Qualitative Research." In *Qualitative Methodologies for Geographers: Issues and Debates,* Melanie Limb and Claire Dwyer, eds. (London: Arnold).

Kradolfer, Sabine. 2011. "The transnationalisation of indigenous peoples' movements and the emergence of new indigenous elites," *International Social Science Journal* 61(202): 377–388.

Krakoff, Sarah. 2013. "Settler Colonialism and Reclamation: Where American Indian Law and Natural Resources Law Meet," *Colorado Natural Resources, Energy & Environmental Law Review* 24(2): 261.

---- 2012. "Planetarian Identity Formation and the Relocalization of Environmental Law." *Florida Law Review* 64: 87–139.

---- 2008. "American Indians, Climate Change, and Ethics for a Warming World." *Denver University Law Review* 85(4): 865–897.

---- 2005. "*City of Sherrill v. Oneida Indian Nation of New York*: A Regretful Postscript to the Taxation Chapter in *Cohen's Handbook of Federal Indian Law*." Tulsa Law Review 41: 5–17.

Kreimer, Osvaldo. 2000. "Collective Rights of Indigenous Peoples in the Inter-American Human Rights System, Organization of American States." *American Society of International Law Proceedings* 94: 315.

Krotz, Sarah Wylie. 2017. "The Affective Geography of Wild Rice: A Literary Study." *Studies in Canadian Literature/Etudes en Littérature Canadienne* 42(1): 13–30.

Kumar, Malreddy Pavan. 2011. "(An)other Way of Being Human: 'indigneous' alternative(s) to postcolonial humanism." *Third World Quarterly* 32(9): 1557–1572.

Kuppe, René. 2009. "The Three Dimensions of the Rights of Indigenous Peoples." *International Community Law Review* 11: 103-118.

Kurtulus, Ersun. 2004. “Theories of Sovereignty: An Interdisciplinary Approach.” *Global Society* 18(4): 347–371.

Kymlicka, Will. 2007. *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford: Oxford Univ. Press).

L

Labban, Mazen. 2014. “Deterritorializing Extraction: Bioaccumulation and the Planetary Mine.” *Annals of the Association of American Geographers* 104(3).

---- 2010. “Oil in parallax: Scarcity, markets, and the financialization of accumulation.” *Geoforum* 41 (2010): 541–552.

---- 2006. “Geopolitics and the Post-Colonial: Rethinking North-South Relations.” *Annals of the Association of American Geographers* 96(3).

LaDuke, Winona. 2007. Ricekeepers. *Orion Magazine*.

Langton, Marcia, et al., eds. 2006. “Settling with Indigenous People: Modern Treaty and Agreement-Making.” *Public Space: the Journal of Law and Social Justice* 2: 1.

Latour, Bruno. 2011. “Reflections on Etienne souriau’s Les diff’erents modes d’existence.” In *The Speculative Turn: Continental Materialism and Realism*, Levi Bryant, Nick Srnicek & Graham Harman, eds. Translated by Stephen Muecke (Melbourne: re.press).

---- 2010. “An Attempt at a ‘Compositionist Manifesto,” *New Literary History* 41(3): 471–90.

---- 2005. *Reassembling the Social* (Oxford: Oxford Univ. Press).

---- 2004a. *The Politics of Nature* (Cambridge, MA: Harvard Univ. Press).

---- 2004b. “Scientific Objects and Legal Objectivity.” In *Law, Anthropology and the Constitution of the Social: Making Persons and Things.* Alain Pottage & Martha Mundy, eds. (Cambridge: Cambridge Univ. Press).

---- 1993. *We Have Never Been Modern* (Cambridge, MA.: Harvard Univ. Press).

Le Billon, Philippe. 2014. “Natural resources and corruption in post-war transitions: matters of trust.” *Third World Quarterly* 35(5).

Le Billon, Philippe & Ryan Vandecasteyen. 2013. “(Dis)Connecting Alberta’s Tar Sands and British Columbia’s North Coast.” *Studies in Political Economy* 91(Spring): 35–57.

Ledarach, John Paul. 1999. *Building Peace: Sustainable Reconciliation in Divided Societies* (Washington, D.C.: United States Institute of Peace Press).

Lefebvre, Henri. 1991. *The Production of Space*. Translated by Donald Nicholson-Smith

(Cambridge, MA: Blackwell).

Lenzerini, Federico. 2006. "Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples," *Texas International Law Journal* 42: 155–189.

Leopold, Aldo. 1970. *A Sand County Almanac* (New York: Ballantine Books).

Li, Tania Murray. 2004. "Environment, Indigeneity and Transnationalism." In *Liberation Ecologies: Environment, Development, Social Movements,* eds. Richard Peet and Michael Watts (New York: Routledge).

Lightfoot, Sheryl R. 2012. "Selective endorsement without intent to implement: indigenous rights and the Anglosphere." *The International Journal of Human Rights* 16(1): 100–122.

---- 2010. "International Indigenous Rights Norms and 'Over-Compliance' in New Zealand and Canada." *Political Science* 62(1): 84–104.

Lillywhite, Austin. 2017. "Relational Matters: A Critique of Speculative Realism and a Defence of Non-Reductive Materialism." *Chiasma: A Site for Thought* 4(1): 13–39.

Lips, Eva. 1956. *Die Reisernte der Ojibwa-Indianer: Wirtschafi und Recht eines Erntevolkes* (Berlin: Akademie Verlag).

Liu, Jianguo et al. 2007. "Coupled Human and Natural Systems." *AMBIO* 36(8): 639–649.

Locke, John. 1980. *Second Treatise of Government* (Indianapolis: Hackett).

Lowe, Ian. 2014. "Wild Law embodies values for a sustainable future." In *Wild Law – In Practice*, Maloney, Michelle and Peter Burdon, eds. (New York: Routledge).

Lubell, Mark et al. 2002. "Watershed Partnerships and the Emergence of Collective Action Institutions." *American Journal of Political Science* 46(1): 148–163.

M

Maantay, Juliana. 2002. "Mapping Environmental Injustices: Pitfalls and Potential of Geographic Information Systems in Assessing Environmental Health and Equity." *Environmental Health Perspectives* 110(2): 161–171.

Maccabee, Paula Goodman. 2015. "Tribal Authority to Protect Water Resources and Reserved Rights Under Clean Water Act Section 401." *William Mitchell Law Review* 41(2): 618–687.

----- 2010. "Mercury, Mining in Minnesota, and Clean Water Act Protection: A Representative Analysis Based on the Proposed Polymet Northmet Project." *William Mitchell Law Review* 36(3): 1111 – 1156.

MacFadyen, Alan J. and G. Campbell Watkins. 2014. *Petropolitics: Petroleum Developemnt, Markets and Regulations, Alberta as an Illustrative History* (Calgary, AB: Univ. of Calgary Press).

Mack, Sarah. 2008. "Court Approves Historic Groundwater Settlement Between Washington and Lummi Indian Nation." *Western Water Law Reporter*, January 2008.

Magubane, Zine. 2003. "Simians, Savages, Skulls, and Sex: Science and Colonial Militarism in Nineteenth-Century South Africa." In *Race, Nature and the Politics of Difference*, Moore, Donald S., et al., eds. (Durham, NC: Univ. of North Carolina Press).

Mahmud, Tayyab. 2007. "Geography and International Law: Towards a Postcolonial Mapping." *Santa Clara Journal of International Law* 5: 525.

Maloney, Michelle and Peter Burdon, eds. 2014. *Wild Law – In Practice* (New York: Routledge).

Margil, Mari. 2014. "Building an international movement for the Rights of Nature." In Wild Law – In Practice, Maloney, Michelle and Peter Burdon, eds. (New York: Routledge).

Marx, Jane, Jana L. Walker & Susan M. Williams. 1998. "Tribal Jurisdiction Over Reservation Water Quality and Quantity." *South Dakota Law Review* 35: 315–380.

Massey, Doreen. 2005. *For Space* (London: Sage).

Mathias, Chief Joe & Gary B. Yabsley. 1991. "Conspiracy of Legislation: The Suppression of Indian Rights in Canada." *BC Studies* 89: 34–47.

McCarthy, James. 2002. "First World Political Ecology: Lessons from the Wise Use Movement." *Environment and Planning A* 34: 1281-1302.

McClintock, Anne. 1995. *Imperial Leather: Race, Gender, and Sexuality in the Colonial Context* (New York: Routledge).

McCreary, Tyler. 2014. "Beyond Token Recognition: The Growing Movement against the Enbridge Northern Gateway Project." In *A Line in the Tar Sands: Struggles for Environmental Justice*. Black et al., eds. (Toronto: Between the Lines Press).

McCreary, Tyler & Vanessa Lamb. 2014. "A Political Ecology of Sovereignty in Practice and on the Map: The Technicalities of Law, Participatory Mapping, and Environmental Governance." *Leiden Journal of International Law* 27(3): 595–619.

McCreary, Tyler & Richard A. Milligan. 2013. "Pipelines, permits, and protests: Carrier Sekani encounters with the Enbridge Northern Gateway Project." *cultural geographies* 21(1): 115–129.

McGregor, Deborah. 2009. ''Honouring Our Relations: An Anishnaabe Perspective on Environmental Justice.'' In *Speaking for Ourselves: Environmental Justice in Canada*,

Julian Agyeman, Peter Cole and Randolph Haluza-Delay, eds. (Vancouver, BC: University of British Columbia Press): 27–41.

Meijknecht, Anna. 2002. "The (Re-)Emergence of Indigenous Peoples as Actors in International Law." *Tilburg Foreign Law Review* 10: 315.

Merry, Sally Engle. 2006. "Transnational Human Rights and Local Activism: Mapping the Middle." *American Anthropologist* 108(1): 38.

Meyer, William H. 2012. "Indigenous Rights, Global Governance, and State Sovereignty." *Human Rights Review* 13(3): 327–347.

Million, Dian. 2013. *Therapeutic Nations: Healing in an Age of Indigenous Human Rights* (Tucson, AZ: Univ. of Arizona Press).

Mills, Jennifer. 2017. "Destabilizing the Consultation Framework in Alberta's Tar Sands." *Journal of Canadian Studies* 1(Winter): 153–185.

Minghi, Julian V. 1963. "Boundary Studies in Political Geography." *Annals of the Association of American Geographers* 53(3): 407–28.

Miranda, Lillian Aponte. 2010. "Indigenous Peoples as International Lawmakers." *University of Pennsylvania Journal of International Law* 32: 203.

---- 2008. "Uploading the Local: Assessing the Contemporary Relationship Between Indigenous Peoples' Land Tenure Systems and International Human Rights Law Regarding the Allocation of Traditional Lands and Resources in Latin America." *Oregon Review of International Law* 10: 419.

Mitchell, Don. 2003. *The Right to the City: Social Justice and the Fight for Public Space* (New York: Guilford Press).

Mitchell, Timothy. 2002. Rule of Experts: Egypt, Techno-Politics, Modernity (Berkeley, CA: Univ. of California Press).

Mol, Annemarie. 2002. *The Body Multiple: Ontology in Medical Practice* (Durham, NC: Duke University Press).

Moore, Donald S., Jake Kosek, & Anand Pandian, eds. 2003. *Race, Nature and the Politics of Difference* (Durham, NC: Duke Univ. Press).

Moreton-Robinson, Aileen. 2011. "Virtuous Racial States: The Possessive Logic of Patriarchal White Sovereignty and the United Nations Declaration on the Rights of Indigenous Peoples." *Griffith Law Review* 20(3): 641–658.

Morgensen, Scott Lauria. 2012. “Theorising Gender, Sexuality and Settler Colonialism: An Introduction.” *settler colonial studies* 2(2): 2 – 22.

Morrow, Karen. 2014. “Peoples’ Sustainability Treaties at Rio+20: giving voice to the other.” In *Wild Law – In Practice*, Maloney, Michelle and Peter Burdon, eds. (New York: Routledge).

Mountz, Alison. 2013. “Political geography I: Reconfiguring geographies of sovereignty.” *Progress in Human Geography* 37(6): 829–41.

Moyle, J.B. 1975. “Review of Relationship of Wild Rice to Sulfate Concentration of Waters.” Report to Minnesota Pollution Control Agency, March 16, 1975.

---- 1969. “Wild Rice – Some Notes, Comments, and Problems.” *State of Minnesota Department of Conservation Division of Game and Fish*, Special Publication No. 47, Nov. 29, 1967 (revised July 3, 1969).

---- 1945. “Some chemical factors influencing the distribution of aquatic plants in Minnesota.” *American Midland Naturalist* 34: 402–420.

---- 1944. “Wild rice in Minnesota.” *Journal of Wildlife Management* 8: 177–184.

Moyle, J.B. and Paul Krueger. 1964. “Wild Rice in Minnesota.” *State of Minnesota Department of Conservation Division of Game and Fish*, Special Publication No. 18, July 1, 1964.

Murdoch, Jonathan. 2006. *Post-structuralist Geography* (London: Sage).

Myrbo, Amy et al. 2017a. “Sulfide Generated by Sulfate Reduction is a Primary Controller of the Occurrence of Wild Rice (*Zizania palustris*) in Shallow Aquatic Ecosystems.” *Journal of Geophysical Research: Biogeosciences*.

----- 2017b. “Increase in Nutrients, Mercury, and Methylmercury as a Consequence of Elevated Sulfate Reduction to Sulfide in Experimental Wetland Mesocosms.” *Journal of Geophysical Research: Biogeosciences*.

N

Nash, Catherine. 2004. “Postcolonial Geographies: Spatial Narratives of Inequality and Interconnection.” In *Envisioning Human Geographies*, Paul Cloke, Philip Crang, and Mark Goodwin, eds. (London: Arnold).

Nelson, Melissa K. 2013. “The Hydromythology of the Anishinaabeg: Will Mishipizhu Survive Climate Change, or Is He Creating It?” In *Centering Anishinaabeg Studies: Understanding the World through Stories*, Jill Doerfler, Niigaanwewidam James Sinclair, & Heidi Kiiwetinepinesiik Stark, eds. (East Lansing, MI: Michigan State Univ. Press).

Nesper, Larry. 2002. *The Walleye War: The Struggle for Ojibwe Spearfishing and Treaty Rights* (Lincoln, NE: Univ. of Nebraska Press).

Newton, Nell Jessup et al., Eds. 2012. *Cohen's Handbook of Federal Indian Law*, 2012 Edition (Albuquerque, NM: American Indian Law Center, Inc.).

Nichols, Robert. 2013. "Indigeneity and the Settler Contract today." *Philosophy Social Criticism* 39: 165.

Niezen, Ronald. 2003. *The Origins of Indigenism* (Berkeley: Univ. of California Press).

Norrgard, Chantal. 2014. *Seasons of Change: Labor, Treaty Rights, and Ojibwe Nationhood* (Chapel Hill, NC: Univ. of North Carolina Press).

O

O'Brien, Jean. 2010. *Firsting and Lasting: Writing Indians Out of Existence in New England* (Minneapolis: Univ. of Minnesota Press).

Osborne, Rachael Paschal. 2013. "Native American *Winters* Doctrine and Stevens Treaty Water Rights: Recognition, Quantification, Management." *American Indian Law Journal* 2(1): 76–113.

Osofsky, Hari. 2008. "The Geography of Justice Wormholes: Dilemmas from Property and Criminal Law." *Villanova Law Review* 53: 117.

---- 2006. "The Inuit petition as a bridge? Beyond dialectics of climate change and indigenous peoples' rights." *American Indian Law Review* 31(2): 675–697.

Ostrom, Elinor. 2009. "Design Principles of Robust Property Rights Institutions: What Have We Learned?" In *Property Rights and Land Policies*, G. K. Ingram and Y.-H. Hong, eds. (Cambridge, MA: Lincoln Institute of Land Policy).

---- 2009. "A general framework for analyzing sustainability of social-ecological systems." *Science,* 325(5939): 419–422.

---- 1990. *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge, U.K.: Cambridge Univ. Press).

Ostrom, Elinor et al. 1999. "Revisiting the Commons: Local Lessons, Global Changes." *Science* 284(5412): 278–282.

Ostrom, Elinor & Edella Schlager. 1996. "The Formation of Property Rights." In *Rights to Nature: Ecological, Economic, Cultural and Political Principles of Institutions for the Environment*. S.S. Hanna, C. Folke, and K.-G. Mäler, eds. (Washington D.C.: Island Press).

Ostrom, Vincent & Elinor Ostrom. 1972. "Legal and Political Conditions of Water Resource Development." *Land Economics* 48(1): 1–14.

O'Tuathail, Gearoid. 1996. *Critical Geopolitics: The Politics of Writing Global Space (Barrows Lectures)* (New York: Routledge).

Owley, Jessica. 2004. "Tribal Sovereignty Over Water Quality." *Journal of Land Use* 20: 61–116.

P

Paasi, Anssi. 2004. "Place and region: looking through the prism of scale." *Progress in Human Geography* 28(4): 536–46.

Panelli, R. 2008. "Social Geographies: Encounters with Indigenous and More-Than-White/Anglo Geographies." *Progress in Human Geography*, 32(6), pp. 801−11.

Parker, Alan. 2012. "Recommendations to native government leadership." In *Asserting Native Resilience: Pacific Rim Indigenous Nations Face the Climate Crisis*. Grossman, Z. and Parker, A. (Eds.) (Corvallis, OR: Oregon State Univ. Press).

Pasqualucci, Jo M. 2006. "The Evolution of International Indigenous Rights in the Inter-American Human Rights System." *Human Rights Law Review* 6(2): 281.

Pasternak, Shiri. 2017. *Grounded Authority: The Algonquins of Barriere Lake Against the State* (Minneapolis, MN: Univ. of Minnesota Press).

---- 2014. "Jurisdiction and Settler Colonialism: Where do Laws Meet?" *Canadian Journal of Law and Society* 29(2): 145–161.

Pastor, John, et al. 2017. "Effects of sulfate and sulfide on the life cycle of wild rice (*Zizania palustris*) in hydroponic and mesocosm experiments." *Ecological Applications* 27: 321–336.

Peet, Richard et al., eds. 2011. *Global Political Ecology* (New York: Routledge).

Peet, Richard & Michael Watts, eds. 2004. *Liberation Ecologies* (New York: Routledge).

Pelizzon, Alessandro. 2014. "Earth laws, rights of nature and legal pluralism." In Wild Law – In Practice, Maloney, Michelle and Peter Burdon, eds. (New York: Routledge).

Pollman, C.D., et al. 2017. "The Evolution of Sulfide in Shallow Aquatic Ecosystem Sediments: An Analysis of the Roles of Sulfate, Organic Carbon, and Iron and Feedback Constraints Using Structural Equation Modeling." *Journal of Geophysical Research: Biogeosciences*.

Pommersheim, Frank. 2009. *Broken Landscape: Indians, Indian Tribes and the Constitution* (Oxford: Oxford Univ. Press).

---- 2005. "Constitutional Shadows: The Missing Narrative in Indian Law." *North Dakota Law Review* 80.

---- 2000. "'Our Federalism' in the Context of Federal Courts and Tribal Courts: An Open Letter to the Federal Courts' Teaching and Scholarly Community." *University of Colorado Law*

Review 71: 123.

Pompeani, David P. et al. 2015. “Copper mining on Isle Royale 6500–5400 years ago identified using sediment geochemistry from McCargoe Cove, Lake Superior.” *The Holocene* 25(2): 253–262.

Povinelli, Elizabeth. 2017. “Geontologies: The Concept and Its Territories.” *e-flux journal* 81: 1–11.

---- 2016. *Geontologies: A Requiem to Late Liberalism* (Durham: Duke Univ. Press).

---- 2011. *Economies of Abandonment* (Durham: Duke Univ. Press).

---- 2002. *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* (Durham: Duke Univ. Press).

---- 1999. “Settler modernity and the quest for an indigenous tradition.” *Public Culture* 11(1): 19–48.

---- 1998. “The State of Shame: Australian Multiculturalism and the Crisis of Indigenous Citizenship.” *Critical Inquiry* 24(2): 575–610.

Preston, The Hon. Brian J. 2014. “Internalizing ecocentricism in environmental law.” In *Wild Law – In Practice*, Maloney, Michelle and Peter Burdon, eds. (New York: Routledge).

R

Rajchman, John. 1995. “Foucault’s Art of Seeing.” In *Michel Foucault (1): Critical Assessments*, Barry Smart, ed. (New York: Routledge).

Ramirez, Renya. 2007. “Race, Tribal Nation, and Gender: A Native Feminist Approach to Belonging,” *Meridians: Feminism, Race, Transnationalism* 7(Spring): 22-40.

Razack, Sherene. 2002. “Introduction: When Place Becomes Race.” In *Race, Space, and the Law: Unmapping a White Settler Society,* Sherene Razack, ed. (Toronto: Between the Lines).

Riebeek, Holli. 1984. “Athabasca Oil Sands.” NASA Earth Observatory. Available at: https://earthobservatory.nasa.gov/Features/WorldOfChange/athabasca.php [Last Accessed May 18, 2018].

Rifkin, Mark. 2009. *Manifesting America: The Imperial Construction of U.S. National Space* (New York: Oxford Univ. Press).

---- 2009b. "Indigenizing Agamben: Rethinking Sovereignty in Light of the 'Peculiar' Status of Native Peoples." *Cultural Critique* 72 (Fall 2009): 88-124.

---- 2008. “Native Nationality and the Contemporary Queer: Tradition, Sexuality, and History in “Drowning in Fire.” *American Indian Quarterly* 32(4): 443–470.

---- 2011. *When Did Indians Become Straight?: Kinship, the History of Sexuality, and Native Sovereignty* (Oxford: Oxford University Press).

Robertson, Lindsay G. 2005. *Conquest by Law: How the Discovery of American Dispossessed Indigenous Peoples of Their Lands* (Oxford: Oxford Univ. Press).

Robbins, Paul. 2002. "Obstacles to a First World Political Ecology: Looking *Near* without Looking *Up." Environment and Planning A* 34(2002): 1509-13.

Rogers, Nicole. 2014. "Who's afraid of the founding fathers? Retelling constitutional law wildly." In Wild Law – In Practice, Maloney, Michelle and Peter Burdon, eds. (New York: Routledge).

Rose, Gillian. 1997. "Situating Knowledges: Positionality, Reflexivities and Other Tactics." *Progress in Human Geography* 21: 305-320.

Rosser, Ezra & Sarah Krakoff. 2012. *Law, Property and Society: Tribes, Land, and the Environment* (Farnham, U.K.: Ashgate Publishing).

Royster, Judith V. 2012. "Tribal Energy Development: Renewables and the Problem of the Current Statutory Structures." *Stanford Environmental Law Journal* 31: 91–137.

---- 2011. "Water, Legal Rights, and Actual Consequences: The Story of *Winters v. United States*." In *Indian Law Stories*, eds. Carole Goldberg, Kevin K. Washburn, and Philip P. Frickey (New York: Foundation Press).

---- 2011. "Conjunctive Management of Reservation Water Resources: Legal Issues Facing Indian Tribes." *Idaho Law Review* 47: 255–272.

---- 2006. "Indian Tribal Rights to Groundwater." *Kansas Journal of Law & Public Policy* XV(3): 489–504.

---- 2000. "Winters in the East: Tribal Reserved Rights to Water in Riparian States." *William and Mary Environmental Law & Policy Review* 25: 169–201.

---- 1997. "Water Quality and the Winters Doctrine." *Water Resources Update* 107: 50.

S

Saha, Gopal Chandra et al. 2017. "Temporal dynamics of groundwater-surface water interaction under the effects of climate change: A case study in the Kiskatinaw River Watershed, Canada." *Journal of Hydrology* 551: 440–452.

Said, Edward. 1994. *Culture and Imperialism* (New York: Vintage Books).

---- 1978. *Orientalism* (New York: Vintage Books).

---- 1983. *The World, The Text, and the Critic* (Cambridge, MA: Harvard Univ. Press).

Salamander, Nicole C. 2009. “A Half Full Circle: The Reserved Rights Doctrine and Tribal Reacquired Lands.” *University of Denver Water Law Review* 12(2): 333–355.

Samson, Colin & Elizabeth Cassell. 2012. “The long reach of frontier justice: Canadian land claims ‘negotiation’ strategies as human rights violations.” *The International Journal of Human Rights* 17(1): 35–55.

Santos, Boaventura de Sousa. 1987. “Law: A Map of Misreading: Toward a Postmodern Conception of Law.” *Journal of Law and Society* 14(3): 279.

Sassen, Saskia. 1996. “Whose City Is It? Globalization and the formation of new claims.” *Public Culture* 8: 205–23.

Satz, Ronald N. & Laura Apfelbeck. 1996. *Chippewa Treaty Rights: The Reserved Rights of Wisconsin’s Chippewa Indians in Historical Perspective* (Madison: Univ. of Wisconsin Press).

Scheffler, Lenor A. 2013. “Reflections of a Contemporary Minnesota Dakota Lawyer: Dakota Identity and Its Impacts in 1862 and 2012.” *William Mitchell Law Review* 39(2): 582–610.

Schmitt, Carl. 1976. *The Concept of the Political* (New Brunswick, NJ: Rutgers Univ. Press).

Shapiro, Kam. 2003. *Sovereign Nations, Carnal States* (Ithaca, NY: Cornell University Press).

Shaw, Karena. 2008. *Indigeneity and Political Theory: Sovereignty and the Limits of the Political* (New York: Routledge).

Shaw, Wendy S., R.D.K. Herman, and G. Rebecca Dobbs. 2006. “Encountering Indigeneity: Re-Imagining and Decolonizing Geography.” *Geografiska Annaler* 88B(3): 267–276.

Sheehan, Linda. 2014. “‘Water as the way’: achieving wellbeing through ‘right relationship’ with water.” In Wild Law – In Practice, Maloney, Michelle and Peter Burdon, eds. (New York: Routledge).

Silvern, Steven E. 1999. “Scales of justice: law, American Indian treaty rights and the political construction of scale.” *Political Geography* 18: 639–68.

Simpson, Audra. 2014. *Mohawk Interruptus: Political Life Across the Boarders of Settler States* (Durham, NC: Duke University Press).

---- 2009. "Captivating Eunice: Membership, Colonialism, and Gendered Citizenships of Grief." *Wicazo Sa Review* 24(2): 105–129.

Simpson, Audra & Andrea Smith (eds). 2014. *Theorizing Native Studies* (Durham, NC: Duke Univ. Press).

Simpson, Leanne Betasamosake. 2012. *Dancing on Our Turtle's Back: Stories of Nishnaabeg Re-Creation, Resurgence, and a New Emergence* (Winnipeg, MB: Arbeiter Ring Publishing).

Simpson, Leanne Betasamosake with Edna Manitowabi. 2013. "Theorizing Resurgence from within Nishnaabeg Thought." In *Centering Anishinaabeg Studies: Understanding the World through Stories*, Jill Doerfler, Niigaanwewidam James Sinclair, & Heidi Kiiwetinepinesiik Stark, eds. (East Lansing, MI: Michigan State Univ. Press).

Sinclair, Niigaanwewidam James. 2013. "*K'zaugin*: Storying Ourselves into Life." In *Centering Anishinaabeg Studies: Understanding the World through Stories*, Jill Doerfler, Niigaanwewidam James Sinclair, & Heidi Kiiwetinepinesiik Stark, eds. (East Lansing, MI: Michigan State Univ. Press).

Slater, David. 2004. *Geopolitics and the Post-Colonial: Rethinking North-South Relations* (Malden, MA: Blackwell Publishing).

Smith, Andrea. 2012. "The Moral Limits of the Law: Settler Colonialism and the Anti-Violence Movement." *settler colonial studies* 2: 2.

---- 2005. *Conquest: Sexual Violence and American Indian Genocide*. (Cambridge, MA: South End Press).

Smith, Linda Tuhiwai. 1999. *Decolonizing Methodologies: Research and Indigenous Peoples* (New York: Zed Books).

Smith, Neil. 2008. *Uneven Development: Nature, Capital and the Production of Space* (Athens, GA: Univ. of Georgia Press).

---- 2007. "Nature as accumulation strategy." *Socialist Register* 43: 19–41.

Smith, Neil, and Caroline Desbiens. 1999. "The International Critical Geography Group: Forbidden Optimism?" *Environment and Planning D: Society and Space* 18: 379-382.

Smith, Rhona K.M. 1997. "The International Impact of Creative Problem Solving: Resolving the Plight of Indigenous Peoples." *California Western Law Review* 34: 411.

Snelgrove, Corey, Rita Kaur Dhamoon, & Jeff Corntassel. 2014. "Unsettling settler colonialism: The Discourse and politics of settlers, and solidarity with Indigenous nations." *Decolonization: Indigeneity, Education & Society* 3(2): 1–32.

Spence, Mark D. 1999. *Dispossessing the Wilderness: Indian Removal and the Making of the National Parks* (Oxford: Oxford Univ. Press).

Srnicek, Nick. 2011. "Capitalism and the Non-Philosophical Subject." 2011. In *The Speculative Turn: Continental Materialism and Realism*, Levi Bryant, Nick Srnicek & Graham Harman, eds. (Melbourne: re.press).

Staeheli, Lynn A., and Don Mitchell. 2008. *The People's Property? Power, Politics, and the Public* (New York: Routledge).

Stark, Heidi Kiiwetinepinesiik. 2013. "Transforming the Trickster: Federal Indian Law Encounters Anishinaabe Diplomacy." In *Centering Anishinaabeg Studies: Understanding the World through Stories*, Jill Doerfler, Niigaanwewidam James Sinclair, & Heidi Kiiwetinepinesiik Stark, eds. (East Lansing, MI: Michigan State Univ. Press).

---- 2012. "Marked by Fire: Anishinaabe Articulations of Nationhood in Treaty Making with the United States and Canada." *American Indian Quarterly* 36(2): 119–149.

---- 2010. "Respect, Responsibility, and Renewal: The Foundations of Anshinaabe Treaty Making with the United States and Canada." *American Indian Culture and Research Journal* 34(2): 145–164.

Steffen, Will et al. 2011. "The Anthropocene: Conceptual and Historical Perspectives." In *Philosophical Transactions of the Royal Society* No. 369: 842-867.

Stengers, Isabelle. 2011a. "Wondering About Materialism." In *The Speculative Turn: Continental Materialism and Realism*, Levi Bryant, Nick Srnicek & Graham Harman, eds. (Melbourne: re.press).

---- 2011b. *Cosmopolitics II*. Translated by Robert Bononno (Minneapolis: Univ. Of Minnesota Press).

---- 2010. *Cosmopolitics I*. Translated by Robert Bononno (Minneapolis: Univ. Of Minnesota Press).

---- 2005. "The cosmopolitical proposal." In *Making Things Public*, Bruno Latour & Peter Weibel, eds. (Boston: MIT Press).

---- 2000. *The Invention of Modern Science*. Translated by Daniel W. Smith (Minneapolis: Univ. of Minnesota Press).

Stoler, Ann Laura. 2006. *Haunted by Empire: Geographies of Intimacy in North American History* (Durham, NC: Duke University Press).

Stromberg, Joseph R. 2004. "Sovereignty, International Law, and the Triumph of Anglo-American Cunning." *Journal of Libertarian Studies* 18(4): 29–93.

Swain, Edward B. et al. 2007. "Socioeconomic Consequences of Mercury Use and Pollution." *AMBIO* 36(1): 45–61.

Sydes, Brendan. 2014. "The challenges of putting Wild Law into practice: reflections on the Australian Environmental Defender's Office movement." In *Wild Law – In Practice*, Maloney, Michelle and Peter Burdon, eds. (New York: Routledge).

Szerszynski, Bronislaw. 2012. "The end of the end of nature: The Anthropocene and the fate of the human." *The Oxford Literary Review* 24(2): 165–184.

T

TallBear, Kim. 2015. "Beyond the Life/Not Life Binary: A Feminist-Indigenous Reading of Cryopreservation, Interspecies Thinking and the New Materialisms." In *Cryopolitics: Frozen Life in a Melting World*, Joanna Radin & Emman Kowal, eds. (Cambridge: MIT Press).

Tarde, Gabriel. 2001. *Les Lois de l'imitation* (Paris: Les Empêcheurs de Penser en Rond).

Taylor, Charles. 1994. "The Politics of Recognition." In *Multiculturalism: Examining the Politics of Recognition*, Amy Gutman, ed.) (Princeton, NJ: Princeton Univ. Press).

Thompson, Marie. 2017. "Whiteness and the Ontological Turn in Sound Studies." *Parallax* 23(3): 266–282.

Tilton, James W. 2016. "The Winters Doctrine: Is it Just About Quantity?" *University of Denver Water Law Review* 19: 307.

Todd, Zoe. 2016. "An Indigenous Feminist's Take On The Ontological Turn: 'Ontology Is Just Another Word for Colonialism.' *Journal of Historical Sociology* 29(1): 4–22.

Treuer, Margaret S. 1984. "An Indian Right to Water Undiminished in Quality." *Hamline Law Review* 7: 347.

Tsosie, Rebecca. 2011. "Reconceptualizing Tribal Rights: Can Self-Determination be Actualized within the U.S. Constitutional Structure?" *Lewis & Clark Law Review* 15(4): 923–950.

---- 2002. "Tribalism, Constitutionalism, and Cultural Pluralism: Where do Indigenous Peoples Fit within Civil Society?" *Journal of Constitutional Law* 5(2): 357–404.

---- 1996. "Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge." *Vermont Law Review* 21: 225–333.

Tsuji, Leonard J.S. and Elise Ho. 2002. "Traditional Environmental Knowledge and Western Science: In Search of Common Ground." *The Canadian Journal of Native Studies* 22(2): 327–360.

Tuck, Eve & K. Wayne Yang. 2012. "Decolonization is not a metaphor." *Decolonization: Indigeneity, Education & Society* 1(1): 1–40.

Turem, Ziya Umut & Andrea Ballestero. 2014. "Regulatory Translations: Expertise and Affect in Global Legal Fields." *Indiana Journal of Global Legal Studies* 21 (1): 1–26.

Turner, Dale. 2006. *This is Not a Peace Pipe: Towards a Critical Indigenous Philosophy* (Toronto: Univ. of Toronto Press).

U

Usher, Peter. 2003. “Environment, Race and Nation Reconsidered: Reflections on Aboriginal Land Claims in Canada.” *The Canadian Geographer* 47(4): 365-382.

V

Valverde, Mariana. 2014. “‘Time Thickens, Takes on Flesh’: Spatiotemporal Dynamics in Law.” In *The Expanding Spaces of Law: A Timely Legal Geography*. Irus Braverman et al., eds. (Stanford, CA: Stanford Law Books).

----- 2009. “Jurisdiction and Scale: Legal ‘Technicalities’ as Resources for Theory.” *Social & Legal Studies* 18(2): 139–57.

Venne, Sharon H. 2011. “Road to the United Nations and Rights of Indigenous Peoples,” *Griffith Law Review: Special Issue on the 2007 Declaration on the Rights of Indigenous Peoples: Indigenous Survival—Where To From here?* 20(3): 557–577.

Vennum, Thomas, Jr. 1988. *Wild Rice and the Ojibway People* (St. Paul, MN: Minnesota Historical Society Press).

Veracini, Lorenzo. 2011. “Introducing Settler Colonial Studies.” *Settler Colonial Studies* 1(1): 1–12.

Verma, Priya, et al. 2016. “Integrating Indigenous Knowledge and Western Science into Forestry, Natural Resources, and Environmental Programs.” *Journal of Forestry* 114(6): 648–655.

Vizenor, Gerald & James Mackay. 2013. “Constitutional Narratives: A Conversation with Gerald Vizenor.” In *Centering Anishinaabeg Studies: Understanding the World through Stories*, Jill Doerfler, Niigaanwewidam James Sinclair, & Heidi Kiiwetinepinesiik Stark, eds. (East Lansing, MI: Michigan State Univ. Press).

W

Walker, Peter. 2003. “Reconsidering ‘Regional’ Political Ecology: Towards a Political Ecology of the American West.” *Progress in Human Geography* 27, 1: 7-24.

---- 2005. “Political Ecology: Where is the Ecology?” *Progress in Human Geography* 29, 1: 73-82.

Watson, Irene. 2011. “Aboriginal(ising) International Law and Other Centres of Power.” *Griffith Law Review: Special Issue on the 2007 Declaration on the Rights of Indigenous Peoples: Indigenous Survival—Where To From here?* 20(3): 619–640.

Watts, Michael. 2000. “Political Ecology.” In *The Dictionary of Human Geography* (4th Edition), eds. R.J. Johnston, Derek Gregory, Geraldine Pratt, and Michael Watts, 590–93 (Malden, MA: Blackwell).

Watts, Michael and Richard Peet. 2004. "Liberating Political Ecology." In *Liberation Ecologies: Environment, Development, Social* Movements, Second Edition, Richard Peet and Michael Watts, eds. (New York: Routledge).

Weissner, Siegfried. 1999. "Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis." *Harvard Human Rights Journal* 12: 57.

Wester, Barbara Leibhardt. 1990. *Land Divided by Law: The Yakama Indian Nation as Environmental History 1840–1933* (New Orleans, LA: Quid Pro Books).

Whitehead, Alfred North. 1920. *The Concept of Nature* (Cambridge: Cambridge Univ. Press).

Wiersma, Lindsey L. 2004. "Indigenous Lands as Cultural Property: A New Approach to Indigenous Land Claims." *Duke Law Journal* 54: 1061.

Whyte, Kyle Powys. 2018a. "Critical Investigations of Resilience: A Brief Introduction to Indigenous Environmental Studies & Sciences." *Daedalus, the Journal of the American Academy of Arts & Sciences* (2): 136–147.

---- 2018b. "Food Sovereignty, Justice, and Indigenous Peoples: An Essay on Settler Colonialism and Collective Continuance." In *The Oxford Handbook of Food Ethics*, Anne Barnhill, Mark Budolfson, and Tyler Doggett, eds. (Oxford: Oxford Univ. Press).

---- 2017a. "Our Ancestors' Dystopia Now: Indigenous Conservation and the Anthropocene." In *Routledge Companion to the Environmental Humanities* (New York: Routledge).

---- 2017b. Keynote Address at Nibi and Manoomin Bridging Worldviews Symposium: Accountable Relationships, Oct. 10–11, 2017, White Earth Nation, Mahnomen, Minnesota.

---- 2014. "A concern about shifting interactions between indigenous and non-indigenous parties in US climate adaptation contexts." *Interdisciplinary Environmental Review* 15: 114–133.

---- 2013. "Conveners of Responsibilities." Essay for the Center for Humans & Nature. Available at: https://www.humansandnature.org/earth-ethic-kyle-powys-whyte [Last Accessed March 23, 2018].

---- 2011. "The Recognition Dimensions of Environmental Justice in Indian Country." *Environmental Justice* 4(4): 199–205.

Whyte, Kyle Powys and Robert P. Crease. 2010. "Trust, expertise, and the philosophy of science." *Synthese* 177: 411–425.

Wilkins, David E. 2013. *Hollow Justice: A History of Indigenous Claims in the United States* (New Haven, CT: Yale Univ. Press).

---- 2003. "The Rehnquist Court and Indigenous Rights: The Expedited Diminution of Native Powers of Governance." *Publius* 33(3): 83–110.

---- 1999. “The Reinvigoration of the Doctrine of ‘Implied Repeals:’ A Requiem for Indigenous Treaty Rights.” *The American Journal of Legal History* 43(1): 1–26.

---- 1998. “Tribal-State Affairs: American States as ‘Disclaiming’ Sovereigns.” *Publius* 28(4): 55–81.

---- 1996. “Indian Treaty Rights: Sacred Entitlements or “Temporary Privileges?” *American Indian Culture and Research Journal* 20(1): 87–129.

---- 1994. “Reconsidering the Tribal-State Compact Process.” *Policy Studies Journal* 22(3): 474–488.

---- 1993. “Transformations in Supreme Court Thought: The Irresistible Force (Federal Indian Law & Policy) Meets the Movable Object (American Indian Tribal Status).” *The Social Science Journal* 30(2): 181–207.

Wilkins, David E. & K. Tsianina Lomawaima. 2001. *Uneven Ground: American Indian Sovereignty and Federal Law* (Norman, OK: Univ. of Oklahoma Press).

Wilkins, David E. & Heidi Kiiwetinepinesiik Stark. 2001. *American Indian Politics and the American Political System*, 1st Ed. (Lanham, MD: Rowman & Littlefield).

Wilkinson, Charles F. 2005. *Blood Struggle: The Rise of Modern Indian Nations* (New York: Norton).

---- 1987. *American Indians, Time, and the Law: Native Societies and a Modern Constitutional Democracy* (New Haven, CT: Yale University Press).

Wilkinson, Charles F. & Eric R. Biggs. 1977. “The Evolution of the Termination Policy.” *American Indian Law Review* 5(1): 139–184.

Wilkinson, Charles F. & John M. Volkman. 1975. “Judicial Review of Indian Treaty Abrogation: As Long as the Water Flows, or the Grass Grows up on the Earth—How Long a Time is That.” *California Law Review* 63(3): 601–661.

Williams, Jr., Robert. 2012. *Savage Anxieties* (New York: Palgrave Macmillan).

---- 2005. *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America* (Minneapolis, MN: Univ. of Minnesota Press).

---- 1997. *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600–1800*. (New York: Routledge).

---- 1990. "Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World." *Duke Law Journal* 1990: 660.

---- 1987. "Taking Rights Aggressively: The Perils of Critical Legal Theory for Peoples of Color." *Law & Inequality* 5: 103.

Winterstein, T.A. 2002. Hydrology and Water Quality of the Grand Portage Reservation, Northeastern Minnesota, 1991–2000. Water-Resources Investigations Report 02-4156. U.S. Department of the Interior & U.S. Geological Survey.

Wolfe, Patrick. 2013. "Recuperating Binarism: a heretical introduction." *Settler Colonial Studies* 3(3–4): 257–279.

---- 2011. "Race and the Trace of History." In *Studies in Settler Colonialism*. New York: Palgrave Macmillan: 272–296.

---- 2006. "Settler colonialism and the elimination of the native." *Journal of Genocide Research* 8(4): 387–409.

---- 2001. "Land, Labor, and Difference: Elementary Structures of Race." *The American Historical Review* 106(3): 866–905.

---- 1999. *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event* (New York: Cassell).

---- 1997. "History and Imperialism: A Century of Theory, from Marx to Postcolonialism." *The American Historical Review* 102(2): 388–420.

Woo, Grace Li Xiu. 2011. *Ghost Dancing with Colonialism: Decolonization and Indigenous Rights at the Supreme Court of Canada* (Vancouver: UBC Press).

X

Xanthaki, Alexandra. 2009. "Indigenous Rights in International Law Over the Last 10 Years and Future Developments." *Melbourne Journal of International Law* 10(1): 27.

Y

Yepez, Rodrigo Uprimny & Nelson Camilo Sanchez. 2013. "Human Rights: New Threats in the Hemisphere." *Americas Quarterly*.

Young, Robert J.C. 2004. *White Mythologies: Writing History and the West*, 2nd Ed. (New York: Routledge).

Yusoff, Kathryn. 2013. "Geologic life: prehistory, climate, futures in the Anthropocene." *Environment and Planning D: Society and Space* 31(5): 779–795.