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Standing for Standing Rock?: Vindicating Native American Religious and Land RIghts by Adapting New Zealand's Te Awa Tupua Act to American Soil

Malcolm McDermond

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ABSTRACT

On February 23, 2017, the Standing Rock Sioux Tribe ("Tribe") was forced to disband its nearly year-long protest against the construction of the Dakota Access Pipeline, which threatened the integrity of its ancestral lands. The Tribe sought declaratory and injunctive relief in the United States District Court for the District of Columbia, but the court ruled against the Tribe and failed to protect its interests. While the United States was forcibly removing Indigenous protesters, other countries were taking steps to protect Indigenous populations. In unprecedented legislative action, New Zealand took radical steps to protect the land and cultural rights of the Indigenous People of New Zealand, the Maori, by passing the Te Awa Tupua (Whanganui River Claims Settlement) Act. Through this act, New Zealand granted legal personhood to the Whanganui River and established a new legal paradigm for protecting Indigenous peoples' unique cultural and land rights.

This Comment discusses how, historically, the United States' legal system has failed to articulate and protect Native Americans' unique cultural, religious, and land rights. This Comment analyzes the existing framework in American jurisprudence that could underpin the potential adoption of a legal innovation similar to the Te Awa Tupua Act in the American context. This legal framework includes extending standing to natural objects and creating special legislative carve-outs to protect Native American cultural and religious rights.

* J.D. Candidate, The Pennsylvania State University's Dickinson Law, 2019. For my father, who taught me to write, and my mother, who taught me to listen.

Finally, after analyzing how the Te Awa Tupua Act functions, this Comment advocates for adopting a legislative framework similar to the Te Awa Tupua Act to ensure that the unique cultural, religious, and land rights of Native Americans are properly vindicated in the United States.

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I. INTRODUCTION

On February 7, 2017, the United States Army Corps of Engineers granted the Dakota Access Company an easement under

Lake Oahe on the Missouri River.[1] This easement was the final regulatory stamp needed to complete the Dakota Access Pipeline, and construction began immediately.[2] This confluence of legal defeat and quick construction effectively ended the months-long protest at the Standing Rock Sioux Reservation—the largest Native American protest movement in recent history.[3]

The very next day, in a final act of resistance, the Cheyenne River Sioux Tribe filed a motion for a preliminary injunction and a temporary restraining order in the United States District Court for the District of Columbia.[4] The Tribe claimed that the completion of the pipeline was a violation of their rights under the Religious Freedom Restoration Act.[5] The pipeline and the oil it carried, the Tribe

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1. *See* Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 239 F. Supp. 3d 77, 82 (D.D.C. 2017).

2. *See* Rebecca Hersher, *Key Moments in the Dakota Access Pipeline Fight*, NAT'L PUB. RADIO (Feb. 22, 2017), https://n.pr/2yA5fxC [https://perma.cc/D63Y-VKG2].

3. *See Dakota Pipeline: What's Behind the Controversy?*, BRIT. BROADCASTING CORP. (Feb. 7, 2017), https://bbc.in/2fIMscy [https://perma.cc/2CRV-AWFM]. With an estimated 10,000 participants at its peak and roughly 200 native groups represented, the impact of the protest is difficult to overstate. *Id.* The movement began in April 2016 when Standing Rock Sioux tribal members established camps at sacred sites near the proposed Dakota Access Pipeline route. *See* Leah Donnella, *At the Sacred Stone Camp, Tribes and Activists Join Forces to Protect the Land*, NAT'L PUB. RADIO (Sept. 10, 2016), https://n.pr/2G4fyAq [https://perma.cc/ZPS4-FT4R]. At that time there had already been a rather convoluted months-long discussion between the Standing Rock Sioux Tribe and the Army Corps of Engineers about the proposed route's environmental and cultural impact. *See* Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 205 F. Supp. 3d 4, 7–8 (D.D.C. 2016). The Tribe claimed the Army Corps had failed to properly consult the Tribe concerning the pipeline. *Id.* As the protest movement grew, the movement attracted support from thousands of people from Native American groups across the country to other social reform movements, including Black Lives Matter. *See* Leah Donnella, *The Standing Rock Resistance Is Unprecedented (It's Also Centuries Old)*, NAT'L PUB. RADIO (Nov. 22, 2016), https://n.pr/2DWeVZ0 [https://perma.cc/J64Q-KYPQ]. In December 2016, despite winning a legal challenge against the Standing Rock Sioux Tribe, the Army Corps of Engineers announced it would not grant the requested easement. *See Standing Rock Sioux Tribe*, 205 F. Supp. 3d at 7–8; *see also* Nathan Rott & Eyder Peralta, *In Victory for Protestors, Army Halts Construction of Dakota Pipeline*, NAT'L PUB. RADIO (Dec. 4, 2016), https://n.pr/2D35x2s [https://perma.cc/B77J-AKYJ]. However, in 2017, after the Trump Administration took office, the Army Corps reversed course and granted the easement. *See* Charlie Northcott, *Dakota Access Pipeline: Is the Standing Rock Movement Defeated?*, BRIT. BROADCASTING CORP. (Feb. 9, 2017), https://bbc.in/2GjmvN1 [https://perma.cc/F2YT-5CUB]. In the wake of this defeat, the protest camp was completely emptied by the end of February 2017. *See* Mitch Smith, *Standing Rock Protest Camp, Once Home to Thousands, Is Razed*, N.Y. TIMES (Feb. 23, 2017), https://nyti.ms/2lMUrrb [https://perma.cc/E2EZ-N262].

4. *See Standing Rock Sioux Tribe*, 239 F. Supp. 3d at 82.

5. *Id. See* Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2018). The Religious Freedom Restoration Act provides that the government

argued, would pollute the ritual purity of the Missouri River waters, thereby effectively prohibiting the Tribe's ability to exercise its traditional religious practices.[6] The motion was denied[7] and, in due time, crude oil began to flow.[8]

However, while the United States was promoting the interests of enterprise over those of Indigenous peoples and the environment, novel legal developments were happening across the globe.[9] On March 20, 2017, New Zealand passed the Te Awa Tupua (Whanganui River Claims Settlement) Act.[10] This act settled 140 years of negotiations between the Maori and New Zealand's government concerning rights related to the Whanganui River.[11] While such a resolution of differences is important, the most significant legal development of the Act was the grant of legal personhood to the Whanganui River as a means of vindicating Maori cultural and religious rights.[12]

This Comment argues that the United States should adopt a legislative model similar to that of New Zealand's Te Awa Tupua Act. Such a model would provide much needed protections to a particularly nebulous area of American law: the interaction between the American legal system and Native American cultural, religious, and land rights.

This Comment begins with a brief introduction of the legal theories that support granting legal standing to natural objects like land or rivers.[13] This Comment then discusses the distinct religious expressions of Native American peoples and how protecting these unique expressions of faith has historically required specific congressional carve-outs.[14] Part II also gives a brief introduction of the rights held by legal constructs like corporations: a legal fiction anal-

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cannot *substantially* burden an individual's religious exercise even through laws of general applicability. *Id.* § 2000bb-1(a). The government may still act in such a way to substantially burden an individual if the government can demonstrate that the burden furthers a compelling government interest and is the least restrictive means of doing so. *Id.* § 2000bb-1(b).

6. *See Standing Rock Sioux Tribe*, 239 F. Supp. 3d at 82.

7. *Id.* at 100.

8. *See* Merrit Kennedy, *Crude Oil Begins to Flow Through Controversial Dakota Access Pipeline*, NAT'L PUB. RADIO (June 1, 2017), https://n.pr/2SJWzOF [https://perma.cc/HK6M-STTV].

9. *See* Eleanor Ainge Roy, *New Zealand River Granted Same Legal Rights as Human Being*, GUARDIAN (Mar. 16, 2017), https://bit.ly/2nHobni [https://perma.cc/A67U-3ETL].

10. Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, (N.Z.).

11. *See* Roy, *supra* note 9.

12. *See* Te Awa Tupua Act, pt 3, sub 2, s 71.

13. *See infra* Part II.A.

14. *See infra* Part II.B–C.

ogous to Te Awa Tupua.[15] Part III examines New Zealand's Te Awa Tupua Act and analyzes its structure, purpose, and effects.[16] Part III then argues that application of a similar model in the United States would not only be possible, but a uniquely beneficial way of vindicating Native American cultural, religious, and land rights.[17]

II. BACKGROUND

A. Natural Objects Do Not Have Standing: But Congress Can Grant Rights to Natural Objects

Within U.S. jurisprudence, land and natural objects generally do not have intrinsic rights.[18] Nor has any court acted conclusively to extend rights or standing to land or natural objects.[19] Despite this reality, activists continue to advocate and litigate in an effort to expand rights to land and the natural world.[20]

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15. *See infra* Part II.D.

16. *See infra* Part III.A.

17. *See infra* Part III.B.

18. *See* Ezer v. Fuchsloch, 160 Cal. Rptr. 486, 493 (Ct. App. 1979) (stating that courts have not adopted "the principle that natural objects are given independent 'rights' and 'standing'"); *see also* CHRISTOPHER D. STONE, SHOULD TREES HAVE STANDING?: LAW, MORALITY, AND THE ENVIRONMENT 5–7 (3d ed. 2014) [hereinafter STONE, SHOULD TREES HAVE STANDING?] (arguing that although under current law the environment is not granted standing or rights, such rights should be granted to the environment in order to protect the integrity and well-being of the natural world).

19. *See*, *e.g.*, Pa. Gen. Energy Co. v. Grant Twp., No. 14–209ERIE, 2015 WL 6002163, at *5 (W.D. Pa. Oct. 14, 2015) (declining to determine whether a river ecosystem seeking to intervene in the action had standing under the law), *aff'd sub nom.* Pa. Gen. Energy Co. v. Grant Twp. E. Run Hellbenders Soc'y, Inc., 658 F. App'x 37 (3d Cir. 2016). While not deciding the validity of the Little Mahoning Watershed's ability to bring suit, in dicta the U.S. Court of Appeals for the Third Circuit questioned whether the Little Mahoning Watershed was an appropriate party pursuant to the Federal Rules of Civil Procedure because it lacked a capacity to sue or be sued. *See Grant Twp. E. Run Hellbenders Soc'y*, 658 F. App'x at 38 n.2; *see also Ezer*, 160 Cal. Rptr. at 493.

20. *See generally* Complaint, Colo. River Ecosystem v. Colorado, No. 1:17-cv-02316 (D. Colo. filed Sept. 25, 2017), 2017 WL 4284548. The suit was later dismissed with prejudice in December 2017. *See* Press Release, Office of the Colo. Att'y Gen., Statement from Attorney General Cynthia H. Coffman on the United States District Court's Dismissal with Prejudice of *Colorado River Ecosystem v. The State of Colorado* (Dec. 4, 2017), https://bit.ly/2MIJ6DW [https://perma.cc/D2F7-5NZ3]; *see also* STONE, SHOULD TREES HAVE STANDING?, *supra* note 18. Stone argues that under the current legal system, polluted or degraded land and ecosystems fail to realize the benefits of the legal system's protections, and to remedy this shortcoming the law should grant the environment rights and adopt land "guardianship" positions to advocate for the "land's rights in the land's name." *Id.* at 7–9.

One of the clearest examples of this advocacy can be found in Christopher Stone's formative work *Should Trees Have Standing?*.[21] Stone's book articulates an in-depth case for granting rights to natural objects.[22] Stone supports his argument with legal as well as moral imperatives.[23] Stone grabs one's attention by highlighting the fact that all the people who now enjoy rights did not always enjoy those rights—for example, slaves and women.[24] However, Stone downplays the radical nature of his syllogistic thesis by reminding the reader that many non-human entities possess rights too.[25]

Stone further argues that natural objects should have rights because under the current system courts cannot directly or adequately address the harm polluters and other degrading entities pose to natural objects—as opposed to individuals.[26] Specifically, Stone highlights how courts grant relief only to a person negatively impacted by the aforementioned polluter, instead of the natural object itself.[27] As a remedy to this shortcoming, Stone urges courts to adopt legal "guardianships" of the environment's rights similar to the guardianships parents have over minor children.[28] Further, to protect substantive rights belonging to the environment, Stone proposes a system analogous to tort and copyright infringement claims: shift the costs of violating the land's rights to the violator.[29]

Indicative of how influential Stone's work is, Stone's advocacy for the intrinsic rights of land has been widely recognized and discussed by political columnists, judges, and lawmakers.[30] Stone's

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21. *See generally* STONE, SHOULD TREES HAVE STANDING?, *supra* note 18.

22. *See generally* STONE, SHOULD TREES HAVE STANDING?, *supra* note 18.

23. *Id.* at 3.

24. *Id.* at 2. While Stone's argument for extending legal standing to nature is in its own right bolstered by what he claims to be an analogous context in the historical process of slowly extending legal rights to natural persons like slaves and women, this Comment's thesis diverges from Stone's argument by recognizing that any extension of legal rights to natural objects must be derivative of natural persons. *See id.*; *see also infra* Part III.

25. STONE, SHOULD TREES HAVE STANDING?, *supra* note 18, at 1–2.

26. *Id.* at 7, 13–15.

27. *Id.* at 13–15.

28. *Id.* at 8–9.

29. *Id.* at 14.

30. *See* Cetacean Cmty. v. Bush, 386 F.3d 1169, 1176 (9th Cir. 2004) (relying on Stone's earlier work to find that Article III of the Constitution does not prohibit Congress from authorizing suits in the name of natural objects); Ezer v. Fuchsloch, 160 Cal. Rptr. 486, 493 (Ct. App. 1979); *see also* 118 CONG. REC. 18340, 18400–13 (1972) (statement of Sen. Hart); Colman McCarthy, *The Price of Progress: Alaska, Thy Name Is Victim*, WASH. POST (Feb. 24, 1980), https://wapo.st/2EoFX9Z [https://perma.cc/XB32-TXED].

work was even persuasive enough to influence Supreme Court Justice Douglas's dissent in *Sierra Club v. Morton*.[31]

In *Sierra Club v. Morton*, the Sierra Club sought declaratory, preliminary, and injunctive relief to prevent the U.S. Forest Service from permitting the Walt Disney Company to develop the Mineral King Valley nature preserve as a ski resort.[32] The Sierra Club claimed it had standing because it had a special interest in the integrity of the nature preserve.[33] The Court found that the Sierra Club did not have standing to protect the nature preserve because it had failed to allege injury specific to it or its members.[34] The Court reasoned that a "mere interest" in a problem is insufficient to establish an individual's standing.[35]

Justice Douglas proposed the creation of "a federal rule that allow[s] environmental issues to be litigated before federal agencies or federal courts" by conferring "standing upon environmental objects to sue for their own preservation."[36] Justice Douglas supported this admonition by reasoning that standing granted to inanimate objects like ships and corporations would be analogous to any standing potentially granted to rivers, mountains, or meadows.[37] He concluded that if the natural objects were able to bring cases on their own behalf, the burden to act as the natural objects' spokesperson would fall on an individual who has an "intimate relation" with the natural object.[38]

Justice Douglas's words did not fall on deaf ears. In response to the majority's opinion that the Sierra Club could not bring a claim based on the non-economic injury derived from environmental degradation,[39] Congress amended the Federal Water Pollution Control Act to provide *any citizen* the right to bring suit against any

31. *See* Sierra Club v. Morton, 405 U.S. 727, 742 (1972) (Douglas, J., dissenting) (citing Christopher Stone, *Should Trees Have Standing?: Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972)).

32. *Id.* at 728–30 (majority opinion).

33. *Id.* at 736.

34. *Id.* at 739.

35. *Id.*

36. *Id.* at 741–42 (Douglas, J., dissenting).

37. *Id.* at 742–43. Justice Douglas concluded that standing for a natural object would be akin to the standing held by ships and intangible "persons" such as corporations and corporations sole. *Id.*

38. *Id.* at 745, 752. Specifically, "people who have so frequented the place as to know its values and wonders will be able to speak for the entire ecological community." *Id.* at 752.

39. *Id.* at 739 (majority opinion) ("[A] mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the APA.").

polluter or administrator failing to perform its duties under the act.[40] While Congress did not take as radical a step as Justice Douglas proposed, it effectively demonstrated that it has the power to expand who has standing in environmental degradation cases.[41] Congress's action authorizing citizen suits on behalf of the environment bolsters the idea that Congress can legislatively confer rights or standing to land entities.

Justice Douglas's words have been persuasive in other courts as well. In *Ezer v. Fuchsloch*,[42] the California Court of Appeals declined to grant standing to a pine tree that was the object of a restrictive covenant property dispute.[43] On appeal from an injunction mandating the trimming of the disputed pine tree, the appellants argued that the trial court had failed to properly consider the pine tree's rights.[44] The court found that the trial court did not err in declining to extend rights to the pine tree.[45] Relying on Justice Douglas's admonitions, the court reasoned that environmental protections come from legislative enactment, and in the absence of legislative action, the court should not take judicial action to create such rights in the pine tree.[46] The court implicitly reasoned that the legislature has the authority to extend rights and protections to the environment through legislative enactments.[47]

Nor has the concept of legislatively conferred standing been limited solely to the environment. Courts considering whether animals have standing to bring a claim have also adopted the reasoning that legislative action can grant standing to unlikely parties.[48] In

40. *See* Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92–500, § 505, 86 Stat. 816, 888 (codified at 33 U.S.C. § 1365 (2018)).

41. *See* Fairview Twp. v. Envtl. Prot. Agency, 773 F.2d 517, 523 n.10 (3d Cir. 1985) ("The aspect of § 1365 that attracted the most attention in Congress was the conferring of standing upon citizens who could demonstrate only injury in fact that was non-economic. As such the citizens' suit provision was a response to the Supreme Court's decision in *Sierra Club v. Morton* . . . .").

42. Ezer v. Fuchsloch, 160 Cal. Rptr. 486 (Ct. App. 1979).

43. *Id.* at 493.

44. *Id.* at 488.

45. *Id.* at 493.

46. *Id.*

47. *Id.*

48. *See* Cetacean Cmty. v. Bush, 386 F.3d 1169, 1175–76 (9th Cir. 2004); *see also* Citizens to End Animal Suffering & Exploitation v. New England Aquarium, 836 F. Supp. 45, 49 (D. Mass. 1993) ("If Congress and the President intended to take the extraordinary step of authorizing animals as well as people and legal entities to sue, they could, and should, have said so plainly."); *see also In re* Nonhuman Rights Project Inc. v. Stanley, 16 N.Y.S.3d 898, 916 (Sup. Ct. 2015) (finding that the "question of 'whether the law should accord legal personality . . . in most instances devolves on the Legislature'" (quoting Byrn v. N.Y.C. Health & Hosps. Corp., 286 N.E.2d 887, 889 (N.Y. 1972))). *But see* Coho Salmon v. Pac. Lumber

Cetacean Community v. Bush,[49] the U.S. Court of Appeals for the Ninth Circuit found that the sole plaintiff, the Cetacean Community, "all of the world's whales, porpoises, and dolphins,"[50] did not have standing to bring a claim against the U.S. Navy.[51] In determining whether the cetaceans had standing, the court first addressed whether American jurisprudence prohibited suits by animals.[52] The court concluded:

> [W]e see no reason why Article III prevents Congress from authorizing a suit in the name of an animal, any more than it prevents suits brought in the name of artificial persons such as corporations, partnerships or trusts, and even ships, or of juridically incompetent persons such as infants, juveniles, and mental incompetents.[53]

The court then sought to resolve the issue of whether Congress had enacted legislation "granting standing to an animal by statutorily authorizing a suit in its name."[54] The court concluded no such statutory authorization existed.[55]

These cases and Congress's actions post-*Sierra Club* illustrate that, within American jurisprudence, Article III does not specifically prohibit land and natural objects from acquiring standing.[56] Rather, the limitation on land bringing a claim in its own right is a lack of authorization by statute.[57]

B. Unique Relationship Between Native Americans and Land

Stone's claim that land and natural objects should have recognized intrinsic rights is not entirely new; Native Americans have

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Co., 61 F. Supp. 2d 1001, 1008 n.2 (N.D. Cal. 1990) ("[T]he court notes that, to swim its way into federal court in this action, the coho salmon would have to battle a strong current and leap barriers greater than a waterfall or the occasional fallen tree.").

49. Cetacean Cmty. v. Bush, 386 F.3d 1169 (9th Cir. 2004).
50. *Id.* at 1171.
51. *Id.*
52. *Id.*
53. *Id.* at 1176.
54. *Id.*
55. *Id.* at 1179.
56. *Id.* at 1175–76; *see also* Hawaiian Crow v. Lujan, 906 F. Supp. 549, 552 (D. Haw. 1991) (finding the attorney naming the Hawaiian crow as a plaintiff was not subject to discipline for filing a frivolous suit because while the plaintiffs "have cited no controlling case law directly supporting the [Hawaiian crow's] right to appear as a named plaintiff, *neither have the . . . defendants presented any direct authority to the contrary*" (emphasis added)).
57. *See Cetacean Cmty.*, 386 F.3d at 1175–76; *see also* Ezer v. Fuchsloch, 160 Cal. Rptr. 486, 493 (Ct. App. 1979).

long recognized the intrinsic value land has in its own right.[58] This recognition that land has intrinsic value may best be illustrated by Chief Seattle's commentary about the threatened loss of his ancestral lands.

In a letter attributed to Chief Seattle, he depicts land in a familial light and as deserving respect.[59] Chief Seattle, worried by the overtures of the federal government to buy his land, poetically highlights the difference between Western concepts of land and those of his people.[60] He opines that many Native American peoples have an intricate connection to the land; a connection best described as a familial relationship.[61] The rivers and the sky are brothers, and the earth is a mother to Native Americans.[62] As such, the rivers, sky, and earth deserve the same kind of respect and kindness one would give to one's own kin.[63]

The Native American prophet Smohalla's resistance to adopting agriculture and mining on native lands exemplifies the unique relationship of respect Native Americans have with land.[64] Smohalla equated farming with taking a knife to his mother's bosom and mining with digging up his mother's bones.[65] According to Smohalla, farming and mining were so offensive to the respect owed to the land that if he were to adopt these practices, he would be unable to find any solace from the earth after his death.[66]

While land certainly garners respect from Native Americans, many Native Americans also value land for its religious significance.[67] For many Native Americans, land is sacred and imbued

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58. *See* CAROLE E. GOLDBERG ET AL., AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 974 (LexisNexis ed., 7th ed. 2015).

59. *See Letter Attributed to Chief Seattle*, *in* MANY HEAVENS, ONE EARTH: READINGS ON RELIGION AND THE ENVIRONMENT 101 (Clifford C. Cain ed., 2012). Nor is a familial relationship limited to the land; according to Chief Seattle, the relationship extends to animals as well. *Id.* at 102.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *See* David Kinsley, *Native American Religions*, *in* MANY HEAVENS, ONE EARTH: READINGS ON RELIGION AND THE ENVIRONMENT 107, 112 (Clifford C. Cain ed., 2012).

65. *Id.* at 113.

66. *Id.* Not all Native Americans, however, were as averse to agriculture as Smohalla. *Id.* at 111–12. For example, the Hopi and Navajo regularly cultivated corn. *Id.* Despite the use of agriculture, it was still seen as a sacred and holy act that required observance of rituals and traditions. *Id.*

67. *Id.* at 112; *see also* Standing Rock Sioux Tribe v. United States Army Corps of Eng'rs, 239 F. Supp. 3d 77, 82 (D.D.C. 2017) (discussing how the Lakota people believe the construction of an oil pipeline beneath Lake Oahe would dese-

with the divine.[68] Within the Hopi, Apache, and Koyukon Tribes, historical tribal lands, religious praxis, and culture are intricately connected.[69] This connection is so enmeshed that the land and religion are inseparable.[70]

The American legal system has struggled to account for the importance of land to Native American religions. The number of legal challenges to land development projects brought by Native Americans under the Free Exercise Clause[71] illustrates how inseparable land and religion are for many Native Americans.[72]

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crate the water and "render them unsuitable for use in their religious sacraments").

68. *See, e.g.*, Wilson v. Block, 708 F.2d 735, 737 (D.C. Cir. 1983) (accepting the plaintiff's contention that the San Francisco Peaks in Arizona were central to Hopi and Navajo religion and were the home of specific deities).

69. *See* Joel Martin, *The Land Looks After Us*, *in* MANY HEAVENS, ONE EARTH: READINGS ON RELIGION AND THE ENVIRONMENT 117, 118–19 (Clifford C. Cain ed., 2012).

70. *Id.*

71. U.S. CONST. amend. I ("Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof . . . ."). The protections of the Free Exercise Clause, however, have been divided into protection of religious belief and protection of religious practice. *See* Emp't Div. v. Smith, 494 U.S. 872, 877 (1990). While the protection of belief is unlimited, not all religious practices enjoy the same broad protection. *Id.* A strict ban on a religious practice because that practice is associated with religious belief clearly violates the Free Exercise Clause. *Id.* However, a law that is otherwise generally applicable and that only hinders religious practice as an incidental result of its application does not violate the Free Exercise Clause. *Id.* at 878.

72. *See* Lying v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); *see also Wilson*, 708 F.2d at 738–39 (bringing a claim under the Free Exercise Clause to enjoin the government from developing ski resorts and using treated waste water on the San Francisco Peaks, mountains sacred to the Hopi and Navajo people); *see also* Badoni v. Higginson, 638 F.2d 172, 176 (10th Cir. 1980) (bringing a claim under the Free Exercise Clause against the government's action in damming a river that "drowned" Navajo gods, denied Navajo access to prayer sites, and permitted tourists to desecrate the sacred site); *see also* Sequoyah v. Tenn. Valley Auth., 620 F.2d 1159, 1160–62 (6th Cir. 1980) (bringing a claim under the Free Exercise Clause against the Tennessee Valley Authority's construction of a dam that would submerge traditional Cherokee lands with religious and cultural significance); *see also* Crow v. Gullet, 541 F. Supp. 785, 787–88 (D.S.D. 1982) (bringing a claim under the Free Exercise Clause against the State of South Dakota for constructing access roads around Bear Butte, a sacred site to the Lakota and Tsistsistas peoples). Although this Comment does not discuss property rights in much detail, it is important to note that property law is a significant factor in many of these suits, despite often being brought under the First Amendment. *See* Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners*, 52 UCLA L. REV. 1061, 1063–65 (2005). Carpenter argues that the federal government's ownership of many sacred native lands presents unique legal issues related to the exercise of Native American religion. *Id.* at 1069. In her article, Carpenter highlights how courts have used property law to justify adverse decisions against Native Americans' Free Exercise Clause claims. *Id.* at 1072–73, 1074, 1083–85. As such, Carpenter advocates for a new Native

For example, in *Lying v. Northwest Indian Cemetery Protective Ass'n*,[73] the Yurok, Karok, and Tolowa Tribes claimed that the Free Exercise Clause prevented the Federal Government from constructing a road and permitting logging in the Chimney Rock area of a national forest.[74] The Tribes argued that the road and logging would seriously harm their religious practice because the activities would irreparably damage sacred land central to their belief systems and impair the successful religious use of the land.[75]

The Supreme Court, however, declined to find that the government had violated the Tribes' rights under the Free Exercise Clause.[76] The Court reasoned there was no violation of the Free Exercise Clause because the construction of the road and authorization of logging would neither coerce the Tribes to violate their religious beliefs nor penalize the Tribes by denying them rights and benefits enjoyed by other citizens at large.[77]

The Court found that the Tribes' efforts to enjoin the road construction and logging amounted to an attempt to exact a specialized carve-out for themselves, instead of an attempt to prevent the government from inhibiting their exercise of religion.[78] The Court reasoned that if it upheld the Tribes' claims, the Tribes would acquire "de facto beneficial ownership" of public lands and divest the government of land rights.[79] The Court gave only scant consideration to the fact that the integrity of the land was so vital to the Tribes' religious practices that government action damaging the land through logging and road construction would make the religious use of the land ineffectual.[80]

However, in his dissenting opinion, Justice Brennan concluded that the majority opinion restricts Free Exercise Clause protections to such an extent that it allowed federal land use decisions to effectively destroy Native American religious practices.[81] Importantly, in reaching this conclusion, Justice Brennan relied on the significant differences between Western religious practices that do not require

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American property interest in federally owned sacred sites that draws heavily on common law non-owner rights, the public trust doctrine, and international human rights law. *See id.*

73. Lying v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).
74. *Id.* at 441–42.
75. *Id.* at 442.
76. *Id.* at 545–46.
77. *Id.* at 449.
78. *Id.* at 451–52.
79. *Id.* at 453.
80. *Id.* at 442.
81. *Id.* at 477 (Brennan, J., dissenting).

the preserved integrity of or access to specific lands and Native American religious practices that do.[82]

Justice Brennan further critiqued the majority's reasoning that the Free Exercise Clause prohibited only government actions compelling "affirmative conduct inconsistent with religious belief" and found that the majority's opinion impermissibly narrowed the Free Exercise Clause by valuing the form of governmental action over the effect of government action.[83] Justice Brennan relied on the reasoning of *Wisconsin v. Yoder*,[84] in which the Court focused its Free Exercise Clause analysis on the impact government actions would have on the religious practice itself.[85] By neglecting to consider the impact the government's action would have on the Tribes' religious practice, Justice Brennan argued, the majority failed to consider the Court's own precedent in *Yoder*.[86]

Unfortunately, although many Native American peoples believe land has inherent sacred and religious importance, the integrity of this sacred land is generally not protected under the First Amendment.[87]

C. Congressional and Executive Action Addressing the Uniqueness of Native American Cultures

Despite the U.S. government's atrocious record dealing with Native Americans,[88] there has been some détente between Native American tribes and the U.S. government over the past half-century.[89] Attempts to rectify the United States's sordid relations with Native American tribes have come primarily in the form of congressionally enacted protections of Native American cultural and religious expression, as well as executive programs of consultation with and exemptions for Native American tribes.[90]

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82. *Id.* at 460–61.

83. *Lying*, 485 U.S. at 467 (Brennan, J., dissenting).

84. Wisconsin v. Yoder, 406 U.S. 205 (1972).

85. *Lying*, 485 U.S. at 466–67 (Brennan, J., dissenting).

86. *Id.* at 467–68.

87. *See supra* notes 64–86.

88. *See* Lindsay Glauner, Comment, *The Need for Accountability and Reparation: 1830–1976 The United States Government's Role in the Promotion, Implementation, and Execution of the Crime of Genocide Against Native Americans*, 51 DEPAUL L. REV. 911, 929–34 (2002) (describing the history of the Indian Removal Act of 1830 and forced removal of Native Americans thereafter).

89. *See* discussion *infra* Part II.C.1–2.

90. *See* discussion *infra* Part II.C.1–2. This section addresses only the positive actions Congress and the executive branch have taken to make amends for past atrocities, in part because the courts have rarely stepped into a role of judicial activism to ensure the cultural and religious rights of Native American peoples. *See* Emp't Div. v. Smith, 494 U.S. 872, 890 (1990) (holding that the First Amend-

1. Congressional Action

Much like the executive branch, Congress's historical relationship with America's Indigenous Nations has not been a model of humanity or fairness.[91] Throughout the period of westward American expansion, Congress enacted legislation authorizing and aiding the dispossession of Native American lands and infringing on Native American rights.[92] However, over the past few decades, Congress has made attempts to rectify some of these wrongs committed by the United States.[93] For example, Congress has enacted legislation protecting Native American gravesites and establishing protocols for the return of Native American exhumed ancestors.[94]

Additionally, Congress has acted to protect unique Native American culture and religious expression after the judiciary has failed to do so.[95] In *Employment Division v. Smith*,[96] the Supreme Court held that an Oregon law prohibiting the consumption of peyote was constitutional.[97] The Court, unconvinced by the respondents' argument that the Oregon law prohibited their free exercise of religion as members of the Native American Church,[98] reasoned that a neutral law that did not intentionally prohibit a particular

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ment does not protect Native Americans who use peyote in religious ceremonies from states' inadvertently discriminatory laws); *Lying*, 485 U.S. at 451–52 (holding that the Free Exercise Clause was not violated by the Government's building of a road through sacred lands despite finding the Government's action would "virtually destroy" the Native Americans' religious practice); Cherokee Nation v. Georgia, 30 U.S. 1, 20 (1831) (finding that the Cherokee Nation did not have standing to bring claims in the United States Supreme Court against the U.S. Government because the Cherokee Nation was not a foreign state). *But see* Worcester v. Georgia, 31 U.S. 515, 561 (1832) (holding that the State of Georgia could not extend its own laws into the Cherokee Nation's territory). In *Worcester*, the judiciary, rather than the legislative or executive branches, protected the right to self-determination of Native American tribes in the United States. *See* Glauner, *supra* note 88, at 932–33. Unfortunately, the Supreme Court's ruling did not prevent the forced removal of the Cherokee Nation by President Andrew Jackson; this forced removal would infamously become known as the "Trail of Tears." *Id.* at 933.

91. *See* discussion *supra* Part II.D.1–2.

92. *See* Indian Removal Act, ch. 148, 4 Stat. 411 (1831); *see also* Indian Appropriation Act, ch. 120, 16 Stat. 544 (1871).

93. *See* H.R.J. Res. 46, 111th Cong. (2009) (recognizing the suffering of Native Peoples due to the actions and policies of the U.S. Government); *see also* Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461–479 (2018)) (abandoning federal policy of forced assimilation).

94. *See* Native American Graves Protection and Repatriation Act, Pub. L. No. 101-601, 104 Stat. 3048 (1990) (codified at 25 U.S.C. §§ 3001–3013 (2018)).

95. *See* Native American Religious Freedom Act Amendments of 1994, Pub. L. No. 103-344, 108 Stat. 3125 (codified as amended at 42 U.S.C. § 1996a (2018)).

96. Emp't Div. v. Smith, 494 U.S. 872 (1990).

97. *Id.* at 890.

98. *Id.* at 874, 878.

religious activity but merely had an "incidental effect" on the religious activity did not violate the First Amendment.[99]

The Supreme Court's ruling in *Employment Division v. Smith* prompted Congress to amend the American Indian Religious Freedom Act.[100] The amended act specifically protects Native American use of peyote for religious purposes and prohibits states from penalizing Native Americans on account of such religious use.[101] The amendment codified Congress's finding that the religious use of peyote was "integral to [Native Americans'] way of life" and the perpetuation of Native American culture.[102]

Pointedly, Congress directly addressed the Supreme Court's ruling in *Employment Division v. Smith*.[103] Congress found that the Supreme Court's ruling raised uncertainties as to whether or not the law protects a right to religious use of peyote.[104] This ambiguity, Congress feared, would only lead to further stigmatization, marginalization, and discriminatory treatment of Native Americans.[105] In short, Congress's amendments to the American Indian Religious Freedom Act affirms that the United States legislature can create laws sensitive to Native American forms of religious expression.[106]

2. *Executive Action*

Congress is not alone in attempting to redress the wrongs committed against Native Americans; the executive branch has also taken steps towards repairing relationships with Indigenous Peoples in America, primarily through the process of consultation.[107]

In 1971, the Nixon Administration implemented the first attempts at consultation between a federal agency and Native Ameri-

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99. *Id.* at 878.

100. American Indian Religious Freedom Act, Pub. L. No. 103-344, 108 Stat. 3125 (1978) (codified as amended at 42 U.S.C. §§ 1996–1996b (2018)).

101. *See* 42 U.S.C. § 1996a.

102. *Id.* § 1996a(1).

103. *Id.* § 1996a(4).

104. *Id.*

105. *Id.* § 1996a(5).

106. *See* John Celichowski, *A Rough and Narrow Path: Preserving Native American Religious Liberty in the* Smith *Era*, 25 AM. INDIAN L. REV. 1, 31 (2000). Celichowski also notes that in response to *Smith* the Oregon legislature created an exception for Native American religious use of peyote from its ban on peyote use. *Id.*

107. *See generally* Colette Routel & Jeffrey Holth, *Toward Genuine Tribal Consultation in the 21st Century*, 46 U. MICH. J.L. REFORM 417 (2013). Significantly, despite the executive branch's efforts to engage in consultation with Native Americans, what consultation means and what the duty of consultation requires is still unclear and lacks an operational definition. *Id.* at 453.

cans.[108] As part of the implementation, the Bureau of Indian Affairs (BIA) solicited feedback from federally recognized tribes on the agency's new procedures for fostering greater Native American participation in the BIA's personnel management decisions.[109] Part of this feedback became new BIA guidelines establishing a consultation policy on personnel matters.[110] As articulated by the guidelines, consultation required the BIA to consider the view of tribal governing bodies and provide these governing bodies with pertinent information.[111] Unfortunately, after the feedback, the BIA failed to comply with its own newly adopted consultation policies.[112]

In 2000, the Clinton Administration also attempted to institutionalize consultation with tribal leaders through an executive order titled "Consultation and Coordination with Indian Tribal Governments" ("Consultation Order").[113] The Consultation Order's goal was to "establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policy" as well as to "strengthen the United States government-to-government relationships with Indian tribes."[114] To achieve these goals, the Consultation Order required all federal agencies to implement consultation processes with Native American tribal officials.[115]

The Consultation Order required each federal agency whose regulatory policies had "tribal implications" to establish a procedure of "meaningful and timely input by tribal officials."[116] Additionally, the Consultation Order directed agencies responsible for formulating and implementing policies to encourage Native American tribes to develop their own policies and to defer to such Native American developed policies as much as possible.[117] But most indicative of the Administration's intention to recognize and protect cultural differences was the Consultation Order's mandate requiring agencies to use more flexible policy approaches to Native American tribes seeking waivers of statutory or regulatory requirements.[118]

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108. *Id.* at 436.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* at 437.
113. *See* Exec. Order No. 13175, 65 Fed. Reg. 67,249 (Nov. 9, 2000).
114. *Id.*
115. *Id.* at 67,250.
116. *Id.*
117. *Id.* at 67,251.
118. *Id.*

Compared to Nixon-era attempts at consultation, the Consultation Order increased actual collaboration between the United States and Native American tribal leaders.[119] However, the consultation process was not without problems.[120] Tribal leaders found the new processes ineffective and uncoordinated.[121] Even if the validity of the agency consultation processes was challenged, the agency consultation policies only offered limited redress for Native Americans because these policies did not have the force of law.[122]

The Obama Administration also sought to foster consultation between the executive branch and Native American tribes.[123] In 2013, the Administration issued an executive order titled "Establishing the White House Council on Native American Affairs" ("White House Council Order").[124] The White House Council Order authorized the Council to coordinate policy developments with the Domestic Policy Council.[125]

On the international level, the Obama Administration indicated its willingness to address past wrongs when the United States officially reconsidered its opposition to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[126] In so

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119. *Compare* Routel & Holth, *supra* note 107, at 436–39 (indicating that consultation with Native American tribes during the Nixon era was limited to personnel policies within the BIA), *with id.* at 442–44 (discussing how under the Clinton Administration consultation procedures expanded to all pertinent federal agencies).

120. *See* Routel & Holth, *supra* note 107, at 444–45.

121. *Id.* at 445.

122. *See* River Runners for Wilderness v. Martin, 593 F.3d 1064, 1071 (9th Cir. 2010). The Court stated:

> To have the force and effect of law, enforceable against an agency in federal court, the agency pronouncement must (1) prescribe substantive rules—not interpretive rules, general statements of policy or rules of agency organization, procedure or practice—and (2) conform to certain procedural requirements. To satisfy the first requirement the rule must be legislative in nature, affecting individual rights and obligations; to satisfy the second, it must have been promulgated pursuant to a specific statutory grant of authority and in conformance with the procedural requirements imposed by Congress.

Id. (quoting United States v. Fifty-Three (53) Eclectus Parrots, 685 F.2d 1131, 1136 (9th Cir. 1982)).

123. *See* Establishing the White House Counsel on Native American Affairs, Exec. Order. No. 13647, 78 Fed. Reg. 39,539 (July 1, 2013).

124. *Id.*

125. *Id.* at 39,541.

126. *See* Press Release, U.S. Mission Geneva, Ambassador Susan E. Rice on Indigenous Issues (Apr. 20, 2010), https://bit.ly/2Sr8Gmw [https://perma.cc/P2VK-TXD7]. The UNDRIP is a non-binding international mechanism that comprehensively sets out the rights of Indigenous Peoples. *See* G.A. Res. 61/178, annex, Declaration on the Rights of Indigenous People (Mar. 6, 2007). For example, the UNDRIP specifically recognized Indigenous Peoples' rights to practice their cul-

doing, the Administration publicly affirmed its commitment to consulting with Native American tribes to overcome the "legacy of bitter discrimination and sorrow that the first Americans still live with."[127]

In short, despite the executive branch's shortcomings in protecting Native American rights and culture, the executive branch has made attempts to improve the quality and frequency of consultations with Native Americans and to ameliorate the tensions arising from differences between Native American culture and federal regulations.

D. Legal Personhood Is a Legal Construct

The final idea to consider is that legal personhood or personality is a legal construct. Legal personhood is a tool that confers rights and duties on persons.[128] Persons are not only natural persons—human beings—but also artificial persons.[129] Artificial persons are entities that are created by law and given rights and duties akin to those of natural persons.[130] To fully illuminate this discussion, this Comment will briefly discuss a common and ubiquitous artificial person: the corporation.[131]

1. Corporations Have Been Granted Rights and Standing Through Legislative and Judicial Acts

Black's Law Dictionary defines a corporation as an entity "established in accordance with legal rules into a legal or juristic person that has a legal personality distinct from the natural persons who make it up, exists indefinitely apart from them, and has the

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tural traditions, to have access to their religious and cultural sites, and to "participate in decision-making in matters which would affect their rights." *Id.* at 5–6. It is worth noting that although the UNDRIP is non-binding, it has been interpreted as authoritative in some international jurisprudence. *See* Cal v. Att'y Gen. of Belize, Claim Nos. 171 & 172, ¶ 131 (Sup. Ct. Oct. 18, 2007) (Belize) (finding that the UNDRIP "reflected general principles of international law on indigenous peoples and their resources" and that Belize's vote in favor of the Declaration bound Belize not to deviate from these principles).

127. *See* Press Release, *supra* note 126.

128. *See* Bryant Smith, *Legal Personality*, 37 YALE L.J. 283, 283 (1928); s*ee also Personality*, BLACK'S LAW DICTIONARY (10th ed. 2014).

129. Billings v. State, 6 N.E. 914, 914 (Ind. 1886) ("Persons are of two kinds, natural and artificial.").

130. *See Artificial Person*, BLACK'S LAW DICTIONARY (10th ed. 2014) [hereinafter *Artificial Person*]. However, not all agree that the rights of artificial persons should have a theoretical and analogous basis in the rights of natural persons. *See generally* Alexis Dyschkant, Note, *Legal Personhood: How We Are Getting It Wrong*, 2015 U. ILL. L. REV. 2075 (2015).

131. *See Artificial Person*, *supra* note 130.

legal powers that its constitution gives it."[132] In other words, corporations are creatures of statute that owe their existence and powers to the will of governing bodies.[133] As such, the law of the jurisdiction of incorporation shapes the purposes and forms of a particular corporation.[134] Today, corporations benefit from laws that grant them perpetual existence, thus promoting particular objectives beyond the natural lifespan of a human being,[135] and other powers like the ability to contract and sue or be sued.[136]

However, the modern corporation did not always exist in its present form.[137] Nor have corporations always had the rights that they enjoy today.[138] Rather, corporate "personhood" has developed through an evolving process.[139] Over the past century, legislatures expanded corporate powers as a means of driving economic growth: for example, relaxing corporate purpose restrictions.[140]

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132. *Corporation*, BLACK'S LAW DICTIONARY (10th ed. 2014).

133. *See* Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 636 (1819) ("A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence."); *see also Corporation (Corporate or Incorporate)*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY DESK EDITION (Stephen M. Sheppard ed., 2012) [hereinafter Sheppard]. Sheppard's description is helpful:

> Corporations may take many forms, but every corporation is a creature of statute, limited in its powers to those allowed by statute in the jurisdiction in which it is incorporated and further limited to the powers and purposes in the charter granted to it by the government of that jurisdiction.

Id.

134. *See Trs. of Dartmouth Coll.*, 17 U.S. at 637 (stating that the purposes of a corporation are "such as the government wishes to promote").

135. *Id.* at 636 (describing corporate perpetual existence as a means of facilitating corporate management and simplifying the ownership of property that would otherwise have to be transferred to each successive member of the corporation).

136. *See* Sheppard, *supra* note 133.

137. *See* Daniel J.H. Greenwood, *Neofeudalism: The Surprising Foundations of Corporate Constitutional Rights*, 2017 U. ILL. L. REV. 163, 169–70 (2017) (discussing medieval corporations like the church, city municipalities, and universities, the modern corporation's ancestors, as groups claiming autonomy from the Crown's claim to exercise rule over their affairs).

138. *See* David H. Gans & Douglas T. Kendall, *A Capitalist Joker: The Strange Origins, Disturbing Past, and Uncertain Future of Corporate Personhood in American Law*, 44 J. MARSHALL L. REV. 643, 656 (2011) (discussing how for the early part of American jurisprudence, corporations did not have constitutional rights).

139. *See* Gans & Kendall, *supra* note 138, at 644–47 (giving a brief overview of changing corporate constitutional rights legal theory throughout American history).

140. *See* Greenwood, *supra* note 137, at 176.

More importantly, corporations' constitutional rights have expanded over the course of American jurisprudential history.[141] The first, and perplexing, instance in which constitutional rights were extended to corporations was in the case of *Santa Clara County v. Southern Pacific Railroad Co.*,[142] which came before the Supreme Court in 1886.[143] Oddly, the published opinion of *Santa Clara* included, without explanation and contrary to common practice, Chief Justice Waite's comment prior to oral argument that the Fourteenth Amendment clearly applied to corporations.[144] Implicit in this proclamation is that the "persons" who states cannot deny the equal protection of law includes corporations.[145] This peculiar editorial decision, in effect, extended Fourteenth Amendment constitutional protections to corporations by mere proclamation rather than legal reasoning.[146] Significantly, this proclamation opened the door to extending more constitutional rights to corporations over the subsequent decades, including freedom of speech and freedom of religion protections.[147] Suffice it to say, corporations now enjoy many constitutional rights that American courts have extended to them.[148]

This brief overview, for the purpose of this Comment, is sufficient to recognize that artificial persons can possess rights traditionally thought to belong to natural persons. There is no reason that lawmakers could not extend analogous rights to Native American sacred lands.

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141. *See* Gans & Kendall, *supra* note 138 and accompanying text.

142. Santa Clara Cty. v. S. Pac. R.R., 118 U.S. 394 (1886).

143. *Id.*

144. *Id.* at 394 (declaring the Fourteenth Amendment applied to corporations in the prefatory materials without indicating how the Court reached such a legal conclusion outside of the official opinion of the Court).

145. *Id.* The relevant text stated:

> The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does.

Id.

146. *See* Gans & Kendall, *supra* note 138, at 666.

147. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2772–75 (2014) (finding that the Free-Exercise Clause protects the religious activities of closely held for-profit corporations). *See also* Gans & Kendall, *supra* note 138, at 674–81. The author argues that this proclamation was the "capitalist joker" inserted into "the deck" that many later Supreme Court benches relied on to extend constitutional rights to corporations between 1895 and 1933. *Id.* According to the author, the erroneous extension of constitutional rights culminated in the Supreme Court's decision in *Citizens United v. FCC*, 558 U.S. 310 (2010), which extended First Amendment free speech protections to corporate entities. *Id.* at 692–98.

148. *See* sources cited s*upra* note 147 and accompanying text.

2. *Corporation Sole: The Special Religious Corporation*

Within the context of religious expression, artificial persons have taken on a unique form as corporations sole.[149] The concept of a corporation sole traces its roots to the common law of England.[150] Historically, the corporation sole was a means of managing the affairs and property holdings of hierarchical religious organizations.[151] In effect, the corporation sole incorporates the office of a religious leader and any successors in order to establish the perpetuity of the religious organization.[152]

Today, the corporation sole has, like other corporations, become a creature of statute.[153] In California, for example, a religious leader of any denomination may form a corporation sole to manage the affairs of the organization[154] by simply filing articles of incorporation.[155] Incorporation grants the corporation sole legal powers to contract, sue and be sued, own property, and receive gifts and bequests.[156] Importantly, these powers exist even if there is a vacancy in the office because the corporation sole has perpetual existence.[157]

III. ANALYSIS: INTERNATIONAL MODELS AS POTENTIAL VINDICATORS OF INDIGENOUS RELIGIOUS AND LAND RIGHTS

The United States is not the only nation to struggle with protecting the religious and land rights of marginalized Indigenous peoples.[158] For potential inspiration, the United States can and

149. *See* Berry v. Soc'y of Saint Pius X, 81 Cal. Rptr. 2d 574, 581 (Ct. App. 1999). "A corporation sole consists of only one person at a time, but the corporation may pass from one person to the next without any interruption in its legal status." Roman Catholic Bishop of Springfield v. City of Springfield, 724 F.3d 78, 84 n.1 (1st Cir. 2013). However, the person of the individual officer embodying the corporation sole is distinct from the person of the corporation sole itself. *See* 1 WILLIAM MEADE FLETCHER & BASIL JONES, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 50 (West 2018).

150. *See Berry*, 81 Cal. Rptr. at 581.

151. *Id.*

152. *Id.* at 582.

153. *See* CAL. CORP. CODE §§ 10000–10015 (Deering 2019).

154. *See id.* § 10002.

155. *Id.* § 10003.

156. *Id.* § 10007.

157. *Id.* § 10008.

158. *See* James Anaya (Special Rapporteur on the Rights of Indigenous Peoples), *The Situation of Indigenous Peoples in Canada*, ¶¶ 4, 58–62, U.N. Doc. A/HRC/27/52/Add.2 (July 4, 2014) (recognizing the history of human rights violations and commending the current land claims settlements between the Canadian government and Indigenous peoples, but also critiquing the Canadian government's

should look to other international legal developments that recognize and protect Indigenous peoples' inextricably connected religious and land rights.

This section first discusses a recent and innovative development in international law that has extended protections to Indigenous peoples by granting legal personhood to the Whanganui River in New Zealand.[159] Second, this section evaluates the feasibility of adopting a similar legal scheme in the United States and makes suggestions for what a similar scheme may look like.[160]

A. New Zealand's Novel Model of Protecting Indigenous Rights: Te Awa Tupua (Whanganui River Claims Settlement) Act

Much like the United States, New Zealand has struggled to protect the rights of Indigenous peoples in New Zealand: the Maori.[161] Despite historical shortcomings of land grabbing and treaty violations, New Zealand has recently strived to uphold its founding treaty obligations by: (1) establishing a tribunal to settle grievances for prior breaches of the treaty; (2) settling land claims arising from the treaty; and (3) using the treaty to interpret legislation.[162] While all of these actions of reconciliation are necessary to vindicate the rights of the Maori people, the New Zealand legislature took radical action to further protect Maori rights by enacting the Tu Awa Tupua (Whanganui River Claims Settlement) Act (the "Act").[163]

The radical nature of the Act is that it seeks to protect the religious and cultural significance the Whanganui River holds for local Maori Tribes by creating a legal person, *Te Awa Tupua*, that comprises the Whanganui River.[164] The Act defines Te Awa Tupua

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continued use of monetary payment schemes to extinguish native land rights); *see also* Victoria Tauli-Corpuz (Special Rapporteur on the Rights of Indigenous Peoples), *Report of the Special Rapporteur on the Rights of Indigenous Peoples on Her Visit to Australia*, ¶¶ 6, 41, U.N. Doc. A/HRC/36/46/Add.2 (Aug. 8, 2017) (recognizing the destructive impact European settlement had on Aboriginal peoples whose religion and culture was deeply connected to the land and the continued lack of consultation between Aboriginal peoples and the government).

159. *See infra* Part III.A.

160. *See infra* Part III.B.

161. *See* James Anaya (Special Rapporteur on the Rights of Indigenous Peoples), *The Situation of Maori People in New Zealand*, ¶¶ 6, 10, U.N. Doc. A/HRC/18/35/Add.4 (May 31, 2011) (finding that despite negotiating a treaty protecting and enshrining the respective land rights of British settlers and original Maori inhabitants, the New Zealand government violated the treaty and stripped Maori of their lands).

162. *Id.* ¶ 22.

163. Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, (N.Z.).

164. *Id.* at pt 2, s 12.

as "an indivisible and living whole, comprising the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements."[165] The Act further outlines that Te Awa Tupua, as so defined, "is a legal person and has all the rights, powers, duties, and liabilities of a legal person."[166]

However, a grant of legal personhood to the river without guidance as to how New Zealand law will effectuate the river's rights and duties would be disastrous. Anticipating this problem, the Act establishes the office of Te Pou Tupua to act on Te Awa Tupua's behalf.[167] *Te Pou Tupua* is the "human face of Te Awa Tupua"[168] and is empowered by the Act to: (1) speak on Te Awa Tupua's behalf; (2) promote the health and wellbeing of Te Awa Tupua; (3) perform landowner functions on behalf of Te Awa Tupua; and (4) take any other action reasonably necessary to effect any of these goals.[169] In an abundance of caution, the Act even delineates Te Pou Tupua's taxable income.[170] Te Pou Tupua is, in effect, a guardian or trustee of Te Awa Tupua.

The Act also anticipates that the legal form of Te Awa Tupua must be flexible as it relates to other acts of the New Zealand Parliament.[171] Specifically, the Act lays out when Te Awa Tupua should be treated as an institution,[172] a public body,[173] a public authority,[174] or a corporation.[175]

To fully understand why New Zealand's legislature deemed granting legal personhood to Te Awa Tupua necessary, one must consider the Act's purpose. The Act both establishes legal personhood in Te Awa Tupua and embodies an official apology,[176] recognizing the unique cultural and religious connection the Whanganui Maori Tribe has with the Whanganui River.[177] Specifically, the Act codifies Maori cultural and religious beliefs concerning the Whanganui River when it recognizes that "Te Awa Tupua is a spiritual and physical entity that supports and sustains both the life and natural resources within the Whanganui River and the

165. *Id.*
166. *Id.* at s 14.
167. *Id.* at pt 3, s 18, subs 1.
168. *Id.* at s 18, subs 2.
169. *Id.* at s 19, subs 1, paras a, c–d, i.
170. *Id.* at s 26.
171. *Id.* at pt 2, s 17.
172. *Id.* at s 17, para a.
173. *See* Te Awa Tupua Act, pt 2, s 17, paras b, g.
174. *Id.* at paras c, e.
175. *Id.* at para f.
176. *Id.* at pt 3, s 70.
177. *Id.* at s 70, para f; *see also* s 71; *see also* pt 2, s 13.

health and well-being of the [Maori] and other communities of the River."[178] The relationship between Te Awa Tupua and the Whanganui Maori Tribe is not just one of sustenance emanating from Te Awa Tupua.[179] Rather, the Whanganui Maori Tribe has "an inalienable interconnection with Te Awa Tupua" and has "responsibilit[ies] to Te Awa Tupua in relation to its health and well-being."[180]

This recognition of the Maori's connection to Te Awa Tupua is an important conceptual distinction. The Whanganui River's legal personhood as Te Awa Tupua is not a legislative grant of rights to the river in its own right, but rather a granting of rights and personhood to the river as derivative of the Whanganui Maori Tribe's religious and cultural beliefs.[181] Granting Te Awa Tupua legal personhood is therefore a vindication of Maori "customary rights."[182]

B. Transplanting Te Awa Tupua: The Feasibility of the New Zealand Model on American Soil

While the Te Awa Tupua Act seems radical at first blush, the Act incorporates many parallel structures that already exist in American jurisprudence. As such, the Te Awa Tupua Act is a framework the United States can integrate seamlessly into its own jurisprudence to build its own environmental standing laws. Because many of the legal concepts that underpin the Act already exist in American jurisprudence, a similar construct can be readily adapted to the American context.[183]

1. A Legislative Solution

American courts have justifiably been cautious about unilaterally expanding rights to land, natural objects, or the environment.[184] The Te Awa Tupua Act demonstrates how to implement a legislative conferral of rights upon a natural object.[185] Were Congress to enact a similar legislative model to confer such rights upon lands

178. *Id.* at pt 2, s 13, para a.
179. *Id.* at pt 3, s 71, cl 1, para a.
180. *Id.* at para b.
181. *See id.* at cl 1.
182. *Id.* at s 70.
183. *See infra* Part III.B.1–3.
184. *See* Pa. Gen. Energy Co. v. Grant Twp. E. Run Hellbenders Soc'y, Inc., 658 F. App'x 37, 38 n.2 (3d Cir. 2016) (questioning the capacity of a watershed to join pending litigation as party); *see also* Ezer v. Fuchsloch, 160 Cal. Rptr. 486, 493 (Ct. App. 1979) (stating that courts have not adopted "the principle that natural objects are given independent 'rights' and 'standing'").
185. *See supra* Part III.A.

deemed sacred by Native Americans, such legislative conferral of rights would likely raise no objection from the courts.[186] Indeed, it is the courts that have consistently said that the "question of 'whether the law should accord legal personality . . . in most instances devolves on the Legislature.'"[187]

Significantly, a legislatively enacted model is the only feasible model for adopting such a legal development. In March 2017, an Indian court unilaterally granted two sacred rivers legal personhood status.[188] In *Salim v. State of Uttarakhand*,[189] the High Court of Uttarakhand sua sponte declared the Ganga and Yamuna rivers to be legal persons "with all the corresponding rights, duties and liabilities of a living person in order to preserve and conserve [the rivers]."[190] The court reasoned that "juristic persons" was a legal concept created to serve the needs of society.[191] The court further reasoned that because such large portions of Indian society relied on the Ganga and Yamuna rivers for physical and spiritual sustenance, the well-being of Indian society necessitated that the rivers' be granted legal personhood as a means of preserving the rivers' health.[192]

The High Court's decision, however, did not stand.[193] On July 7, 2017, the Indian Supreme Court stayed the High Court's ruling.[194] While the Indian Supreme Court's order was silent as to the court's reasoning,[195] the High Court's decision left multiple issues

186. *See* Cetacean Cmty. v. Bush, 386 F.3d 1169, 1176 (9th Cir. 2004) ("We see no reason why Article III prevents Congress from authorizing a suit in the name of an animal, any more than it prevents suits brought in the name of artificial persons . . . .").

187. *See In re* Nonhuman Rights Project Inc. v. Stanley, 16 N.Y.S.3d 898, 916 (Sup. Ct. 2015) (quoting Byrn v. N.Y.C. Health & Hosps. Corp., 286 N.E.2d 887, 889 (N.Y. 1972)).

188. *See generally* Salim v. Uttarakhand, Writ Petition (PIL), No. 126 of 2014, Uttarakhand HC (Mar. 20, 2017) (India), https://bit.ly/2G3DS5m [https://perma.cc/B69R-XWGZ].

189. Salim v. Uttarakhand, Writ Petition (PIL), No. 126 of 2014, Uttarakhand HC (Mar. 20, 2017) (India).

190. *Id.* ¶ 19.

191. *Id.* ¶¶ 14, 16.

192. *Id.* ¶¶ 17–19.

193. *See SC Stays Uttarakhand HC Order on Ganga, Yamuna Living Entity Status*, INDIAN EXPRESS (July 8, 2017), https://bit.ly/2DP17Og [https://perma.cc/CZ38-NGEV].

194. Order of the Supreme Court, Salim v. Uttarakhand, Petition for Special Leave to Appeal No. 016879/2017, (2017) (India), https://bit.ly/2BeEYay [https://perma.cc/QG7G-ZLDP].

195. *Id.*

unresolved.[196] For example, while the High Court declared the rivers to be legal persons with all the corresponding "rights, duties and liabilities of a living person," *how* the rivers would be liable for their actions was strikingly absent from the High Court's decision.[197] Would the rivers be liable for property damage caused by flooding? Would the rivers be responsible to pay taxes? Lacking the greater precision of legislative drafting, the High Court's grant of legal personhood to the rivers naturally made implementing the rivers' "rights, duties and liabilities" prohibitively unfeasible.[198]

As the legal experiments in both India and New Zealand demonstrate, extending legal personhood to natural objects requires a legislative model that specifically lays out the rights, duties, and liabilities the natural object would have.

2. *Land's Rights Are Derivative of Native American Religious Rights*

Congress can and should implement legislation similar to the Te Awa Tupua Act. Congress has a history of taking action to protect the rights of Native American peoples.[199] Congress has acted decisively and specifically to expand religious protections to Native Americans.[200] One such instance of congressional action was when Congress, by passing the Native American Religious Freedom Amendments in 1994, protected the rights of Native Americans to participate in the religious use of peyote while maintaining their eligibility for public benefits.[201]

However, Congress has done little to protect Native Americans' religious connection to their ancestral and sacred lands.[202] Adopting a legal framework akin to the Te Awa Tupua Act could resolve this issue. Native American religious expression and experience, like Maori religious expression, is integrally connected to

196. *See* Salim v. Uttarakhand, Writ Petition (PIL), No. 126 of 2014, Uttarakhand HC (Mar. 20, 2017) (India), ¶ 19.

197. *Id.*

198. *Id.*

199. *See supra* Part II.B.

200. *See generally* Native American Religious Freedom Act Amendments of 1994, Pub. L. No. 103-344, 108 Stat. 3125 (codified as amended at 42 U.S.C. § 1996a (2018)).

201. *See id.*; *see also supra* Part II.B.

202. *See, e.g.*, Lying v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988). In response to this case, and others like it, there was an unsuccessful attempt in Congress to codify protections for Native American sacred lands. *See* Native American Sacred Lands Act, H.R. 2419, 108th Cong. (2003) (protecting Native American access to sacred sites and avoiding potential damages to sacred lands).

the land and environment.[203] Were Congress to grant legal personhood to Native American sacred lands, Congress would be protecting Native American religious expression in a culturally sensitive fashion by protecting the integrity of the land that is the object of Native American faith.[204]

Additionally, because the legal personhood of sacred lands would be derivative of Native Americans' own religious rights, adopting this legal construct would not have to overcome the conceptual hurdles that Stone encounters in advocating for the *intrinsic* rights of the environment.[205] Rather, the legal personhood of sacred lands would be, like Te Awa Tupua, an extension of Native American cultural and religious rights.[206]

3. An Analogous Form in the Corporation

Finally, there is already an analogous artificial person in American jurisprudence after which Congress could model personhood for sacred Native American land: the corporation. Te Awa Tupua is, like a corporation, a creature of statute.[207] Te Awa Tupua's rights, duties, and obligations are statutorily defined.[208] It also, like a corporation, benefits from perpetual existence—a crucial trait for natural objects with longevity far exceeding the lifespan of a natural person.[209]

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203. *Compare Lying*, 485 U.S. at 442 (recognizing the Tribes' contention that the Tribes had a deep spiritual connection with the land), *and Letter Attributed to Chief Seattle*, *supra* note 59 (describing animals and the environment as having a familial connection with himself), *with* Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, pt 2, s 13 (N.Z.), *and id.* pt 3, s 70 (recognizing the "integral connection" of the Maori and the Whanganui River as Te Awa Tupua).

204. *See generally* Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980) (bringing a claim under the Free Exercise Clause claiming that the construction of a dam "drowned" the gods incarnate in the land). Although beyond the scope of this Comment, it is worth noting that this Comment's proposed congressional action may implicate the Establishment Clause's prohibition of the "establishment of religion." *See* U.S. CONST. amend. I. ("Congress shall make no law respecting an establishment of religion . . . ."). The question—whether congressional adoption of legislation similar to the Te Awa Tupua Act violates the Establishment Clause protections—is ripe for further scholarship.

205. *See* STONE, SHOULD TREES HAVE STANDING?, *supra* note 18 and accompanying text.

206. See s*upra* Part III.A.

207. *Compare* Sheppard, *supra* note 133, *with* Te Awa Tupua Act, pt 2, ss 12–18.

208. *See* Te Awa Tupua Act, pt 2, s 14.

209. *Compare* Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 636 (1819) (describing corporate perpetual existence as a necessary tool for facilitating corporate management), *with* Te Awa Tupua Act pt 2, s 12 (defining Te Awa Tupua as the Whanganui River in its entirety).

Much like the religious subset of corporations, a corporation sole, Te Awa Tupua also has a religious dimension:[210] it is a "spiritual and physical entity that supports and sustains both the life and natural resources within the Whanganui River."[211] Another point of convergence is the similar purposes of a corporation sole and Te Awa Tupua: both manage the affairs of a religious entity.[212]

However, the most important convergence is that protecting corporate rights protects the rights of the individuals comprising the corporation.[213] In the case of sacred land, the corporate form granted to the land would arise out of the individual devotees' aggregate association.[214] Therefore, like extending rights to any other corporate form, extending rights to sacred land would protect the rights of the individual believers that give shape to the legal person.[215]

4. Implementation: Practical Considerations

One question remains: what would implementing a statutory scheme similar to the Te Awa Tupua Act require in the United States? This Comment proposes that legislation granting legal personhood to sacred lands should require the natural objects to have a distinct and historical personality for Native Americans, establish a legal representative, and specifically delineated rights and duties.

In both India and New Zealand, the courts and legislature extended legal personhood to rivers predicated on the fact that these rivers had a historical and distinct personality associated with them.[216] In the United States, legislation should grant sacred lands

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210. *Compare* Berry v. Soc'y of Saint Pius X, 81 Cal. Rptr. 2d 574, 581–82 (Ct. App. 1999) (describing the purpose of a corporation sole as a means of preserving and managing the affairs of the religious organization), *with* Te Awa Tupua Act, pt 2, s 13, para a (defining Te Awa Tupua as a spiritual and physical entity).

211. Te Awa Tupua Act, pt 2, s 13, para a.

212. *Compare Berry*, 81 Cal. Rptr. 2d at 581–82 (describing the purpose of a corporation sole as a means of preserving and managing the affairs of the religious organization), *with* Te Awa Tupua Act, pt 2, s 14 (establishing that the office of Te Pou Tupua will manage the affairs of the entity Te Awa Tupua).

213. *See e.g.* Citizens United v. FCC, 558 U.S. 310 (2010); Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014); *see also* Tamara R. Piety, *Why Personhood Matters*, 30 CONST. COMMENT. 361, 372–73 (2015) (arguing that in the absence of any judicial guidance, the best rational scholars can posit for extending constitutional rights to corporations is that such an extension protects the rights of the individuals that make up the corporation).

214. *See* Te Awa Tupua Act pt 2, ss 12–13.

215. *Compare* Te Awa Tupua Act pt 3, sub 2, s 71, *with Burwell*, 134 S. Ct. at 2772–75.

216. *See* Te Awa Tupua Act pt 2, ss 12–13; *see also* Salim v. Uttarakhand, Writ Petition (PIL), No. 126 of 2014, Uttarakhand HC (Mar. 20, 2017) (India), at ¶ 17.

and rivers personhood only if a distinct personality associated with the land or river can be shown to exist in Native American culture and belief.[217]

Additionally, like the Te Awa Tupua Act, legislation must establish and empower a legal representative to act on behalf of the natural object.[218] The representative could be an individual or an office and would act like the natural object's fiduciary.[219] Like Te Pou Tupua, a tribe associated with the natural object's legal person must elect the representative.[220] Establishing a legal representative would resolve the issue of who acts on behalf of and speaks for the land or river.

Finally, the implementing legislation must also outline the contours of the land or river's rights, duties, and liabilities. Failure to use legislative specificity would result in the ambiguity faced by the courts in India.[221] Instead, New Zealand's meticulous statutorily defined rights are the model to follow because of the clarity and guidance they provide.[222]

IV. CONCLUSION

The protests at Standing Rock highlighted the continuous failure of the United States to fully protect the rights of Indigenous people in America.[223] On first consideration, granting legal personhood to natural objects is a radical proposal to ameliorate this failure.[224] Courts have been justifiably reticent to extend rights and standing to land, trees, and animals in the absence of legislative action.[225] However, granting legal personhood to sacred Native American lands and rivers is not radical when one considers that: Congress has already enacted legislation granting special protections to Native Americans,[226] Native American religious and cul-

217. *See, e.g.*, Badoni v. Higginson, 638 F.2d 172, 176–77 (10th Cir. 1980). For example, the Navajo deity associated with Rainbow Bridge National Monument would have been a likely candidate for this status prior to its decimation. *Id.*

218. *See* Te Awa Tupua Act pt 2, ss 18–19.

219. *Id.* at s 19, cl 2, para a (mandating that Te Awa Tupua's representative, Te Pou Tupua, act in the interests of Te Awa Tupua).

220. *Id.* at s 20.

221. *See supra* notes 193–98 and accompanying text.

222. *See supra* Part III.A.

223. *See supra* notes 1–8, 73–86, 88, 92 and accompanying text.

224. *See supra* Part II.A.

225. *See In re* Nonhuman Rights Project Inc. v. Stanley, 16 N.Y.S.3d 898, 916 (Sup. Ct. 2015) (finding that the "question of 'whether the law should accord legal personality . . . in most instances devolves on the Legislature'" (quoting Byrn v. N.Y.C. Health & Hosps. Corp., 286 N.E.2d 887, 889 (N.Y. 1972))).

226. *See supra* Part II.C.

tural rights have a unique relationship to nature,[227] and other non-human entities enjoy the legal fiction of personhood.[228]

In light of these factors, adopting a model like New Zealand's Te Awa Tupua Act in the United States to protect the integrity and well-being of Native American sacred lands is not only possible but highly beneficial.[229] With an innovative legislative act, Congress could extend broad protections to the environment while acting decisively to protect the interests and rights of Native Americans in a culturally sensitive manner. Were Congress to grant standing for Native American sacred lands it would be taking a colossal step forward in protecting the rights of Indigenous peoples and the environment.

227. *See supra* Part II.B.
228. *See supra* Part II.D.
229. *See supra* Part III.B.2.