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DESERVING A PLACE AT THE TABLE:
EFFECTING CHANGE IN SUBSTANTIVE ENVIRONMENTAL PROCEDURES IN INDIAN COUNTRY

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This note explores how tribal-federal relations have impacted environmental justice efforts in domestic pipeline construction in and around Indian Country. The impact these poor relations have had on indigenous peoples has the potential to adversely affect indigenous people and their reservation and ancestral lands. This note discusses how the federal government's consultation provision in the National Environmental Policy Act and Executive Order 12898—that were supposed to support and include tribal governments in the process—have disregarded tribal governments as indigenous sovereign nations that must be brought into the conversation long before the first shovel penetrates the ground to disturb sacred land. The Dakota Access Pipeline case through the Standing Rock Sioux Nation is used as a case study to further explore the consultation process and tribal-federal relations in the process. Drawing on Federal Indian Law, looking to federal common law and introducing the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), this note suggests incorporating human rights law into the environmental justice platform as well as delving into the trust doctrine and an interest balancing test to improve tribal-federal relations in the consultation process. Including tribes in the decision-making process will help inter-government relations and garner tribal self-determination.

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I. Introduction

Smoke Signals is one of the first all Native American films: Natives acted in principle roles, directed, wrote, and produced this movie. The movie is about two young, Coeur d'Alene Indian boys, Victor and Thomas, who travel to recover the ashes of Victor's deceased, estranged father. On the bus ride, two white men take the seats where Victor and Thomas previously sat.[1] One of the guys dissuades Victor and Thomas from reclaiming their seats, saying, "Now listen up. These are our seats now and there ain't a damn thing you can do about it. So why don't you and super injun there find someplace else to have a powwow, ok?"[2] After a failed attempt to get their seats back, Victor and Thomas are forced to relocate to another seat near the back of the bus.[3] The two boys sit down, frustrated.[4] Thomas says to Victor, "Man, the cowboys always win! Look at Tom Mix! What about John Wayne?"[5] This scene tells a small part of the Native American narrative and the ongoing dynamic between the federal government and Indian tribes.

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[1] SMOKE SIGNALS (Miramax Films Sept. 28, 1999).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*

The relationship between the federal government and tribes has been strained since European contact. The narrative is a repeated forced removal of tribes and their peoples from their ancestral lands at the behest of the federal government. The plenary power of Congress and countless court cases have created a power dynamic in which the federal government can do anything to Native American communities and lands and there is not much that tribes can do about it. Without a change in substantive procedures in federal programs and legislation, tribes cannot hope to affect environmental justice by changing their low priority regarding federal and state government procedures with federal domestic projects that affect tribal lands and peoples. Native American governments and their peoples should have a substantive say in how state and federal governments and private entities use their ancestral lands, especially when it affects resources used by Indian peoples and communities.

This note posits that a dichotomy and disconnect between the federally mandated procedures and the substantive actions of the federal government's dealings cause environmental controversies in Indian Country. Although many environmental issues within Indian Country exist because of this disconnect, this note will focus on Indian tribes and governmental relations. This note will use the National Environmental Protection Act ("NEPA") and domestic oil pipelines—specifically the recent Dakota Access Pipeline—as an example of the current tribal-federal structure. Part I will define and discuss the legal history of the term "Indian Country" as it pertains to tribal-federal relations within NEPA. Part II will provide further insight on what the Supreme Court has termed "environmental justice." Part III will discuss the Dakota Access Pipeline and how this pipeline converges into the general domestic oil pipeline framework. Part III will also include the issues that Indian Country faces as a result of tribal-federal procedures. Finally, Part IV will propose solutions that will benefit Indian Country, the federal government, and the environment.

II. Federal Indian Law and the Foundations of Tribal-Federal Relations

A. Defining Indian Country

In order to pick up Victor's father's ashes, Victor and Thomas have to leave the reservation.[6] Friends give them a ride to the Greyhound bus station.[7] As they are being dropped off, one of the friends asks Victor and Thomas, "You got your passports?" "Passports?" Thomas asks confused.[8] "Yeah," the friend responds, "you're leavin' the rez and goin' into a whole different country cousin."[9] Thomas, still confused, says, "But…but, it's the United States."[10] The other friend clarifies, "Damn right it is! That's as foreign as it gets. Hope you two

[6] SMOKE SIGNALS, supra note 1.
[7] *Id.*
[8] *Id*.
[9] *Id.*
[10] *Id.*

have your vaccinations!"[11] Thomas and Victor's friends' joke is a perspective both Indians and non-Indians have taken. This perspective became a question that the Supreme Court had to answer: how foreign are Indian tribes and what does that mean for the United States?[12]

The federal government and Indian tribes, and invariably reservations, have a unique relationship. Indian tribes are their own, separate governments with inherent rights, culture, and structure of sovereign nations. However, these rights are limited because the land where Indian nations reside and govern are within the jurisdiction and territory of the United States of America. This section will further explore what Victor's friends meant by "a whole different country" and "as foreign as it gets," because in some respects, these adjectives are an accurate description of the differences between Indian Country and non-Indian Country. Indian Country is a term of art, defined by statute, to mean:

> (a) All land within the limits of any Indian reservations under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.[13]

Congress defined Indian Country to mean three distinct areas: reservations, Dependent Indian Communities, and allotted land. Reservations are designated federally confirmed lands, held in trust by the U.S., for Indian tribes for their use and benefit. This includes everything within the boundaries of the reservations, even fee patents to non-Indians, highways, etc.[14] Dependent Indian Communities are lands that, "[first,] must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence."[15] Allotments are plots of land given to individual Indians and may be held in trust by the federal government for the benefit of the allottee.[16]

Defining the terms in Indian Country is important to the discussion of tribal-federal affairs because Indian Country also encompasses the jurisdictional boundaries of each government. When a domestic project, like the Dakota Access Pipeline, crosses through or residually affects Indian Country, the separate

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[11] *Id.*
[12] *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).
[13] 18 U.S.C. § 1151.
[14] 18 U.S.C. § 1151(a).
[15] *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 521 (1998); *United States v. Sandoval*, 231 U.S. 28, 29 (1913) also says they can be communal, tribal lands in fee simple title where Congress is able to legitimately exercise its power.
[16] 25 U.S.C. § 331.

governmental entities need to be aware of who will take care of the general welfare of the people being affected.

B. The Legal Origins of Indian Country

The intricacies and boundaries of Indian Country are not organic; they are comprised of hundreds of years of Indian policies and experiments conducted by the federal government. Christendom was on a mission to disseminate their doctrine amongst those they considered to be heathen. The Crusades, the Spanish Inquisition, and many other events in history have demonstrated this mission. Religious leaders declared it a divine right to colonize, civilize, and Christianize the ungodly wherever they may be.[17] From this ecclesiastical edict, monarchies found a basis on which to "discover" new non-Christian lands.[18] This basis is known as the Doctrine of Discovery, the right of Christian countries to travel to other lands undiscovered by any other Christian country to "civilize" and exercise dominion over the peoples of the non-Christian country. After the colonization of North America, the British monarch promulgated the Proclamation of 1763 that centralized relations with Indian nations.[19] Relations, contracts, promises, deals, etc., could no longer be individualized.[20] Previous to this Proclamation, individual colonists would make deals with Indian nations. By centralizing relations between Indian tribes and the government, the government in effect recognized that Indian tribes are, at the very least, entities that can make agreements, or at the most, sovereign governments.

After American independence, relations with Native American tribes became stilted and contentious. The young country attempted to keep centralized relations, but this proved difficult and confusing for states and individual citizens.[21] No one really knew what to do with the Indians. This "Indian Problem" initiated the framework for the *Marshall Trilogy*, which is a series of three cases written by Supreme Court Chief Justice, John Marshall, that laid the framework for Indian Law today.

C. Foundations: The Marshall Trilogy

The first case in the Trilogy, *Johnson v. M'Intosh*, establishes the legal foundation to "Indian Title." Chief Justice Marshall found that the United States had title to lands and tribes only had the right to occupancy.[22] The Court reasoned that Great Britain gained full title to the lands through the Doctrine of Discovery.[23] "The principle was that the discovery gave title to the government

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[17] DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW, 53 (7th ed. 1979).
[18] *Id.*
[19] *Proclamation of 1763*, ENCYCLOPEDIA BRITANNICA, INC. (July 12, 2016), https://www.britannica.com/event/Proclamation-of-1763.
[20] *Id.*
[21] GETCHES ET AL., *supra* note 17, at 68.
[22] *Johnson v. M'Intosh*, 21 U.S. 543, 595-605 (1823).
[23] This archaic, European doctrine was reaffirmed in a 1955 case *Tee-Hit-Ton v. United States*. Human Rights activists and Natives have called for reform or repeal of this Doctrine. The

whose subjects or by whose authority it was made against all other European governments, which title might be consummated by possession."[24] The Indian tribes as original occupants, and by the permission of the discoverer, only have a right of occupancy.[25] Tribes lacked the full bundle of property rights—they can only physically possess and use the land—that the European governments enjoyed.[26] The American Revolution, and transfer of power between governments, shifted those rights from Great Britain to the United States through treaty.[27] This diminished the full bundle of rights that Indians had before European contact and established Aboriginal Title, or Indian Title, reducing the rights to solely a right to inhabit their aboriginal territory. "[B]ut their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it."[28] Indian Title is still an active principle and those tribes that have Indian Title to lands are within the boundaries of "Indian Country" as it pertains to statute.

The second installment in the *Marshall Trilogy* is *Cherokee Nation v. Georgia*. This case presented a jurisdictional issue because the Cherokee Nation sought to sue the State of Georgia for interfering with its treaty rights and self-government, raising the question of what political status Indian tribes hold.[29] The Supreme Court Justices were split 2-2-2, each opinion classifying Indian tribes in a different way. One opinion was that the text of the Constitution classified Indian tribes as "foreign nations," creating an international relationship between Indian Tribes and the United States.[30] Another opinion thought that Indian tribes were "tribes" wholly under the jurisdiction of the federal and state governments without a separate sovereign status. The opinion of the Court ruled that tribes were not foreign nations but rather "domestic dependent nations" existing as wards of the federal government.[31] The Court explained that because, "[t]hey occupy a territory to which we assert a title independent of their will. . .[and] they are in a state of pupilage. . .[t]heir relation to the United States resembles that of a ward to his guardian."[32] The Court goes on to describe the essence of a trust relationship corresponding to Indian nations' new status asserting that, "being so under the sovereignty and dominion of the United States, that any attempt to

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repercussions would reach to extreme ends and make it almost impossible to adjudicate. It would undo hundreds of years of property law.

[24] *Johnson*, 21 U.S. at 573.
[25] *Id.* at 543.
[26] *Id.*
[27] *Id.* at 545.
[28] *Id.* at 574.
[29] *See*, *Cherokee Nation*, 30 U.S. 1.
[30] *Id.*
[31] *Id.*
[32] *Id.* at 2.

acquire their lands, or to form a political connexion [sic] with them, would be considered by all as an invasion of our territory, and an act of hostility."[33]

The Court also used a textual argument with language from the Constitution. The Commerce Clause grants Congress the power to, "regulate commerce with foreign nations, and among the several states, ***and*** with the Indian tribes" (emphasis added).[34] The word "and" gave textual support to the Court's argument that tribes were not foreign nations because the authors of the Constitution would not have had to differentiate between foreign nations and tribes had they meant for tribes to be classified as foreign nations.[35] Marshall opined, "[i]n this clause they are as clearly contradistinguished by a name appropriate to themselves, from foreign nations, as from the several states composing the union."[36] This case announced that Indian tribe are wards to the federal government conferring upon the United States a duty to protect and thereby giving the United States further right to insert themselves in proprietary affairs of the Indian tribes and Indian Country.[37]

The last case in the Trilogy, *Worcester v. Georgia*, declared that state law did not extend into the Cherokee Nation's territory, even in relation to non-Indians.[38] Only the federal government has rights and authority over Indian nations. Marshall stated in his opinion that, "[t]he treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provided that all intercourse with them shall be carried on exclusively by the government of the union."[39] Rights and jurisdictions do not extend to the states regardless of where Indian nations reside. The United States exercised the principle of preemption by stating that the laws of the states have "no force"[40] on Indian nations. The United States Constitution and the Bill of Rights put a limiting power on states' authority as well as tribal inherent sovereignty.

The *Marshall Trilogy* proves the basic framework for understanding Indian Law at its core. These cases outline that (1) the federal government has a duty to protect Indian nations, (2) Indians have inherent sovereignty but they are subject to federal authority, and (3) the federal government has plenary power[41] over Indian nations.[42] These points play out in the reasoning as to how the rest of Indian Country came to be and add weight to the idea that Indian tribes must be part of the process when decisions are being made and not whether what governments are doing is in good faith and in the best interest of the tribe. Tribal status, both as sovereign nations as well as under the protection of the federal

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[33] *Id.* at 17.
[34] U.S. Const. art. I § 8, cl. 3.
[35] *Cherokee Nation*, 30 U.S. at 19.
[36] *Id.* at 18.
[37] *Id.* at 65.
[38] *Worcester v. Georgia*, 31 U.S. 515 (1832).
[39] *Id.* at 519.
[40] *Id.* at 520.
[41] *Lone Wolf v. Hitchcock*, 187 U.S. 533 (1903) (expanding Marshall's definition of plenary power to include exercising government actions done in "good faith" or in the "best interest" of Indian Tribes).
[42] *See generally*, Johnson, 21 U.S. 543; *Worcester*, 31 U.S. 515; *Cherokee Nation*, 30 U.S. 1.

government, should be a significant reason to invite tribal governments to the discussion early in the process.

D. The Allotment Era: The Shaping of Indian Country

The doctrine of Manifest Destiny and westward expansion spawned the Indian Removal Era. President Andrew Jackson signed into action the Indian Removal Act of 1830.[43] The Indian Removal Act authorized the forced removal of Indian peoples from their ancestral lands for European settlement. Indians were relocated west to Indian Territory and put into reservations.[44] Reservations are areas of federal land allocated for Indian tribes' use under the direction of the federal government. The Removal Era displaced hundreds of Indian tribes and killed thousands of Native Americans during the course of forced removal. The Indian Removal Era ended around 1860 and ushered in the Reservation Era until Congress passed the Dawes General Allotment Act of 1887 (Dawes Act).

The Dawes Act "provided for 'allotment' of the reservations in severalty to individual tribal members as part of an official policy to destroy tribalism through reductions of the treaty guaranteed tribal land base."[45] The Dawes Act portioned out reservation land for tribal members to individually owned plots of land as divided by the terms of the statute.[46] The land would be held in trust for 25 years.[47] The remainder of the reservation land was then portioned out to non-Indians.[48] The underlying purpose was to inculcate the forced assimilation of Indians.[49] The Dawes Act moved Indians away from communal land holdings to individualized property ownership in an attempt to destroy tribal communities and culture. Indian allotments still exist today and are considered part of Indian Country.[50]

The reservation and allotment eras show how the government handled the proverbial "Indian problem" in history. The core ideas of the era, to destroy the Indian or remove the Indian to a place where they can be contained, went inherently against the *Marshall Trilogy* foundation that tribes are sovereigns and have a trust relationship with the federal government.[51] The reservation and allotments eras set up the philosophy that tribes now have: Self-Determination.

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[43] *See*, Indian Removal Act, Sess. I Ch. 148, 411 (1830).
[44] *Id.*
[45] GETCHES ET AL., *supra* note 17, at 169.
[46] 25 U.S.C. § 331.
[47] 25 U.S.C. § 331.
[48] 25 U.S.C. § 331.
[49] GETCHES ET AL., *supra* note 17, at 168.
[50] 18 U.S. § 1151.
[51] President Andrew Jackson did not agree with the Marshall model of thinking about Indians and after Chief Justice John Marshal published the opinion in *Worcester*, President Jackson was livid saying, "John Marshall has made his decision, now let him enforce it."

E. The Indian Country Today: We'll Overlook Watergate If You Don't Overlook Self-Determination

After the federal government's many failed attempts at terminating reservations and tribal culture President Richard Nixon initiated and passed in Congress the Self-Determination Policy. President Nixon approached Congress with this idea saying,

> It is long past time that the Indian policies of the Federal government began to recognize and build upon the capacities and insights of the Indian people. Both as a matter of justice and as a matter of enlightened social policy, we must begin to act on the basis of what the Indians themselves have long been telling us. The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.[52]

Tribes have their own constitutions; executive, judicial, and legislative branches; laws and policies; customs and traditions. Indian tribes have a platform in their own communities however, that platform only extends as far as the borders of the Reservations or Indian communities. Indian tribes are in a trust relationship alluded to by Marshall in *Worcester v. Georgia* and perpetuated in federal Indian common law.[53] This future determined by Indian statutes and Indian decisions should give Native Americans and tribes a right to be at the decision-making table with regards to federal domestic projects that affect Indian Country.

The federal government recognizes 573 Indian tribes.[54] Environmental legislation has given a small voice to Indian Country but not enough to substantially change outcomes of proposed pipelines and save Native Americans, especially those in Indian Country, from adverse effects like contaminated water sources. Self-Determination and environmental legislation should be the foundation on which to enact substantial change in substantive procedures.

III. Environmental Justice

A. Defining Environmental Justice: Cultural Consideration

Environmental Justice refers to the unfair distribution of the burdens of environmental policy, its effects on minorities and other cultural groups, and the

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[52] Message from Richard Nixon, President, United States, 213-Special Message to the Congress on Indian Affairs (July 8, 1970), https://www.epa.gov/sites/production/files/2013-08/documents/president-nixon70.pdf.

[53] *Worcester*, 31 U.S. 515.

[54] 83 Fed. Reg. 4235 (Jan. 30, 2018); Michael Martz, *Trump Signs Bill Giving Federal Recognition to Virginia Indian Tribes*, RICHMOND TIMES-DISPATCH (Jan. 29, 2018), http://www.richmond.com/news/virginia/trump-signs-bill-giving-federal-recognition-to-virginia-indian-tribes/article_0596872c-040c-540d-a5e6-2e3dbdbb0001.html (January 2018 President Trump signed legislation to grant federal recognition to six Virginia tribes making the list of federally recognized tribes).

ways to legally remedy the injustices that developers have placed on these minority groups.[55] Environmental Justice provides a platform for recognizing that a people's ecology and resources could be damaged so adversely that those damages may be remedied and prevented legally. The negative impacts on the environment—living entropies that include water, vegetation, soil, and humans—in the surrounding area and subsequent damage are so adversely affected that the federal government and justice systems deem these adverse environmental impacts to be justiciable.

Over the last 50 years, statutes, executive orders, and case law have emerged to create a foundation on which to advance environmental justice. This section will discuss some of these statutes in order to gain a better understanding and knowledge on how this affects Indian Country and tribal-federal relations.

NEPA was among the first legislation that sought to establish policies ensuring information on impacts of any federal or federally funded action is publicly available.[56] NEPA was enacted as the "basic national charter for protection of the environment. It establishes policy, sets goals, and provides means for carrying out the policy."[57] NEPA was also enacted to "make sure that federal agencies act…and help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment."[58]

NEPA is purely procedural;[59] the Supreme Court has stated that "[w]hen the Government conducts an activity, [NEPA] itself does not mandate particular results; instead, NEPA imposes only procedural requirements to ensure that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts."[60] However, the statute does not designate any rights of action to mandate any particular result should the environmental impact statements indicate adverse effects.[61]

President Bill Clinton enacted Executive Order 12898 (EO12898) entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*. EO12898 requires that every, "[f]ederal agency make achieving environmental justice part of their missions by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies and activities on minority populations in low-income populations in the United States. . . ."[62] Low income and minority populations were to be participants in the process and enforcement

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[55] Eric K. Yamamoto & Jen-L Lyman, *Racializing Environmental Justice*, 72 U. Colo. L. Rev. 311 (2001).
[56] NEPA Title 40 Ch. V §1500.1(b).
[57] *Id.* at 1500.1(a).
[58] 1500.1(a)(c).
[59] *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008).
[60] *Id.*
[61] *Id.*
[62] Executive Order 12898 Sect. 1-101 (1994).

of environmental domestic projects that could relate to human health and the environment surrounding them.[63]

EO12898 also tasked agencies with the responsibility to collect data and provide research on any adverse effects that such projects could have on low-income and minority environments.[64] General provisions including application on environmental justice, specifically related to Native American programs are clarified in EO12898 and the Environmental Justice Guidance Under the National Environmental Policy Act.[65] However, "[n]either the Executive Order nor [the Guide Book] prescribes any specific format for examining environmental justice. . . ." The remedy is to simply be aware that Environmental Justice issues may "arise at any step in the NEPA process and agencies should consider these issues at each and every step of the process as appropriate."[66]

The Guide Book and the language of EO12898 are interesting, because they separate Indian tribes from all other categories. This indicates that Indian tribes have a distinct political influence and relationship with the federal government that general low-income and minority populations do not share. Indian tribes have governing bodies and should have more political clout because of this Executive Order.

The Executive Order did not change legal thresholds and statutory interpretation under the NEPA or existing case law.[67] EO12898 does not address resolutions for when the analysis says that development will negatively affect minority populations, specifically Native Americans. Twenty years later, under the Obama administration, the Government promised to rededicate federal agencies to reducing pollution on tribal lands and to reconvene environmental interagency work groups.[68] Ironically, the Obama administration fast tracked the Army Corps of Engineers to begin development on the Dakota Access Pipeline. This is another example of the disconnect occurring within the federal government that not only negatively affects Tribal governments but seemingly disregards any policy that would improve Indian Country's physical environment.

B. Environmental Justice and the Native American Perspective

Indian tribes have been subject to treaties, statutes, and case law that have affected Tribal lands since European contact. Environmental justice and its confines are directly correlated with indigenous rights because so much of what Native Americans do is tied to the land. For indigenous peoples, Environmental Justice is about environmental racism, culture, economic self-determination, and

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[63] *Id*.
[64] *Id*.
[65] *See generally* Council on Environmental Quality, *Environmental Justice: Guidance Under the National Environmental Policy Ac*t, (Dec. 1997), https://www.epa.gov/sites/production/files/2015-02/documents/ej_guidance_nepa_ceq1297.pdf.
[66] *Id*.
[67] *Id*. at 10.
[68] *See generally* Council on Environmental Quality, *supra* note 64, at 3-5 (a memorandum summarizing Executive Order 12898 on Environmental Justice).

belief systems that connect a people's history, spirituality, and livelihood to the natural environment.[69]

The Environmental Justice perspective that many Native American's have compared to many non-Indians is very different because Native Americans have more of an understanding that the physical and social aspects of the physical environment are interconnected to them culturally and spiritually.[70] Non-Indians have the ideology that the physical environment is tied to them purely contractually and temporally.[71] Identity, status, and power sustain different cultures and relationships to the physical environment. The environment gives definition to some cultural identity.[72] Whereas with non-Indians, the environment is something for them to be stewards over rather than a part of themselves. Environmental justice differs in cultural identity between indigenous peoples and non-indigenous peoples.

When indigenous peoples fight for environmental justice, it goes far beyond the land as an object that affects their health and livelihood in a biological perspective. Indigenous peoples fight for environmental justice because it goes back ancestrally and there is a deep, spiritual intimacy with the personhood of the land or water—a relationship is formed.[73] This is because families become part of the ecosystem for two reasons: (1) a person's DNA becomes part of that soil in the circle of life; family is buried in the ground, decomposes and infuses with that land—it goes beyond a spiritual connection and reaches into the physical, and (2) there is a symbiotic relationship between the people; the land needs the people to take care of it and nurture the land just as people need the land for sustenance and to perform sacred rituals and ceremonies. Land is sacred because of the cultural traditions and rituals that have been performed on that land and the families that have been buried underneath it have become part of that soil.

Environmental Justice in a Native American perspective also involves tribal sovereignty and the inherent right of people to help make decisions about what happens to the land that affects their livelihood.[74]

Environmental justice advocates assert that people of color are prime targets for both private and public environmental abuses because of their inability to mobilize effectively against the government and business policies that adversely affect their communities. Environmental justice scholars attribute this deficiency to the shortage of political power in communities of color.[75]NEPA and the Executive Order have attempted to remedy this problem by creating an avenue

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[69] Eric K. Yamato et al., *supra* note 55, at 311.
[70] Rebecca Tsosie, *Indigenous Peoples and Epistemic Injustice: Science, Ethics, and Human* Rights, 87 Wash. L. Rev. 1133, 1138 (2012).
[71] This is the very construct of modern day, common law property in the United States.
[72] Eric K. Yamato et al., *supra* note 55, at 312.
[73] Rebecca Tsosie, *supra* note 69, at 1139.
[74] Eric K. Yamato et al., *supra* note 55, at 313.
[75] *Id*. at 317.

for federal government agencies to openly communicate with the communities affected, or that will be affected by domestic pipelines.

The difference between other minorities and Native Americans is that Native Americans have political status and are political communities with sovereign powers.[76] Native Americans have inhabited the North American continent since time immemorial. Their inherent sovereignty existed since before European contact, predating the United States Constitution. Open communications between environmental and minority groups, and improving each groups' access to legislative, administrative, and judicial remedies should be procedurally and substantively different for Indian tribes. Native Americans are not clumped into the realm of "minorities" per the language of the constitution, NEPA, or the Executive Order for the express reason that Native Americans have inherent sovereignty as domestic dependent nations.

Because tribes have political status, tribes are the "political power" that scholars believe "communities of color" lack.[77] The Indian Reorganization Act gave tribes the ability to form their own governments that are recognized by the United States government.[78] Even though tribes are governmental entities, tribes are not being recognized as the inherent sovereigns they are, even without the formal, procedural recognition of the United States. Indian nations are merely seen as an aside in the administrative process, similar to being a cog in the wheel to move the wheel along; tribes are another wheel that exists to either help move the cart along or put on the breaks. Therefore, Environmental Justice is more than a degradation of the land. It is a willful stand for indigenous rights to land, rights to make decisions for a people.

Environmental justice to Native Americans is not a stand against the federal government but rather a move for tribal government sovereignty. When states, private entities, or the federal government do not involve tribes more substantially or take their lands and livelihoods into account from the start, especially when domestic pipelines will inevitably pass through or near enough to affect tribal lands and communities, tribal sovereignty is undermined.

IV. Procedural Issues and DAPL

A. Procedure: As it Stands, Not a Winning Argument

Many of the environmental statutes and executive orders require federal agencies to interact and consult with tribal governments. While government-to-government interactions in consultation is an important step in the right direction towards tribal environmental justice, government-to-government interaction is not feasible with substantive procedural disparities in the statutes. NEPA has a review and consultation requirement provision. It states,

> (a) to the fullest extent possible agency shall prepare draft environmental impact statement concurrently with an integrated with environmental

[76] *Morton v. Mancari*, 417 U.S. 535 (1974).
[77] Eric K. Yamato et al., *supra* note 55, at 318.
[78] 25 U.S.C.A. § 472.

> impact analysis and related services in studies required by [congressional acts] and other environmental review laws and executive orders.[79]

This consultation language is nonspecific and fails to define consultation.[80] Adequate consultation methods must be outlined to ensure that tribes, and other communities that may be affected by federal projects, are able to provide constructive feedback.[81] Tribes must have the ability to convey to managing project entities how this would impact the physical and social construct of the communities.

NEPA requires public involvement as well as consultation for agencies to promulgate. NEPA requires that, "[i]n the case of an action with effects primarily of local concern" the agency must notify to Indian tribes "when effects may occur on reservations."[82] Public involvement would imply more than mere notice. The statute states that public involvement may also include public hearings or public meetings, involving the public in preparation and implementation of NEPA procedures, and comments on the environmental impact statement.[83] Public hearings or meetings are to be held "whenever appropriate or in accordance with statutory requirements applicable to the agency"[84] or when, "there is substantial environmental controversy concerning the proposed action or substantial interest in holding the hearing."[85] Public involvement comes too late in the process. At this point the environmental impact statement as well as the project planning has already taken place.[86] Public involvement appears to be more of an afterthought than a forethought. It may not be feasible or reasonable to believe that at this junction in planning that changes could or will be made. The "public involvement" provision appears to be a step to plead with the public to accommodate the project or a public relations campaign to get the public on board with an already planned project.

Procedural violation claims, with the law as is, will not stand as enough to either stop or redirect federal pipelines running through or near reservations. Lack of adequate counseling, communication, or consultation with sovereign tribal governments directly affected the represented people on which these domestic batteries, called pipelines, effect. Neglected or deficient procedural duties, like consultation, are easy to bypass inspection as long as agencies comply with NEPA in due diligence and a reasonable good faith effort. Again, the provisions in the executive orders and statutes do not mandate, or even suggest, that the

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[79] 40 C.F.R. § 1502.25.
[80] *Id*.
[81] Council on Environmental Quality, *supra* note 64, at 12.
[82] 40 C.F.R. § 1506.6(b)(3)(ii).
[83] 40 C.F.R. § 1506.6.
[84] 40 C.F.R. § 1506.6(c).
[85] 40 C.F.R. § 1506.6(c)(1).
[86] *See generally*, 40 C.F.R. § 1500.

permitting agency take any particular preservation measures to protect the resources that will be adversely affected.

B. Issues and Effects of Oil Pipelines on Indian Tribes

Oil has been a sore subject in the political spectrum for years. Politicians have expressed an interest and a need to domesticate American oil in order to improve the economy and lower gas prices. Historically, state-owned companies control most oil in the world.[87] The four largest oil companies: Saudi Aramco, Petroleos de Venezuela, Iran's NIOC, and Mexico's Pemex "produce 25% of the world's oil and hold 42% of the world's reserves."[88] However, some recent changes in the industry that have shifted oil ownership from state and nation owned to industry and private corporation owned.[89] "By 2001, five corporations controlled 61% of the United State's retail gas market, 47% of the oil refinery market, and 41% of the oil exploration and production. These firms control 15% of the world's oil production, more than Saudi Arabia and Kuwait combined.[90] This shift in crude oil control has caused procedural problems working with Native American tribes.

Contentious government-to-government interactions are a common result regarding oil production. Conflict with indigenous peoples "over oil development" is one of the most common types of conflict.[91] This is because oil production activities disrupt sensitive environments and "threaten the survival of indigenous populations that live in these ecosystems."[92] Indigenous peoples must fight for the environmental justice of "territorial integrity and control," which is necessary for the "cultural reproduction and ultimately the survival" of their people.[93] Tribal-federal relations and negotiations must be at the forefront of oil production in order to avoid such conflicts.

Because oil is not government-owned in the U.S., these corporations do not have to involve tribal councils or indigenous nations until late in the process. Private corporations that developed the domestic pipelines are working on mostly privatized land. This private land is under the jurisdiction of the state government. Therefore, the private corporations work with the state officials to get licensing and private property owners for permission or purchase to drill on private land. Tribal governments are not involved until land is already staked out for drilling and pipeline development.

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[87] Connolly O'Rourke, *Just Oil? The Distribution of Environmental and Social Impacts on Oil Production and Consumption*, Annu. Rev. Environ. Resour. (2003).
[88] *Id*.
[89] *Id*. at 592
[90] Id.
[91] *Id.* at 596.
[92] *Id.*
[93] *Id.*

C. Procedural Nightmares at Standing Rock – DAPL

The Dakota Access Pipeline and the #NoDAPL movement is a prime example of the tribal-federal relationship and the fight for environmental justice for the Standing Rock Sioux Tribe of South Dakota. This section will discuss, as an example, the consultation methods employed and the procedural disparities of NEPA regarding tribal-federal negotiations.

Standing Rock Sioux Nation v. Army Corps of Engineers is one of the first instances wherein a judge found that a federal agency failed to consider factors such as environmental justice impact and impacts on treaty rights. It is one of the only cases that holds that the government's environmental impact statement was arbitrary and capricious because of: (1) inaccurate minority and low income statistical statements, (2) insufficient data on the radius of impact, (3) the category of impacts of which the Army Corp of Engineers tested, and (4) the lack of information on social and treaty impacts on fishing and hunting.[94]

For example, the Army Corps of Engineers had inaccurate figures in their environmental impact statement.[95] This error affects the rest of the environmental impact statement and how that statement is studied to find alternative solutions. The court discussed the importance of analyzing demographics in environmental impact statements because according to the NEPA guide, "agencies must consider pertinent treaty, statutory, or executive order rights and consult with tribal governments in a manner consistent with the government-to-government relationship."[96] Demographics about how those affected by pipeline projects are important because the government analyzes the environmental impact statements differently to accommodate cultural and social factors to the effects of the pipeline.[97]

Another reason the Court held that the environmental impact statement was arbitrary and capricious was because the "unit of geographic analysis" did not include where the reservation was located.[98] The Army Corps of Engineers used a 0.50-mile radius to conduct soil sample testing.[99] Every soil sample was taken within the 0.50-mile buffer between the pipeline site and the reservation; the area that testing covered was only a fraction of the total area. In addition to the soil samples only covering a small percentage of the land between the reservation and the pipeline, the Army Corps of Engineers decision to use a 0.50-mile buffer appears to be because the Standing Rock reservation is 0.55 miles, or 80 yards, beyond the .5 limit.[100] Parameters are set based on agency expertise. The Army

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[94] *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 16-1534 (JEB) (D.C. District Court, June 2017).
[95] *Id.* at 48.
[96] Council on Environmental Quality, *supra* note 64, at 14.
[97] *Id.* at 9.
[98] *Standing Rock Sioux Tribe*, 16-1534 (JEB) (D.C. District Court, June 2017) at 48.
[99] *Id*.
[100] *Id*. at 6.

Corps determined that a 0.50-mile buffer is typical for transportation and natural gas pipeline projects under the federal Energy Regulatory Commission.[101] However, the court did not find that argument reasonable because the pipeline was not meant for transportation nor was it a natural pipeline. The court made it very clear that the intended pipeline was a crude oil pipeline and that the buffer should have been created to reflect a greater impact zone due to the nature of crude oil pipelines. The Court was "hard pressed to conclude. . .the buffer was reasonable." Even in its comments the Environmental Protection Agency, the agency in charge of enforcing NEPA, advised the Army Corp that "the area of analysis to assess potential impacts to [environmental justice] communities should correspond to the impacts of the proposed project instead of only the area of construction disturbance." The 0.50-mile buffer zone for a crude oil pipeline was not reasonable enough to meet the standards to ensure environmental justice.[102]

The Army Corp of Engineers mis-analogized the type of pipeline project for the environmental impact statement. The environmental impact statement for the Dakota Access Pipeline was created similarly to impact statements for natural gas pipelines.[103] Natural gas pipelines are less threatening and harmful than crude oil pipelines because natural gas is cleaner than crude oil.[104] Natural gas emits less carbon dioxide than crude oil, making[105] crude oil less safe for the environment.[106] Thus, crude oil creates a need for a greater impact zone and greater analysis for potential damages down-stream because the area of analysis should "correspond to the impacts of the proposed project instead of only the area of construction disturbance."[107]

The Standing Rock Sioux live downstream from Lake Oahe, where the pipeline will cut across.[108] Lake Oahe is Standing Rock's main source of water.[109] The Army Corp of Engineers downplayed the effect crude oil would have on the community's main water supply by likening crude oil pipelines to natural gas pipelines and even to transportation pipelines.[110] Even the Chief of the Army Corp realized the potential hazard a crude oil pipeline could wreak if the pipelines break.[111] The Army Corp Chief's reviews critiqued the buffer zone and crude oil pipeline placement saying, "While the equally sized buffer on both sides of the pipeline seems reasonable along land areas, it is arguably less so at water areas because of the potential for water currents to carry a spill downstream."[112] The Army Corp Chief continues, stating that if the impact zones were expanded to

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[101] *Id*. at. 49-50.
[102] *Id*. at 50.
[103] *Id*.
[104] *Difference Between Crude Oil and Natural Gas* (April 24, 2001), http://www.differencebetween.net/science/nature/difference-between-crude-oil-and-natural-gas/.
[105] *Id.*
[106] *Id.*
[107] *Standing Rock Sioux Tribe*, 16-1534 (JEB) (D.C. District Court, June 2017) at 51.
[108] *Id*.
[109] *Id*. at 7.
[110] *Id.* at 49-50.
[111] *Id.* at 51.
[112] *Id.*

include the water source to the Standing Rock Sioux, the environmental assessment would have to determine if the environmental effects would be "disproportionately high."[113] This is because the type of oil being piped affects the environmental assessment.

The environmental impact statement did not take into consideration treaty rights with Indian nations.[114] The Standing Rock Sioux Tribe has a treaty with United States government in order for tribal members to continue hunting and fishing on traditional tribal lands.[115] The environmental impact statement is silent on the cultural and social effects it will have on the Standing Rock Sioux Tribe.[116] Many of the tribal members continue fish hunt and gather for subsistence, however, the environmental impact statement does not mention the value of the water and land for the subsistence of tribal members.[117] The Court recognized that, "[l]osing the ability to [fish, hunt, and gather for subsistence] could seriously and disproportionately harm those individuals relative to those in nearby nontribal communities. . .[the environmental assessment] needed to offer more that a bare-bones conclusion that Standing Rock would not be disproportionately harmed by a spill."[118] Environmental Justice is about protecting the people, specifically low income, minority groups, and Indian tribes. The environmental impact statements should give an indication of how the peoples living in the environment will be affected in every facet of their lives – including culturally.

The purpose of environmental justice analysis is to determine whether a product will have a disproportionately adverse effect on minority and low-income populations. The Army Corps of Engineers environmental impact statement failed to consider how the crude oil pipeline would affect tribal members. These procedural nightmares could have been avoided had the Army Corps of Engineers effectively and adequately consulted with tribal members prior to conducting and planning the implementation of the pipeline. The guidelines for the environmental impact statement need to be clearer on how testing should be done, how far-reaching the impact zone should go, and how project managers or commissioners should consult with tribal officials.

V. Possible Solutions to the Substantive Procedural Issues of NEPA and Tribal Relations

Congress, states, and private entities must start recognizing tribes as a sovereign government, having a special relationship with the United States government. As demonstrated by the DAPL example and further illustrated in current tribal-federal relations, tribes are perceived as something that should be

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[113] *Standing Rock Sioux Tribe*, 16-1534 (JEB) (D.C. District Court, June 2017) at 51.
[114] *Id.* at 52.
[115] *Id.* at 57.
[116] *Id.* at 54.
[117] *Id.* at 58.
[118] *Standing Rock Sioux Tribe*, 16-1534 (JEB) (D.C. District Court, June 2017) at 48.

overlooked until the federal government remembers that tribes exist as something more than an archaic stereotype. The following is a potential solution to include Indian nations and tribes at the proverbial negotiation table. The solution is imperfect and has its fair share of challenges to overcome, this serves merely as a jumping off point.

A. Procedural Rights: Consult First, Act Later

Tribal governments need to be involved in discussions with the federal government agency overseeing federal pipeline projects, states, and private development companies prior to any action taken that could adversely affect tribal members or tribal land. Currently, Indian nations and tribes are collateral. The damage is done, and the nails are driven in the coffin before the government or private corporations can even identify who is inside the metaphorical coffin. Consultation becomes a key component. Ideally, discussions with Indian nations and tribes would take place in the earliest stages of development and project proposal. Consultation and procedural changes would be the fastest, most efficient, and most plausible way for change to take effect. However, after one look at the administrative process one can see that administrative changes are easier said than done.

The National Environmental Policy Act does not have a set standard for adequate consultation. Consultations standards are not mentioned in the National Environmental Policy Act itself nor in the National Environmental Policy Act and Guidebook. Any instructions regarding consultation with Indian Nations or tribes is limited to broad language such as "consultation with tribal leaders" or "coordinate steps to be taken pursuant to this order that address federally recognized Indian tribes."[119] This note proposes that the federal government takes into consideration the applicability of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) consultation guidelines.

The United Nations Declaration ("Declaration") on the Rights of Indigenous Peoples is a document proposed by the Economic and Social Council's working group on indigenous populations.[120] It was proposed and adopted by the general assembly on September 13th, 2007 with 144 signatory states. [121] The Declaration is the most comprehensive International instrument on the rights of indigenous peoples. It establishes a universal framework of "minimum standards for the survival, dignity, and well-being of the indigenous peoples of the world," and it elaborates on existing human rights standards and fundamental freedoms as they apply to the specific situations of indigenous peoples.[122] Only four nations voted against the Declaration: Australia, Canada, New Zealand, and the United

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[119] 40 C.F.R. § 1500.
[120] *See generally*, United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 2001, 46 I.L.M. 1013 (2007)) at 1 http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.
[121] *Id.*
[122] *Id.*

States—all of which have since reversed their position and now support the declaration.[123]

UNDRIP's provisions on consultation do not provide step by step directions on how to consult with indigenous peoples and their governments. This is most likely because every indigenous Nation has its own customs and traditions and unique relationships with the federal government. This note does not propose that micromanagement of consultations through detailed step-by-step processes, but rather a guide for tribe-to-federal government negotiations. What UNDRIP does is provide an environment where consultations can occur (1) prior to adopting or implementing any sort of legislation or administrative measures that may affect the indigenous peoples, and (2) operates the consultations in good faith with and through their own representative institutions.

Generally, it would be difficult to persuade judges and legislators to consider human rights in tribal-to-federal consultations. But, UNDRIP was written through a human rights lens. A human rights argument would be difficult because the right to consultation is not an enumerated or fundamental right: it is a courtesy in government to government relations. This note suggests that using the basic and core principles of UNDRIP to bolster the premise of tribal-federal relations in environmental justice consultations efforts will prove reasonable in getting tribes into the project process earlier. Tribes could be incorporated into the discussion earlier if NEPA were to incorporate UNDRIP's consultation language. UNDRIP's language is substantially more comprehensive than the language in NEPA. The term good faith would need to be more wholly defined to include language such as: best efforts to engage in discussions with tribal officials and leaders to work in the best interest of the tribe or Nation. UNDRIP's language through their own representative institutions recognizes that tribes have governmental institutions regardless of if they are formal or informal.[124] UNDRIP also recognizes that productive and effective consultation can only take place by engaging in fair discussions with individuals that indigenous peoples have recognized as authority figures to speak for and reflect the best interest of the tribe.[125]

UNDRIP also has a provision with similar language but it expands upon the implementation of legislative or administrative measures to any project affecting their lands or territories and other resources.[126] Both of these provisions in conjunction, will engage in both the procedural and substantive aspects of developing domestic pipelines on or affecting Indian Country. The language that this note suggests changing from UNDRIP is the narrow construct of who shall consult with indigenous peoples. Since more than just states work in the consultation phase, a broader scheme of entities should be legally and

[123] *Id.*
[124] *Id*. at Art. 4.
[125] *Id*. at Art. 19.
[126] *Id*. at Art. 26.

procedurally bound to consult with indigenous peoples, such as private entities. The United Nations Declaration on the Rights of Indigenous Peoples provides a diplomatic approach to the recognition as well as the importance of substantially bolstering the consultation process with indigenous peoples.

B. Applying an Agency Balancing Test to Ensure Consultation

Other substantive procedural actions, that would require more research, include pre-project hearings. The hearings would be held on a *Matthews v. Eldredge* model. The basis of the hearing would be that the Environmental Protection Agency ("EPA") is committing an environmental injustice in allowing pipelines to be built so close to indigenous lands and in such a way that was detrimentally and adversely affecting indigenous peoples. A lack of pre-project negotiations or hearings could potentially create a mix of due process and environmental justice issues. A lack of meaningful consultation before domestic pipeline projects or projects that could trigger an environmental justice platform with indigenous peoples and land should commence a due process violation.

The due process issue would employ the *Matthews v. Eldredge* balancing test the Supreme Court enumerated. The Supreme Court explained that,

> …the identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.[127]

This balancing test would look at the government's interest, private interest (or tribal interest), and the risk of erroneous deprivation. However, the trust doctrine and the federal accountability to Indigenous tribes through a kink in the balancing test. The balancing test would have to be re-defined when looking at private, tribal, and government interests. Interest gauging walks a delicate line as the Supreme Court outlined in *United States v. Sioux Nation* stating, "Congress cannot simultaneously (1) act as trustee for the benefit of the Indians, exercising its plenary power over the Indians and their property, as it thinks is in their best interest, and (2) exercise its sovereign power…within the meaning of the Fifth Amendment to the Constitution. In any given situation in which Congress has acted with regard to Indian people, it must have acted either in one capacity or the other. Congress can own two hats, but it cannot wear them both at the same time."[128] The trust doctrine will have to be taken into consideration if this

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[127] *Matthews v. Eldridge*, 424 U.S. 319, 334-35 (1976).
[128] *United States v. Sioux Nation*, 448 U.S. 371, 408 (1980).

approach were to be employed to seek environmental justice and foster a meaningful tribal-federal relationship.

This idea would, clearly, need to be researched further. Proponents of this idea would have to research and solve the following issues: what are the government's interest when the government has conflicting interests rather than private individuals, how would private rights be analyzed, and how to reconcile that the EPA does not have an adjudicatory process for termination like Social Security and Welfare (e.g. *Matthews v. Eldridge*). Furthermore, proponents would have to get past the vague definition of consultation in NEPA.

VI. Conclusion

Hundreds of years of Federal Indian Law has shaped the way governments and private entities view and interact with Indian nations and tribes. Environmental Justice is the current mechanism that tribes could use, that has worked recently, to work to better their tribal communities and be recognized as a governmental entity that needs to be properly and adequately consulted in dealings directly relating to tribal communities and resources. It is a new era for tribal governments that should be afforded to a people that have inhabited the United States since time immemorial. Since the land and our communities are at the essence of tribal governance, tribes and other decision makers must start to work together to safeguard a better and more efficient future.

Government-to-government interaction and tribal-federal relations must be improved upon. Environmental justice issues as discussed in this note should be a catalyst to change the stilted and strained relationship. Self-determination and concern for the indigenous lands, people, and general welfare should lead the way for tribes to change the way they are treated by the government and private entities. It is only through a betterment of tribal-federal relations that environmental justice can be employed to ensure a brighter, healthier future.